

April 17, 2012

## NLRB Notice Requirement Delayed

According to a South Carolina federal judge, the National Labor Relations Act (“NLRA” or the “Act”) does not support the National Labor Relations Board’s (“Board”) asserted authority to require that employers provide employees notice of their rights under the NLRA. (*Chamber of Commerce v. NLRB*, D.S.C., No. 11-cv-2516, 4/13/12). In granting summary judgment to the Chamber of Commerce, Judge David C. Norton noted that while the court “does not discredit” the Board’s policy view that there may be an increased need for employees to learn about their NLRA rights, that policy cannot be given effect through the text of the Act.

In so holding, Judge Norton analyzed Section 6 of the Act, arguably the source of authority for this rule, and considered the structure of the Act and the legislative intent. Judge Norton noted that the plain language of Section 6 requires that rules promulgated by the Board be “necessary to carry out” other provisions of the Act. But that while this notice rule “aids” or “furthers” the aspirational goals of Section 1 of the Act (by notifying employees of their rights under Section 7), the rule is not “necessary,” in part, because the Act places no affirmative obligation on employers to post notices of employee rights. Thus, Finding that the challenged rule is “necessary” to carry out other provisions of the Act would mean ignoring the statutory language as a whole. Further, the structure of the Act clearly indicated Congress’ intent that the Board’s authority over employers be triggered by an outside party’s filing of a representation petition or ULP charge. The notice-posting rule, however, would proactively dictate employer conduct prior to the filing of any petition or charge, which is inconsistent with the Board’s *reactive role* under the Act. And, the court noted, despite its explicit inclusion or addition of notice-posting obligations in numerous federal employment-related statutes in the last several decades, Congress never added such a requirement to the Act, even though it made extensive revisions to it in 1947, 1959, and 1974. Accordingly, Norton held that rule is unlawful and granted summary judgment in favor of Chambers.

Finally, the notice requirement is now rendered unenforceable until further notice, after the National Association of Manufacturers (NAM) sought, and was granted, an emergency motion today, April 17, 2012, for an injunction preventing its enforcement. *National Ass’n of Manufacturers, et al. v. N.L.R.B., et al.*, 1:11-cv-01629-ABJ (U.S. Court of Appeals, D.C.C.). In light of NAM’s pending appeal of a November 2011 D.C. District court decision upholding the notice requirement and Norton’s ruling, the Appellate Court agreed that NAM satisfied the requirements for an injunction pending court review. The court stated, “[t]he uncertainty about enforcement counsels further in favor of temporarily preserving the status quo while this court resolves all of the issues on the merits.”

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