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One Minute Memo®

Federal Court Rules That NLRB Can Require Employers To Post "NLRA Rights" Notice

In a widely anticipated decision, *National Association of Manufacturers, et al. v. NLRB et al,* Civil Action No. 11-1629 (ABJ), today the United States District Court for the District of Columbia held that the National Labor Relations Board ("NLRB" or "Board") has the authority to require employers covered by the National Labor Relations Act ("NLRA" or "Act") to post a workplace notice regarding employee rights under the Act (*see alert*). This requirement would apply to most of the private sector employers in the United States. Prior to the decision, the NLRB had announced that it would put this requirement into effect on April 30, 2012.

While upholding the NLRB's right to require the notice, the District Court's decision overturns other important aspects of the Board's intended rule. The Court struck down the portion of the NLRB's rule which would make it an unfair labor practice (violation of Section 8(a)(1) of the Act) to fail to post the notice. Rather, the Court concluded that the Board would need to make a specific finding based on the facts and circumstances in an individual case that failure to post the notice interfered with an employee's exercise of their rights under the Act. Essentially, the Court held that the Board cannot make a "blanket advance determination" in that regard.

The District Court also struck down the portion of the Board's intended rule which would permit it to toll the NLRA's 6-month statute of limitations in any future unfair labor practice action involving a job site where the notice was not posted. Here, as well, the Court would allow the NLRB to consider equitable tolling based on a failure to post a notice on an individual basis.

Among other reasons for its decision, the District Court rejected a challenge based on a contention that posting the rights notice violated the First Amendment as "compelled speech." The Court contrasted recent Supreme Court decisions in which a violation was found because a speaker, such as a religious organization, had its own message materially affected by the government's requirement. Here, the District Court held that the NLRA rights notice was not suggesting that employers favor collective bargaining, or restricts what they may say about the NLRA or unions. (However, under the NLRA, an employer cannot engage in threatening or coercive conduct in this regard).

The District Court's decision may be appealed. Moreover, there is a separate lawsuit challenging the notice posting rule which is pending in the United States District Court for South Carolina. Accordingly, it is quite likely that the last word has not been heard in this area. Nonetheless, this is the strongest indication yet that employers covered by the NLRA will need to post a required employee rights notice as of April 30, 2012.

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