

ALERTS

Labor & Employment Law Alert - D.C. Circuit Invalidates NLRB Posting Rule

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The Court of Appeals for the D.C. Circuit today struck down the NLRB's rule which required all employers covered by the National Labor Relations Act to post an NLRB-drafted "Notification of Employee Rights under the National Labor Relations Act." Under that rule, employers failing to post the notice would be subject to an unfair labor practice charge. The rule has been on hold since March 2012 when the District Court partially invalidated the posting regulation and enjoined its application pending this appeal.

In coming to that decision, the D.C. Circuit held that in promulgating the rule, NLRB had departed from its "historic practice" and "negative attitude" toward rulemaking and in doing so violated sections 8(c) and 10(b) of the NLRA. Specifically, the Court found that the enforcement mechanisms placed into the Rule by the Board overstepped the Board's enforcement authority. Once the enforcement mechanisms were declared unlawful, the Court then found that the posting requirement standing alone was not severable from the Rule. "Here we know that the Board would not have issued a posting rule that depended solely on voluntary compliance. We know this because the Board rejected that regulatory option in the preamble to its final rule. . . . Subpart A must therefore fall along with the rest of the Board's posting rule."

Before reaching this decision, the Court first considered whether its decision in *Noel Canning* which invalidated NLRB action for failure to have a quorum controlled this case. The Court decided that *Noel Canning* was not dispositive because the Board had a quorum on the date the rule was filed with the Office of the Federal Register.

In their concurring opinion joining in the decision written by Judge A. Raymond Randolph, Judges Karen LeCraft Henderson and Janice Rogers Brown also decided that the NLRB's rulemaking process was invalid under Section 6 of the NLRA.

To obtain more information, please contact the Barnes & Thornburg Labor and Employment attorney with whom you work, or a leader of the firm's Labor and Employment Law Department in the following offices:

Kenneth J. Yerkes, Chair (317) 231-7513; John T.L. Koenig, Atlanta (404) 264-4018; Norma W. Zeitler, Chicago (312) 214-8312; William A. Nolan, Columbus (614) 628-1401; Eric H.J. Stahlhut, Elkhart (574) 296-2524; Mark S. Kittaka, Fort Wayne (260) 425-4616; Michael A. Snapper, Grand Rapids (616) 742-3947; Peter A. Morse, Indianapolis (317) 231-7794; Scott J. Witlin, Los Angeles (310) 284-3777; Tina Syring Petrocchi, Minneapolis (612) 367-8705; Janilyn Brouwer Daub, South Bend (574) 237-1139; Teresa L. Jakubowski, Washington, D.C. (202) 371-6366.

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RELATED PEOPLE



Kenneth J. Yerkes

Partner
Indianapolis

P 317-231-7513
F 317-231-7433
ken.yerkes@btlaw.com



John T.L. Koenig

Partner
Atlanta

P 404-264-4018
F 404-264-4033
john.koenig@btlaw.com



Norma W. Zeitler

Partner
Chicago

P 312-214-8312
F 312-759-5646
norma.zeitler@btlaw.com



William A. Nolan

Partner
Columbus

P 614-628-1401
F 614-628-1433
bill.nolan@btlaw.com

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Mark S. Kittaka

Partner

Fort Wayne, Columbus

P 260-425-4616

F 260-424-8316

mark.kittaka@btlaw.com



Michael A. Snapper

Of Counsel (Retired)

P 616-742-3947

mike.snapper@btlaw.com



Peter A. Morse, Jr.

Partner

Indianapolis, Washington, D.C.

P 317-231-7794

F 317-231-7433

pete.morse@btlaw.com



Scott J. Witlin

Partner

Los Angeles

P 310-284-3777

F 310-284-3894

scott.witlin@btlaw.com



Janilyn Brouwer Daub

Partner

South Bend, Elkhart

P 574-237-1139

F 574-237-1125

janilyn.daub@btlaw.com



Teresa L. Jakubowski

Partner

Washington, D.C.

P 202-371-6366

F 202-289-1330

teresa.jakubowski@btlaw.com

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