

Supreme Court Decision Impacts Many 2012-13 NLRB Case Decisions

On June 26, 2014, the U.S. Supreme Court decided *Noel Canning v. NLRB* and found invalid the January, 2012 recess appointments of three members to the NLRB. The decision effectively renders invalid the National Labor Relations Board (NLRB) decisions handed down between January 4, 2012 and July 31, 2013. While these decisions will be revisited or challenged upon a party's request, the time period required for the NLRB to handle all pending matters is likely to lengthen due to the necessity to review many of these invalidated decisions. It remains important for all employers to keep abreast of the many NLRB and court decisions that will follow.

Overview of the NLRB

The NLRB enforces the National Labor Relations Act ("NLRA"). The NLRA was enacted in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain employment practices. Section 7 of the NLRA provides that all employees (not just employees of unionized employers) have the right to self-organization; to form, join or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Under Section 8(a)(1) of the NLRA, it is an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act. The NLRB enforces Sections 7 and 8 of the Act to prohibit employers from restricting employees' ability to discuss the terms and conditions of their employment, even if they are not in a union.

The Supreme Court Opinion

The Court's *NLRB v. Canning* opinion addressed the validity of President Obama's three appointments to the NLRB during periods in which the Obama Administration contended the U.S. Senate was in recess. The U.S. Constitution requires the Senate to consent to presidential nominations for executive and judicial posts. However, the Constitution permits the President to fill vacancies without the Senate's consent while it is in recess. In January 2012, the Senate was in session every Tuesday and Friday of each week without transacting any business. On a Wednesday in which the Senate was not in session, President Obama appointed three nominees to the NLRB without Senate confirmation. The Obama Administration contended that the appointments were proper because the Senate was actually in recess.

After the recess appointment of the three members, the NLRB began hearing cases and issuing decisions. Noel Canning subsequently challenged a February, 2012 NLRB decision requiring it to execute a collective bargaining agreement with a labor union. Specifically, the employer argued that the NLRB lacked a quorum to make a decision in its case because three of the Board's members were not appointed during an actual Congressional recess.

On appeal, the Supreme Court agreed with Noel Canning in its 5-4 decision. It found the Senate was in session in January 2012 when it was open twice a week and no business was conducted. Therefore, the three NLRB appointments were not proper recess appointments and the more than 700 published and unpublished decisions handed down by the NLRB when it lacked a proper quorum may now be challenged as void.

In response to the Supreme Court's decision, NLRB Chairman Mark Gaston Pearce issued a statement that the NLRB currently has five Senate-confirmed members and that it is "committed to resolving any cases affected" by the ruling. While the current Board may rule similarly to the invalidated prior Board in some or even many cases, the opportunity to revisit and challenge particularly negative rulings for employers is a positive development.

Action for Healthcare Employers

Employers will benefit from keeping a close eye on the NLRB's and appellate courts' decisions in the aftermath of the Noel Canning decision. It is premature to revise policies but future court decisions may create such opportunities.

Some of the important NLRB cases that now are subject to reconsideration include Banner Estrella Medical Center (striking down the Hospital's rule or practice of prohibiting employees from discussing an ongoing investigation); Costco Wholesale Corp. (holding unlawful a social media policy that prohibited statements posted electronically that damaged the company, defamed any individual, or violated company policies), Knauz BMW (finding unenforceable the social media policy which prohibited disrespectful conduct or language which injures the image or reputation of the company); J.W. Marriott Los Angeles at L.A. (invalidating the employer's rule that off-duty employees could not access interior areas of the property without managerial approval); and Flex Frac Logistics, LLC (determining confidentiality agreement was overbroad because it prohibited employees from disclosing personnel information and documents to persons outside the organization).

If you have questions or need assistance regarding compliance with NLRB guidance and other employment laws, please contact Kimberly Daniel or Jonathan Sumrell at (866) 967-9604, kdaniel@hdjn.com, or jsumrell@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website, www.hdjn.com.

The information contained in this advisory is for general educational purposes only. It is presented with the understanding that neither the author nor Hancock, Daniel, Johnson & Nagle, PC, is offering any legal or other professional services. Since the law in many areas is complex and can change rapidly, this information may not apply to a given factual situation and can become outdated. Individuals desiring legal advice should consult legal counsel for up-to-date and fact-specific advice. Under no circumstances will the author or Hancock, Daniel, Johnson & Nagle, PC be liable for any direct, indirect, or consequential damages resulting from the use of this material.

Visit us on the web at www.hdjn.com or call 866.967.9604

Richmond, VA
Fairfax, VA
Virginia Beach, VA

Harrisonburg, VA
Columbia, SC

Franklin, TN
Johnson City TN
Lewisburg, WV

