



For your information

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## NLRB Employee Rights Posting Is Now on Hold

After several delays, the NLRB's employee rights notice-posting rule was slated to take effect on April 30, 2012. In light of conflicting federal court decisions on whether the NLRB had the authority to promulgate the rule, a federal appellate court temporarily stayed the posting requirement and the NLRB announced that it will not implement the rule until legal challenges are resolved.

### Background

On August 30, 2011, the National Labor Relations Board (NLRB or Board) issued a final rule requiring private-sector employers subject to the National Labor Relations Act (NLRA) to conspicuously post a notice informing employees of their rights under the NLRA, including the right to organize. The notice-posting rule originally was to take effect on November 14, 2011. (See our September 7, 2011 [For Your Information](#).) In the face of legal challenges, the NLRB first delayed the effective date of the rule to January 31, 2012 and later extended the effective date to April 30, 2012. (See our January 6, 2012 [For Your Information](#).)

### Legal Challenges

In separate federal lawsuits filed in September 2011 in the District of Columbia (DC) and in South Carolina (SC), business groups challenged the NLRB's authority to issue the notice-posting rule.

In *National Association of Manufacturers et al. v. NLRB et al.*, the National Association of Manufacturers and other business groups brought suit against the NLRB in DC federal district court, alleging that the Board's promulgation of the notice-posting rule exceeded its authority under the NLRA in violation of the Administrative Procedure Act (APA) and violated their First Amendment rights. Specifically, the groups argue that the Board lacks the authority under the NLRA to:

- Promulgate a rule requiring employers to post a notice of employee rights under the NLRA in the absence of an express grant of authority in the NLRA
- Require employers to post a notice absent the filing of a representation petition or an unfair labor practice charge
- Deem an employer's failure to post to be an unfair labor practice

- Toll the six-month statute of limitations for filing an unfair labor practice charge.

On March 2, 2012, U.S. District Judge Amy Berman Jackson [upheld](#) the NLRB's posting requirement but struck down two of the rule's penalty provisions for noncompliance. The court ruled that, as a matter of law, the NLRB lacks authority to deem every employer's failure to post as an unfair labor practice or to toll the statute of limitations in all unfair labor practice actions against employers where the notice was not posted. However, the court left open the possibility that a failure to post can still result in an unfair labor practice or equitable tolling in an appropriate case. The court also let stand the part of the rule allowing an employer's "knowing and willful" failure to post to be considered as evidence of unlawful motive in a case in which motive is an issue. The business groups promptly filed a [notice of appeal](#), and asked the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) to delay the rule's April 30 effective date.

In *Chamber of Commerce of the U.S. and South Carolina Chamber of Commerce v. NLRB et al.*, the national and state Chambers of Commerce brought suit against the NLRB in SC federal district court to invalidate the notice-posting rule. The Chambers allege that:

- The NLRB lacks authority to promulgate the notice-posting rule under the NLRA
- The NLRB's action is arbitrary and capricious under the APA
- The NLRB violated the Regulatory Flexibility Act by failing to conduct regulatory flexibility analyses
- The NLRB's action violated the First Amendment.

On April 13, 2012, U.S. District Judge David C. Norton [ruled](#) that the notice-posting rule is unlawful under the APA, and granted summary judgment in favor of the Chambers of Commerce. Unlike the DC district court, the SC district court concluded that the Board lacked authority to issue the rule.

## DC Circuit Court of Appeals Enjoins Posting Requirement Pending Appeal

On April 17, 2012, the DC Circuit [enjoined](#) enforcement of the rule pending appeal of the lower court ruling. Oral argument is slated for September 2012, with a decision on the merits to follow. Until then, the court will preserve the *status quo*.

**COMPLIANCE ALERT:** The DC Circuit's injunction does not affect the notice-posting requirement under Executive Order 13496 (EO) for covered federal contractors and subcontractors. Contractors subject to the EO must continue to post the Department of Labor's [notice](#) of employees' NLRA rights.

## NLRB Delays Implementation Pending Appeal

Following the DC Circuit's action on April 17, 2012, NLRB Chairman Mark Gaston Pearce [announced](#) that the NLRB's regional offices will not move forward with implementing the notice-posting rule on April 30. Citing conflicting decisions at the district court level, the DC Circuit's temporary injunction, and the Board's interest in the uniform implementation and administration of agency rules, Chairman Pearce delayed implementation pending the resolution of the issues before the DC Circuit. Chairman Pearce added that the NLRB will appeal the decision by the SC district court as well as a part of the DC district court's decision that addresses enforcement mechanisms.

### INSIGHT

The NLRB previously announced plans to launch a new website to educate employees about their rights under the NLRA, and to distribute educational brochures through advocacy groups and through other federal agencies. Whether the roll-out will similarly be delayed remains to be seen.

### Conclusion

The DC district court decision eliminates two of the rule's key enforcement provisions, but leaves the notice-posting requirement standing. The SC district court decision that invalidates the rule in its entirety is a more favorable development for employers, but it remains to be seen what will happen on appeal. Even if the NLRB succeeds on appeal, it is unlikely that it could implement the rule before late 2012. At least for now, private-sector employers that were preparing to post the NLRB's prescribed employee rights notice on April 30, 2012 can hold off.

#### Buck Can Help

- Keep you updated on further developments as the appeals proceed
- Review and update your policies, employee handbooks, and workplace postings as needed
- Train and educate managers and supervisors on NLRA issues

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.  
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