

CLIENT ALERT: South Carolina Federal Court Rejects NLRB's Authority to Require Employers to Post Notice of Employee Rights

The United States District Court for the District of South Carolina decided on April 13 that the National Labor Relations Board did not have the statutory authority to issue a regulation requiring private employers under its jurisdiction to post a notice of employee rights under the National Labor Relations Act (the "Act"). See *Chamber of Commerce v. NLRB*, D.S.C., No. 11-cv-2516.

The Court noted that Section 6 of the Act grants the Board the right to issue "rules and regulations **as may be necessary** to carry out the provisions of [the] Act." However, the Court disagreed that this grant of authority is expansive enough to support a rule requiring the posting. The Board had argued that the posting will "aid" and "further" the aspirational goals of Section 1 of the Act, namely, that the Act is designed to address the "inequality of bargaining power between employees and employers," to "encourage the practice and procedure of collective bargaining" and to "protect the exercise of workers of full freedom of association, self-organization and designation of representatives of their own choosing." The Court said, however, that the Board failed to show that the posting was "necessary" to carry out the provisions of the Act, as Section 6 dictates.

Further, noting that the Act is only triggered for employers when an unfair labor practice charge or representation petition is filed, the proposed posting does not serve to carry out any existing duties under the Act but instead places "an affirmative obligation on employers **prior** to a charge or petition first being filed." The Act intended the Board to be "a reactive, quasi-judicial body with two primary functions: preventing and resolving ULP charges and conducting representation elections." Its authority thus limited, the Board does not have the authority to issue regulations that seek to generally educate employees about the Act in a manner unrelated to a charge or petition being filed.

The Court also rejected the Board's argument that it was "filling in a statutory gap" because Congress did not expressly write in a posting requirement. The Court said that "by promulgating a rule that proactively imposes an obligation on employers prior to the filing of a ULP charge or representation petition, in the absence of express statutory authority, the Board has contravened the statutory scheme established by Congress."

The Court found no legislative history to support the issuance of a posting requirement and noted that Congress had amended the Act three times without ever adding such a requirement, even while Congress imposed notice requirements in eight other employment statutes, including Title VII, ADEA, and ADA, among others.

This decision stands now in contrast to a decision from the District Court for the District of Columbia in early March which upheld the posting requirement, but rejected the rule that any failure to post could be deemed an unfair labor practice and that failure to post would automatically toll the six month statute of limitations for filing charges. That decision is on appeal. For more information on the District of Columbia litigation, please see [MBJ's client alert](#) dated March 7, 2012.

Nicholas DiGiovanni is a partner at Morgan, Brown & Joy, LLP. Nick may be reached at (617) 523-6666 or at ndigiovanni@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was prepared on April 16, 2012.

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, should not be construed as legal advice or a legal opinion on any specific facts or circumstances by

Morgan, Brown & Joy, LLP and its attorneys. This newsletter is intended for general information purposes only and you should consult an attorney concerning any specific legal questions you may have.