

SOUTH CAROLINA DISTRICT COURT STRIKES DOWN NLRB POSTING RULE, LEADING DC CIRCUIT TO ENJOIN ITS ENFORCEMENT PENDING APPEALS

By Scott J. Wenner

Just as it appeared that employers should begin preparing to post the notice of employee rights in the workplace mandated by a final rule of the National Labor Relations Board (“NLRB”) to become effective April 30, a federal district judge has found that rule to be beyond the authority of the NLRB and has found the rule to be unlawful and unenforceable.¹ *Chamber of Commerce of the United States et al. v. National Labor Relations Board et al.*, Case No. 2:11-cv-02516 (D.S.C. April 13, 2012).

Agency authority is delimited by the powers granted to it by Congress. As put by U.S. District Judge David C. Norton in his order last Friday:

Regardless of how serious the problem an administrative agency seeks to address, ... it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

Judge Norton found in the case of the notice-posting rule that “[t]he notice-posting rule proactively dictates employer conduct prior to the filing of any petition or charge, and such a rule is inconsistent with

1. Specifically, the court ruled that the rule violates the Administrative Procedure Act (“APA”), 5 U.S.C. §706. The APA subjects final agency action to judicial review to determine whether, inter alia, it is “in excess of statutory jurisdiction, authority, or limitations” granted to an administrative agency such as the NLRB. 5 U.S.C. §706(2)(C)

the [NLRB]’s reactive role under the [National Labor Relations Act (“NLRA”)].” While the Act permits the NLRB to require an employer to post a remedial notice if found to have violated the NLRA, it found no evidence to support the NLRB’s assertion of authority to require proactive posting by employers of a notice of employee rights.

The ruling of the federal court in South Carolina comes six weeks after a federal judge in the District of Columbia reached the opposite conclusion in refusing to declare the notice-posting provisions of the same rule to be invalid. In that case, *National Association of Manufacturers et al. v. National Labor Relations Board et al.*, Case No. 1:11-cv-01629, District Court Judge Amy Berman Jackson found:

that the NLRA granted the board broad rule-making authority to implement the provisions of the act, and that the board did not exceed its statutory authority in promulgating Subpart A of the challenged rule — the notice-posting provision.

That ruling presently is on appeal to the United States Court of Appeals for the District of Columbia.

Injunction Issued

Just as this Alert was going out, word was received that the Court of Appeals for the District of Columbia has issued an emergency stay of the NLRB posting rule citing the existing uncertainty over enforcement of the rule on April 30. The Court also observed that the NLRB had postponed the effective date of the rule during the challenge in the earlier decided *National*

(continued on page 2)

(continued from page 1)

Association of Manufacturers case in the District of Columbia. It conceded in that case that a postponement was necessary to give the district court ample opportunity to consider the arguments before the rule went into effect. However, the NLRB now had adopted a contrary position before the DC Circuit in arguing that the rule's effective date should not be delayed. These opportunistically contradictory positions worked against the NLRB's argument.

What Are Employers to Do?

Compliance with the NLRB posting rule is now postponed pending resolution of the rule's enforceability. ♦

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