

STRIKE TWO - ANOTHER COURT STRIKES DOWN NLRB'S NOTICE POSTING RULE

The NLRB's rule requiring private sector employers to post a "Notice of Employee Rights" took another [hit](#) from another federal appeals court. The rule that was scheduled to go into effect early in 2012 was enjoined by lower federal courts last year and was ultimately struck down by a [decision](#) of a federal appeals court on May 7 of this year. Now, another federal appeals court has followed suit and has declared that the NLRB lacked the authority to issue the rule in the first place. The NLRB has yet to claim a victory in this ongoing legal battle over its rule. For the past two years, we have been following the evolution of the NLRB's Notice Posting Rule. You can access those articles [here](#), [here](#), [here](#) and [here](#) for some historical background.

THE NLRB LACKS STATUTORY AUTHORITY TO ISSUE THE RULE

Unlike the ruling of the court in the May decision that struck down the rule because it violated employers' rights of free speech - the rule compelled employer speech - this court found it unnecessary to even reach the constitutional issue. Instead, the court analyzed the statutory role of the NLRB as being *reactive* as opposed to *proactive*. In other words, Congress established the NLRB to react *only* to the filing of an unfair labor practice charge or a petition for a secret ballot election. The NLRB therefore lacked the authority to issue rules that were not in furtherance of its reactive function based on the filing of a charge or a petition for an election. The powers given the NLRB by Congress were much different from those given to the EEOC or the Department of Labor. Those agencies can, by statute, initiate their own investigations even without a charge or complaint. The NLRB cannot. Furthermore, there is an explicit requirement to post employee rights notices under various other federal employment laws such as Title VII, OSHA, FLSA, FMLA, ADA and the Polygraph Protection Act. The NLRA has no such explicit notice requirement. As laudable as the NLRB's intentions might have been to inform employees of their rights, it had no power to do so according to the court.

MANY CHALLENGES FOR THE NLRB AHEAD

Given the recent challenges to the NLRB's authority to issue rules and even to issue decisions due to a lack of a quorum because of unconstitutional recess appointments, it is unlikely that the notice posting rule will be resurrected any time soon. Indeed, the NLRB will be down to two members in late August after the term of Chairman Mark Gaston Pearce expires. Even if the remaining two members are ultimately held to have been legitimate recess appointments, the Supreme Court has said that two members cannot constitute a quorum of the NLRB and therefore cannot act. The next few months will be interesting for those who follow developments in labor relations.

Reference: *U.S. Chamber of Commerce v. NLRB, et al* (4th Cir. No. 12-1757, June 14, 2013).

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