

## CLIENT ALERT: Supreme Court Invalidates President Obama's Recess Appointments to the National Labor Relations Board

On June 26, the United States Supreme Court ruled that three appointments by President Obama to the National Labor Relations Board ("NLRB") were invalid because the United States Senate was not in "recess" at the time the appointments were made. While the exact consequences of this ruling are not yet known, the decision could call into question a number of actions taken by the NLRB in the 2012-2013 time period.

The background of this case, *NLRB v. Noel Canning*, is as follows: Under the United States Constitution, appointment to certain offices – including appointments to the National Labor Relations Board – requires the confirmation of the United States Senate. However the Constitution also gives the President the right to unilaterally make "recess" appointments when the Senate is not in session. In *Noel Canning*, the issue before the Court centered on the meaning of this constitutional provision.

The NLRB is the federal agency charged with administering the National Labor Relations Act. Most of its activities involve the policing of elections in which employees determine whether they wish to be unionized, and resolving unfair labor practice claims under the NLRA. By statute the NLRB has five members, appointed by the President with the approval of the Senate. A quorum (three members) is necessary for the NLRB to conduct business.

In January 2012 the NLRB had only two sitting members and three vacancies. President Obama, having been frustrated in his attempt to achieve formal Senate confirmation of previous appointees, decided to use his Constitutional recess powers and appointed three members to the Board – Sharon Block, Terrence Flynn and Richard Griffin – on January 4, 2012. At that time, the Senate was holding informal *pro forma* sessions – at which no business was conducted – on Tuesday and Friday of each week.

After their appointment, the three new NLRB members began to participate in NLRB decisions. In one case, the NLRB found that employer Noel Canning, a Pepsi distributor, had violated the National Labor Relations Act by refusing to execute a contract it had reached with a labor union. Canning appealed, contending that the Senate was not in "recess" at the time the three appointments were made. Therefore, it claimed, the appointments were improper, there was no quorum of NLRB members, and the decision was invalid.

Canning's appeal eventually wound its way to the Supreme Court. The employer contended that (1) the President can only make recess appointments during the period of time *between* the (usually) two formal sessions of Congress; and (2) such appointments can only be made if the vacancies in question occurred *during* such a recess, not if they had occurred *prior* to the recess. On the other hand, the NLRB argued that the President can make *intrasession* appointments as well as long as there was a "recess" in the Senate proceedings. Further, the Board argued that the vacancies in question did not

have to “happen” during the recess but can be preexisting.

In the Court’s decision, all nine justices agreed that the three members were not validly appointed. However there was disagreement as to the reasoning. Five of the justices concluded that intrasession appointments are indeed valid under the recess clause, but in this particular case, the three day periods that the Senate was not in session each week in January 2012 was too short a period to be considered as “recess” allowing unilateral Presidential appointment. These justices declared that any period of less than ten days would presumptively not be considered a “recess”. The Court majority also ruled that vacancies can be filled whenever they occur and the President is not limited to filling only those vacancies that come into being during the recess.

The four remaining justices went further, contending that the President could make recess appointments only between each two year Senate session, and then only with respect to vacancies which arose between those sessions.

At this writing, the consequences of the Court’s decision are not clear. The current Board members were all properly confirmed by the Senate in August 2013. Their appointments are free from challenge, and therefore the period in controversy is limited to the January 2012 through August 2013 period. However, by some estimates, over 800 cases were decided by the NLRB during that period, and over 100 cases were under appeal at the time the *Canning* decision was issued. It is anticipated that many of these cases will be returned to the NLRB for reconsideration.

Further complicating the matter, a number of the cases decided by the NLRB during this period set precedent on important issues in labor law, and those precedents may have been relied upon in subsequent cases. It is an open question whether these precedents may now be relied upon by the NLRB, at least unless and until they are re-affirmed by the current NLRB.

Finally, these same NLRB members who were invalidly appointed in January 2012 were responsible for appointing a large number of subsidiary NLRB personnel, such as Regional Directors. Regional Directors are charged with making rulings on a wide variety of issues, many with respect to the conduct of union elections. It is possible that decisions made by these officials are subject to challenge as well.

Until these issues begin to be sorted out, it is recommended that employers review any interactions they may have had with the NLRB since January 2012, with an eye toward determining if any of those interactions involved decisions made by NLRB employees whose appointments may be called into question. If you have any questions in this regard, you should contact your Morgan, Brown & Joy attorney.

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