

Labor & Employment **ADVISORY**

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D.C. Federal Court Upholds NLRB Posting Requirement but Invalidates Enforcement Provisions

On March 2, 2012, the United States District Court for the District of Columbia held in *National Association of Manufacturers v. National Labor Relations Board*, No. 1:11-cv-01629 (D.D.C. March 2, 2012) that the National Labor Relations Board (NLRB, or the “Board”) did not exceed its authority by promulgating a rule requiring that all employers subject to the National Labor Relations Act (NLRA, or the “Act”) post notices to employees of their rights under the NLRA. The court, however, also held that the enforcement provisions of the challenged rule that treat a failure to post as an unfair labor practice, and that toll the statute of limitations in unfair labor practice actions against employers who have failed to post, violate the NLRA and are invalid as a matter of law.

The plaintiffs, which included the National Association of Manufacturers and the National Right to Work Legal Defense and Education Foundation, brought separate actions against the NLRB and its members and general counsel alleging that the Board exceeded its authority in violation of the Administrative Procedure Act by promulgating the posting rule, and that the Board violated the plaintiffs’ First Amendment right to refrain from speaking. The court consolidated the plaintiffs’ suits and ruled on the parties’ cross motions for summary judgment.

The court addressed whether the NLRB had the authority under the NLRA to promulgate the posting rule, whether the Board’s action was arbitrary and capricious, and whether the rule violates the First Amendment. First, the court agreed with the NLRB that, although Congress had not specifically addressed the Board’s authority to enact this kind of rule, the Board reasonably interpreted Section 156 of the NLRA to authorize this rulemaking. Next, the court declined to find that the Board’s promulgation of the notice posting provision was arbitrary and capricious, noting the deferential standard of review applied to this analysis. Lastly, the court found that the Board’s posting rule does not compel employers to speak, because the notice that the rule requires be posted in the workplace constitutes “government speech” that is insulated from scrutiny under the First Amendment’s Free Speech Clause. The court accordingly upheld the validity of the challenged posting requirement.

With respect to the enforcement provisions at issue, the court rejected the Board’s position that an employer’s failure to post the required notice necessarily constitutes an unfair labor practice under the NLRA. Rather, the court found that the Board must make a specific finding in individual cases that a failure to post interfered with an employee’s ability to exercise his or her rights, and “the Board

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cannot make a blanket advance determination that a failure to post will always constitute an unfair labor practice.” For similar reasons, the court determined that the NLRA does not permit the Board to promulgate a rule that enables it to toll the statute of limitations for filing unfair labor practice charges involving a job site where the notice was not posted by excusing employees from the requirement that a charge be filed within six months after the occurrence of allegedly unlawful conduct. The court concluded that the Board exceeded its authority under the NLRA when it promulgated the unfair labor practice and equitable tolling provisions.

In a separate opinion issued on the same day, the court denied the plaintiffs’ motion for leave to supplement and/or amend their complaints to request that the court declare that the Board no longer had authority to implement or enforce the notice posting rule after recess appointments were made to the Board. The court agreed with the defendants that the validity of the recess appointments that were made after the promulgation of the rule had no bearing on the issues in the case and “decline[d] this invitation to take up a political dispute that is not before it.”

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Alston & Bird's Labor and Employment Group

ATLANTA

Shama Barday
404.881.7437
shama.barday@alston.com

Ashley D. Brightwell
404.881.7767
ashley.brightwell@alston.com

Lisa H. Cassilly
404.881.7945
lisa.cassilly@alston.com

Brett E. Coburn
404.881.4990
brett.coburn@alston.com

Patrick L. Coyle
404.881.4367
patrick.coyle@alston.com

Clare H. Draper IV
404.881.7191
clare.draper@alston.com

R. Steve Ensor
404.881.7448
steve.ensor@alston.com

Kimberly L. Fogarty
404.881.4502
kim.fogarty@alston.com

Alexandra V. Garrison
404.881.7190
alex.garrison@alston.com

Marilee Fiebig Holmes
404.881.4374
marilee.holmes@alston.com

Molly M. Jones
404.881.4993
molly.jones@alston.com

J. Thomas Kilpatrick
404.881.7819
tom.kilpatrick@alston.com

Christopher C. Marquardt
404.881.7827
chris.marquardt@alston.com

Wes R. McCart
404.881.7653
wes.mccart@alston.com

Charles H. Morgan
404.881.7187
charlie.morgan@alston.com

Edmund M. Morrell
404.881.7953
edmund.morrell@alston.com

Glenn G. Patton
404.881.7785
glenn.patton@alston.com

Robert P. Riordan
404.881.7682
bob.riordan@alston.com

Eileen M. Scofield
404.881.7375
eileen.scofield@alston.com

Alicia P. Starkman
404.881.4994
alicia.starkman@alston.com

CHARLOTTE

Susan B. Molony
704.444.1121
susan.molony@alston.com

DALLAS

Jon G. Shepherd
214.922.3418
jon.shepherd@alston.com

NEW YORK

Erin L. Connolly
213.576.1024
erin.connolly@alston.com

Stephen S. Hart
212.210.9463
stephen.hart@alston.com

James F. Moyle
212.210.9454
james.moyle@alston.com

LOS ANGELES

Lindsay G. Carlson
213.576.1038
lindsay.carlson@alston.com

Martha S. Doty
213.576.1145
martha.doty@alston.com

Jesse M. Jauregui
213.576.1157
jesse.jauregui@alston.com

Deborah Yoon Jones
213.576.1084
debbie.jones@alston.com

Sayaka Karitani
213.576.1026
sayaka.karitani@alston.com

Claire Lucy Readhead
213.576.1181
claire.readhead@alston.com

Nicole C. Rivas
213.576.1021
nicole.rivas@alston.com

Casondra K. Ruga
213.576.1133
casondra.ruga@alston.com

WASHINGTON, D.C.

Emily Seymour Costin
202.239.3695
emily.costin@alston.com

Charles A. Gartland II
202.239.3978
chuck.gartland@alston.com

Jonathan G. Rose
202.239.3693
jonathan.rose@alston.com

Leslie Wood Bradenham
202.239.3636
leslie.bradenham@alston.com

ATLANTA

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

BRUSSELS

Level 20 Bastion Tower
Place du Champ de Mars
B-1050 Brussels, BE
Phone: +32 2 550 3700

CHARLOTTE

Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS

2828 N. Harwood St.
Suite 1800
Dallas, TX 75201
214.922.3400

LOS ANGELES

333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK

90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE

4721 Emperor Boulevard
Suite 400
Durham, NC 27703-8580
919.862.2200

SILICON VALLEY

275 Middlefield Road
Suite 150
Menlo Park, CA 94025-4004
650.838.2000

VENTURA COUNTY

Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.239.3300

www.alston.com

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