



D.C. Circuit Court Stays Implementation of NLRB's Employee Rights Posting Rule

Client Advisories

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In the latest episode of what has turned into something of a soap opera, the U.S. Court of Appeals for the District of Columbia Circuit granted an emergency injunction on April 17, 2012 blocking the implementation of the National Labor Relations Board's rule requiring the posting of employee rights. As Archer previously informed you in an advisory released on August 30, 2011, the new rule requires employers to place a poster at the workplace that notifies employees of the rights guaranteed to them under the National Labor Relations Act (NLRA).^{*} The law was scheduled to go into effect on November 14, 2011, but was pushed back twice to January 31, 2012 and April 30, 2012. It is now on **hold** until the fall of 2012, at the earliest.

The decision came in light of conflicting decisions among federal trial courts regarding the Board's authority to issue and enforce the rule as set forth. In March 2012, the D.C. District Court determined that the Board did have general authority to promulgate the posting rule pursuant to Section 6, but exceeded its authority with respect to certain provisions. Specifically, the D.C. District Court struck down the provisions which allowed the Board to declare violations of the posting requirements an unfair labor practice and to toll the statute of limitations for claims brought by employees against employers who failed to post in accordance with the rule.

Just last week, the South Carolina District Court went even farther - that court found that the NLRB lacked any authority to promulgate the rule. Specifically, the court stated that the consequences of allowing this rulemaking authority would be to expand the Board's power to basically create rules in any area in which Congress did not explicitly forbid Board action. The court refused to do so and further noted that Congress would have provided for a similar posting requirement had it so intended, as Congress had done just that by providing for notice posting requirements in at least eight other federal labor laws.

Board Chairman Mark Gaston Pearce responded to the recent rulings, announcing the Board's intention to appeal those portions of the decisions that limited the Board's authority. But, in keeping with the trial court rulings, he further announced that the Board's regional offices will not implement the rule pending the resolution of the issues before the court. As the D.C. Circuit Court has scheduled oral argument for September 2012, later implementation of the rule is not expected until well into the fall of 2012, if at all.

In summary, for now, employers do not have to post at the workplace notice to employees about their right to unionize. Archer will update this during 2012 to all its email subscribers and on its website.

If you have questions or concerns related to the new NLRB regulations or other labor & employment matters, please contact a member of Archer's Labor and Employment Department in Haddonfield, N.J., at (856) 795-2121, in Philadelphia, Pa., at (215) 963-3300 or in Hackensack, N.J., at (201) 342-6000.

*For more information on the specifics of the rule, please see our previous client advisory: Private Sector Employers Now Required to Post Employees' Union Rights at the Workplace.

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