IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.*,	)	Case No. 1:11-cv-01629-ABJ
	)	
	)	Judge Amy Berman Jackson
Plaintiffs,	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs hereby move for an injunction pending appeal pursuant to F.R.Civ.P. 62(c). As grounds for this appeal, Plaintiffs state as follows:

1. Plaintiffs have filed a Notice of Appeal from those portions of the Court's final orders that will, absent the requested injunction, allow the challenged Notice Posting Rule to go into effect on April 30, 2012. Plaintiffs are in the process of moving for expedited consideration of their appeal at the Court of Appeals. Pursuant to the Federal Appellate Rules, however, Plaintiffs are required to seek an injunction pending appeal from this Court prior to seeking such relief from the appellate court. *See* F.R.App.P. 8.
2. As more fully set forth in the attached Memorandum of Points and Authorities, the four-part test for granting an injunction pending appeal in this Circuit supports granting the requested injunction.

3. Pursuant to Local Rule 7, counsel for Plaintiffs has notified counsel for Defendants of this Motion. Counsel for Defendants has not consented to it.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs hereby file this Memorandum in support of their Motion for Injunction Pending Appeal, pursuant to F.R.Civ.P. 62(c). Plaintiffs have filed a Notice of Appeal from those portions of the Court's final orders that will, absent the requested injunction, allow the challenged Notice Posting Rule to go into effect on April 30, 2012. Plaintiffs are in the process of moving for expedited consideration of their appeal at the Court of Appeals. Pursuant to the Federal Appellate Rules, however, Plaintiffs are required to seek an injunction pending appeal from this Court prior to seeking such relief from the appellate court. *See* F.R.App.P. 8.[1]

As is more fully set forth below, the four-part test for issuing an injunction pending appeal supports granting the requested injunction, notwithstanding the Court's decision denying Plaintiffs' motion for judgment on the merits. Judge Kessler explained why a request for

[1] "Although a party's filing of a notice of appeal generally divests the district court of jurisdiction over the matter being appealed, it does not deprive a district court of jurisdiction over a motion … to grant an injunction pending appeal." *McCammon v. United States*, 584 F. Supp. 2d 193, n.2. (D.D.C. 2008).

injunction pending appeal should be granted under similar circumstances in *Chamber of Commerce v. Reich*, 897 F. Supp. 570, 584 (D.D.C. 1995):

> The Court has discretion to grant such relief, pursuant to Fed.R.Civ.P. 62(c). In exercising that discretion, it must weigh four factors: (1) the likelihood that the adversely affected party will prevail on the merits of the appeal; (2) the likelihood that the adversely affected party will be irreparably harmed absent an injunction; (3) the prospect that other interested parties will be harmed if the Court grants the injunction; and (4) the public interest in granting the injunction. *Cuomo v. United States Nuclear Regulatory Comm'n.*, 772 F. 2d 972, 974 (D.C. Cir. 1985); *WMATC v. Holiday Tours, Inc*., 559 F. 2d 841, 843 (D.C. Cir. 1977).

In the *Chamber of Commerce* case, the district court upheld a presidential executive order that limited the use of strike replacements by government contractors, rejecting arguments by employers that the President lacked such authority under the National Labor Relations Act. 897 F. Supp. 570. The court nevertheless entered an injunction pending appeal after finding that the plaintiffs had raised "serious questions" on the merits and that they had demonstrated a balance of hardships that justified a temporary injunction to allow the D.C. Circuit time to decide the appeal. *Id*. at 584-85. This proved to be a prescient decision by the district court, in as much as the D.C. Circuit ultimately reversed the district court's ruling on the merits and permanently enjoined the President's executive order. *Chamber of Commerce v. Reich*, 74 F. 3d 1322 (D.C. Cir. 1996).

For the reasons explained below, application of the *WMATC* four-part test likewise supports granting an injunction pending appeal in the present case.

1. A "Serious Legal Question" Exists Regarding The Legality Of The Challenged Rule.

As to the first factor, "likelihood of success," Plaintiffs do not seek to reargue the merits of their claims, which the Court has already found to be unavailing. In the context of a motion for injunction pending appeal, the real issue for the Court to decide with regard to likelihood of success is whether Plaintiffs have raised a "serious legal question." *Chamber of Commerce*, 897 F. Supp. at 584. As further defined by the D.C. Circuit: "[I]f the other elements are present (*i.e.* the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make a fair ground for litigation and thus more deliberative investigation." *WMATC*, 559 F. 2d at 844-45.

