Employee Rights Poster Invalidated By Courts. What Does It Mean To Finishers?

Two courts say "no" to National Labor Relations Board's controversial rule.

Two federal appeals courts recently invalidated the National Labor Relations Board's controversial rule that requires private sector employers subject to the NLRB's jurisdiction—virtually all private sector employers, both unionized and non-unionized—to post a notice about employee rights.

This means employers will not have to post the NLRB's "Employee Rights Under the National Labor Relations Act" unless or until the three-judge panels' decisions are reversed by decisions of all of the judges on the District of Columbia Circuit Court of Appeals or the Fourth Circuit Court of Appeals, or by the United States Supreme Court. The likelihood of reversal is low. The practical effect of these decisions should be the end of the NLRB's poster rule, even though the NLRB will probably and unsuccessfully appeal both decisions.

The NLRB's poster rule was initially published in 2011 and was scheduled to take effect on April 30, 2012. Its status had been in limbo since April 17, 2012, when the District of Columbia Circuit Court temporarily blocked its implementation while the court reviewed whether the NLRB had the legal authority to impose such a rule.

On May 7, the court concluded that the poster rule violated Section 8(c) of the National Labor Relations Act (NLRA), which grants employers freedom of speech. The poster rule violated that right for the following reason: the rule "makes an employer's failure to post the Board's poster an unfair labor practice," and, by treating the failure to post as "evidence of anti-union" bias in other cases, the rule also treats such a failure "as evidence of an unfair labor practice." In a concurring opinion, two of the three judges further stated that the NLRB lacked the authority to even promulgate the posting rule because it was not necessary to "carry out the express provisions of the Act."

> **Nothing in the National Labor Relations Act suggested that the burden of educating employees—filling the knowledge gap—should fall on the employer's shoulders by a requirement to post the NLRB's poster.**

On June 14, the Fourth Circuit Court of Appeals similarly concluded that the NLRB "exceeded its authority in promulgating" the poster rule for two reasons. First, the NLRB's rulemaking authority under the National Labor Relations Act only empowers the NLRB "to carry out its statutorily defined reactive roles in addressing unfair labor practice charges and conducting representation elections upon request." Second, Congress never granted the NLRB the statutory authority to "promulgate notice requirements" such as the poster. None of the sections of the NLRA "imply that Congress intended to grant" the NLRB to issue the notice-posting rule on its own.

The "Employee Rights Under the National Labor Relations Act" poster informed employees of both their legal rights under the NLRA and, as the court stated, "more specific employee rights the Board derived from judicial and Board interpretations of the Act." But, as the District of Columbia Circuit Court noted, employers objected to the message that the NLRB sought to order them "to publish on their premises." Employers "see the poster as one-sided, as favoring unionization, because it 'fails to notify employees … of their rights to decertify a union, to refuse to pay dues to a union in a right-to-work state, and to object to payment of dues in excess of the amounts required for representational purposes.'"

Under Section 8(c), the NLRB, as the District of Columbia Circuit Court stated, cannot charge "an employer with an unfair labor practice for posting a notice advising employees of their right not to join a union." The court rhetorically asked: "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)?" Answering its question, the court said Section 8(c) "necessarily protects—as against the Board …—the right of employers (and unions) not to speak." The NLRB's poster rule violated Section 8(c) by penalizing an employer for failing to "speak" by failing to post the NLRB's poster.

The NLRB's officially-stated reason for the poster rule was to educate non-unionized employees about their right to unionize. Its unofficial reason was to increase the unionization rate among private sector employees.

But the Fourth Circuit Court of Appeals found that the NLRB "is nowhere charged with informing employees of their rights under the NLRA." It concluded that there was "no indication in the plain language" of the NLRA that "Congress intended to grant" the NLRB "the authority to promulgate" the poster rule.

The concurring opinion in the District of Columbia Circuit Court's decision similarly stated that nothing in the National Labor Relations Act suggested that the burden of educating employees—"filling the knowledge gap—should fall on the employer's shoulders" by a requirement to post the NLRB's poster. The Act, according to the concurring opinion, "simply does not authorize the Board to impose

on an employer a freestanding obligation to educate its employees on the fine points of labor relations law."

Even though the NLRB's poster rule may never take effect, it was only one of many actions that the pro-union NLRB is taking to regulate employer's policies, rules and actions and to increase unionization among private sector employees. The NLRB, for example, continues to issue decisions that make various employer policies and rules unlawful. An employer should update its policies and rules to ensure that they comply with current NLRB rulings. To prepare itself for the risk of union organizing activity, a non-unionized employer also should review and update its plan for remaining non-unionized; assess its vulnerability to union-organizing activity; remedy any weaknesses in how it treats, compensates and communicates with its employees; and train its supervisors and managers about why it wants to remain union-free and how it plans to achieve that goal.

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