



ATTORNEYS AT LAW

April 18, 2012

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT ENJOINS NLRB FINAL RULE REQUIRING EMPLOYERS  
TO POST COLLECTIVE BARGAINING RIGHTS NOTICES**

Yesterday, the United States Court of Appeals for the District of Columbia Circuit entered an Order which temporarily suspends the final rule issued by the National Labor Relations Board (“NLRB”), which requires most private employers to post notices to their employees of the right to organize and collectively bargain, from taking effect. The NLRB announced the final rule on August 30, 2011. Litigation immediately followed in two separate, federal court lawsuits filed in South Carolina and the District of Columbia. The notice rule was previously scheduled to go into effect April 30, 2012, but now, after today’s decision from the United States Court of Appeals for the District of Columbia Circuit, employers are no longer required to comply with the April 30, 2012 deadline.

Yesterday’s decision from the United States Court of Appeals for the District of Columbia Circuit comes after a recent South Carolina federal court decision held that the NLRB exceeded its authority by requiring the notice, conflicting with an earlier ruling of the District of Columbia federal court. On April 13, 2012, the United States District Court for South Carolina held in *Chamber of Commerce of the United States et al. v. National Labor Relations Board et al.* that the NLRB exceeded its authority when it passed the final rule. The Chamber of Commerce brought suit in federal court in South Carolina, alleging that the NLRB acted exceeded its legal authority in issuing the final rule. In its Order, the Court specifically held that Congress did not vest the NLRB with the authority to require employers to post the notice. Accordingly, the Court held that the NLRB’s final rule is unlawful. It is expected that the NLRB will appeal the decision, although it has not done so yet.

Last month, on March 2, 2012, the United States District Court for the District of Columbia issued a Memorandum Opinion in *National Association of Manufacturers v. National Labor Relations Board, et al.*, ruling on a similar challenge by the National Association of Manufacturers (“NAM”) to the NLRB’s legal authority to require employers post the notice. The Court, contrary to the South Carolina case discussed above, held that the NLRB had the authority to require employers to post the notice. The Court went on, however, to hold that the NLRB does not have the authority to deem a failure to post the notice a *per se* unfair labor

practice. Rather, the Court held that, while a failure to post may constitute an unfair labor practice in an individual case where the failure to post interferes with the employee's exercise of his/her rights, the NLRB cannot make a blanket, advance determination that the failure to post will *always* constitute an unfair labor practice. The Court also held that the NLRB exceeded its authority when it included a provision in the final rule that tolls the statute of limitations for six (6) months where there is a failure to post, and that the application of equitable tolling should be case specific, based on the individual circumstances of each case. NAM has filed a Notice of Appeal of the decision to the United States Court of Appeals for the District of Columbia Circuit.

The conflicting decisions between the South Carolina and District of Columbia cases create an uncertainty as to the future of the final rule. Today's decision from the United States Court of Appeals for the District of Columbia Circuit means that, for now, while the cases are handled on appeal, employers will not be required to post the notices required by the final rule. **Tugle Duggins will update clients as new information becomes available and employers should monitor developments before posting the notice required by the final rule.**

For more information on the final rule, please see our article, "*NLRB Issues Final Rule Requiring Employers to Post Notices of Employees' Collective Bargaining Rights.*" Please contact Ross Hamilton [(336) 271-5279], Denis Jacobson [(336) 271-5242], Nathan Duggins [(336) 271-5246], Jeff Southerland [(336) 271-5251], Martha Sacrinty [(336) 271-5217], Brandy Mills [(336) 271-5212], or Alan Felts [(336) 271-5215] of the Labor and Employment practice group if you have any questions concerning your compliance with the final rule.