In a resounding victory for employers across the nation, the Fourth Circuit Court of Appeals affirmed a recent decision of the U.S. District Court for the District of South Carolina, striking down the National Labor Relations Board's (NLRB) controversial notice posting rule. The rule would have required most private sector employers to post in the workplace a notice informing employees of their rights under the National Labor Relations Act (NLRA). The Fourth Circuit held that the NLRB “exceeded its authority in promulgating the challenged rule.” Ogletree Deakins brought the lawsuit on behalf of the Chamber of Commerce of the United States and the South Carolina Chamber of Commerce. 

Chamber of Commerce of the United States v. NLRB, Fourth Circuit Court of Appeals, No. 12-1757 (June 14, 2013).

Stressing that the Board does not have authority to enforce the Act proactively, the Fourth Circuit agreed with the district court that “the rulemaking function provided for in the NLRA, by its express terms, only empowers the Board to carry out its statutorily defined reactive roles in addressing unfair labor practice [ULP] charges and conducting representation elections upon request.” Notably, the court stressed that “[a]lthough the Board is specifically empowered to ‘prevent’ unfair labor practices, the Board may not act until an unfair labor practice charge is filed alleging a violation of the Act.” In its thorough and well-reasoned opinion, the Fourth Circuit reviewed the NLRA’s plain language, structure, and legislative history, along with the history of subsequent labor legislation, in holding that the Board was not empowered to promulgate the rule. “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.”

Gray Geddie, Ogletree Deakins’ former managing shareholder and the attorney who argued the case, states: “We are extremely gratified with the decision issued by the Fourth Circuit and with the court’s recognition that the NLRB overstepped its authority. This is a strong rebuke to the Board, and hopefully the Board will take heed.”

The Fourth Circuit’s opinion is even more favorable for employers than the recent decision by the D.C. Circuit Court of Appeals, National Association of Manufacturers v. National Labor Relations Board (D.C. Cir. May 7, 2013), which struck down the notice posting rule on the grounds that it violated Section 8(c) of the NLRA, which gives employers the right to stay silent.

According to Ben Glass, a shareholder in Ogletree Deakins’ Charleston office and one of the attorneys who briefed the appeal, “This is an enormous win for the business community, and hopefully it will cause the NLRB to rethink its recent efforts to recast itself from a neutral arbiter of labor relations in America into an”
advocate for unionization. We are very pleased to have had the opportunity to partner with the Chamber of Commerce of the United States and the South Carolina Chamber of Commerce on this important work.”