Employment Edge 129th Edition—Federal Court of Appeals Blocks NLRB's Notice Posting Rule, But New Election Rules Take Effect on April 30

April 18, 2012

To post or not to post? Employers now have a temporary answer. The D.C. Circuit Court of Appeals issued an order on April 17, 2012, blocking implementation by the National Labor Relations Board (NLRB) of its announced rule requiring private employers to post a Notice of Collective Bargaining Rights by April 30. We have previously written (Edge No. 128) about the Notice posting rule. Now, employers will not be required to post the Notice until at least some time later this fall. This ruling does not affect in any way the underlying collective bargaining rights that were the subject of the Notice. Nor does the court's decision change the effective date of the NLRB's new rule for union organizing elections, which remains April 30.

This will not be the end of the Notice posting issue. In an April 17 press release, NLRB Chairman Mark Gaston Pearce said, "We continue to believe that requiring employers to post this notice is well within the Board's authority, and that it provides a genuine service to employees who may not otherwise know their rights under our law."

The D.C. Court of Appeals in March found the basic notice-posting rule valid-but that court also struck down the rule's enforcement mechanisms. Then, last Friday a South Carolina federal court issued a decision to a different effect, holding the entire rule invalid because it exceeds the NLRB's authority.

The NLRB's press release responding to the injunction against the Notice posting rule summarized the Board's positions and intent:

In light of conflicting decisions at the district court level, the DC Circuit Court of Appeals has temporarily enjoined the NLRB's rule requiring the posting of employee rights, which had been scheduled to take effect on April 30, 2012. In view of the DC Circuit's order, and in light of the strong interest in the uniform implementation and administration of agency rules, regional offices will not implement the rule pending the resolution of the issues before the court. In March, the D.C. District Court found that the agency had the authority to issue the rule. The NLRB supports that decision, but plans to appeal a separate part that raised questions about enforcement mechanisms. The agency disagrees with and will appeal last week's decision by the South Carolina District Court, which found the NLRB lacked authority to promulgate the rule.

Many employers and their advocates have expressed concern that the Notice posting requirement might lead to increased union organizing activity. While this concern is now less immediate, the NLRB's new election rules that become effective at the end of April could also have a tendency to increase unions' organizing success rates.

To prepare for the new election rules, employers who wish to avoid unionization may be wise to take proactive steps to improve their positioning in the event of organizing activity, such as ensuring that supervisors are clearly identified and empowered with the kind of authority the NLRB will recognize as sufficient to keep them out of any unit that a union attempts to organize.

Gray Plant Mooty's Employment & Labor practice group is available to consult with employers on issues relating to unions. Employers who have questions or concerns about union organizing and union avoidance in the workplace are invited to contact Mark S. Mathison (612.632.3247, mark.mathison@lathropgpm.com), or any other member of the GPM Employment & Labor practice group.

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