A Timely Analysis of Legal Developments

ASAP®

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Federal Court Partially Invalidates NLRB Notice Posting Rule, Rejects First Judicial Attempt to Contest Board Recess Appointments

By Stefan Marculewicz and Gavin Appleby

The U.S. District Court for the District of Columbia issued a ruling on March 2, 2012 that strikes down part of the National Labor Relations Board's notice posting rule, but declines to address whether the three recess appointments to the Board are valid.

The lawsuit at issue was brought by, among other entities, the National Association of Manufacturers (NAM) and the National Right to Work Legal Defense and Education Foundation (NRTW). It sought to enjoin the enforcement of the Board's new rule mandating that as of April 30, 2012, private sector employers subject to the National Labor Relations Act (NLRA) post a notice informing employees of their rights under the NLRA in a "conspicuous place" readily seen by employees and penalizing employers for non-compliance. In the event an employer is found to have violated the posting rule, the Board would be permitted, among other remedies, to toll the six month statute of limitations for an employee who files an unfair labor practice (ULP) charge. This provision would extend the statute of limitations for all unfair labor practice actions against the employer, not just those ULPs arising from the failure to post the notice. The rule would deem a failure to post the required notice a ULP in its own right.

The lawsuit challenged not only whether the Board has the authority under the NLRA to promulgate the rule at issue, but whether the Board's action was arbitrary and capricious and whether the rule violates the First Amendment.

In her decision, Judge Amy Berman Jackson upheld the Board's right to require employers to post the notice, but not the imposition of the rule's strict penalties. In upholding the Board's right to promulgate the rule, Judge Berman Jackson stated:

> the Board is not attempting to regulate entities or individuals other than those that Congress expressly authorized it to regulate, and it is not extending its reach to cover activities that do not fall within the ambit of the Act. The stated purpose of the Rule is directly related to the policy behind the NLRA.
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> Therefore, the Court cannot find that in enacting the NLRA, Congress unambiguously intended to preclude the Board from promulgating a rule that requires employers to post a notice informing employees of their rights under the Act. Neither the text of the statute nor any binding precedent supports plaintiffs' narrow reading of a broad, express grant of rulemaking authority.

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The court, however, found fault with the rule's unfair labor practice provisions. In essence, the court concluded that the Board exceeded its authority in declaring the failure to adhere to the posting rule equates to "interference" with an employee's rights under the NLRA, and is therefore an unfair labor practice. According to the court, the Board:

> must make a specific finding based on the facts and circumstances in the individual case before it that the failure to post interfered with the employee's exercise of his or her rights. The Court is not making an absolute statement that inaction can never be interference; rather this memorandum opinion simply holds that the Board cannot make a blanket advance determination that a failure to post will always constitute an unfair labor practice.

The court similarly found that the NLRA "does not authorize the Board to enact a rule which permits it to toll the statute of limitations in any future unfair labor practice action involving a job site where the notice was not posted." The portion of the rule at issue states that:

> failure to post the required notice will not automatically warrant a tolling remedy. If an employer proves that an employee had actual or constructive knowledge of the conduct alleged to be unlawful, as well as actual or constructive knowledge that the conduct violated the NLRA, and yet failed to timely file an unfair labor practice charge, the Board will not toll the [160](b) period merely because of the employer's failure to post the notice.

The decision explains that this rule effectively "establishes tolling as the standard practice unless the employer can prove to the Board that it should not be applied," a standard that "turns the burden of proof on its head. The plaintiff generally bears the burden of proving that equitable tolling should apply in an individual case, but the rule demands that the employer prove that across the board, unlimited extension should not apply." Thus, the court held, imposition of this remedy is impermissible.

The court, however, rejected the argument that the rule violates an employer's free speech rights under the First Amendment. Further, the court held that the invalid portions of the rule are severable from the legitimate portions, and therefore the rule, as a whole, may stand.

As a practical matter, without the rule's enforcement teeth, it would appear that the NLRB cannot find an independent unfair labor practice if an employer fails to post the notice. That said, it would also appear that an employer's failure to post the notice could be considered as part of the facts and circumstances the Board relies upon to determine whether certain unfair labor practices have occurred.

A separate piece of litigation on this issue remains pending in federal court in South Carolina, and it is unclear what impact, if any, the ruling in this case will have on that proceeding.

Challenge to Recess Appointments

In granting some of the plaintiffs' motion for summary judgment in this matter, the court also addressed the separate issue regarding the validity of the recent recess appointments to the Board by President Obama. On January 13, 2012, the NRTW along with other business advocacy groups filed the first judicial challenge to President Obama's decision to seat three new members to the Board via recess appointment on January 4, 2012, when the Senate was still holding *pro forma* sessions. According to the plaintiffs' motion, since the Senate was not technically in recess at the time of the appointments, the President lacked the authority to appoint new Board members without the Senate's advice and consent. The plaintiffs sought to add this charge to the pending suit opposing the Board's notice posting rule. The crux of their argument was that because the recess appointments are not constitutionally legitimate, the NLRB lacks the quorum needed to implement and enforce the notice posting rule.

The NLRB opposed this motion because it sought to challenge the appointments made after the rule was already issued, and after the rule was extended on two occasions by an operational Board.

In her ruling denying the plaintiffs' motion to supplement the complaint, Judge Berman Jackson stated that the plaintiffs were attempting to "shoehorn" the recess appointment challenge into the existing lawsuit, and that "the validity of the recess appointments has absolutely no bearing on any of the issues that are ripe for decision in this case." Specifically, she stated that the regional director, not the Board, is the body that exercises enforcement and investigative authority under the NLRA. Therefore, bringing a claim against the Board, which would become involved only if the regional director determined a claim had merit and filed an administrative complaint with the Board, is premature. Moreover, Judge Berman Jackson ruled that "[a]dding an entirely new issue to this case, which would require full briefing and oral argument,

would cause undue delay in resolving the merits of the original claims, and be prejudicial to defendants who have already postponed the effective date of the rule twice."

While this legal challenge was denied, more challenges to the President's authority to make these recess appointments will no doubt be forthcoming.

Practical Considerations

At this point, while the rule does not make failure to post an unfair labor practice *per se*, it still requires employers to post the notice. Therefore, employers should plan to post the NLRB notice on April 30, although further legal rulings could occur between now and then. In particular, it seems likely that a ruling may be issued before April 30th in the case brought against the NLRB by the U.S. Chamber of Commerce in federal court in South Carolina. In addition, an appeal is likely in the D.C. case.

As explained in Littler's earlier ASAP on this topic, employers also should train managers to handle questions that arise from the NLRB poster. Further, employers who are more at risk for union campaigns may wish to create a counter-poster, but not before considering whether such an approach could create more of an emphasis on NLRB rights rather than less.[1] Finally, employers should continue to take the preventive steps required to ensure that their employees do not feel the need in the first place for a third party to intervene on their behalf with their employer.

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[1] Apparently at least one Region has opined that an employer counter-poster could be prohibited by the NLRA. While that opinion seems questionable, employers considering a poster should be cautious of the language used (including being mindful of the current Board standards that apply to communications like handbook statements), the location of the poster and the reality that employer posters may be subject to litigation until the law is clarified through Board and court decisions.