

Facing Suits, NLRB Delays Employee Rights Posting Rule

By **Ben James**

Law360, New York (October 05, 2011, 7:11 PM ET) -- The National Labor Relations Board postponed the effective date for its employee rights posting rule Wednesday, after a federal judge requested more time to consider the arguments in litigation challenging the rule, an attorney involved in the case said.

The rule, which requires businesses to post notices apprising workers of their right to unionize, had been slated to take effect on Nov. 14, but the new effective date is Jan. 31, 2012. The rule inspired two lawsuits from plaintiffs including the National Federation of Independent Business and the National Association of Manufacturers, and both of those cases were consolidated Tuesday.

At a conference in that litigation on Monday, U.S. District Judge Amy Berman Jackson asked NLRB attorneys to request that the board delay the Nov. 14 effective date to give her time to properly mull over all the arguments, rather than forcing her to consider a preliminary injunction, said John Raudabaugh of Nixon Peabody LLP, a former NLRB member and counsel for the NFIB.

“The delay is significant because there's no way to properly evaluate all the arguments and conduct a full hearing in such a short time frame,” Raudabaugh said.

Attorneys for the NLRB said Monday that they had already discussed the option of postponing the effective date, and that the board had declined, prompting the judge to request that they ask the board to reconsider nonetheless, according to Raudabaugh.

At another status conference on Wednesday, NLRB lawyers said that the board would postpone the effective date. A minute order filed in the case Wednesday said that NAM's motion for a preliminary injunction was moot because of the NLRB's representation that the effective date had been pushed back.

The NLRB on Wednesday said that it had delayed the implementation date “to allow for enhanced education and outreach” to small and medium-sized businesses in particular. NLRB spokeswoman Nancy Cleeland said the decision to postpone the effective date had nothing to do with the lawsuits over the rule.

“The decision to extend the rollout period followed queries from businesses and trade organizations indicating uncertainty about which businesses fall under the board’s jurisdiction, and was made in the interest of ensuring broad voluntary compliance,” the board said. “No other changes in the rule, or in the form or content of the notice, will be made.”

In addition to the NFIB and NAM, the U.S. Chamber of Commerce has also sued over the rule. The NLRB issued the final rule, which requires most private sector employers to post notices informing employees of their rights under the National Labor Relations Act, in August.

NAM filed suit on Sept. 8, arguing, among other things, that the promulgation of the rule exceeded the board's statutory authority. The suits brought by the NFIB and the chamber also accused the board of going beyond the bounds of its authority.

That's a strong argument because there's no notice requirement in the NLRA, Doreen Davis of Morgan Lewis & Bockius LLP said. The NLRB is supposed to enforce the law, not write the law, according to Davis.

“It's not contained in the statute itself. The legislature did not intend there to be a notice requirement,” she said.

Davis said that when she heard that the effective date had been postponed, she thought the NLRB had taken that step to avoid a possible injunction.

“I'm assuming that this change of heart is related to the litigation,” Davis said.

The NAM is represented by Peter Kirsanow, Maynard Buck, Patrick Peters and Kristen Cady of Benesch Friedlander Coplan & Aronoff LLP, and William Miossi and Gregory Jacob of Winston & Strawn LLP.

The Coalition for a Democratic Workplace is represented by Lesley Pate Marlin and Maurice Baskin of Venable LLP. The NFIB, Southeast Sealing Inc. and Racquetball Centers Inc. are represented by John N. Raudabaugh of Nixon Peabody LLP. The National Right To Work Legal Defense and Education Foundation Inc. is represented by in-house counsel Glenn Taubman.

The case is National Association of Manufacturers et al. v. National Labor Relations Board et al., case number 1:11-cv-01629, in the U.S. District Court for the District of Columbia.

--Editing by Andrew Park.

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