D.C. Circuit Court of Appeals Strikes Down NLRB Posting Rule

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May 8, 2013

The United States Court of Appeals for the District of Columbia Circuit has struck down in its entirety the National Labor Relations Board's rule requiring all employers covered by the National Labor Relations Act to post a notice informing employees of their rights under the Act. *National Association of Manufacturers v. NLRB*, No. 12-5068 (D.C. Cir. May 7, 2013). This blow to the NLRB's authority follows the D.C. Circuit's earlier ruling in *Noel Canning* that President Barack Obama's January 2012 recess appointments to the NLRB were invalid and the Board was acting without a required quorum. (For more information, please see Recess Appointments at NLRB Unconstitutional, Federal Appeals Court Rules.)

The notice posting rule would have required approximately six million employers to conspicuously post a notice informing employees of their right to organize as well as to engage in other protected activities.

The case is the result of an appeal of a decision by the D.C. District Court. On March 2, 2012, the District Court held that although the NLRB had the authority to issue the posting rule, the Board exceeded its authority by promulgating provisions that permitted it to: (1) deem the failure to post to be an unfair labor practice; and (2) toll the statute of limitations for claims against employers who failed to post the notice. (For details, please see Implementation of NLRB Workers' Rights Posting Rule Delayed by Federal Appeals Court.)

On appeal, the D.C. Circuit affirmed, in relevant part. The Court bypassed the issue of whether the Board had authority to mandate the poster under Section 6 of the Act (giving the Board power to issue rules necessary to carry out the Act's other provisions) — although, in a concurring opinion, two of three judges on the appeals panel said the Board exceeded its authority under this provision, too. Instead, the Court held the notice posting rule violated Section 8(c) of the Act, which expressly permits employer noncoercive speech and, the Court decided, protects *a refusal* to engage in such speech also. (Under the rule, failure to post the notice may constitute an independent unfair labor practice and may be considered evidence of unlawful motive in certain proceedings before the NLRB.) The Court found the Board's rule invalid because it requires employers, under threat of being found to have committed an unfair labor practice, to engage in speech by posting the NLRB notice. Such "compelled speech," it concluded, ran afoul of Section 8(c).

The Court explained:

> Suppose that § 8(c) prevents the Board from charging an employer with an unfair labor practice for posting a notice advising employees of their right not to join a union. Of course § 8(c) clearly does this. How then can it be an unfair labor practice for an employer to refuse to post a government notice informing employees of their right to unionize (or to refuse to)? Like the freedom of speech guaranteed in the First Amendment, § 8(c) necessarily protects—as against the Board..., the right of employers (and unions) not to speak. This is why, for example, a company official giving a noncoercive speech to employees describing the disadvantages of unionization does not commit an unfair labor practice if, in his speech, the official neglects to mention the advantages of having a union.

The D.C. Circuit also struck down the notice posting rule's enforcement mechanism to toll the Act's six-month statute of limitations (which is prohibited by Section 10(b) of the Act) should an employer fail to post the notice. Tolling would have allowed the Board to suspend the limitations period, thus permitting unfair labor practice charges to be filed beyond the six-month statute of limitations. In reaching this conclusion, the Court noted the NLRB had not cited any authority showing that, when Section 10(b) was promulgated, in 1947, Congress "intended to allow §10(b) to be modified in the manner of the Board's tolling rule." The D.C. Circuit Court was particularly critical of the NLRB on this point, explaining, "Whether one frames the Board's tolling rule as resting on the employer's failure to post the Board's notice or on the charging employee's lack of knowledge of his rights under the National Labor Relations Act, the Board marshaled nothing to show that by 1947 this was a generally accepted basis for tolling limitations periods." The last enforcement mechanism in the rule, which would allow the Board to consider an

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employer's "knowing and willful refusal to post the notice as evidence of unlawful motive," also was struck down by the Court.

Although the D.C. Circuit found the NLRB's notice posting rule invalid, this is not the end of the story. A separate challenge to the validity of the notice posting rule is pending before the United States Court of Appeals for the Fourth Circuit, in Richmond. In that case, the federal district court for the District of South Carolina determined the NLRB did not have authority to promulgate the rule at all. The Fourth Circuit is not bound by the D.C. Circuit Court's decision and a contrary outcome could create a conflict in the circuits. Such a conflict almost certainly would result in a U.S. Supreme Court review of the rulemaking.

The separate requirement under Executive Order 13496 that covered federal contractors and subcontractors post a notice informing employees of the right to unionize and to engage in certain protected activities under the NLRA is unaffected by the D.C. Circuit's ruling. The Executive Order is not based on the Board's statutory authority.

We will keep you apprised of further developments in connection with the notice posting rule. If you have questions about these legal challenges, please do not hesitate to contact the Jackson Lewis attorney with whom you regularly work.

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