



Legal Alert: Court Upholds Board's Notice Posting Rule; Strikes Enforcement Provisions

3/2/2012

Executive Summary: A federal trial court in the District of Columbia has upheld the notice posting requirement in the National Labor Relations Board's recently issued Final Rule requiring employers to post a "Notification of Employee Rights under the National Labor Relations Act." The court also held, however, that the enforcement provisions of the Rule are invalid because the Board exceeded its authority under the National Labor Relations Act (NLRA) in promulgating these provisions. See *National Association of Manufacturers v. National Labor Relations Board* (D.D.C. March 2, 2012).

Background

As discussed in our August 30, 2011 Legal Alert, *NLRB to Require Posting of Notice of Employee Rights*, available at <http://www.fordharrison.com/shownews.aspx?Show=7546>, the Rule requires employers covered by the NLRA to post a Notice of Employee Rights Under the National Labor Relations Act "in conspicuous places where [it] is readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted." The notice requirement does not apply to employers who are not covered by the NLRA, including, among others, any person subject to the Railway Labor Act, as well as entities over whom the Board has been found not to have jurisdiction or over which the Board has chosen not to assert jurisdiction.

The National Association of Manufacturers (NAM) and the National Right to Work Legal Defense and Education Foundation (NRTW) filed suit in federal court claiming the Board exceeded its authority under the NLRA and violated the Administrative Procedures Act (APA) when it promulgated the Rule. The posting requirement was originally scheduled to take effect November 14, 2011; however, the Board postponed the effective date until April 30, 2012, so that the court could rule on the challenges to the Rule.

Court Decision

The court held that the NLRA grants the Board broad rulemaking authority to implement the provisions of the Act and the Board did not exceed its statutory authority in promulgating Subpart A of the Rule – the notice posting provision. In upholding the Board's authority to promulgate the Rule, the court held that it could not find the Board's conclusion that employees lack awareness of their NLRA rights to be arbitrary and capricious. The court

also held that the notice posting requirement is a reasonable means of promoting employees' awareness of their rights. Accordingly, the court held that the Board's promulgation of the Rule was not arbitrary or capricious.

The court also held, however, that the enforcement provisions in Subpart B violate the NLRA and are invalid as a matter of law. One of these provisions deems the failure to post the notice to be an unfair labor practice. The other provision tolls the statute of limitations in unfair labor practice actions against employers who have failed to post the notice. The court rejected the Board's argument that an employer's failure to post the notice is an unfair labor practice because it interferes with employees' exercise of their rights under the NLRA. The court held that "[s]ince Congress prohibited the Board from considering an employer's express statement of its views to be an unfair labor practice, it follows that it did not intend that an employer's mere failure to supply information would be designated as one." The court noted that its holding does not preclude the Board from finding that the failure to post a notice constitutes an unfair labor practice in a particular case; however, it does mean that the Board cannot "make a blanket advance determination that a failure to post will always constitute an unfair labor practice."

Additionally, the court held that the provision in the rule extending the statute of limitations in unfair labor practice charges is invalid because it substantially amends the statute of limitations that Congress expressly set out in the statute. Thus, the court held that because "Congress left no ambiguity as to the appropriate statute of limitations under section 160(b), the Board's promulgation of this provision exceeds its statutory authority."

Bottom Line

Because the court found that the Board acted lawfully in promulgating the notice posting requirement and that this requirement can be severed from the unlawful portions of the Rule, it upheld the requirement. Thus, unless this decision is overturned on appeal or another court finds the Rule to be invalid (the U.S. Chamber of Commerce has filed a lawsuit challenging the rule, which is still pending), the notice posting requirement will take effect April 30, 2012. Under the court's decision, the Board may still find that the failure to post the notice is an unfair labor practice, depending on the particular facts of a specific case. Similarly, the court's decision does not prevent the Board from considering an employer's failure to post the notice in determining whether the statute of limitations should be tolled in a particular unfair labor practice case.

If you have any questions regarding this decision, please contact the Ford & Harrison attorney with whom you usually work.