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National Labor Relation Board's (NLRB) Poster Rule is Rejected by D.C. Circuit Court

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On May 7, 2013, the Court of Appeals for the District of Columbia rejected the National Labor Relation Board's (NLRB) ongoing attempts to create a far-reaching rule that would require all employers to post an NLRB-created notice at the workplaces, and possibly on employer websites. Relying on longstanding principles under the First Amendment, the D.C. Circuit ruled that employers could not be forced to adopt the speech contained in the NLRB-authored poster and invalidated the posting requirement. Nat'l Ass'n. of Mfrs. v. NLRB, Case No. 12-5068 (D.C. Cir. May 7, 2013).

Known as the "Poster Rule", the NLRB issued a rulemaking on August 30, 2011, which stated in part:

> "[a]ll employers subject to the National Labor Relations Act (NLRA) must post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures, in the language set forth in the Appendix to Subpart A of this part."

29 C.F.R. § 104.202(a). In addition, employers who customarily communicate with their employees electronically would be required to publish the NLRB's notice on their intranet or internet websites. See id. § 104.202(f). The NLRB determined the size, content, font size, and format of the poster. See id. § 104.202(b). The content of the proposed poster was one-sided in that it focused on the benefits of union membership and informed employees of their union rights as described in the NLRA, NLRB interpretations, and judicial decisions. See 29 C.F.R. pt. 104, subpt. A, app.; 76 Fed. Reg. at 54,018.

In addition to declaring an employer's failure to post the Poster an "unfair labor practice," the Rule created two additional enforcement devices: (1) it suspended the six-month limitation period for filing unfair labor practice charges unless the employee had actual or constructive notice of the violation;

and (2) it declared that “knowing and willful refusal” to comply was evidence of unlawful motive. NLRB member Hayes issued a dissent arguing that the NLRB did not have authority or appropriate evidentiary support to create the rule.

The case was appealed from a district court decision that struck down the blanket “unfair labor practice” provision, but upheld the posting requirement. The D.C. Circuit Court first grappled with the effects of its recent decision in Noel Canning v. NLRB where it invalidated the President’s recess appointments to the NLRB. The Noel Canning decision held that the NLRB did not have quorum when it reached many of its decisions in 2012. In this case, the Circuit Court was able to avoid the quorum issue by finding the Poster Rule had been submitted to the Office of the Federal Register at a time when a quorum of Senate-confirmed NLRB members still existed.

The Circuit Court’s discussion emphasized the importance of Section 8(c) of the NLRA and its relationship to the First Amendment. Section 8(c) states that it is not an unfair labor practice for an employer to express or disseminate “any views, argument, or opinion … whether in written, printed, graphic, or visual form” as long as there is no “threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). As the Circuit Court put it: “[a]lthough § 8(c) precludes the Board from finding non-coercive employer speech to be an unfair labor practice, or evidence of an unfair labor practice, the Board’s rule does both.” The Circuit Court relied on clear Supreme Court precedent indicating the First Amendment encompasses a right to choose not to disseminate speech, including government speech. The Circuit Court also rejected the NLRB’s argument that the Poster was not “compelled speech” because it only contained “non-ideological” fact. The Circuit Court again relied on the Supreme Court’s finding that there is no distinction between compelled factual speech and compelled opinion speech under the First Amendment. The Circuit Court concluded that the blanket “unfair labor practice” determination and right to find “evidence of unlawful motive” based on an employer’s failure to comply with the Rule violated Section 8(c) of the NLRA, and by analogy, the First Amendment.

The Circuit Court also struck down the limitations tolling clause of the Poster Rule, finding that the NLRB failed to show why they should be allowed to override the statute of limitations written into the NLRA by Congress. Having struck down all three enforcement mechanisms proposed in the Rule, the Circuit Court found that the posting requirement could not be separated from the enforcement provisions and invalidated the Poster Rule in its entirety.

While this decision does not impact voluntary postings or mandatory postings about a union election, the future of the Poster Rule is uncertain. For now, employers need not post the notice. The issue also is on appeal in the Fourth Circuit, and is likely to be addressed through further litigation.

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