Zinsergram a/k/a Legal Update

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NLRB UPDATE

1. NOTICE POSTING ENJOINED – In my last column I reported that the U.S. District Court in Washington, D.C., in a case filed by the National Association at Manufacturers, ruled the NLRB had the authority to require the posting but struck down the penalty provisions. While some trade groups filed suit in federal court in the District of Columbia, the U.S. and South Carolina Chambers of Commerce filed suit in South Carolina.

On April 13, 2012, U.S. District Court Judge David C. Norton granted the Chambers' motion for Summary Judgment and found that the Board exceeded its authority in violation of the Administrative Procedure Act. Highlights from this decision include the following comments by the judge:

- The plain language and structure of the NLRA compelled a finding that the Board lacks authority under Section 6 to promulgate the rule.

- The Act places no affirmative obligation on employers to post notices of employee rights or inform employees of those rights, so the rule cannot be "necessary" to carry out such a nonexistent provision. Neither Section 6 nor any other section of the Act even mentions the issue of notice posting.

- NLRB argued that the rule was "necessary to carry out" Sections 1 and 7 of the Act, but confused a "necessary" rule with one that is simply useful. The notice-posting rule "aids" or "furthers" the aspirational goals of Section 1 by notifying employees of their rights under Section 7, but the NLRB did not show that the rule is "necessary" to carry out any other provision of the Act. Finding that the challenged rule is "necessary" to carry out other provisions of the Act would require the court to ignore "the statutory language as a whole, and allow the Board to create rules in any area in which Congress did not specifically *withhold* the Board's power.

- "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." The Board may not disregard restrictions Congress has imposed on its authority in other sections of the governing statute by relying on Section 6 in isolation to these substantive provisions. The Board did not show that

Congress delegated authority to the Board through Section 6 to regulate employers in this manner.

- Congress authorized the Board to regulate employers' conduct in two essential areas: preventing and resolving ULP charges and conducting representation elections. It is clear from the structure of the Act that Congress intended the Board's authority over employers to be triggered by an outside party's filing of a representation petition or ULP charge. The Notice Posting Rule proactively dictates employer conduct prior to the filing of any petition or charge, and such a rule is inconsistent with the Board's reactive role under the Act.

- The notice-posting rule does not serve to "carry out" any existing duties under the Act, but instead places an affirmative obligation on employers prior to a charge or petition first being filed. Congress did not impose a notice-posting requirement on employers in the Act or commit this area of regulation to the Board. "Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked."

- The Board may not promulgate rules that enlarge its authority beyond the scope intended by Congress. By promulgating a rule that proactively imposes an obligation on employers prior to the filing of a ULP charge or representation petition, in the absence of express statutory authority, the Board has contravened the statutory scheme established by Congress.

- Congress clearly knows how to include a notice-posting requirement in a federal labor statute when it so desires. "Where Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power." Despite its explicit inclusion of notice-posting obligations in numerous federal statutes during the twentieth and twenty-first centuries, Congress made extensive revisions to the NLRA in 1947, 1959, and 1974, yet never found the need to include a notice-posting provision. Based on the statutory scheme, legislative history, history of evolving Congressional regulation in the area, and a consideration of other federal labor statutes, the court found that Congress did not intend to impose a notice-posting obligation on employers, nor did it explicitly or implicitly delegate authority to the Board to regulate employers in this manner.

National Association of Manufacturers had already appealed its case to the U.S. Court of Appeals for the D.C. Circuit when Judge Norton issued his decision and filed an emergency motion for injunction. The D.C. Circuit granted the injunction on April 17, 2012 and noted the hypocrisy in the Board's position concerning implementing the rule:

> We note that the Board postponed operation of the rule during the pendency of the district court proceedings in order to give the district court

> an opportunity to consider the legal merits before the rule took effect. That postponement is in some tension with the Board's current argument that the rule should take effect during the pendency of this court's proceedings before this court has an opportunity to similarly consider the legal merits. We note also that the district court's severability analysis left the posting requirement in place but invalidated the primary enforcement mechanisms for violations of the requirement. The Board has indicated that it may cross-appeal that aspect of the district court's decision. The uncertainty about enforcement counsels further in favor of temporarily preserving the status quo while this court resolves all of the issues on the merits.

On April 17, 2012, Board Chairman Mark Gaston Pearce issued a statement in response to the injunction:

> In light of conflicting decisions at the district court level, the D.C. Circuit Court of Appeals has temporarily enjoined the NLRB's rule requiring the posting of employee rights, which had been scheduled to take effect on April 30, 2012.
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> In view of the D.C. Circuit's order, and in light of the strong interest in the uniform implementation and administration of agency rules, regional offices will not implement the rule pending the resolution of the issues before the court.

This issue is far from over. The Board may appeal the South Carolina decision. We know that the parties in the D.C. Circuit Court of Appeals case will brief their positions in May and June and that oral argument has been set for September.

2. NLRB "QUICKIE ELECTION" RULE – The U.S. Chamber of Commerce and Coalition for a Democratic Workplace filed suit in the District Court for the District of Columbia on December 20, 2011. Their suit seeks declaratory and injunctive relief in order to block the Board from implementing the new rules. The Chamber and Coalition believe that the Board's promulgation of these new rules is contrary to the National Labor Relations Act, violates the Administrative Procedures Act, the Regulatory Flexibility Act ("RFA"), and the First and Fifth Amendments to the U.S. Constitution. Specifically, they have argued that: (1) the rule substantially curtails the statutorily mandated pre-election hearing; (2) the rule violates the Fifth Amendment's guarantee of due process of law by curtailing pre-election hearings and eliminating pre-election requests for Board review; (3) the rule prevents employers from exercising their Section 8(c) right and the First Amendment to communicate their views through their supervisory agents by curtailing an employer's right to communicate with its employees by substantially shortening the election period; (4) reflects the Board contravening (without a rational basis) its longstanding tradition of overruling existing Board precedent only by the affirmative vote of three members of the Board, by authorizing the hearing officer to reject evidence and defer ruling on the supervisory status of certain employees; and that (5) the Board failed to provide an adequate factual basis and understated the impact the Rule would have on

small businesses as required by the RFA (which requires an agency to "prepare and make available for public comment an initial regulatory flexibility analysis" describing, among other things, "the impact of the proposed rule on small entities."). Based on these assertions, the Chamber and Coalition have argued that the Board's actions are arbitrary, capricious, an abuse of discretion, and failed to comply with the various procedures required by law.

This case is still pending before the District Court for the District of Columbia. However, the parties have each filed motions to dispose of the case. The NLRB filed a motion to dismiss for lack of jurisdiction and a motion for summary judgment on February 3, 2012. Similarly, the Chamber and Coalition filed its own motion for summary judgment. The American Hospital Association, American Organization of Nurse Executives, American Society for Healthcare Human Resources Administration, HR Policy Association, and Society for Human Resource Management moved to file an amicus brief in support of the Chamber and Coalition. Both the NLRB and Chamber filed their opposition briefs on February 28, 2012. The Chamber also filed a reply in support of its motion for summary judgment on March 23, 2012. Judge James E. Boasberg has yet to rule on any of these motions.

Absent court action, the Rule is scheduled to go into effect April 30, 2012.