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# BOND INFORMATION MEMO

## Labor and Employment Law

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### U.S. Court of Appeals for the Fourth Circuit Becomes Second Appellate Court to Strike Down NLRB's Notice Posting Rule

On June 14, 2013, the U.S. Court of Appeals for the Fourth Circuit held that the rule promulgated by the National Labor Relations Board ("NLRB") requiring employers to post a notice of employee rights under the National Labor Relations Act ("NLRA") is invalid. The Fourth Circuit is the second appellate court to strike down the NLRB's notice posting rule. The U.S. Court of Appeals for the D.C. Circuit issued a decision on May 7, 2013 also holding that the rule is invalid.

The Fourth Circuit affirmed a decision rendered by the U.S. District Court for the District of South Carolina, holding that the NLRB did not have the authority under the NLRA to promulgate the rule. The Fourth Circuit examined the plain language of the statutory text, which grants the NLRB the authority to issue rules that are "necessary to carry out" the provisions of the NLRA, and determined that the notice posting rule was not necessary to carry out any of the provisions of the NLRA. The Fourth Circuit observed that the NLRB "serves expressly reactive roles," such as conducting representation elections and resolving unfair labor practice charges, and that Congress did not intend to grant the NLRB the authority to take on a proactive role such as requiring employers to post a notice of employee rights under the NLRA.

The Fourth Circuit also noted that Congress explicitly included notice posting requirements in several federal employment and labor laws passed during the span of years from 1935 to 1974, such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Occupational Safety and Health Act, but did not include such a requirement in the NLRA despite the fact that the NLRA was amended in other ways three times during that time period. The Fourth Circuit stated that "Congress's continued exclusion of a notice-posting requirement from the NLRA, concomitant with its granting of such authority to other agencies, can fairly be considered deliberate. . . . Had Congress intended to grant the NLRB the power to require the posting of employee rights notices, it could have amended the NLRA to do so."

It remains to be seen whether the NLRB will ask the U.S. Supreme Court to consider this issue.

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