

## **Client Alert**

### *Federal Court Rules on NLRB Poster Requirement*

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*Considering the many legal challenges to the NLRB's proposed mandatory posting (effective April 30, 2012), employers have been asking about their obligation to place this posting in their workplace. Here is the latest update.*

On March 2, 2012, a federal district court in the District of Columbia issued a decision in a lawsuit challenging the new NLRA posting requirement. *National Association of Manufacturing v. NLRB*. The court upheld the posting requirement, but struck down two of the three enforcement provisions of the new rule.

#### **The Posting Requirement**

The National Labor Relations Board (NLRB) decided in 2011 to require most private-sector employers to post a new notice entitled "*Employee Rights Under the National Labor Relations Act*." The NLRB's rule provided enforcement of the posting requirement in basically three ways: First, failure to post would constitute an unfair labor practice in and of itself. Second, failure to post would "toll" the statute of limitations for filing other unfair labor practices against the employer. And, third, failure to post would create an inference of "anti-union animus" in regard to proving other ancillary unfair labor practices of an employer.

#### **Challenge to the Posting Requirement**

The National Retail Federation challenged the posting requirement on multiple legal grounds, including arguments that the posting requirement exceeded the NLRB's authority under the NLRA and that the requirement violated employers' First Amendment free speech rights. The federal court issued a split decision, upholding part of the new rule while overturning other provisions. The court ruled that:

- The NLRB's posting requirement is legal because there was no showing that Congress intended to preclude the NLRB from promulgating such a rule and the workplace notice does not violate employers' free speech rights.
- The NLRB's enforcement provisions stating that failure to post constituted an unfair labor practice per se and as tolling the statute of limitations were "invalid as a matter of law." However, while the court ruled that failure to post the notice is not by itself an act of interference or obstruction of employee rights by the employer (and, thus, does not constitute a per se unfair labor practice), the court did not rule out the possibility that failure to post could be considered and used as evidence in regard to an unfair labor practice claim.

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**What Now?**

It is likely that this federal district court decision will be appealed. Moreover, there remains a pending legal challenge brought by the U.S. Chamber of Commerce in a federal district court in South Carolina.

As noted above, the required posting date for employers is April 30, 2012. This decision does not halt this requirement. Although this decision has diminished the NLRB's enforcement power, failure to post can still be used as evidence against an employer in an unfair labor practice charge. Unless and until another lawsuit is decided, the posting obligation remains a valid requirement of employers subject to the NLRB's jurisdiction.

For more information and strategies for dealing with the NLRB's posting requirement, please email or call Jay Wallace, Tom Case, Tammy Wood or Adrienne Jackson.