

APRIL 2012

## DISTRICT OF COLUMBIA COURT OF APPEALS DELAYS IMPLEMENTATION OF NLRB POSTING REQUIREMENT

On April 17, 2012, the District of Columbia Circuit Court of Appeals issued an emergency injunction delaying enforcement of the National Labor Relations Board's (NLRB's) notice-posting rule (*National Association of Manufacturers v. NLRB*). The ruling is just the latest twist in the posting-rule saga, which has seen an extended comment period, multiple lawsuits, delayed implementation, conflicting court decisions, and now an emergency injunction prohibiting enforcement. For now, the NLRB is prohibited from requiring employers to post notices apprising employees of their rights to organize unions pending the full resolution of the appeal on the merits. As such, **employers are not required to post the notice on April 30, 2012.**

### Background

On August 30, 2011, the NLRB promulgated its Final Rule, "Notification of Employee Rights under the National Labor Relations Act." The new rule, found at 29 C.F.R. § 104.202, requires all employers covered by the National Labor Relations Act (NLRA) to post a notice informing employees of their rights to, among other things, form a union, join a union, assist a union, or refrain from doing any of these things. More information on the details of the posting requirement can be found in a recent WSGR Alert.<sup>1</sup>

### Legal Challenges

Before the rule became effective, a number of business-friendly organizations, including the National Right to Work Legal Defense and Education Foundation and the National Chamber of Commerce, filed lawsuits challenging the new rule. A decision in one of those cases, *National Association of Manufacturers v. NLRB*, resulted in a ruling upholding the power of the NLRB to enact the posting requirement. Further information on that decision is available in a separate WSGR Alert.<sup>2</sup>

In contrast, a more recent decision out of a federal district court in the District of South Carolina held that the NLRB exceeded its authority by promulgating the posting requirement (*Chamber of Commerce v. NLRB*). In that case, Judge David C. Norton ruled that the NLRB's Final Rule exceeded the statutory rights of the NLRB and violated the Administrative Procedure Act. As a result, the rule was deemed unlawful.

### The Injunction

Yesterday, the District of Columbia Circuit Court of Appeals stepped into the fray, issuing an emergency injunction halting the NLRB's enforcement of the posting rule. The court indicated that, given the uncertainty surrounding the status of the requirement, an

injunction delaying implementation until the matter can be resolved fully and finally was merited. In entering the injunction, the court of appeals noted that the NLRB already had delayed enforcement of the Final Rule once during the pendency of district court proceedings. Such action undermined the NLRB's argument that an injunction was inappropriate and enforcement should begin on April 30, 2012, as planned.

### Looking Ahead

While the future of the posting rule is still very much up in the air as of now, employers are not required to post the notice on April 30. Indeed, Mark Gaston, the current NLRB chairman, issued a press release following the injunction stating that "[i]n view of the DC Circuit's order, and in light of the strong interest in the uniform implementation and administration of agency rules, regional offices will not implement the rule pending the resolution of the issues before the court."

Wilson Sonsini Goodrich & Rosati will continue to monitor the situation and provide updates as warranted. For more information, please contact Fred Alvarez, Ulrico Rosales, Marina Tsatalis, Charles Tait Graves, Laura Merritt, or another member of the firm's employment and trade secrets litigation practice.

<sup>1</sup> For additional information, please read the WSGR Alert titled "NLRB Enacts Rule Requiring All Employers to Post Right-to-Unionize Notice," available at <http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert-right-to-unionize.htm>.

<sup>2</sup> Further details are available in the WSGR Alert titled "Court Upholds NLRB's Right to Require Employers to Post Notice regarding Unions," available at <http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/pdfsearch/wsgralert-union-rights.htm>.

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