

Circuit Court Ruling that NLRB Recess Appointments were Constitutionally Invalid Calls into Question Enforceability of 2012 NLRB Decisions

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On Friday, January 25, 2013, in *Noel Canning v. NLRB*, the D.C. Circuit Court of Appeals held that President Barack Obama's recess appointments to the National Labor Relations Board (NLRB) were constitutionally invalid, throwing into question the enforceability of all NLRB decisions issued by the Board since January 2012. The petitioner in the case argued that a February 8, 2012 NLRB order was invalid because three members of the five-member Board (Sharon Block, Terence F. Flynn and Richard F. Griffin) were improperly appointed as recess appointments. The NLRB argued that these recess appointments were valid pursuant to the Recess Appointment Clause of the Constitution which permits the president to "fill up all Vacancies that may happen during the Recess of the Senate."

The D.C. Circuit rejected the NLRB's argument, explaining the term "Recess" did not encompass breaks or adjournments which the Senate took while still in session. Rather, "Recess" referred to only those times when the Senate was not in session. Moreover, the D.C. Circuit held the Recess Appointment Clause only permits the president to fill vacancies that occur during a recess, and, in order to be valid, those vacancies must be filled during the same recess in which they arose. Thus, the court held that the president's purported recess appointments were invalid because, although they were made during a break on January 4, 2012, Congress had already begun a new session on January 3, 2012. Moreover, the vacancies on the Board did not arise during a recess.

Because the recess appointments were invalid, the NLRB lacked the required three-person quorum when it rendered the underlying NLRB decision. Thus, the D.C. Circuit vacated the NLRB order at issue.

The D.C. Circuit limited its holding to the NLRB order at issue in that case, and did not address the remaining opinions issued by the Board composed of the recess appointees. Arguably, however, the holding that the recess appointments were invalid throws into question the enforceability of all of the opinions rendered by the

Board on which those recess appointees sat. This includes the proliferation of pro-union NLRB decisions throughout 2012, such as:

- *Banner Health System*, holding that employers generally may not impose blanket rules prohibiting employees from discussing ongoing investigations.
- *Alan Ritchey, Inc.*, holding that employers must bargain with a union before imposing certain types of discretionary discipline upon employees.
- *WKYC-TV, Inc.*, holding that employers must continue dues check-off while bargaining over a new collective bargaining agreement.
- *Piedmont Gardens*, holding that witness statements are now subject to disclosure upon the union's request.
- *Latino Express, Inc.*, holding that employers must compensate employees for the adverse tax consequences of receiving lump-sum back pay awards.
- *Hispanics United of Buffalo, Inc.*, holding that a Facebook conversation between employees about a coworker's criticism of their job performance was concerted activity protected by the National Labor Relations Act.

The D.C. Circuit indicated that there was some disagreement among the other circuits regarding the president's authority under the Recess Appointment Clause. Thus, there is a good chance this issue will proceed to the Supreme Court. In the meantime, the enforceability of the decisions listed above, as well as future decisions issued by the Board unless or until existing or new members are appointed or confirmed, will remain uncertain.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:

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