

Client Alert

LABOR, EMPLOYMENT AND BENEFITS PRACTICE GROUP | MARCH 2012

WIGGIN AND DANA

Counsellors at Law

Court Upholds NLRB's Authority to Issue Rule Requiring Posting of Notice Advising Employees of Their Rights Under the National Labor Relations Act

As previously reported, last year the National Labor Relations Board ("NLRB") issued a Final Rule requiring that private-sector employers subject to the NLRB's jurisdiction post a notice informing employees of their rights under the National Labor Relations Act ("NLRA"). Implementation of that rule was postponed on two occasions, most recently due to consolidated legal challenges pending in federal court in Washington D.C. On March 2, 2012, Judge Amy Jackson upheld the authority of the NLRB to issue the Final Rule concluding that "the Court cannot find that in enacting the NLRA, Congress unambiguously intended to preclude the [NLRB] from promulgating a rule that requires employers to post a notice informing employees of their rights under the Act."

However, the Court also determined that the NLRB exceeded its authority by including in the Final Rule provisions that (i) permitted the NLRB to toll the statute of limitations on an unrelated unfair labor practice charge if the employer failed to provide the notice, and (ii) deemed the failure to post the notice a per se unfair labor practice. The Court made it clear that the NLRB was free to find on a case by case basis that an employer committed an unfair labor practice by neglecting to post the notice, it was the "blanket advance determination that a failure to post will always constitute an unfair labor practice" that the Court found problematic. Thus, employers can still be penalized for failing to comply with the posting requirement.

In the meantime, the fight against this Final Rule continues. An appeal of Judge Jackson's decision has already been filed, and similar litigation is pending in federal court in South Carolina. Employers should nonetheless begin preparing to comply with the current implementation deadline of April 30, 2012, and, if they have not done so already, obtain a copy of the required poster from the NLRB's website (available at www.nlr.gov/poster), or from any of the NLRB's regional subregional or resident offices, and make arrangements to provide a link to the notice from their internal or external websites if they routinely use the site to publish personnel rules or policies. We will continue to monitor this issue and provide you with updates as developments warrant.

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