

Appeals Court Strikes Down NLRB Rule Requiring Employer to Post a Notice of Employee Rights Under the National Labor Relations Act

In a much anticipated decision, the Court of Appeals for the District of Columbia Circuit recently invalidated the National Labor Relations Board's (the Board) rule that required employers to post a notice of employee rights under the National Labor Relations Act (the Act). The court had previously stayed implementation of the rule—first adopted in August 2011—after the district court had partially affirmed it.

The required poster lists certain rights that employees have under the Act, including specific rights that were extrapolated from various court and agency decisions over the years. The National Association of Manufacturers, the plaintiff in the case, criticized the poster for being one-sided because it did not also inform employees of their right to "decertify a union" or "refuse to pay dues to a union in a right-to-work state." The Board argued that it was entitled to make "editorial judgments" about the poster's contents.

To ensure compliance, the Board established three enforcement mechanisms: (1) failure to post the notice would be an unfair labor practice; (2) failure to post would be used as evidence of unlawful motive in any case in which motive is an issue; and (3) suspension of the six-month limitations period for filing any unfair labor practice charge. The Court concluded that all three mechanisms were unlawful and struck down the rule in its entirety.

Central to the court's decision was Section 8(c) of the Act, which protects every employer's right to speak freely on labor issues. Such speech "shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." According to the court, this right includes the right not to speak and not to disseminate information on the Board's behalf. The court held that the Board's rule violates section 8(c) because it compels employer speech (posting the notice) through threat of an unfair labor practice charge. The court also found that the third mechanism—tolling the six-month statute of limitations—is unlawful because Congress did not contemplate a tolling rule of this sort when it enacted the limitation in 1947.

Although the court's decision was 3-0, two of the judges on the panel wrote a

POSTED:

May 23, 2013

RELATED PRACTICES:

[Labor and Employment](#)

<https://www.reinhartlaw.com/practices/labor-and-employment>

RELATED PEOPLE:

[Robert S. Driscoll](#)

<https://www.reinhartlaw.com/people/robert-driscoll>



separate concurrence finding that the Board did not have Congressional authority to enact a notice-posting rule regardless what enforcement mechanisms it used. According to the concurrence, the Act "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."

A similar challenge to the notice posting rule was filed in South Carolina. The district court there also invalidated the rule, and the appeal is currently pending before the Court of Appeals for the Fourth Circuit.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.