



SC Court Says "No" to NLRB Posting Rule

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The Chamber of Commerce of the United States and the South Carolina Chamber of Commerce ("Chambers") filed a lawsuit seeking review of a final rule promulgated by the National Labor Relations Board ("NLRB" or "the Board"). For over seventy-five years, the NLRB was one of a very few federal labor agencies that did not require employers to post a general notice of employee rights in the workplace.

On December 22, 2010, the Board decided that it would change from its 75 year history and issued a proposed rule: all employers subject to the National Labor Relations Act ("NLRA" or "the Act") must post notices informing employees of their rights under the NLRA. After completing a notice and comment period/process, the Board published a final rule on August 30, 2011. After a number of extensions, the rule was set to take effect on April 30, 2012.

United States District Court Judge David Norton reviewed the rule in extensive briefings from the Chambers and the NLRB. Judge Norton determined that the Chambers' position was the correct position - the Board, in promulgating the final rule exceeded its authority in violation of the Administrative Procedure Act.

Judge Norton's opinion provides a thorough review of the Act, the purposes of the Act, and how rule making should be performed under the Administrative Procedure Act, as he carefully addressed the issues before him. He also looked at other labor statutes and part of his very detailed analysis was a comparison chart of other

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federal labor and employment statutes' posting requirements with that of the NLRA. Interestingly, the three Acts that generally comprise the NLRA (the Wagner Act, along with the Taft-Hartley and Landrum-Griffin Amendments) contain no statutory mandate to post any notice as required by the NLRA's rule. Other statutes such as Title VII, ADEA, OSHA, FMLA and others contain specific statutory authority requiring that employers post notices outlining rights and remedies under those statutes.

Judge Norton, as he had with the detailed discussion of the Act, went through the applicable case law in a statutory construction case. He found that the plain language of the Act "compelled" a finding that the Board lacked the authority under the Act's language to promulgate the rule.

The Court's conclusions can be summed up as follows:

1. The rule is "useful" but "not necessary" to carry out the provisions of the NLRA;
2. The NLRB is an agency that reacts to charges filed by others and the rule "proactively dictates employer conduct prior to the filing of any petition or charge;" and
3. There was no statutory "gap" for the NLRB to fill.

Additional Information

McNair Law Firm has experienced attorneys who focus on various aspects of the law including litigation, tax, and corporate law. If you have any questions about this news alert, please contact Rick Morgan or any of our attorneys on our website at www.mcnair.net.

This Alert provides an overview of certain aspects of a specific legal issue. It is not intended to be, and should not be construed as, legal advice for any particular fact situation. This Alert does not establish and should not be construed as establishing an attorney client relationship.

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