LEGAL UPDATES PUBLISHED: JUNE 27, 2014

NLRB Recess Appointments Found Unlawful by Supreme Court

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The last year or so has not been a good one for the National Labor Relations Board (NLRB). Time and time again the courts have shot down the Board in a number of matters, including the Board's notice posting rule, its attempt to modify its own election rules for processing representation petitions, and *D.R. Horton* has been denied enforcement and otherwise ignored by every court of appeals that has reviewed the issue. And now, the Administration's recess appointments to the Board have been found to be unconstitutional by the U.S. Supreme Court in the case of *NLRB v. Noel Canning*.

Noel Canning involved three of President Obama's recess appointments to the NLRB in 2012. Noel Canning, a soft drink distributor, was engaged in negotiations with its employee union. After negotiations deteriorated, the union filed a complaint with the NLRB alleging Noel Canning committed an unfair labor practice in violation of the National Labor Relations Act. The NLRB panel affirmed a ruling against Noel Canning. Noel Canning appealed the NLRB's decision and won. The appellate court found the NLRB decision to be invalid because the panel issuing the decision consisted of an insufficient number of legally appointed panel members. Specifically, the appellate court found that President Obama appointed three of the NLRB panel members illegally.

On June 26, 2014, the Supreme Court unanimously decided that President Obama's appointments to the NLRB without Senate confirmation in 2012 were illegal. In 2012, the Senate convened in "pro forma" meetings every third business day to prevent President Obama from making recess appointments. President Obama argued that the "pro forma" meetings were a sham and invoked the Recess Appointments Clause, which allows presidents to fill vacancies that occur while Congress is in recess. However, the Court held that the Senate was not in formal recess when President Obama made the

appointments because the Senate announced that it was in session and, for the purpose of the Recess Appointments Clause, the Senate determines when it is in session.

Any one of these defeats for the NLRB in itself would likely not have much of an impact upon the Board and its policymaking. But given the cumulative effect of these adverse decisions, the NLRB will probably reassess. In other words, attempts to move forward on a number of these items may decelerate. The NLRB will need to be very judicious in how it moves forward due to the embarrassing nature of its many losses over the recent months. Moreover, its resources are going to be taxed in terms of reviewing the many cases issued by those members who were appointed via the recess appointment process.

What This Means to You

The number of representation petitions being filed and processed by the Board has dropped precipitously in recent years, so the Board does not have a great number of cases to push forth its agenda through its case decisions in that area. However, it can do so through its unfair labor practice proceedings. Some of the larger issues in play right now before the Board include modification of the rules regarding employee and union access to an employer's email system, redefinition of the joint employer doctrine, and expanding *Weingarten* to the non-union context once again. It is this process and procedure, where the majority of the changes will take place in terms of the NLRB's reach into the workplace.

Many of these issues will likely be fleshed out by the time Husch Blackwell's Labor and Employment seminar takes place later this year. In the interim, for more commentary on developments in labor law matters, please visit our blog at laborrelationslawinsider.com.