
LEGAL ALERT

Friday The 13th An Unlucky Day For The NLRB

For months now, the business community has been bracing for the implementation of two key pro-labor initiatives on April 30, courtesy of the National Labor Relations Board: 1) an expedited election rule designed to cut the period between petition and election in half; and 2) a first-ever mandatory-posting requirement that would educate employees as to their representation rights, while laying the groundwork for unfair labor practice charges and extended limitations periods against those employers who fail to comply. The first initiative is proceeding on course, despite ongoing challenges that will ultimately be played out before the courts.

But this past Friday, the NLRB's posting requirement was dealt a serious blow by the U.S. District Court for South Carolina. In a 31-page decision that left little doubt as to his position, Judge Norton invalidated the Board's posting rule in its entirety, finding a lack of statutory authority in violation of the Administrative Procedure Act. In so doing, he granted summary judgment to both the South Carolina and U.S. Chambers of Commerce.

Although the ruling does not enjoin the Board from proceeding with the posting requirement, it makes clear that the proposed rule is void for all intents and purposes. Unless it is reversed or stayed within the next two weeks, the decision appears to block implementation of the rule, scheduled for April 30.

This decision comes on the heels of last month's ruling by Judge Jackson of the U.S. District Court for the District of Columbia, which actually upheld the validity of the posting requirement itself, but struck down those provisions of the rule that established an independent basis for the issuance of unfair labor practice charges and the tolling of the statute of limitations periods for those who fail to post. That decision is now up on appeal before the U.S. Circuit Court of Appeals for the District of Columbia, which is expected to issue a ruling within the next two weeks. It is entirely possible that the D.C. Court of Appeals will rule the same way as the district court in South Carolina.

In the meantime, we appear to have a partial conflict between those portions of Judge Jackson's ruling that uphold the validity of the posting rule, and Judge Norton's decision to invalidate it completely. While this may give rise to some confusion between now and April 30, the D.C. Circuit has an opportunity to lend some clarity to the picture in the days to come.



But even in the absence of such a decision, this represents a serious legal and political setback for the NLRB. There is no mistaking the fact that Judge Norton intended to strike down the posting requirement in its entirety, ruling against a group of defendants that included the Acting General Counsel, along with all then-members of the NLRB.

In so doing, he granted summary judgment to both plaintiffs, one of which (the U.S. Chamber of Commerce) does business in every jurisdiction, along with its constituent members. Should the D.C. Circuit decline to approve Judge Jackson's decision within the next two weeks (which appears to be a distinct possibility), Judge Norton's decision invalidating the rule may end up carrying the day.

Given what's at stake, the Board may well pursue a stay of that decision in the short-term. It remains to be seen whether that tactic is likely to succeed. Should it fail, the Board is likely to pursue face-saving efforts by declaring yet another postponement of the implementation schedule, putting it off to a new date in June or July. For all these reasons, we encourage employers to continue to monitor developments carefully, while refraining from any premature compliance efforts (which may prove unnecessary) prior to April 30. Our advice: wait and see.

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