

INSIGHTS

South Carolina Federal Court Strikes Down NLRB's Notice Posting Rule

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On April 13, 2012, a South Carolina federal district court held that the National Labor Relations Board (NLRB) exceeded its authority in promulgating a rule that requires all employers subject to the NLRB's jurisdiction to post a notice of Employee Rights, including the right to unionize. The court agreed with [a challenge filed by the Chamber of Commerce of the United States](#) and the South Carolina Chamber of Commerce, and concluded that the NLRB's rule, currently set to go into effect on April 30, 2012, is unlawful.

[As we recently reported](#), a D.C. federal court last month partially rejected a similar challenge to the rule filed by other business groups, finding that the NLRB has the statutory authority to require the posting of the notice, but not to implement proposed penalties for failure to post. [An appeal of that decision is pending](#).

The South Carolina court explained that while it "does not discredit" the NLRB's factual finding of the need for informing employees of their rights under the National Labor Relations Act (NLRA), the NLRB's notice-posting rule contradicts both the plain meaning of the NLRA and the balance achieved by the statutory framework.

The court noted that the NLRA reflects Congressional intent that the NLRB be a "reactive, quasi-judicial body" with two primary functions: preventing and resolving unfair labor practice (ULP) charges and conducting union representation elections. The NLRB had conceded that it lacked any "roving investigatory powers" and has no power to initiate cases. "[B]y 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 court found that the NLRB had "contravened the statutory scheme established by Congress."

The court also found it significant that Congress imposed no such employer duty of employee notification either when it first passed the NLRA in 1935 or in any of its amendments. In contrast, Congress included specific notice posting requirements in 1934 in its amendments to the Railway Labor Act, and has since included specific notice posting requirements in eight federal labor laws. The Court noted that, "[f]or over seventy five years, the NLRB has been nearly unique among federal labor agencies in not requiring employers to post a general notice of employee rights in the workplace."

While the South Carolina court's ruling is a favorable development for employers, it remains to be seen what will happen with the NLRB's April 30, 2012 notice posting deadline and whether the NLRB – or a court – will postpone the posting requirement. As of the release of this update, the NLRB has not issued any official guidance or comment on the court decision or any changes to its notice posting rule.