The questions surrounding the challenged Rule are sufficiently "serious" to meet the foregoing standard. As the Court is aware, this is a case of first impression regarding the authority of the Board to impose a new regulatory obligation on millions of businesses who have done nothing otherwise to invoke the Board's jurisdiction over them. Plaintiffs have argued that the Board's exercise of rulemaking authority under the challenged Rule is inconsistent with the limited jurisdiction granted to the Board by Congress, and Plaintiffs have cited what they believe to be controlling precedent of the Supreme Court and the D.C. Circuit that forbids the Board from acting in this manner without Congressional authority.

Without seeking to reargue the merits here, it is nevertheless appropriate to summarize the serious questions that will be presented to the Court of Appeals, as to which the D.C. Circuit will render its opinion after a *de novo* review. The questions presented include but are not limited to the following:

- Whether the overall structure, language, and longstanding interpretation of the Act conflicts with the Board's unprecedented assertion of authority over millions of employers who have not engaged in any actions that interfere with rights protected by the Act and who are not the subject of a representation petition.

- Whether the Act's text and legislative history are truly silent as to the Board's authority to promulgate the challenged Rule, as the district court found, or whether the text and history of the Act indicates express refusal by Congress to impose a statutory notice requirement in the Act while (both before and since) including such a requirement in other labor and employment laws. *See Alcoa Steamship Co. v. Fed. Maritime Comm'n.*, 348 F.2d 756, 758 (D.C. Cir. 1965).

- Assuming without conceding that the district court is correct that the Act and its history are truly silent as to the Board's authority to promulgate the challenged Rule, whether the court has improperly presumed from such silence a statutory delegation of authority to the Board to promulgate the challenged Rule. *See American Bar Ass'n v. FTC*, 430 F. 3d 457 (D.C. Cir. 2005); *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F. 3d 655, 671 (D.C. Cir. 1994) (*en banc*).

- Whether the Board's challenged Rule improperly attempts to regulate conduct (communications with employees) that Congress intended to be unregulated because left to be controlled by the "free play of economic forces." *See Chamber of Commerce v. Brown*, 550 U.S. 60 (2008); *Machinists v. Wisconsin Employment Commission*, 427 U.S. 132 (1976).

- Whether the Board is entitled to exercise greater authority over employer conduct via rulemaking than the agency has been permitted by the courts to exercise through the adjudicative process. *See NLRB v. Fin. Inst. Employees*, 475 U.S. 192 (1986); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *Local 357, Teamsters v. NLRB*, 365 U.S. 667 (1961); *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940).

- Whether the Board's challenged Rule is otherwise arbitrary and capricious due to the failure of the Board to obtain or publish for comment any adequate, non-anecdotal data on which to base its conclusions. *Portland Cement Ass'n v. Ruckelshaus*, 486 F. 2d 375 (D.C. Cir. 1973).

- Whether, notwithstanding the district court's correct decision to enjoin sections 104.210 and 104. 214(a), the challenged Rule remains unlawful because "nothing in this decision prevents the Board from finding that a failure to post constitutes an unfair labor practice in any individual case brought before it" (Mem. Op. at 31); and because the decision "does not prevent the Board from considering an employer's failure to post the employee rights notice in evaluating a plaintiff's equitable tolling defense in an individual case before it." (Mem. Op. at 37 n.21).

- Whether the Board is entitled to find that any employer who knowingly fails to post the challenged Notice is guilty of harboring anti-union animus and drawing an adverse inference from that finding in subsequent unfair labor practice and/or representation proceedings. (Mem. Op. at 44-45 & n.26).

- Whether the challenged Rule violates the First Amendment of the Constitution, notwithstanding the district court's finding that the required Notice constitutes "government speech," where the challenged Rule compels employers to post the government-ordered message on their private property. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

- Whether the challenged Rule violates Section 8(c) of the Act, and whether the district court should have analyzed the statutory mandate separately from the constitutional standard. *Chamber of Commerce v. Brown*, 550 U.S. 60 (2008).

- Whether the decision to enjoin Sections 104.210 and 104.214(a) requires invalidation of the entire challenged Rule because the Board did not express its intent to allow severance of these provisions, and because the remainder of the regulation will not function sensibly without the stricken provisions. *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F. 3d 732, 734 (D.C. Cir. 2001).

- Finally, whether the decision to deny Plaintiffs' motion to supplement the pleadings is consistent with the weight of judicial authority under F.R.Civ.P. 15.

By listing these issues and areas of disagreement with the Court's decision, Plaintiffs do not seek to relitigate them now. Ultimately, it is up to the appellate courts to clarify the application of their previous rulings to the unprecedented rulemaking undertaken by the Board in the present case, and neither the Plaintiffs nor the Board can predict the outcome of the appeal. Plaintiffs respectfully submit, however, that the questions identified above are plainly "serious, substantial, difficult and doubtful," within the meaning of the *WMATC* standard, as is implicitly acknowledged by the length of the Court's opinion. *WMATC*, 559 F. 2d at 844-45; *Chamber of Commerce*, 897 F. Supp. at 584. In conjunction with the balance of hardships discussed next below, these serious questions fully justify this Court's issuance of a temporary injunction pending the outcome of the appeal.

