

PUBLICATION

Court Upholds NLRB Notice Posting Rule But Guts Remedies for Failure to Post

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The U.S. District Court for the District of Columbia issued a ruling on March 2, 2012, that will affect union and nonunion employers alike. It upheld the NLRB's authority to implement a rule requiring virtually all private sector employers to post a notice in their workplaces. The notice will educate employees regarding their right to unionize, strike, and engage in protected concerted activity.

Business groups challenged the rule, noting that the National Labor Relations Act does not contain a notice requirement, and the Act does not give the Board the authority to implement a notice posting requirement through administrative rulemaking. The District Court found that the notice posting requirement was not specifically precluded by the language of the statute, and it further found that the notice was a “reasonable means of promoting awareness” of employees' rights under the NLRA.

However, the District Court invalidated two of the three remedies that would be imposed on employers who fail to post the notice. The proposed rule contains three “remedies” for an employer's failure to post a notice: (1) the rule makes the failure to post the notice an unfair labor practice; (2) the rule extends the six-month statute of limitations for unfair labor practices where employers do not have the notice posted, and (3) the rule allows the knowing and willful failure to post the notice to be used as evidence of anti-union animus in unfair labor practice proceedings.

The District Court struck down the first two remedies in the proposed rule as exceeding the NLRB's authority. The District Court found that the failure to post a notice cannot be an independent unfair labor practice because the failure to inform employees of their rights under the NLRA is not the equivalent of affirmatively interfering with their rights (the standard for finding an unfair labor practice). The District Court also found that the Board could not extend the limitations period through rulemaking, since the six-month statute of limitations is set out in the statute. The District Court left open the possibility that the NLRB could impose these remedies if a particular case warranted them (without specifying which particular cases would warrant the remedies). However, the District Court held that the NLRB did not have the authority to impose these broad remedies as a general proposition for all cases.

If the District Court's decision is upheld on appeal, or if it is not appealed, then all employers subject to the NLRB's jurisdiction (union and nonunion alike) will be required to post the NLRB's notice. The consequences for failing to do so are less clear after the District Court's decision. The District Court's decision will likely be appealed to the U.S. Court of Appeals for the D.C. Circuit, so stay tuned...