

# PUBLICATION

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## NLRB Poster Rule Torn Down by the D.C. Circuit

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In August 2011, the National Labor Relations Board (NLRB) attempted to implement a rule requiring every employer in the United States to post a "notice" of union organizing rights. After an almost two-year battle, the courts have ruled that the NLRB cannot force employers, under the threat of an unfair labor practice finding or the tolling of the period for an employee to file a charge, to post on their properties and on their websites a "Notification of Employee Rights." Tuesday's D.C. Circuit ruling in *Nat'l Ass'n of Mfrs. v. NLRB* brings much relief to the nearly six million employers, including a large number of small businesses, that the posting rule would affect.

Under the NLRB rule, if an employer failed to post the notice, there were three enforcement mechanisms:

- (1) An employer's failure to post the notice would be considered an unfair labor practice;
- (2) the NLRB may suspend the running of the six-month limitations period for filing any unfair labor practice charge "unless the employee has received actual or constructive notice that the conduct complained of is unlawful,"; and
- (3) the NLRB may consider an employer's "knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue," thereby allowing the NLRB to find yet another violation of the National Labor Relations Act (NLRA).

Trade associations and other organizations representing employers across the country filed complaints in the district court arguing that the rule violated the NLRA and the First Amendment.

The NLRB claimed authority to promulgate the rule under Section 6 of the NLRA to make "such rules and regulations as may be necessary to carry out the provisions" of the Act, claiming that employees in today's working environment need to know their rights to be able to enforce them. However, opponents of the rule and the D.C. Circuit Court focused their analysis on Section 8(c) of the Act, which provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, *shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act]*, if such expression contains no threat of reprisal or force or promise of benefit. (emphasis added)

The court held that the Rule allowed the NLRB to find "non-coercive employer speech to be an unfair labor practice [and] evidence of an unfair labor practice," both of which are prohibited.

The NLRB argued that the rule did not violate Section 8(c) because the poster was not the speech of the employer, but instead, the speech of the NLRB, as it is the NLRB's required wording on the poster. The court, relying on well-established First Amendment law, flatly rejected this argument, noting both that the First Amendment "prohibits the government from telling people what they must say," citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, and that the First Amendment and Section 8(c) include not only the right of free speech, but also the right *not to speak*, *i.e.*, the right not to communicate the message in the NLRB's

poster. Thus, under this reasoning, the court struck down the first and third enforcement mechanisms mentioned above as a violation of Section 8(c).

Finally, turning to the enforcement mechanism that would toll the period for filing any unfair labor practice charge if an employer failed to post the notice, the court found that the NLRB failed to invoke any authority suggesting that Congress, when the NLRA was enacted in 1947, intended to allow the tolling period set forth in Section 10(b) to be modified in the manner set forth in the rule. As such, the NLRB had no authority to alter the Act's limitations period.

Because the court found that each of the rule's enforcement mechanisms were invalid, it did not reach the question of whether the NLRB had the regulatory authority to require employers to post the notice, because it found that without the enforcement mechanisms, the rule would be left with only voluntary compliance, and the NLRB would not have adopted the rule without any means to enforce it.

This D.C. Circuit ruling solidifies the right of employers to choose how it communicates with its employees about union issues, and thwarts the NLRB from using employers to educate employees on its own agenda. If you have questions about this ruling, or other NLRB issues, please contact any of our more than 70 Labor & Employment attorneys.