2. Plaintiffs Will Be Irreparably Harmed If The Challenged Rule Is Implemented Prior To A Decisive Outcome On Appeal.

From the outset of this case, Plaintiffs have contended that the implementation of the challenged Rule will cause irreparable harm to the millions of employers whom the Plaintiffs represent. *See* NAM Motion for Preliminary Injunction (Docket No. 13); and NRTW/NFIB Motion for Preliminary Injunction in (pre-consolidation) Case No. 11-1683 (Docket No. 6). As set forth in those filings, employers will be irreparably harmed if the Rule goes into effect while Plaintiffs' appeal is pending, because employers who do not post the Notice as of April 30 will risk committing an unfair labor practice, notwithstanding the Court's partial injunction against the "automatic" unfair labor practice provision of the Board's rule. The Court's Order leaves intact the Board's asserted authority to declare failures to post the Notice to be violations of the Act on a "case by case" basis (Mem. Op. at 31), and further allows the Board to penalize employers who fail to post the Notice by finding them to harbor unlawful anti-union animus and to draw adverse inferences from such a finding in unrelated proceedings. (*Id*. at 44-45 & n.26).

Perhaps most importantly, as noted above, Plaintiffs will be irreparably harmed because the Board's Notice posting requirement infringes on employers' First Amendment rights. The Supreme Court and the D.C. Circuit have held that First Amendment violations "unquestionably" result in irreparable harm to those whose rights are infringed. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also Mills v. District Of Columbia*, 571 F.3d 1304, 1313 (D.C. Cir. 2009); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297-301 (D.C. Cir. 2006).

Plaintiffs of course recognize that the Court has ruled against their First Amendment claims. However, as discussed above, for purposes of the factors to be considered in deciding a motion for injunction pending appeal, the "probability of success is inversely proportional to the degree of irreparable injury evidenced." *Chamber of Commerce v. Reich*, 897 F. Supp. at 584, *citing Cuomo v. United States Nuclear Regulatory Comm'n.*, 772 F. 2d 972, 974 (D.C. Cir. 1985). Here, the degree of irreparable harm is at its highest because First Amendment principles are at stake. Therefore, in light of the serious question raised as to the impact of the challenged Rule on Plaintiffs' First Amendment rights, the balance of hardships favors issuance of an injunction pending the outcome of Plaintiffs' appeal. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that a governmental requirement that private parties display the government's message on their own private property violates First Amendment rights, even where the message is contained on an "official government notice" (a license plate)).

3. The Defendant NLRB Will Suffer No Significant Harm If A Temporary Injunction Is Granted.

The Court itself has observed that the Board has waited more than 75 years to publish its Rule requiring employers to post a notice of employee rights, and the Board can therefore afford to wait a short time longer before the Rule goes into effect. (Transcript of Argument on Cross Motions for Summary Judgment, at 70-71 (Dec. 19, 2011)). The Board will therefore suffer no significant harm if an injunction is granted pending appeal.

4. **The Public Interest Strongly Supports Granting The Requested Injunction**.

Until the appeal of this case is decided, absent temporary injunctive relief, there will be tremendous uncertainty and confusion in the business community as to the obligations of employers under the challenged Rule. Plaintiffs NAM, CDW and NFIB have already been

inundated with inquiries from their member businesses regarding the status of the Rule and the uncertain impact of the Court's order on their obligations under the Rule. As the April 30 effective date approaches, millions of employers will be unable to determine their compliance obligations.

An injunction pending appeal will simply maintain the status quo in order to allow the appellate courts the full time period needed to delve fully into the complicated issues presented and render a definitive decision. Maintaining the status quo for this short period of time best serves the public interest. *See WMATC*, 559 F. 2d at 844 (recognizing the public interest in maintaining the status quo in order to allow "legal questions [to be] decided on the merits, as correctly and expeditiously as possible"). *See also Chamber of Commerce*, 897 F. Supp. at 585 (finding no harm to the public interest in the absence of "disruption to any long-standing, well-established government … policy.").

Conclusion

For each of the reasons set forth above, Plaintiffs ask that their Motion for Injunction Pending Appeal be granted.

Respectfully submitted,

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PROPOSED ORDER

Upon consideration of Plaintiffs' Motion for Injunction Pending Appeal, said Motion is hereby GRANTED.

_____ _____

Judge Amy Jackson Date