

## **Federal Court Gives Green Light To NLRB's Notice Posting Requirement But Strikes Several Enforcement Provisions from the Board's Final Rule**

March 6, 2012 by [Adam Santucci](#)

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As [readers of this blog may recall, on August 30, 2011](#), the National Labor Relations Board (Board) issued its Final Rule, "Notification of Employee Rights under the National Labor Relations Act." The Final Rule required employers subject to the Act (virtually all private sector employers) to post a rather large conspicuous "Notice of Employee Rights" to inform employees that they have the right to join unions, organize, engage in collective bargaining, strike, picket, etc.

The National Association of Manufacturers (NAM) challenged the Board's authority to require such posting and filed a lawsuit in federal district court in Washington, D.C. On March 2, 2012, Judge Amy Berman Jackson (appointed to the bench by President Obama in 2011), [issued a "split decision" in the matter](#), upholding the Board's right to require the notice posting, but finding unlawful and striking those provisions in the Rule which would have (1) automatically deemed the failure to post the notice to be an unfair labor practice (ULP), and (2) tolled the six-month statute of limitations for filing a ULP Charge against an employer who had failed to post the notice.

In finding that the Board had authority to require the notice posting, Judge Jackson found no indication that in enacting the Act, Congress clearly intended to preclude the Board from promulgating such a rule. She went on to find that the Board's promulgation of the Rule was neither arbitrary nor capricious, and given the lack of Congressional prohibition, the Board had sufficient legal authority to require the notice posting.

But, according to Judge Jackson, the Board did not have the requisite authority to deem failure to post as a new category of ULP under the Act. She did, however, leave that door open a bit, holding that the Board could still find failure to post to be a ULP in an individual case based on the facts and circumstances of that case. The Board just could not make a blanket advance decision that in every case failure to post would automatically constitute a ULP.

Judge Jackson further found that the Board had exceeded its statutory authority by purporting to toll the statute of limitations against those employers who fail to post. The Court noted that it was the Board's burden to prove, in any individual case, that there

are equitable reasons to toll the statute of limitations, and that automatic tolling under the Final Rule would “turn the burden of proof on its head.”

All in all, [NAM v. Nat'l Labor Relations Bd.](#) was a disappointing decision for employers and probably for the Board as well. It should be noted, however, that this case was not the only legal challenge to the Board's Final Rule. The U. S. Chamber of Commerce has a separate suit pending in federal district court in Charleston, SC, and Judge Jackson's decision will not be binding in the South Carolina court. Additionally, it is quite likely that Judge Jackson's decision will be appealed to the U.S. Court of Appeals for the D.C. Circuit. In the meantime, unless there is some further judicial action to the contrary, employers subject to the Act are advised to post the Notice of Employee Rights effective April 30, 2012, copies of which can be found and reproduced from the [Board's web site.](#)

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