
NLRB Posting Rule Struck Down by Appeals Court

By Thomas P. Brady, Kurt A. Miller / May 29, 2014

On May 7, 2013, the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals) invalidated the National Labor Relations Board's (Board) rule requiring employers to post a notice of employee rights under the National Labor Relations Act (Act).

On August 30, 2011, the Board issued a final rule requiring employers subject to the Act to conspicuously post the Board's "Notification of Employee Rights under the National Labor Relations Act," informing employees of their right to form and join labor unions. The rule's effective date was postponed several times. In *National Association of Manufacturers v. NLRB*, the District Court for the District of Columbia held that the Board had the authority to require employers to post the Notice. The Court of Appeals stayed the lower court's ruling until it could hear the appeal of the case.

Section 8(c) of the Act contains a free speech provision which states, "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."

In its May 7, 2013 ruling, the Court of Appeals held that the Board violated the free speech provision of Section 8(c) by requiring employers to post the notice. Based upon several First Amendment cases, the Court of Appeals reasoned that Section 8(c) prevented the Board from coercing an employer into expressing views that may be contrary to the employer's views. Because the Board's rule which imposed the posting requirement also provided that an employer's failure to post the Notice constituted an unfair labor practice, and could also be used by the Board as evidence in support of other unfair labor practice charges, the rule violated the employer's Section 8(c) rights. The Court of Appeals also held that the provision of the rule which allowed for tolling of the Act's six-month statute of limitations for the filing of unfair labor practice charges rendered the rule invalid, because the provision was contrary to the specific language of Section 10(b), which imposes a six-month statute of limitations for the filing of charges.

Two of the Judges hearing the appeal also found that the Board lacked authority to promulgate the posting rule under Section 6 of the Act.

Practice Pointer: In previous e-alerts on the posting requirement, we advised that employers did not have to post the "Notification of Employee Rights under the National Labor Relations Act" while this case was pending in the Court of Appeals. If you did post the Notice, you may take it down.

If you have any questions please contact Thomas P. Brady, (313) 965-8291, tbrady@clarkhill.com, Kurt A. Miller, (412) 394-2363, kmiller@clarkhillthorpreed.com or another Clark Hill or Clark Hill Thorp Reed labor or employment attorney.