

District Court Upholds NLRB Authority to Issue Posting Requirement

As you likely are aware from several earlier Alerts we have issued on this matter, in August 2011 the National Labor Relations Board (the “Board”) issued a rule requiring almost all private employers (both unionized and non-unionized alike) to post workplace notices informing employees of their rights under the National Labor Relations Act (the “Act”). Posted notices must reference employees’ rights to form and join unions, to bargain over their wages, hours and other terms and conditions of employment, and to take collective action to improve their working conditions. Although it was originally scheduled to take effect on November 14, 2011, the posting requirement was delayed until April 30, 2012 at the request of a federal court hearing a legal challenge to this rule.

In an opinion issued on Friday, March 2, the U.S. District Court for the District of Columbia held generally that the Board acted within its authority under the Act when it promulgated the posting requirement. The Court also held, however, that the provisions of the rule that would have deemed a failure to post the notice to be an unfair labor practice, and that would have allowed for the tolling of the statute of limitations in respect to unfair labor practice charges against employers who have not posted the notice, did exceed the Board’s authority under the Act and were therefore invalid.

This decision does not invalidate or further delay the posting requirement. At present, employers will be required to post the notice as of April 30, 2012. The notice is available in multiple languages [here](#).

Although the opinion makes clear that the failure to post the notice is not a violation of the Act in and of itself, a failure to post may still be considered evidence supporting an unfair labor practice charge. The Court noted 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 in the individual case before it that the failure to post interfered with the employee’s exercise of his or her rights.”

In addition to the appeals that are likely to be filed (perhaps on both sides) challenging Friday’s decision, there is another challenge to the posting requirement pending in the U.S. District Court for the District of South Carolina. We will keep you apprised of developments regarding this matter. For more information on this notice requirement, or on employee rights and employer obligations under the National Labor Relations Act more generally, contact an attorney in Ropes & Gray’s [labor & employment](#) department.