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Supreme Court Voids More Than 600 NLRB Decisions

Last week, in a 5 to 4 decision, the Supreme Court found that the National Labor Relations Board lacked the authority to issue orders absent an appropriate quorum of three Members. The Board operated with only two Members for more than three years when Congress refused to confirm replacements nominated by then-President George W. Bush, or current President Barack Obama.

Fortunately, the Board, well aware of concerns about the legitimacy of acting with only two of the statutory five members, limited its two Member decisions to the “garden variety” cases pending during this time frame. Hence, it is unlikely that the current NLRB will make any significant changes in policy when it revisits the cases as a result of this ruling. In a statement released last Thursday, the NLRB announced that approximately 75 cases challenging the actions of the two-Member Board are pending before the Supreme Court and Court of Appeal — all were stayed pending the Court’s decision in *New Process Steel*. It is expected these cases will now be remanded to the Board for review.

However, an estimated 500 decisions were not appealed and the fate of these cases is not clear. A strong argument exists that their further examination should be precluded because the parties failed to appeal, and instead chose to implement the Board's decision. Nevertheless, some are likely to attempt to have their orders voided, particularly in situations where the Board ruled on representation issues.

The Senate confirmation log-jam was alleviated temporarily by President Obama’s recess appointment of two new Members on April 7, 2010. The appointments are only valid until Congress adjourns in 2011. If the log-jam has not cleared by then, this ruling will preclude any Board action until at least a third member has been confirmed by the Senate.

New General Counsel. Although unrelated to this decision, Ron Meisburg, the Board's General Counsel for the past four and a half years, resigned effective at midnight June 20, 2010. Yesterday, President Obama appointed Lafe Solomon, a career Board Attorney as Acting General Counsel. Solomon has been with the Board since 1972 and has for the past ten years directed the Office of Representation Appeals. It is likely he will only hold the position on an interim basis as this is a key political appointment. Regardless of who Obama selects for the position, there is much speculation that the Board's new composition, in conjunction with the new General Counsel, will support efforts to implement certain aspects of the pending Employee Free Choice legislation by incorporating them into changes to the Board's administrative regulations.

Contact Information

If you have any questions about this or other employment matters, please contact your Husch Blackwell Sanders attorney.

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