April 19, 2012

National Labor Relations Board Indefinitely Postpones Posting Requirement

On April 17, 2012, the National Labor Relations Board ("NLRB") announced it will postpone the effective date of its rule requiring employers to post a notice advising employees of their rights under the National Labor Relations Act ("Act") pending resolution of two court cases.

NLRB Chairman Mark Gaston Pearce issued the announcement in the wake of both the April 17, 2012 emergency injunction halting the NLRB from implementing the rule until the case pending before the U.S. Court of Appeals for the District of Columbia is resolved, and the April 13, 2012 decision by the U.S. District Court for the District of South Carolina that invalidated the rule. The South Carolina District Court specifically found that "such a rule is inconsistent with the Board's reactive role under the Act" and that the NLRB does not have the authority to issue the notice-posting rule.

The U.S. District Court for the District of Columbia previously upheld the rule, but invalidated its primary enforcement mechanisms and struck down a request for an injunction. Employer groups appealed and the DC Circuit Court of Appeals granted the injunction in light of the DC District Court's ruling that invalidated the primary enforcement mechanisms for violating the posting requirement, the NLRB's indication that it may cross-appeal that portion of the decision and the need to consider the merits of the challenges to the rule before it went into effect.

These decisions are a victory for employers. However, the fight over whether the NLRB can require employers to post notices advising employees of their rights under the Act is not over. Chairman Pearce announced, "We continue to believe that requiring employers to post this notice is well within the Board's authority and that it provides a genuine service to employees who may not otherwise know their rights under our law." We expect the NLRB to appeal the South Carolina District Court decision to the Fourth Circuit. If the decisions of the DC Circuit and the Fourth Circuit conflict, it is likely that the matter will be appealed to the Supreme Court. It is important to note that this deferral does not affect the Department of Labor's current requirement that federal contractors and subcontractors post a similar notice.

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