

NLRB Recess Appointments Ruled Invalid, But NLRB Chairman Declares Business as Usual

Over the past year, the National Labor Relations Board (NLRB) has issued a large number of significant decisions on a multitude of issues. During that time, the Board did so under the authority granted by President Obama's recess appointment of three NLRB members in January 2012. However, according to a recent ruling from the D.C. Circuit Court, those appointments were unconstitutional. Thus, all of the Board's decisions made since January 2012 are now invalid. See [Noel Canning v. NLRB, No. 12-1115](#).

Specifically, on January 25, 2013, the D.C. Circuit Court held that President Obama's January 4, 2012 recess appointments of Sharon Block, Terence F. Flynn and Richard E. Griffin were an unconstitutional exercise of presidential power. President Obama moved to appoint these new NLRB members while the Senate was away for the holiday break in January 2012. In its recent decision, the court held that the holiday break, during which *pro forma* sessions of Congress took place, were not a "recess" within the meaning of the Constitution and, therefore, the President's actions, going around the Appointments clause – which requires that the President's appointment of NLRB members be with the advice and consent of the Senate – were contrary to the "purpose of the Framers in the careful separation of powers structure."

Under the D.C. Circuit's decision, the NLRB is left with fewer members than are required to meet its quorum requirements, casting doubt on its ability to legally issue decisions following the Supreme Court's clarification in 2010 of the quorum requirement in [New Process Steel](#). Nevertheless, just hours after this decision was handed down, Mark Gaston Pearce, Chairman of the NLRB, stated that "the board has important work to do" and business would continue as usual. Chairman Pearce also stated that the D.C. Circuit's decision only applied to the specific case in which the court ruled. However, that interpretation appears to be highly suspect, as the D.C. Circuit issued orders in other pending cases involving NLRB appeals placing those cases on hold. As other circuit courts of appeal have held, albeit indirectly, that the recess appointments were constitutional, it seems extremely likely that, as in *New Process Steel*, the issue of whether the Board's decisions after January 4, 2012 are enforceable will be decided by the Supreme Court.

The uncertainty caused by the D.C. Circuit's decision – which is the only decision to date to directly address the constitutionality of the recess appointments – affects a number of a significant NLRB decisions from the past year. For example, the Board's 2012 rulings and guidance pertaining to social media policies are now disputable. See [Costco Wholesale Corp., 358 NLRB No. 106](#) (Sept. 7, 2012). Likewise, several December 2012 decisions related to union rights are now up in the air, including an obligation to bargain over pre-imposition of discipline and a union's right to witness statements prior to arbitration. See [Alan Ritchey, Inc., 359 NLRB No. 40](#) (December 14, 2012); [Stephens Media, LLC, d/b/a Hawaii Tribune-Herald, 359 NLRB No. 39](#) (December 14, 2012). For a more detailed review of NLRB decisions issued in recent month, see [A Review of The NLRB's Holiday Gift to Unions and Employees](#).

Because it appears that Supreme Court review is inevitable, employers are advised not to rely heavily on the D.C. Circuit Court decision, as the Supreme Court could side with the Seventh and Eleventh Circuits and uphold the recess appointments. Instead, employers should use caution, and would be wise to treat the NLRB decisions made in the past year as advisory opinions and consult counsel with any interpretive issues.

Contact

W. Michael Hanna
T +1 216 479 8699
mike.hanna@squiresanders.com

Susan M. DiMichele
T +1 614 365 2842
susan.dimichele@squiresanders.com

D. Lewis Clark
T +1 602 528 4065
lew.clark@squiresanders.com

David J. Millstone
T +1 216 479 8574
david.millstone@squiresanders.com

Michael Kelly
T +1 415 954 0375
michael.kelly@squiresanders.com

Daniel B. Pasternak
T +1 602 528 4187
daniel.pasternak@squiresanders.com