



Court Strikes Down NLRB Poster Rule

Insights

5.10.13

The National Labor Relations Board suffered another significant blow this week, when the U.S. Circuit Court of Appeals for the District of Columbia struck down the Board's controversial notice-posting mandate on the basis that it infringed upon employer free speech rights, while otherwise violating the National Labor Relations Act (NLRA). The posting requirement, which was scheduled to take effect back on April 30 of 2012, was invalidated in its entirety. *Nat'l. Assn. of Manufacturers v. NLRB*.

The rule would require the nearly six million employers subject to the NLRA to post notices informing employees of their rights under the Act. This unprecedented use of rulemaking triggered a severe backlash from the business community by virtue of its seemingly pro-union message. It would also render any posting violation an independent unfair labor practice, and evidence of unlawful motive, as well as toll the Act's six-month limitations period for filing charges.

In its decision, the D.C. Circuit found the rule at odds with free speech protections in the First Amendment and the NLRA, noting that the right to free speech includes a prohibition on government-compelled speech and the right to refrain from speech all together. The court concluded that Section 8(c) of the Act not only gives employers the right to such free speech, but also the right to remain silent, rejecting any attempt to convert a failure to speak (through the mandatory notice) into an unfair labor practice or evidence of improper motive.

The court went on to uphold a lower court ruling, which held that the notice purports to substantially amend statutory language legislated by Congress, thereby exceeding the Board's authority. Unfortunately, the court chose to bypass the significant question of the Board's underlying authority to engage in such rulemaking.

Nonetheless, the decision and its vindication of employer free speech rights is a major victory for the business community, at least so long as it withstands any further judicial challenge. The Board has said that it would refrain from implementing the rule so long as litigation as to its validity remained pending. The Board has not yet indicated whether it will appeal this decision, and may be waiting on the outcome of a similar appeal before the 4th Circuit Court of Appeals that remains pending. But for now, the Board has been dealt a serious setback in its efforts to impose a new posting requirement.

If you have any questions about this ruling, please contact your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific court ruling. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.