Advisory

MAY 2013

LABOR, EMPLOYMENT AND BENEFITS DEPARTMENT

MARY A. GAMBARDELLA
Chair
203.363.7662
mgambardella@wiggin.com

KAREN L. CLUTE
203.498.4349
kclute@wiggin.com

SHERRY L. DOMINICK
203.498.4331
sdominick@wiggin.com

PETER J. LEFEBER
203.498.4329
plefeber@wiggin.com

LAWRENCE PEIKES
203.363.7609
lpeikes@wiggin.com

JOHN G. ZANDY
203.498.4330
jzandy@wiggin.com

RACHEL B. ARNEDT
203.498.4397
rarnedt@wiggin.com

NAJIA S. KHALID
203.498.4314
nkhalid@wiggin.com

CAROLINE B. PARK
203.498.4317
cpark@wiggin.com

JOSHUA B. WALLS
203.363.7606
jwalls@wiggin.com

D.C. Circuit Rejects NLRB's Poster Rule

The U.S. Court of Appeals for the District of Columbia Circuit has done it again. On the heels of its landmark ruling in *Noel Canning Co. v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) that President Obama's recess appointments to the National Labor Relations Board ("NLRB") were unconstitutional, thereby calling the NLRB's entire operational authority into question, the Court delivered yet another body blow by shooting down the NLRB's controversial rule requiring employers to display posters informing employees about their statutory right to unionize. The decision, *National Association of Manufacturers v. NLRB*, No. 12-5068 (D.C. Cir. May 7, 2013), marks the second time in a matter of months that the D.C. Circuit has chastised the NLRB for exceeding its statutory powers.

In this case, rather than focusing on whether the NLRB overstepped its authority under Section 6 of the National Labor Relations Act ("the Act") by issuing the poster rule, the Court's analysis hinged on Section 8(c) of the Act, which preserves an employer's right to speak freely about unionization so long as that speech is non-coercive and without "threat of reprisal or force or promise of benefit." Citing to a litany of historic First Amendment cases, the D.C. Circuit reminded the NLRB that "'the right to speak' includes 'the right not to speak'" just the same.

The Court cemented this position with a simple hypothetical: "Suppose that Section 8(c) prevents the [NLRB] from charging an employer with an unfair labor practice for posting a notice advising employees of the right not to join a union. Of course Section 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, Section 8(c) necessarily protects—as against the [NLRB]—the right of employers (and unions) *not to speak*. This is why, for example, a company official giving a non-coercive 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." Because the NLRB's rule compelled employer speech (in the form of a poster) under threat of a lawsuit for failing to do so, it stood in clear violation of Section 8(c).

Senior Circuit Judge Randolph's majority opinion sidestepped the question of whether the NLRB had the authority to promulgate the poster rule in the first place, but his two colleagues, Judges Henderson and Brown, filed a concurring opinion arguing that the rule should have been rejected under Section 6 as well. Calling the Act a "remedial" statute that "does not authorize the [NLRB] to impose on an employer a freestanding obligation to educate its employees on the fine points of labor

CONTINUED ON NEXT PAGE

D.C. Circuit Rejects NLRB's Poster Rule CONTINUED

relations law," these judges could find no evidence that "Congress intended [it] to authorize a regulation so aggressively prophylactic." While the concurring opinion does not create governing law, it sends a clear and unmistakable shot across the NLRB's bow to the extent it's considering implementing similar measures in the future.

It remains to be seen whether the NLRB will appeal this ruling to the U.S. Supreme Court. It also remains to be seen how another challenge to the poster rule currently pending before the U.S. Court of Appeals for the Fourth Circuit will play out, and whether the Fourth Circuit will adopt the D.C. Circuit's rationale or further stir the pot by issuing a contradictory decision.