



District Court Invalidates Portion of NLRB Posting Rule

March 2, 2012

By Jennifer Dunn, Amy Moor Gaylord, Chris Johlle

Today a federal district court judge partially invalidated the National Labor Relations Board's (NLRB) rule requiring private sector employers to post a notice informing employees of their rights under the National Labor Relations Act (NLRA).

The Rule

As we reported previously, in August 2011 the NLRB adopted a final administrative rule that requires covered employers to post a "notice to employees" regarding their rights under the NLRA. The notice describes the NLRA and informs employees of their rights under the NLRA, including but not limited to their right to organize a union to negotiate with their employer about their wages, hours and other terms and conditions of employment.

The NLRB's rule also establishes several penalties for non-compliance. Under the rule, the NLRB may find that an employer commits an unfair labor practice where it fails or refuses to post the notice. The NLRB also may toll the NLRA's six-month statute of limitations for filing unfair labor practice charges if employers fail to post the notice. Finally, the NLRB also may use an employer's failure to post the notice as evidence of an unlawful motive in unfair labor practice proceedings where motive is a disputed issue.

At the time it adopted the rule, the NLRB announced that it would take effect on November 14, 2011. The NLRB since delayed the rule's implementation date to April 30, 2012, as we previously reported, amid substantial controversy surrounding the rule.

The Lawsuits

Shortly after its adoption, the National Association of Manufacturers (NAM) and the National Right to Work Legal Defense and Education Foundation (NRTW) filed lawsuits in federal district court challenging the rule. They argued that the NLRB lacked authority under the NLRA to promulgate the rule and that the rule violated the First Amendment.

The District Court's Opinion

Judge Amy Berman Jackson upheld only that portion of the NLRB's rule that requires employers to post the notice to employees regarding their rights under the NLRA. She determined that the NLRB is



granted broad rulemaking authority under the NLRA and is not limited to enacting rules that address only particular statutory sections. Finding that the NLRA places the NLRB “squarely at the heart of labor management relations,” the judge held that the dissemination of information about employee rights under the NLRA—as the NLRB’s rule requires—“is well within its bailiwick.”

The judge also found that the NLRB provided a reasonable explanation for adoption of the notice requirement: in order for employees to fully exercise their rights under the NLRA, they must know that those rights exist, and requiring employers to post notices of those rights raises employee awareness. Finally, she concluded that the NLRB did not act arbitrarily when it adopted the notice requirement because it relied on empirical and anecdotal evidence demonstrating that many employees are unaware of their rights under the NLRA—including the fact that a comparatively small percentage of private sector employees are represented by unions.

On the other hand, the judge invalidated those portions of the rule tolling the statute of limitations for filing unfair labor practice charges and finding that failure to post the notice constitutes an unfair labor practice. The NLRA expressly limits unfair practices to those enumerated in Section 8 of the statute, and similarly, Section 10(b) expressly establishes a six-month statute of limitations. The judge concluded that the NLRB’s rule impermissibly expanded the reach of both of these provisions. Notably, however, the judge found that nothing prohibits the NLRB from finding on a case-by-case basis that failure to post the notice constitutes an unfair labor practice.

Lastly, the judge rejected the claim that the NLRB’s rule violated the First Amendment because it compelled employers to speak against their will. According to the judge, the notice constitutes “government speech” because its content and message are controlled by the government, and therefore is not subject to the First Amendment’s Free Speech Clause.

What It Means

Although the judge invalidated two portions of the rule, she upheld the notice requirement, and that portion of the NLRB’s rule remains valid. Further, the NLRB is permitted to rely on an employer’s failure to post the notice as grounds for the finding of an unfair labor practice on a case-by-case basis.

As a final note, the plaintiffs in this matter did not specifically challenge that aspect of the NLRB’s rule that permits the NLRB to use an employer’s failure to post the notice as evidence of unlawful motive in its unfair labor practice proceedings. As a result, the judge found that that portion of the rule remains valid.



For now, employers who are covered by the NLRA must plan to post the notice on April 30. Another challenge to the rule is pending in a federal district court in South Carolina. We will continue to monitor that case and will keep you updated as to further developments.

More Information

Jennifer A. Dunn
jad@franczek.com
312.786.6585

Amy Moor Gaylord
amg@franczek.com
312.786.6172

Christopher A. Johlle
caj@franczek.com
312.786.6152

Related Practices

Labor & Employment
Union-Related Matters
Labor Relations Board Practice

Copyright © Franczek Radelet P.C. All Rights Reserved. Disclaimer: Attorney Advertising. This is a publication of Franczek Radelet P.C.
This publication is intended for general informational purposes only and should not be construed as legal advice