

# Employment Law Matters

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A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

## SPECIAL REPORT

### NLRB's "Right-to-Unionize" Posting Requirement Delayed Until September 2012 or Later

Earlier today, the U. S. Court of Appeals for the District of Columbia Circuit granted an injunction blocking the implementation of the National Labor Relations Board (NLRB) rule requiring employers to post a notice advising employees of their right to create and/or join a union. This means that employers will **not** be required to post the notice until after the lawsuit challenging the rule is decided on appeal. (See *National Ass'n of Manufacturers v. NLRB*, \_\_\_ F.Supp.3d \_\_\_ (D. C. Dist. of Columbia, 3/2/12).) Oral argument on this matter is currently scheduled for an unspecified date in September 2012. The Court's decision will come sometime thereafter. **In other words, the poster rule which was set to go into effect on April 30, 2012, will now be delayed until September 2012 at the earliest.**

This injunction comes on the heels of last Friday's decision by a Federal District Court in South Carolina that struck down the poster rule as being beyond the NLRB's regulatory authority created by federal law (in this case, the National Labor Relations Act) (*Chamber of Commerce v. NLRB*, \_\_\_ F.Supp.3d \_\_\_ (D. C. S. Car., 4/13/12).) In *Chamber of Commerce v. NLRB*, the District Court Judge held that Congress intended (in the National Labor Relations Act) for the NLRB to function "as a reactive agency"; taking action **only** when unfair labor practice charges or representation petitions are filed by members of the public. Creating and implementing the poster rule was viewed as being more proactive than reactive and, therefore, beyond its authority. Moreover, Congress included explicit notice-posting authority in other statutes but not in the National Labor Relations Act. Thus, the Judge explained, Congress did not intend to delegate such authority to the NLRB.

The U. S. Court of Appeals for the District of Columbia Circuit took note of this decision in its order granting the emergency injunction in the *National Ass'n of Manufacturers v. NLRB* appeal. This does not guarantee, however, that the District of Columbia Circuit will follow the South Carolina Court's ruling in this matter. Conflicting decisions among Federal Appeals Courts are fairly common. When this occurs, it is usually up to the U. S. Supreme Court to resolve the conflict.

We will keep you informed of any further developments with respect to this NLRB rule. If you have any questions, please feel free to contact our office.

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