

# CLIENT ALERT: DC Circuit Court of Appeals Strikes Down NLRB Poster Rule

On May 7, 2013, the Court of Appeals for the District of Columbia dealt a crippling and potentially fatal blow to the National Labor Relations Board's requirement that employers post a notice of employee rights under the National Labor Relations Act. A three-judge panel of the Court rejected the Board's August 2011 regulation requiring businesses to post notices of worker rights because the regulation violates the free speech rights of employers. *National Ass'n of Mfrs. v. NLRB*, D.C. Cir., No. 12-5068.

The NLRB posting rule had provided that the failure to post the required notice would be (1) an unfair labor practice; and (2) evidence of unlawful motivation when considering issues of employer motive. The NLRB rule also provided that the failure to post would toll the six (6) month statute of limitations for filing unfair labor charges set forth in Section 10(b) of the Act.

The Court held that the rule violated an employer's free speech rights under Section 8(c) of the Act. Section 8(c) precludes the Board from finding non-coercive speech to be an unfair labor practice or evidence of an unfair labor practice. The Board's posting rule improperly did both. According to the Court, Section 8(c) protects the rights of employers not to speak and not to be compelled to post messages that they see as one-sided and favoring unionization. The Court found the Board's third method of enforcing the rule, tolling the Act's six (6) month limitation period for filing unfair labor practice charges, to be contrary to Section 10(b) of the Act. Finally, the Court noted that in its rule-making process, the Board rejected the option of making the posting rule voluntary. Accordingly, the Court vacated the posting rule in its entirety.

If the Board wants to continue pushing its efforts to require employers to post a notice of employee rights, it can either ask that the entire Court of Appeals for the District of Columbia consider the matter *en banc*, or it can request the Supreme Court to review the three-judge panel opinion directly. Until further action by the Board or by the courts, however, employers need not post the NLRB's proposed poster.

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This alert was prepared on May 8, 2013.

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