

# PUBLICATION

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## Federal Judge Says NLRB Out of Bounds in Union Notice Posting

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On Friday, April 13, a South Carolina federal judge ruled that the National Labor Relations Board (NLRB) overreached in mandating that employers post a notice about employees' right to unionize.

U.S. District Judge David C. Norton ruled in *Chamber of Commerce of the United States v. NLRB* that the NLRB exceeded the authority it derived under the Administrative Procedure Act and granted the U.S. Chamber's motion for summary judgment. At issue was Section 6 of the National Labor Relations Act (NLRA), which states that "the board shall have authority from time to time to make, amend and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this act."

In his ruling, Judge Norton ruled that the plain language and structure of the act means the NLRB lacks authority under Section 6 to put the rule into effect. Judge Norton held that the NLRA limits the NLRB to a reactive role. "The notice-posting rule proactively dictates employer conduct prior to the filing of any petition or charge, and such a rule is inconsistent with the board's reactive role under the act," Judge Norton wrote. "Congress did not impose a notice-posting requirement on employers in the act or commit this area of regulation to the board."

Specifically, Judge Norton ruled that the notice requirement would allow the NLRB to create rules in an area in which Congress didn't specifically bar the NLRB's power. "Neither Section 6 nor any other section of the NLRA even mentions the issue of notice posting," he wrote. "Looking to the statutory language as a whole, the text of the act shows that the board's rule is not necessary to carry out any provision of the act."

Additionally, the judge observed that Congress had mandated at least eight additional notice requirements in federal labor laws since 1934, but that it had intentionally left alone the NLRA.

Accordingly, Judge Norton concluded that the text of the law, its legislative history, the history of congressional regulation in federal labor law and its failure to amend the NLRA to include a notice posting requirement under the NLRA all combined to demonstrate that Congress did not mean to mandate a notice-posting obligation on employers and that the NLRB exceeded its authority in mandating such a requirement.

The NLRB had issued the final rule requiring employers to post notices informing employees of their rights under the NLRA in August 2011. It was slated to take effect November 14, but its implementation was postponed until April 30 due to suits filed by the U.S. Chamber and other business groups.

This ruling comes on the heels of, and contradicts in part, District Court Judge Amy Berman's ruling in *National Association of Manufacturers v. NLRB*. That case upheld the requirement that employers post the notice, although it stripped some of the penalties from the provision in the event employers failed to post the notice. The plaintiffs in National Association of Manufacturers filed an appeal, and the NLRB is expected to appeal Judge Norton's order. Accordingly, while only employers in Maryland, North Carolina, South Carolina, West Virginia and Virginia can argue they are legally exempt from posting the notice, the NLRB is effectively left without a meaningful penalty for those employers who decide to forego posting the notice while these cases progress through the courts.

If you have questions about this or any other aspect of the NLRA, please reach out to any of our nearly 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.