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Of Counsel Carl S. Silverman

January 29, 2013

Re: The D.C. Circuit Voids the NLRB's "Recess" Appointments

## The Decision

Last Friday, January 25, 2013, the U.S. Court of Appeals for the D.C. Circuit ruled in *Noel Canning v. NLRB* that President Obama's "Recess Appointments" of three new National Labor Relations Board (NLRB) members in January 2012 were unconstitutional, and, consequently, that the NLRB has lacked any authority to act since that time. The Court also voided the NLRB's order in that case, reasoning that the Labor Board had no quorum.

## It's Impact

This important decision, which surely will be appealed to the U.S. Supreme Court, provides a temporary hold on the aggressive, pro-union agenda of the current NLRB. It also leaves the NLRB with only one properly-appointed member, which may well effectively prevent the Labor Board, going forward, from lawfully implementing such priorities of organized labor as expedited election rules - - unless and until a duly constituted quorum is in place.

Unless the U.S. Supreme Court were to reverse this decision, or another federal circuit court were to issue a contrary holding, it may also be argued that *all* NLRB decisions issued since January 4, 2012 should be invalidated on the same basis as that relied on in *Noel Canning*.

## Going Forward

- President Obama's one lawful appointee, NLRB Chairman Pearce, has sought to limit the impact of the *Noel Canning* decision to that particular case, while declaring that the currently-constituted NLRB will continue to issue decisions. Hopefully, the Chairman's position will be rejected by the courts that are called upon to consider this issue.
- Bottom line, while we do not know when the Constitutional challenge will be resolved, the Obama NLRB is here to stay for the next four years.

- Keep in mind that the *Noel Canning* decision likely will not deter the NLRB's General Counsel from continuing to issue a host of controversial interpretations that restrict management's historical prerogatives in a variety of contexts, as we have reported in the past.

- Accordingly, employers would be well advised to carefully monitor and consider the NLRB's General Counsel's positions in developing employee handbooks, employment agreements, and policies in such "targeted" areas of enforcement as employment-at-will implementation, regulation of social media, restrictions on sharing salary information, confidentiality, non-disclosure, public criticism of the employer as a protected activity, and limits on employer non-disparagement prohibitions, among others.

Feel free to contact us if further guidance would be useful regarding pending cases, policy development, or otherwise.