

Labor & Employment ADVISORY

April 23, 2012

Courts Further Delay Enforcement of NLRB Posting Requirement

As explained in Alston & Bird LLP's [March 7, 2012, advisory](#), the United States District Court for the District of Columbia recently held that the National Labor Relations Board (the "Board") did not exceed its authority in promulgating a rule requiring employers subject to the National Labor Relations Act (the "Act") to post notices explaining employees' rights under the Act. Although the court upheld the validity of the posting requirement, it found that the rule's enforcement provisions were invalid as a matter of law. Two recent decisions have further muddied the waters regarding how employers should approach the controversial posting requirement, which was set to take effect on April 30, 2012.

On April 13, 2012, the United States District Court for the District of South Carolina issued an order disagreeing with the D.C. District Court's decision and holding that the Board lacked authority to issue the notice-posting requirement. Specifically, the court held that Section 6 of the Act, which confers rulemaking authority on the Board, fails to mention the issue of notice posting. The court therefore found that a notice-posting requirement was not "necessary to carry out any provision of the Act." Notably, however, the court did not issue an injunction barring enforcement of the posting requirement.

More importantly, on April 17, 2012, the United States Court of Appeals for the District of Columbia Circuit granted an emergency injunction postponing enforcement of the posting requirement while the appellate court reviews the D.C. District Court's earlier decision regarding the validity of the posting requirement. In delaying enforcement of the rule, the Court of Appeals noted that, in addition to consideration of the legal merits of the rule, the "uncertainty about enforcement counsels further in favor of temporarily preserving the status quo while this court resolves all of the issues on the merits." The court also ordered that the appeal be expedited, with oral argument set for September 2012.

In light of these recent decisions, it appears that the posting requirement's enforcement has been delayed pending appeal, but the Board has not yet formally postponed the current April 30, 2012, effective date in response to the D.C. Circuit's injunction. Thus, because of the continuing uncertainty surrounding the posting requirement's ultimate validity, employers should consult with counsel regarding their present obligations under the Act.

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