

Supreme Court Creates Headache for NLRB; Employers Likely to See Little Impact

The United States Supreme Court sided with the Senate against the President in a recent decision involving the composition of the National Labor Relations Board (NLRB). By holding that President Obama did not have the authority to appoint members to the NLRB during times when the Senate claimed it was in session but conducted no business, the Court invalidated several years' worth of NLRB decisions. While this will have some direct impact on employers with matters decided between January 2012 and August 2013, the Board is now at full strength and is likely to affirm most, if not all, of the major decisions made during that period. So for employers dealing with issues under the National Labor Relations Act (NLRA), not much has changed.

The NLRB administers the NLRA. It conducts union elections in the private sector, ensures that parties that are obligated to bargain collectively under the NLRA do so in good faith, and enforces certain employee rights under Section 7 of the NLRA. While the Board has always been somewhat political, it became much more so during the Obama Administration. Board members made public statements pushing a significantly pro-union agenda and the Board had several high profile controversial cases.

The Senate must confirm board members, and Republicans in the Senate were able to block votes on the President's nominees. By the end of 2011, the Board had only two members. Because the law requires three members for a valid quorum, the Board could not function. In December, 2011, most Senators left for the holidays, but adopted a resolution that it said kept the Senate in session through a series of pro forma sessions whereby one Senator would open and close a session each Tuesday and Friday until the full Senate returned.

The Constitution provides that if a vacancy for a post needing Senate confirmation arises during a senate recess, the President may make a "recess appointment." Frustrated that the NLRB would be without power to act, the President deemed one of the days between the pro forma sessions a "recess" and made "recess appointments" of three NLRB members. For the next 20 months, the NLRB decided cases with a composition of two senate-confirmed members and three "recess appointees."

One case involved a Pepsi canner and distributor. The NLRB found that Noel Canning had failed to bargain in good faith with the union representing its employees and ordered it to sign an agreement and make good on certain monetary losses. Noel Canning appealed the ruling, arguing that the

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NLRB was not properly composed because the “recess appointments” were not lawful. In a decision issued June 26, 2014, the Supreme Court agreed.

It held that the Senate was able to prevent a recess by holding periodic pro forma sessions and that the three days between such sessions was too short to trigger the Constitution’s recess appointment clause. Thus, the NLRB that decided the Noel Canning case was not properly constituted, rendering its decision void. By extension, all the decisions the Board made during this period were also void.

The immediate impact of the Court’s decision will be a large increase in the work of the current NLRB, as it revisits more than a year and a half worth of cases. Given the current composition of the Board, it is likely that the decisions in all or most of those cases will be the same as previously issued, but there could be some changes. For employers with cases that arose in that period, this could provide some short term advantages (or disadvantages), but for other employers, the decision will have little practical impact. The NLRB will continue to push an agenda that is somewhat more pro-union than in the past, with a focus on quicker union elections and extending NLRA protections to individuals in non-union workplaces. Employers, whether unionized or not, will need to remain mindful of the National Labor Relations Act and its various requirements.

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