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D.C. Court of Appeals Strikes Down NLRB Notice-Posting Rule

On May 7, 2013, a panel of the United States Court of Appeals for the District of Columbia issued its opinion in *National Association of Manufacturers v. NLRB,* striking down the National Labor Relations Board's (NLRB or the "Board") 2011 rule requiring employers to post notices explaining employees' rights under the National Labor Relations Act (NLRA). The rule would have required all employers subject to the NLRA to post a notice informing employees of their rights to unionize and go on strike, among other things. The rule contains three enforcement mechanisms: (1) it would make an employer's failure to post the notice an unfair labor practice; (2) it would allow the Board to consider a knowing and willful failure to post the notice as evidence of unlawful motive in unfair labor practice cases where motive is an issue; and (3) it would permit the statute of limitations for unfair labor practice charges to be equitably tolled for the period during which the required notice was not posted. The court's main opinion found all three of these enforcement methods to be invalid and accordingly held that the rule could not be enforced. Further, in a concurring opinion, a majority of the panel also found that the posting requirement exceeded the NLRB's rulemaking authority.

This decision followed an appeal of the D.C. District Court's decision last year holding that although it was within the NLRB's authority to promulgate the notice-posting rule, the enforcement provisions of the challenged rule were invalid. (*See* March 7, 2012, Labor & Employment Advisory.) Both parties appealed the decision, and while the appeal was pending, the D.C. Circuit granted an emergency injunction postponing enforcement of the posting requirement. (*See* April 22, 2013, Labor & Employment Advisory.)

The D.C. Circuit Court began its analysis by considering the impact of its decision in *Noel Canning v. NLRB*, in which the court held that President Obama's recess appointments to the NLRB were unconstitutional. (*See* January 30, 2013, Labor & Employment Advisory.) The court concluded that although the Board did not have enough constitutionally appointed members to constitute a quorum on August 30, 2011, when the notice-posting rule was published in the Federal Register, a quorum did exist on August 25, 2011, when the rule was filed with the Office of the Federal Register.[1] The court found that the relevant date to consider was the date the rule was submitted for publication,

[1] On August 25, 2011, the Board had three Senate-confirmed members: Wilma Liebman, Mark Gaston Pearce and Brian Hayes. Liebman's term expired on August 27, 2011, leaving the Board one constitutionally appointed member short of a quorum.

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and thus that the Board had a properly constituted quorum when it promulgated the rule.

After resolving this threshold issue, the court considered whether the first two enforcement mechanisms of the notice-posting rule run afoul of § 8(c) of the NLRA, which states that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof…shall not constitute or be evidence of an unfair labor practice." The court found that this provision, which is meant to mirror and protect First Amendment free speech rights, protects both the employer's right to disseminate a view and the right *not* to disseminate a view. The court thus held that by making the employer's failure to post the notice an unfair labor practice and potential evidence of an unlawful motive, the notice-posting rule impinges upon employers' free speech rights and is therefore unlawful under § 8(c).

The court also invalidated the notice-posting rule's third enforcement mechanism, which purported to toll the NLRA's six-month statute of limitations for filing unfair labor practice charges when an employer fails to post the notice. The court explained that in determining whether equitable tolling of a statute of limitations is permissible, the "critical consideration" is whether equitable exceptions to the statute of limitations were "generally recognized" at the time Congress enacted the statute. Here, the court held that the NLRB had not provided any evidence that Congress, when it enacted the NLRA, had a basis for assuming that the statute of limitations would be modified by tolling for either the failure of an employer to post a notice explaining employee rights or based on the employee's lack of knowledge about his rights. Therefore, like the other two enforcement mechanisms, the tolling provision of the NLRB's rule was also found to be invalid.

Because the court struck down all of the methods for enforcing the notice-posting requirement, and because the remaining provisions of the law could not be severed, the majority held that the notice-posting requirement is invalid. Having found the rule invalid on this basis, the court, in its main opinion, decided not to address the broader issue of whether the NLRB even had rulemaking authority under § 6 of the NLRA to promulgate the rule. This question was specifically addressed, however, in a concurring opinion that took the position that in enacting the rule-posting requirement, the NLRB had exceeded its rulemaking authority under § 6. Section 6 states that the Board has rulemaking authority "as may be necessary to carry out the provisions" of the NLRA. The concurring judges explained that because the notice-posting rule essentially created a new type of unfair labor practice not contemplated by the text of the NLRA, it was not "necessary" to carrying out the NLRA.

This decision follows several other decisions by the D.C. Circuit and other federal courts that have reigned in the NLRB's attempts to expand the scope of its authority. For now, the notice-posting rule is invalid and will not go into effect, but the NLRB has not stated whether it will seek rehearing by the D.C. Circuit sitting *en banc* or petition the Supreme Court for a writ of certiorari. The Fourth Circuit Court of Appeals is currently considering an appeal of the ruling of the District Court for the District of South Carolina that the Board lacked authority to issue the notice-posting rule, and the Fourth Circuit's decision in that case will likely impact the NLRB's strategic decisions in response to the D.C. Circuit's recent holding.

Link: The D.C. Circuit's opinion in *National Association of Manufacturers v. NLRB*

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