

January 2013

Labor & Employment Bulletin

GROUNDBREAKING D.C. CIRCUIT DECISION: PRESIDENT OBAMA'S NLRB APPOINTMENTS EXCEEDED HIS CONSTITUTIONAL AUTHORITY

In a momentous decision, a three-judge panel of the U.S. Court of Appeals for the District of Columbia unanimously held that President Obama lacked the constitutional authority to appoint three members to the National Labor Relations Board (NLRB) while the Senate was on an intrasession break from December 20, 2011 through January 23, 2012.

Under the Supreme Court's decision in *New Process Steel*, the NLRB Board must have a quorum of three members to act. On January 4, 2012, while the Senate was in *pro forma* sessions meeting every three business days, President Obama filled three vacancies on the Board without approval by the Senate. In *Noel Canning v. NLRB*, petitioner argued, and the court agreed, that the Constitution's "Recess Appointments Clause" is limited to the "the Recess" period between sessions of the Senate when the Senate is, by definition, not in session. "The Recess" does not include *intrasession* breaks in the Senate's business while it is otherwise in a continuing session. The court also held that the President may only make recess appointments to fill vacancies that arise *during* the intersession recess. This interpretation conflicts with the prior understanding that the President can use the appointment power to fill a vacancy in existence during the Senate recess even though it did not arise at that time.

The impact of the *Noel Canning*

decision is yet to be seen, but could have far-reaching consequences. According to the court, President Obama's NLRB appointments were "invalid from their inception," meaning that hundreds of NLRB rulings during 2012 and the beginning of 2013 are at risk of being invalidated. Furthermore, the Board may lack the authority to issue new rulings or rules until President Obama validly appoints and the Senate confirms new NLRB Board members sufficient to form a quorum. As it stands, the NLRB can request an *en banc* rehearing of the D.C. Circuit decision or it can appeal the decision to the U.S. Supreme Court. If the ruling is upheld, it will drastically limit the Presidential appointment power for any administrative or executive agency in the future.

The court's ruling could also call into question the January 4, 2012 appointment of Richard Cordray to the Consumer Financial Protection Bureau. Cordray's appointment, which is unrelated to the NLRB decision but occurred on the same day, is the subject of a separate lawsuit.

Mark Gaston Pearce, Chairman of the NLRB, issued a statement on January 25, 2013 in response to the D.C. Circuit decision stating that "the Board respectfully disagrees with today's decision and believes that the President's position in the matter will ultimately be upheld. It should be noted that this order applies to only one specific case, *Noel Canning*, and

that similar questions have been raised in more than a dozen cases pending in other courts of appeals." Moreover, White House Press Secretary, Jay Carney, stated that the D.C. Circuit's decision is a "novel and unprecedented ruling" and that the decision has "no impact on the ongoing operations of the National Labor Relations Board." Taken together, these statements indicate that, at least for the moment, the NLRB expects to conduct business as usual.

The full D.C. Circuit decision can be found here. Meanwhile, Employers should proceed with caution. Benesch will continue to provide alerts on any further developments concerning this case. If your company was a party to a case before the NLRB and a decision was issued on or after January 4, 2012, you should immediately contact labor and employment counsel to discuss the impact of this decision.

Should you have any questions about this decision please contact a member of Benesch's Labor & Employment Practice Group

Maynard (Mike) A. Buck at 216.363.4694 or mbuck@beneschlaw.com

Joseph N. Gross at 216.363.4163 or jgross@beneschlaw.com

Patrick O. Peters at 216.363.4434 or ppeters@beneschlaw.com

Peter Kirsanow at 216.363.4481 or pkirsanow@beneschlaw.com

Steve Moss at 216.363.4675 or smoss@beneschlaw.com

As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.

UNITED STATES TREASURY DEPARTMENT CIRCULAR 230 DISCLOSURE: TO ENSURE COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE IRS, WE INFORM YOU THAT, UNLESS EXPRESSLY STATED OTHERWISE, ANY U.S. FEDERAL TAX ADVICE CONTAINED IN THIS COMMUNICATION (INCLUDING ANY ATTACHMENTS) IS NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (i) AVOIDING PENALTIES UNDER THE INTERNAL REVENUE CODE, OR (ii) PROMOTING, MARKETING OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN.