

Even Nonunion Employees Should Know Their Rights

Law360, New York (March 12, 2012, 1:33 PM ET) -- Judge Amy Berman Jackson of the United States District Court for the District of Columbia on March 2, 2012, held that the National Labor Relations Board (NLRB) validly issued a rule requiring most employers, including employers without any union employees, to post a notice of employees' rights under the National Labor Relations Act (NLRA). *Nat'l Ass'n of Manufacturers v. NLRB*, Civil Action No. 11-1629 (ABJ) (U.S.D.C.-D.D.C.).

Jackson did, however, strike down portions of the board's rule that deemed an employer's failure to comply with the notice-posting requirement to be an unfair labor practice, and that tolled the statute of limitations for filing an unfair labor practice charge during the period when the notice was not posted.

Unless the court's ruling is overturned or stayed in the next few weeks, the board's rule will take effect on April 30, 2012.

The Board's Notice-Posting Requirement

As discussed in Dechert's Sept. 8, 2011 *DechertOnPoint National Labor Relations Board Requires Union and Non-Union Employers to Post Notice of Employee Rights and Overturns Three Key Cases*, the board's rule requires most private employers to post a notice of employee rights physically in their workplaces and on the Internet or intranet if they typically post personnel policies electronically.

Significantly, this rule applies to all employers, including those who have no union-represented employees.

The notice provides a long list of rights under the NLRA, as well as information about how to contact the board and to file a complaint. Among the rights described on the notice are the right to form, join or assist a union, the right to bargain collectively, and the right to discuss wages and benefits with co-workers and take collective action to improve working conditions.

The notice takes the form of an 11 x 17 inch poster that employers can download from the board's website or obtain in hard copy form from the board's regional offices.

In addition to mandating the posting of the notice, the board's rule states that failure to post the employee notice "may be found" to constitute an unfair labor practice and that the board may rely on an employer's failure to post the notice "to excuse [an] employee from the requirement that [unfair labor practice] charges be filed within six months after the occurrence of the allegedly unlawful conduct ..."

The board's rule initially had an effective date of Nov. 14, 2011. However, the board postponed that date until Jan. 31, 2012, and then again until April 30, 2012.

The Court's Decision

Shortly after the board's adoption of its final rule, the National Association of Manufacturers (NAM) and several other employer groups filed suit challenging the rule.

According to the NAM and the other plaintiffs, the board exceeded its statutory authority in promulgating the rule and, in any event, the rule violated the First Amendment's prohibition on compelled speech. The parties filed cross-motions for summary judgment, and numerous additional parties filed briefs as amicus curiae.

With regard to the argument that the board exceeded its authority in issuing the rule, Jackson first concluded that nothing in the NLRA expressly prohibited the board from imposing the posting requirement. She then examined the rule under the U.S. Supreme Court's Chevron standard and held that the rule was valid because:

1. The board reasonably concluded that the rule was "necessary" to carry out the NLRA's goal of allowing employees to fully exercise their NLRA rights; and
2. The board's action was not arbitrary and capricious because it "considered the relevant factors and articulated a rational connection between the facts found and the choice made."

Accordingly, Jackson held, the notice-posting requirement was valid and enforceable.

Turning to the other challenged provisions of the rule, Jackson held that the rule was invalid to the extent it "allows the board to deem the failure to post to be an unfair labor practice in every situation." For an employer's action to be an unfair labor practice, the court stated, there must be an element of "obstruction" involved; a "mere unwillingness to help" does not suffice.

The court cautioned, however, that "nothing in this decision prevents the board from finding that a failure to post constitutes an unfair labor practice in any individual case brought before it. But the ruling does mean that the board must make a specific finding based on the facts and circumstances ... that the failure to post interfered with the employee's exercise of his or her rights."

With respect to the rule's "equitable tolling" provision, Jackson rejected this as well, holding that the provision improperly "strips away the case-specific nature of the equitable tolling doctrine by imposing it as the rule rather than the exception."

Jackson concluded her decision by rejecting the plaintiffs' argument that the rule violated their First Amendment rights: "[T]he board's notice posting requirement does not compel employers to say anything. The poster that the regulation prescribes for the workplace is 'government speech,' which is 'not subject to scrutiny under the Free Speech Clause.'"

She also held that the board's rule was severable and that therefore the notice-posting requirement could be implemented despite the invalidity of the rule's enforcement provisions.

The Impact of the Decision

On Monday, March 6, 2012, NAM and the other plaintiffs filed an expedited appeal of the court's decision and sought an injunction against enforcement of the board's rule pending that appeal. Decisions on these filings could come at any time.

In the meantime, employers subject to the notice posting requirement must be prepared to comply with the board's rule on its effective date of April 30, 2012. Copies of the board's notice can be downloaded from its website at www.nlr.gov/poster.

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