



Supreme Court Invalidates President Obama's NLRB Recess Appointments

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On June 26, 2014, the Supreme Court decided *National Labor Relations Board v. Noel Canning*, holding that President Barack Obama's appointment of three members to the National Labor Relations Board ("NLRB" or "Board") was unconstitutional.

Previously, the NLRB found that employer Noel Canning unlawfully refused to reduce to writing and sign a collective-bargaining agreement the terms of which it had orally agreed to. The NLRB ordered Noel Canning to sign that agreement and to make its employees "whole for any losses." Noel Canning asked the Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") to set aside the Board's decision because it believed that three of the five NLRB members who had issued the Board's decision were invalidly appointed, thereby leaving the Board without its required quorum of three lawfully appointed members necessary for it to make decisions.

President Obama nominated the three Board members in question in 2011. Generally, Presidential appointments of Board members require approval of the Senate. However, on January 4, 2012, while the nominations were pending in the Senate awaiting confirmation, President Obama invoked the Recess Appointments Clause of the Constitution and appointed all three nominees to the Board. The Recess Appointments Clause gives the President the power "to fill up all Vacancies that may happen during the Recess of the Senate." The appointments were made between the January 3 and January 6 *pro forma* sessions of the Senate, which were sessions the Senate convened for a few minutes but during which it transacted no business.

The Supreme Court agreed with the D.C. Circuit's conclusion that these appointments fell outside the scope of the Recess Appointments Clause and that the President had exceeded his constitutional authority. The Supreme Court held that the Senate's three day *pro forma* sessions were not long enough to trigger the President's recess appointment power and thus, the President lacked the authority to make the appointments.

The Supreme Court's ruling invalidates several important rulings by the NLRB in which the three unlawfully appointed board members participated. These rulings are in the hundreds and involve among other issues, employee use of social media, at-will employment provisions, and confidentiality of employer investigations into workplace incidents.

In response to the Supreme Court's decision, NLRB Chairman Mark Gaston Pearce issued a statement that the NLRB is "analyzing the impact that the Court's decision has on Board cases in which the January 2012 recess appointees participated." Pearce also indicated that currently, the NLRB "has a full contingent of five Senate-confirmed members who are prepared to fulfill [their] responsibility to enforce the National Labor Relations Act" and that the "Agency is





committed to resolving any cases affected by today's decision as expeditiously as possible." if an employment arbitration agreement causes employees to believe that they are precluded from filing a charge with the Board.

Reminder! California Minimum Wage Increases on July 1, 2014

Effective July 1, 2014, California employers must pay their employees a \$9.00 per hour minimum wage. This increase is the result of Governor Jerry Brown signing into law a bill in 2013 that raised the current minimum wage rate to \$9.00 per hour on July 1, 2014, and to \$10.00 per hour on January 1, 2016.

All non-exempt California employees must be paid the new increased minimum wage. The minimum wage increase also affects exempt "administrative," "executive," and "professional" employees because their minimum salary requirements are tied to the state minimum wage. To maintain their exemptions, these employees must be paid a monthly salary that is at least equivalent to two times the state minimum wage (i.e., at least \$37,440 per year). Importantly, employers should also insure that they are posting a current minimum wage order, reflecting the new minimum wage.

ASK MSK

Q: What is the impact of *Noel Canning* on Board decisions issued since President Obama's January 4, 2012 "recess" appointments?

A: Because the Supreme Court affirmed the D.C. Circuit's ruling, all of the NLRB's decisions from January 4, 2012 to July 30, 2013 are invalid. However, since July 30, 2013, the NLRB has consisted of five members who all received Senate confirmations after being nominated by the President. The current Board could potentially re-visit the cases its predecessor members decided during the period from January 4, 2012 to July 30, 2013.

Q: What are some of the other consequences arising from *Noel Canning*?

A: Among others, the decision in *Noel Canning* calls into question the validity of the appointments of Regional Directors made during the period from January 4, 2012 to July 30, 2013, which appointments must be approved by the Board. Also, actions taken by the Board's General Counsel through the unlawfully appointed Board (such as the authority to seek injunctions under Section 10(j) of the National Labor Relations Act) also may be challenged.