

## Federal Court Partially Overturns NLRB Posting Regulation (Updated From Earlier Post)

March 2, 2012 | [Labor And Employment](#)

As [we reported earlier today](#), a federal judge in the District of Columbia has partially overturned the National Labor Relation Board's (NLRB) posting regulation. The ruling by United States District Court Judge Amy Berman Jackson upholds the right of the NLRB to promulgate and require posting of the Notice. However in its [March 2, 2012 ruling](#), the Court invalidated the portions of the NLRB's rule that (1) would have made the failure to post an independent unfair labor practice; (2) made failure to post evidence of anti-union animus; and (3) tolled the statute of limitations in every instance when an employer had failed to post the Notice.

Specifically, the Court ruled that NLRB exceeded the authority granted to it by Congress with respect to two regulatory provisions: 1) Section 104.210; and 2) Section 104.214(a).

Section 104.210 reads, in relevant part: "Failure to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section, 7 29 U.S.C. 147, in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1)." The Court held that this provision "does not distinguish between a situation where an employer's failure to post was intended to or did exert influence over an employee's organizational efforts, and where the employer merely declined or failed to post the information publicizing those rights." Therefore, under the Rule, a mere failure to post the notice of employee rights, no matter what the context, would qualify as "interference" with the exercise of rights guaranteed by the NLRA. According to the Court, nothing prevents the Board from finding that a failure to post constitutes an unfair labor practice. However, in order to do so, the Board must make a specific finding based on the facts and circumstances in the individual case before it.

Section 104.214(a) reads, in relevant part: "When an employee files an unfair labor practice charge, the Board may find it appropriate to excuse the employee from the requirement that charges be filed within six months after the occurrence of the allegedly unlawful conduct if the employer has failed to post the required employee notice unless the employee has received actual or constructive notice that the conduct complained of is unlawful." The Court found that this provision not only extends the limitations period for unfair labor practices arising out of a failure to post, it applies to *all* unfair labor practices. "The Final Rule strips away the case-specific nature of the equitable tolling doctrine by imposing it as the rule rather than the exception." According to the Court, the National Labor Relations Act does not authorize the Board to enact a rule which permits it to toll the statute of limitations in *any* future unfair labor practice action involving a job site where the notice was not posted.

The NLRB's posting regulation requires businesses to post an 11 x 17 notice

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that alerts workers to their rights under Section 7 of the National Labor Relations Act (NLRA), including the right to organize and join a union. The rule also requires businesses that use the Internet or an intranet site to post human resources-related information to post the NLRB notice on those sites as well. These obligations appear unaffected by this decision.

An appeal to the D.C. Circuit Court of Appeals is likely.