

Supreme Court Rules Recess Appointments of NLRB Members Unconstitutional

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June 27, 2014

On June 26, 2013, the U.S. Supreme Court held in *National Labor Relations Board v. Noel Canning* that President Obama's use of recess appointments to fill three vacancies on the National Labor Relations Board in January 2012 was unconstitutional. The ruling effectively calls into question hundreds of decisions issued by the Board between January 2012 and July 2013.

In *Noel Canning*, an employer challenged the validity of an unfavorable Board decision. At the time of the decision, three of the Board's five members had been appointed by the President on January 4, 2012, pursuant to the Recess Appointments Clause of the Constitution and, therefore, were not confirmed by the Senate. The employer argued that the recess appointments were not legally valid and, as a result, the Board did not have a required quorum of at least three members for its action to be binding. The Court of Appeals for the D.C. Circuit agreed and stuck down the Board's decision. (Our e-bulletin discussing the Court of Appeals' decision can be **found here**.)

Although the Court rejected the analysis employed by the Court of Appeals, it reached the same conclusion. The Court held that the three-day Senate recess during which the President made his recess appointments was simply too short to trigger his recess-appointment power. Recesses of less than ten days, the Court held, are presumptively too short for the President to invoke that power. As a result, the President's recess appointments to the Board were not valid and the Board did not have the necessary quorum to act.

By virtue of the *Noel Canning* ruling, many decisions issued by the Board between January 4, 2012 and July 31, 2013, are now invalid. (The Senate confirmed others to fill the positions occupied by recess-appointees at issue on July 31, 2013, giving the Board a quorum as of that date.) Several of the invalidated cases involve significant Board precedent, including Board decisions regarding an employer's obligation to honor dues checkoff arrangements after the expiration of a collective bargaining agreement, an employer's obligation to provide unions with witness statements related to employee discipline proceedings, and the lawfulness of workplace confidentiality rules and social media policies. It is expected that Board decision on appeal in court will be remanded to the Board. However, the *Noel Canning* decision does not guarantee that the Board will reverse its previous rulings. The Board will merely be required to reconsider the decisions and ultimately may reach the same conclusions, this time with the necessary quorum.

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