

For Now, No Notice Required: D.C. Circuit Enjoins NLRB Notice Posting Requirement

BY TODD C. DUFFIELD & SANDRA N. BENJAMIN

Earlier this month, Paul Hastings published a [Stay Current](#) regarding a rule enacted by the National Labor Relations Board (“NLRB” or “Board”) requiring private sector employers subject to the National Labor Relations Act (“NLRA”) to post a notice designed to inform employees of their rights under the NLRA, including their right to unionize and bargain collectively. The rule was most recently scheduled to go into effect on April 30, 2012.

Following a D.C. District judge’s ruling upholding the NLRB’s authority to require employers to post the notice, several employer groups involved in the litigation appealed the decision, requesting an injunction to allow the D.C. Circuit time to consider the appeal before the fast-approaching April 30, 2012 deadline. On April 17, 2012, the D.C. Circuit granted the injunction, enjoining enforcement of the rule during appeal. The D.C. Circuit noted that the Board’s earlier postponement weighed in favor of injunction, as did the Board’s indication that it may appeal the portion of the ruling invalidating certain enforcement mechanisms. The D.C. Circuit has ordered expedited briefing, with oral argument to be scheduled for September 2012. In the meantime, the NLRB said that regional offices “will not implement the rule pending the resolution of the issues before the court.”

The injunction follows a ruling just last week in the U.S. District Court for South Carolina that granted summary judgment in favor of the U.S. and South Carolina Chambers of Commerce, who had challenged the rule. On April 13, 2012, U.S. District Judge David C. Norton held that by enacting the posting rule, the Board had exceeded its authority under the Administrative Procedure Act. Judge Norton found that, though the Board has the authority to promulgate rules that are “necessary to carry out” provisions of the NLRA, the Board did not show that the rule was necessary rather than “simply useful.” The Court also held that the notice posting rule “proactively dictates employer conduct prior to the filing of any petition or charge,” which is inconsistent with the Board’s role as a reactive body under the NLRA. Finally, Judge Norton held that silence by Congress could not be interpreted as conferring such rule-making authority on the Board, and that legislative history indicated that Congress did not intend to impose a universal notice posting requirement, or to authorize the Board to do so. The NLRB has said that it will appeal the decision.

Overall, the injunction issued by the D.C. Circuit preventing enforcement of the posting rule is expected to remain in effect throughout that appeal, delaying implementation through at least September 2012. Depending on the outcome of the currently pending and expected appeals, the posting requirement could be delayed even longer, or ultimately be struck down without ever going into effect. Clients are urged to stay tuned for future updates from the Firm.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Atlanta

Weyman Johnson, Jr.
1.404.815.2209
weymanjohnson@paulhastings.com

John F. Wymer, III
1.404.815.2374
johnwymer@paulhastings.com

New York

Todd C. Duffield
1.212.318.6278
toddduffield@paulhastings.com

Zachary D. Fasman
1.212.318.6315
zacharyfasman@paulhastings.com

Chicago

Jon A. Geier
1.312.499.6054
jongeier@paulhastings.com

Orange County

Stephen L. Berry
1.714.668.6246
stephenberry@paulhastings.com

Michael A. Hood
1.714.668.6260
michaelhood@paulhastings.com

San Francisco

Robert P. Kristoff
1.415.856.7073
robertkristoff@paulhastings.com

Los Angeles

Nancy L. Abell
1.213.683-6162
nancyabell@paulhastings.com

Al Latham
1.213.683.6319
allatham@paulhastings.com

Washington, D.C.

Neal D. Mollen
1.202.551.1738
nealmollen@paulhastings.com

Kenneth M. Willner
1.202.551.1727
kennethwillner@paulhastings.com