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Of Counsel Carl S. Silverman

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Re: U.S. Court of Appeals for the District of Columbia Strikes Down NLRB Rule  
Requiring Employers to Post Union Rights Poster

On May 7, 2013, a panel of the U.S. Court of Appeals for the District of Columbia, in a suit filed by the National Association of Manufacturers, vacated the National Labor Relations Board's (NLRB's) rule requiring employers to post a union rights poster.

## **Background:**

The Obama NLRB issued a Final Rule in 2011 requiring employers to post notices informing employees of their rights under the National Labor Relations Act (NLRA). The notice, in effect, requires employers to invite their employees to organize and join a union. The Final Rule contained a number of penalties for non-compliance that were embodied in the following enforcement mechanisms: (1) considered the failure to post the notice to be an unfair labor practice (ULP) under the NLRA; (2) authorized the NLRB to extend the six-month statute of limitations for filing a ULP charge involving any other ULP allegations against any non-complying employer; and (3) in effect "legislated" that the employer's knowing and willful refusal to comply with the posting requirement evidenced an unlawful motive, to be used against the employer in assessing other alleged violations of the NLRA.

## **This Litigation:**

A District of Columbia federal district court rejected a challenge to the posting requirement, and substantially upheld its penalties, finding that the NLRB was authorized to issue the rule under its rule-making authority to effectuate the purposes of the NLRA.

The D.C. Circuit reversed that ruling. It found that Section 8(c) of the NLRA prohibits the NLRB from finding a ULP where an employer fails to post the poster, and further prohibits this Agency from relying on that failure as evidence of unlawful motive with respect to other alleged violations. The Court also struck down the NLRB's attempt to extend the statute of limitations period due to an employer's failure to post the notice.

Based on its finding that all three enforcement mechanisms violated the NLRA, the Court held that the NLRB would not have issued a posting rule that depended solely on voluntary compliance. However, the Court did not determine whether the NLRB had the statutory authority to promulgate such a rule.

### **Going Forward:**

Do not discard your NLRB poster. The same issue is now before the U.S. Court of Appeals for the Fourth Circuit, which no longer can be considered a reliable ally of employers on questions of this nature. Should the Fourth Circuit issue a contrary ruling, the legality of the NLRB's posting requirement may well be headed to the Supreme Court for final resolution.