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COURT DECISION ON NLRB POSTING REQUIREMENT ISN'T MUCH OF A "WIN" FOR EMPLOYERS

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Last week's decision by a federal judge on the **"posting rule"** of the National Labor Relations Board was not a total loss for employers, but it was hardly a resounding victory.

In ***National Association of Manufacturers v. NLRB***, Judge Amy Berman Jackson of the U.S. District Court in Washington, D.C., upheld the notice-posting requirement but found that the Board had exceeded its authority (1) by creating a new unfair labor practice based on failure to post the notice, and (2) by pre-determining by rule that a failure to post the notice would toll the six-month limitations period for filing unfair labor practice charges that is found in Section 10(b) of the NLRA. Unfortunately, these latter parts of Judge Jackson's ruling may provide little comfort to employers because, as the judge indicated in her decision, the Board may pursue these results on a case-by-case basis – just not by way of general rulemaking.

The Case and Analysis

The plaintiffs in the case, which included the National Right to Work Legal Defense and Education Foundation as well as the NAM, brought the court challenge to the Board rulemaking implemented in August 2011. They contended that the Board had no authority under the NLRA to make such a rule and that the rule interfered with employers' right to refrain from speech, thus violating the First Amendment to the U.S. Constitution. They also contended that the Board could not add a new unfair labor practice to those explicitly set forth in the NLRA and that the Board could not adopt a rule automatically imposing tolling of the Section 10(b) limitations period simply because of a failure to post the notice.

Judge Jackson found that the Board had broad authority to adopt rules it deemed necessary to promote the purposes of the NLRA and that the posting requirement was within that scope. The rulemaking was a reasonable and not an arbitrary and capricious interpretation of the NLRA, she said, even though the statute says nothing about posters. In rejecting the First Amendment challenge, Judge Jackson found that the notice did not compel the employer to speak. Instead, she concluded, the notice was government speech and the Board could mandate the posting to get out its message.

On a more positive note, Judge Jackson found that the NLRA prohibited interference with employee rights but that the Board could not, by rulemaking, expand the unfair labor practices under the NLRA to require employers to "facilitate" employee rights. Likewise, she found that the Board could not use rulemaking to negate the statutory limitations period of Section 10(b).

What's Left

This ruling is not the end of the story. Press reports indicate that the Right to Work organization has vowed to appeal Judge Jackson's decision, and the outcome of an appeal is difficult to predict.

To complicate matters even more, another case raising the same issue is pending in federal court in South Carolina. The court in South Carolina can reach its own conclusion, and there is no guarantee that it will follow Judge Jackson's decision.

Meanwhile, companies and employees continue to slouch toward April 30, the date on which the notices must be posted.