

## Two out of Three is Bad: Judge Says Poster Goes Up.

5. March 2012 by Steve Palazzolo

On Friday, Judge Amy Berman Jackson of the United States District Court for the District of Columbia, ruled that the National Labor Relations Board does have the authority to make a rule requiring employers to post a notice outlining employee rights under the National Labor Relations Act. You can read more about the poster [here](#) and [here](#). Judge Berman Jackson had two basic questions in front of her: 1) Does the Board have the rulemaking authority to require private employers to post the poster; and 2) Does the Board have the rulemaking authority to set the penalties that it set for failure to post the poster? Yes I know, the title of this post says “two out of three.” What’s the third? Well, a couple of the plaintiffs filed a motion seeking to have the court decide if President Obama’s recess appointments to the NLRB valid? The Judge did not deal with that question in her memorandum order, but separately ruled that the poster rule was promulgated by a quorum of Board members who were undisputedly authorized to make rules well before the recess appointments were made.

Judge Berman held:

The Court holds that the NLRA granted the Board broad rulemaking authority to implement the provisions of the Act, and that the Board did not exceed its statutory authority in promulgating Subpart A of the challenged rule – the posting provision. But it also holds that the provisions of Subpart B that deems a failure to post to be an unfair labor practice, and the provision that tolls the statute of limitations in unfair labor practice actions against employers who have failed to post, do violate the NLRA are invalid as a matter of law.

Finally, Judge Berman held that the invalidity of the enforcement mechanism in Subpart B of the rule did not invalidate the entire rule and that the posting requirement is severable and valid.

So, all in all, this is a win for the Board and the unions. In fact, according to *The Wall Street Journal*, the General Counsel for the AFL-CIO said “While the judge invalidated two sensible enforcement mechanisms in the rule, her decision affirms that the Board has ample authority to enforce the notice-posting requirement on a case-by-case basis, . . .”...On the other hand, again according to *The Wall Street Journal*, the president of the National Association of Manufacturers said: “We believe today’s decision is fundamentally flawed, . . .” You can see the WSJ article [here](#).

So, if you’re an employer, what does this mean to you? It means you are going to have to post the NLRB poster by April 30, 2012. If you want to see it, you can find the poster [here](#).

If you want to discuss what your options are, give me a call. You can find me [here](#).