

One Minute Memo®



Supreme Court Cans NLRB Recess Appointments

By John J. Toner and Joshua L. Ditelberg

The Supreme Court today issued its much anticipated decision in *NLRB v. Noel Canning*, regarding the President's authority to avoid the Senate's confirmation procedure by granting recess appointments to fill vacant positions. The *Noel Canning* decision specifically involved the legitimacy of the President's recess appointment of Terence Flynn, Sharon Block, and Richard Griffin to be Members of the National Labor Relations Board. A unanimous Court found that those appointments were beyond the President's appointments authority; and, therefore, unconstitutional.

As a result of the Court's decision, NLRB decisions in which Block, Griffin, or Flynn participated most likely will be invalidated. The current Board, which now has a full complement of Senate-confirmed Members, would need to—and presumably will—independently reconsider the outcomes of those cases. Given the present Democrat majority on the Board, it is likely that any such reconsiderations would be in line with the decisions of the majority Democrat "Recess Board." Consequently, the outcome of individual cases may not differ in most circumstances. The expected invalidation of the "Recess Board" cases may also open an argument to invalidate other, non "Recess Board" decisions whose holdings are based upon the flawed rulings.

In addition to the case decisions that now may be invalidated, any administrative actions in which Block, Flynn, or Griffin participated may also be invalid—including the appointments of Regional Directors and Administrative Law Judges. As a result, many decisions issued by these Regional Directors or Administrative Law Judges also may be invalid.

Institutionally, the *Noel Canning* decision will further burden an NLRB which already has a considerable backlog of pending cases and is devoting substantial efforts to issuing regulations regarding expedited union elections. Among the decisions that the NLRB will have to revisit are those involving highly controversial issues such as an employer's ability to issue reasonable rules regarding employee behavior at work or to limit access to its facilities by off-duty employees; an employer's obligation to continue dues deduction after expiration of the collective bargaining agreement; the duty to bargain discipline during first contract negotiations; confidentiality instructions to employees during employer investigations; and an employer's obligation to provide a union with documents previously considered confidential.

NLRB Chairman Mark Pearce issued the following statement after the issuance of *Noel Canning*: "The Supreme Court has today decided the *Noel Canning* case. We are analyzing the impact that the Court's decision has on Board cases in which the January 2012 recess appointees participated. Today, the National Labor Relations Board has a full contingent of five Senate-confirmed members who are prepared to fulfill our responsibility to enforce the National Labor Relations Act. The Agency is committed to resolving any cases affected by today's decision as expeditiously as possible."

The full fallout from this important decision will not be known for some time, and we will continue to monitor and advise you of ongoing developments. However, no matter how far the repercussions ultimately extend, the decision is a tremendous victory for employers.

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