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Supreme Court Invalidates NLRB Recess Appointments

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Last week the U.S. Supreme Court issued its highly anticipated decision in *Noel Canning v. NLRB*. Affirming the D.C. Circuit's January 2013 ruling in favor of beverage distributor Noel Canning, the Court held that President Obama's January 2012 recess appointments to the National Labor Relations Board were unconstitutional because the Congressional recess was of insufficient length.

The three recess appointments at issue—Members Sharon Block, Terence Flynn, and Richard Griffin—occurred on January 4, 2012, during an intra-session recess while the Senate was operating in *pro forma* sessions, meeting every third business day.

The Court first examined whether the "Recess Appointments Clause" in the U.S. Constitution, Art. II., §2, cl. 3, limits recess appointments to inter-session recesses (between enumerated sessions of Congress), or whether recess appointments are also permissible during intra-session recesses (short breaks during the midst of a session, like summer break). The Court determined that the constitutional text is ambiguous, but that a broad interpretation is supported by the purpose of recess appointments and historical evidence that Presidents made intra-session appointments over the past 150 years. The Court therefore concluded that a President may make recess appointments during both inter-session and intra-session recesses.

The Court next examined what it described as the "greater interpretive problem"—how long must a recess last to fall within the scope of the Recess Appointments Clause? Noting the Solicitor General's acknowledgement, grounded in The Adjournments Clause, that a three-day recess would be too short, the Court ruled that a recess must be more than three days to trigger the Recess Appointments Clause. The Court also noted that, historically, recess appointments have not been made during recesses shorter than 10 days. With that in mind, the Court determined that a "recess of more than 3 days but less than 10 days is presumptively too short" to trigger a recess appointment. Notably, 10 days is not the absolute threshold as the Court recognized particular circumstances could demand a recess appointment during a short break.

The Court also analyzed whether a President may fill a vacancy that existed prior to the recess, or only those vacancies coming into existence during the recess. Again finding the constitutional text ambiguous, the Court reviewed the purpose of the Recess Appointments Clause and historical practice and determined that a broader interpretation, allowing vacancies to be filled regardless of when they first arose, ensures that positions are filled.

Finally, the Court assessed whether Congress was actually in session during the January 2012 *pro forma* sessions. President Obama made the three recess appointments at issue on January 4, 2012, between the January 3 and January 6 *pro forma* sessions. At issue was whether these *pro forma* sessions, during which Congress had declared it would conduct no business, functionally elevated Congress out of recess. The Court declined to examine what the Senate actually did during its *pro forma* sessions and instead found that "the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business." Here, the Senate retained power to conduct business, despite its resolution that it would not do so. Thus, because the Senate said it was in session during the *pro forma* sessions, it was in session.

What Does This Mean for Employers?

In operation, the Court's holding is very narrow. President Obama's recess appointments in January 2012 were unconstitutional solely because the Congressional recess was of *insufficient length*. The Court's holding does not find other recess appointments to the Board, such as President Obama's March 27, 2010, appointment of Member Craig Becker, invalid. Member Becker was appointed during a two-week intra-session recess; accordingly, his appointment appears to survive under *Noel Canning*, but that will now be for the courts of appeal to decide.

While the composition of the current Board, which consists of five Senate-confirmed members as of August 4, 2013, will not be altered, *Noel Canning* nonetheless has significant implications. Under the Supreme Court's *New Process Steel* precedent, the Board must have a 3-member quorum to operate. In declaring the recess appointments of Members Block, Flynn and Griffin invalid, the decision means the Board lacked the required quorum during their tenure. In effect, therefore, *Noel Canning* invalidates decisions issued by the improperly constituted Board between January 9, 2012, and August 4, 2013.

Consequently, the Board will spend a tremendous amount of time looking backwards to revisit old decisions, at the cost of moving its current agenda forward. As explained in Littler's Workplace Policy Update, numerous controversial decisions were issued while Members Block, Flynn and Griffin served on the Board, and are now ripe for review by the current Board. Such decisions include *Piedmont Gardens* (Board reversed 34-year-old precedent exempting witness statements gathered from an employer's internal investigation from disclosure to unions under Section 8(a)(5) of the National Labor Relations Act); *Banner Health System* (employer must establish a specific legitimate business justification for requiring employees to maintain confidentiality during internal investigations of employee complaints); *Alan Ritchey, Inc.* (newly unionized employer has a duty to bargain with a union before imposing discretionary discipline on an employee even though a first collective bargaining agreement has not been negotiated); and *Supply Technologies, LLC* (nonunion employer's mandatory arbitration policy was invalid because it interfered with employees' Section 7 rights), among many others.

Noel Canning will not likely impact the Board's overall agenda. While the set aside cases are no longer precedent, they certainly signal the Board's future direction. A majority of the Board's current members share a philosophy similar to that of the majority that existed when the constitutionally infirm appointees were in office. At a minimum, employers are on notice of the Board's position and should proceed cautiously if considering acting contrary to precedent invalidated by *Noel Canning*.

Implications from the *Noel Canning* decision will continue to develop, including potential challenges to Regional Directors appointed while the Board lacked a quorum, and challenges to decisions issued by those Regional Directors. Indeed, employers and labor practitioners are apt to test the boundaries of the Court's *Noel Canning* decision over the days, weeks and months ahead.

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