U.S. SUPREME COURT RULES THAT RECESS APPOINTMENTS TO THE NLRB ARE UNCONSTITUTIONAL: NOEL CANNING – PART III

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On Thursday, June 26, 2014, the U.S. Supreme Court issued a much anticipated ruling in the *Noel Canning* case. President Obama's recess appointments to the National Labor Relations Board (NLRB) were found to be unconstitutional in the unanimous decision of the court. The court determined that it would not ignore the *pro forma* Senate sessions with "no business… transacted." In making the determination, the court noted that "when the appointments before us took place, the Senate was in the midst of a 3-day recess. Three days is too short a time to bring a recess within the scope of the [Recess Appointments] Clause." Accordingly, the court determined that "we conclude that the President lacked the power to make the recess appointments here at issue."

The court indicated that they "seek to interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation."

The court grappled with the question of the scope of the phrase "the recess of the Senate," and held that "[i]n our view, the phrase 'in recess' includes an intra-session recess of substantial length." However, the court noted that the "interpretive problem is determining how long a recess must be in order to fall within the Clause. Is a break of a week, or a day, or an hour too short to count as a 'recess'?" The court answered this question with two parameters: "If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. See Art. I, §5, cl.4. And a recess lasting less than 10 days is presumptively too short as well."

The court also interpreted the scope of the phrase "vacancies that may happen during the recess," and ruled that "[a]ll agree that the phrase applies to vacancies that initially occur during a recess." The court questioned whether it also applied to vacancies that "initially occurred before a recess and continue to exist during the recess." The court ruled that the phrase applies to both.

The court framed the third question around the "calculation of the length of the Senate's 'recess.'" The recess appointments were made between the January 3 and 6 *pro forma* Senate sessions. Disagreeing with arguments made by the solicitor general,

the court found that "the *pro forma* sessions count as sessions, not as periods of recess" and ruled that "the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here."

The majority opinion concludes that "[g]iven the answer to the last question before us, we conclude that the Recess Appointment Clause does not give the President the constitutional authority to make the appointments here at issue."

For employers, what does this ruling mean? Several hundred decisions rendered by the NLRB when its compliment included the recess appointments are invalid. The current full board of five members, confirmed by the Senate on July 30, 2013, will have to revisit these cases and determine if they wish to reissue prior decisions or if they will reevaluate the recess board's decisions. It is yet unclear whether the board will enforce numerous significant decisions, including (to name a few) *Hispanic United of Buffalo, Inc.*, 359 NLRB No. 37 (December 14, 2012) (social media case), *Sabo, Inc. d/b/a/ Hoodview Vending Co.*, 359 NLRB No. 36 (December 14, 2012) (broad definition of protected concerted activity), *Stephens Media, LLC, d/b/a Hawaii Tribune-Herald*, 359 NLRB No. 39 (December 14, 2012) and *Piedmont Gardens*, 359 NLRB No. 46 (December 15, 2012) (both cases regarding obligation to disclose of witness statements), *WKYC-TV, Inc.*, 359 NLRB No. 30 (December 12, 2012) (dues check-off), *United Nurses & Allied Professionals (Kent Hospital)*, 359 NLRB No. 42 (December 14, 2012) (reduces economic incentive to be a *Beck* objector), and *Alan Ritchey, Inc.*, 359 NLRB No. 40 (December 14, 2012) (discipline of unionized employees before a first contract has been reached). Moreover, for employers with current pending matters at the board, there may be delay in the processing of those cases while the board determines how to proceed on the invalidated cases.