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DC CIRCUIT STRIKES DOWN NLRB UNION POSTER RULE

A decision this week by the U.S. Court of Appeals for the District of Columbia Circuit struck down a National Labor Relations Board (NLRB) rule requiring employers to post notices about union rights. The NLRB has not been able to implement this “notice posting rule” since its issuance in 2011 due to multiple challenges against the rule in federal court. Had the controversial rule gone into effect, it would have obligated approximately 6 million NLRB-covered private employers to conspicuously display a poster about workers’ rights, including employees’ rights to join or assist a union and bargain collectively with their employer.

The appeals court did not address the litigants’ arguments about the NLRB’s authority under Section 6 of the National Labor Relations Act (NLRA), which grants the Board power to issue rules to carry out the other provisions of the NLRA. Instead the D.C. Circuit, in an opinion written by Judge A. Raymond Randolph, rejected the rule because it violated Section 8(c) of the NLRA and impermissibly infringed on employers’ First Amendment rights. The court found that since Section 8(c) of the NLRA grants employers the right to expression so long as it does not contain threats, it also protects the rights of employers not to engage in speech. Judge Randolph also noted that since the First Amendment prevents government prohibition of speech, it may also prevent the government from compelling employers to express certain views.

In addition to holding that the “notice posting rule” violates the NLRA, the court also rejected part of the rule that allowed for tolling of the statute of limitations period for filing unfair labor practice charges in the event that an employer did not properly post the required notice. Therefore, the D.C. Circuit’s ruling may have broader implications for other federal agencies since it casts doubt on the government’s ability to preserve claims under other employment laws such as Title VII.

The D.C. Circuit decision resolved one of two appeals pending over challenges to the rule. In April 2012, a South Carolina federal judge also held that the NLRB does not have the authority to require such notice and that employers were not obligated to comply with the rule’s requirements. The NLRB has appealed this decision to the Fourth Circuit and states that it will not fully implement the rule unless the district court decision is overturned by the Fourth Circuit or the Supreme Court.

For a full copy of the decision, click [here](#).