



U.S. Supreme Court Invalidates NLRB Recess Appointments, Leaving Many Recent Labor Decisions in Doubt

Client Advisories

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The United States Supreme Court on June 26 announced a decision with potentially wide-ranging consequences for employers. In [National Labor Relations Board v. Noel Canning](#), the Court decided that President Obama's recess appointments to the National Labor Relations Board ("NLRB") in 2012, without Senate confirmation, were illegal. In making those appointments, President Obama invoked the Constitution's provision giving him the power to make temporary appointments when the United States Senate is in recess. At that time, there were three vacancies on the five-member Board; without the recess appointments, the NLRB could not act, as it did not have a quorum. Although the Senate was not in a formal recess when President Obama made the appointments, the administration argued that the Senate's holiday break, during which it held brief sessions every three days, was effectively a recess, as it was intended solely to prevent seats on the NLRB from being filled. The Supreme Court unanimously rejected this argument, and essentially held that the Senate gets to determine when it is in recess.

The facts of the case, and the reason why it reached the Supreme Court, demonstrate the importance of this decision. The NLRB had found that Noel Canning, a Pepsi-Cola distributor, had unlawfully refused to execute a collective bargaining agreement with a labor union, and awarded the employees substantial back pay and a retroactive hourly wage increase. The distributor appealed that decision and argued that the NLRB lacked a quorum to make any decision because three of its five members - President Obama's recess appointments - were not properly appointed.

The Supreme Court's decision means that the NLRB's order directing Noel Canning to sign a collective bargaining agreement and pay damages is void. In addition, hundreds of other decisions rendered by the NLRB during the time when President Obama's temporary appointments served on the Board are also invalid. These include various controversial decisions, such as:

- A decision that an employer may not ask employees not to discuss matters related to an ongoing investigation with their co-workers
- Decisions invalidating employer confidentiality and social media policies, such as a decision that an employer unlawfully fired employees for critical Facebook posts
- A decision requiring an employer to provide a union with witness statements obtained by the employer during an investigation of employee misconduct

As a practical matter, the Supreme Court's decision will not stop the NLRB from operating, because the Board now consists of a full quorum of five validly appointed members, confirmed by the Senate. The open issue, which is not clear, is how the NLRB will deal with the hundreds of decisions which are now invalid, and if those now invalid decisions can simply be ratified by the present Board members without full review after appropriate briefing and arguments by the parties. Whatever action the NLRB takes is likely to lead to further challenges and litigation. On a broader level, the Supreme Court's decision makes it virtually impossible for the President to use recess appointments to fill vacancies without Senate approval.

If you have any questions about any NLRB decisions, and particularly if your business was involved in any proceeding before the NLRB during 2012-2013, please contact one of the attorneys in the **Labor and Employment Department** of Archer in Haddonfield, N.J., at (856) 795-2121, in Philadelphia, Pa., at (215) 963-3300, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, or in Wilmington, Del., at (302) 777-4350.

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