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Another Court Ruling Weakens the Authority of the NLRB

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Less than two months after the U.S. Court of Appeals for the D.C. Circuit dealt a blow to the authority of the National Labor Relations Board in *Noel Canning v. NLRB*, it once again weakened the authority of the NLRB by striking down the NLRB's 2011 "posting rule." In *National Assoc. of Mfg. v. NLRB*, the U.S. Court of Appeals for the D.C. Circuit held that the NLRB violated employers' rights to free speech by requiring all employers to post a "Notice of Employee Rights Under the NLRA" or face penalties.

Numerous groups representing employers, including the National Association of Manufacturers and the U.S. Chamber of Commerce, challenged the 2011 rule that required employers to post notices of certain employee rights regarding unionization. The content of the posting was prepared by the NLRB. Employer groups challenging the posting rule argued that employers should not be compelled to post notices which appeared to be one-sided, favoring unions, as the posting did not inform employees of their right to decertify a union, or not pay dues in a right to work state, or to object to payment of dues to a union in excess of the amounts required for representational purposes. The D.C. Circuit Court judges agreed with the employers, citing §8(c) of the Labor Management Relations Act which expressly permits employers to express views about unions so long as the expression contains no threat of reprisal or force or promise of benefit. Therefore, the Court reasoned under §8(c) and the First Amendment that the NLRB is precluded from telling employers what they must say to employees by enforcing the posting requirement. The D.C. Circuit Court also held that the penalties employers faced for failing to post the notice, including possible unfair labor practice charges and an extension of the statute of limitations for filing charges, were invalid. As a result of the *NAM* decision, employers that posted the proposed notice may take it down if they have not done so already. Undoubtedly, the NLRB will appeal the D.C. Circuit Court's decision to the U.S. Supreme Court as it indicated it will do in the *Noel Canning* decision.

In *Noel Canning*, the D.C. Circuit held that the recess appointments of three members of the NLRB by President Obama in 2012, Sharon Block, Terence F. Flynn, and Richard Griffin, were unconstitutional because the Senate was still in

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session. Therefore, for all of 2012 the NLRB was acting with only one member. In a previous court ruling it was held that for the NLRB's actions to be effective, a quorum (three members) of the Board must act. Therefore, the authority of the NLRB continues to be limited.

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