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National Labor Relations Board Throws in Towel on Posting Rule

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The saga of the National Labor Relations Board's ("Board") Notice posting rule has ended quietly. In a press release issued this week, the Board wrote that:

The National Labor Relations Board (NLRB) has decided not to seek Supreme Court review of two U.S. Court of Appeals decisions invalidating the NLRB's Notice Posting Rule, which would have required most private sector employers to post a notice of employee rights in the workplace.

If you recall from our prior Alerts, in 2011 the Board issued a Rule mandating the posting of an 11" x 17" Notice in virtually every private sector workplace in the country – unionized or not - informing employees of their rights under the National Labor Relations Act ("Act"). Because employee rights under the Act apply to both union and non-union workplaces, all employers subject to the Board's jurisdiction would have been required to post the Notice. Employers also were required to post the notice on an intranet or an internet site if personnel rules and policies are customarily posted there, or provide a link to the Notice on the Board website, www.nlr.gov.

This Rule was challenged in two cases, one in the District of Columbia, and one in South Carolina (brought by the Chamber of Commerce). In the first case, the District Court largely upheld the Rule except for its enforcement mechanisms, but was reversed by the Circuit Court of Appeals for the District of Columbia on the basis that noncoercive employer speech cannot be an unfair labor practice or evidence of an unfair labor practice.

In the second case, the District Court ruled that the Rule was invalid because the Board lacked the statutory authority to require such a posting. That decision was affirmed by Circuit Court of Appeals for the Fourth Circuit. By allowing the Supreme Court's January 2 review deadline to pass, the Board has determined that it will not pursue appeals in those cases. Thus those decisions stand.

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In short, this announcement means that no posting is required. It does not mean, however, that the Board is done with its efforts to publicize employees' rights under the National Labor Relations Act. As the Board wrote in their press release:

The NLRB remains committed to ensuring that workers, businesses and labor organizations are informed of their rights and obligations under the National Labor Relations Act. Therefore, the NLRB will continue its national outreach program to educate the American public about the statute.

As always, we will keep you informed of the Board's activities. Among other things, the Board is likely to pursue other rulemaking including but not limited to revisions and a reissuance of its so-called "quickie election" rules, originally issued in 2011. While those rules were invalidated by a federal district court on the basis that the Board lacked a proper quorum, the Board last month voluntarily dismissed that appeal, presumably in an effort to start with a clean slate. Now that the Board has a full five members with no questions about the legitimacy of those appointments, we believe the Board is gearing itself up for further regulatory actions.

We are pleased to announce that Nan O'Neill, a former partner of the firm, has rejoined the MHTL labor, employment and benefits team effective Monday, January 6, 2014. We are looking forward to having Nan part of our team once again.

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If you have any questions or concerns with regard to the implementation of the Act, please contact Geoffrey Wermuth or the attorney assigned to your account.

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