

Reproduced with permission from BNA's Health Law Reporter, 23 HLR 903, 7/10/14. Copyright © 2014 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Unfair Labor Practices

Justices Reject NLRB Recess Appointments; Significant Health Care Decisions in Limbo

The U.S. Supreme Court's June 26 decision that President Obama lacked the authority to make recess appointments to the National Labor Relations Board in January 2012 undermines the validity of hundreds of board decisions, rules, and other actions affecting health-care entities, attorneys told Bloomberg BNA (*NLRB v. Noel Canning*, 2014 BL 177533, U.S., No. 12-1281, 6/26/14).

The ruling is especially significant for health-care employers because unions are active in the labor intensive health-care sector and a number of the NLRB decisions affected by the high court's ruling involved health-care providers (22 HLR 203, 2/7/13).

Although the exact impact of the decision on the NLRB, employers, unions and employees remains to be seen, the board is faced with resolving existing and future cases that may arise out of now invalid actions, including some of the most important and controversial rulings the board made in 2012 and 2013, attorneys said.

The White House's ability to push through health-care agency nominees also could be compromised in the future if Republicans win control of the Senate in November, they added.

Holding that the president could not make "recess" appointments when the Senate was holding pro forma sessions, the high court clarified some ground rules for future recess appointments and made clear what many labor attorneys previously said they suspected: that myriad decisions and rules issued by the board between Jan. 4, 2012, and Aug. 5, 2013, are subject to challenge.

Decisions Invalidated. Patrick J. Hoban, with Zashin & Rich, Cleveland, said that approximately 331 NLRB decisions were rendered invalid by the Supreme Court's ruling. In addition, "to the extent that affirmation of *Noel Canning* undermines the legitimacy of former Member Craig Becker's appointment, it could be used as a basis for vacating another 109 NLRB decisions dating back to Aug. 28, 2011," he added.

"Some things after the Court's decision are certain: the NLRB will not be able to obtain enforcement of decisions issued by the unconstitutionally constituted NLRB; cases pending in federal courts regarding enforcement of NLRB decisions rendered during former Member Becker's recess appointment are subject to challenge based on *Noel Canning*; and the NLRB and federal courts have begun dismissing enforcement

actions/vacating NLRB decisions in light of the decision," Hoban said.

Appointments Violated Constitution. In a unanimous judgment, the high court affirmed a ruling of the U.S. Court of Appeals for the District of Columbia Circuit that an NLRB order was invalid. The board lacked a quorum because three of its five members were improperly appointed by Obama, the Supreme Court said, agreeing with the appeals court.

However, the high court divided 5-4 on important questions about the power of Obama and future presidents to make recess appointments to positions that normally require the advice and consent of the Senate.

"Many NLRB decisions impacted by the Supreme Court's ruling involve health-care industry employers or have important implications for them."

PATRICK J. HOBAN, WITH ZASHIN & RICH, CLEVELAND

Writing for the majority, Justice Stephen G. Breyer said the president may make appointments without Senate confirmation during recesses that occur either during or outside of Senate sessions, and is not limited to filling vacancies that come into being during a recess. But the president cannot act during Senate recesses of less than three days, and "presumptively" cannot make a recess appointment during a recess of less than 10 days, the court said.

Justices Anthony M. Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan joined in the majority opinion.

Justice Antonin Scalia, joined by Chief Justice John G. Roberts, and Justices Clarence Thomas and Samuel A. Alito, concurred in the judgment, but wrote separately and disagreed with much of the majority's reasoning.

Scalia agreed the 2012 NLRB appointments were improperly made because the Senate was actually in session, but argued that the U.S. Constitution only gives the president the power to act without Senate confirmation during recesses that occur between sessions of the Senate, not during intrasession recesses.

The concurring opinion also agreed with the D.C. Circuit that the recess appointment power only applies to vacancies that arise during a Senate recess, and does

not allow the White House to act during a recess on a vacancy that existed before the recess even began.

Vacancies Left Board Without Quorum. Obama made the appointments to fill vacancies on the board that would have left the NLRB without a quorum to decide cases.

Becker, a Democrat, was given a recess appointment as a board member in 2010. Becker's recess appointment expired Jan. 3, 2012, at the formal end of the first session of the 112th Congress.

The Supreme Court held in 2010 in *New Process Steel LP v. NLRB*, No. 08-1457, 2010 BL 136207 (U.S. June 17, 2010), that the authority of the five-seat board cannot be exercised by a panel with fewer than three members.

Due to two vacant seats on the board, Becker's departure left the NLRB with only two members who lacked authority to decide cases under *New Process Steel*.

On Jan. 4, 2012, Obama announced recess appointments of Democrats Sharon Block and Richard F. Griffin and Republican Terence F. Flynn to serve on the board. Obama had nominated Flynn in January 2011, and nominated Block and Griffin on Dec. 15, 2011, but the Senate had not acted on the nominations.

The Senate had been holding pro forma sessions every three days for weeks before the president's action, and Republicans contended that the Senate was not in recess when the appointments were made.

D.C. Circuit Found Appointments Invalid. In 2013, a three-judge panel of the D.C. Circuit found that an NLRB order against Yakima, Wash., bottler Noel Canning would otherwise have been enforceable, but the president's recess appointments were unconstitutional (705 F.3d 490, 2013 BL 20942 (D.C. Cir. 2013)).

The NLRB asked the court to review the appeals court's reasoning on recesses and on the occurrence of a vacancy.

Noel Canning asked the court to consider and resolve a third issue—whether the president's recess appointment power may be exercised when the Senate is convening every three days in pro forma sessions as it was in early 2012. The court agreed to consider the additional issue (22 HLR 977, 6/27/13).

The high court heard oral argument in the case in January (23 HLR 99, 1/16/14).

Fallout Predicted. Attorneys who spoke to Bloomberg BNA said that, while the specific implications of the high court's decision were uncertain, there was no doubt the impact will be significant. They noted that the board could—with the current, properly appointed board—reissue many of the affected decisions and rules, but that it was too soon to predict the full dimensions of the fallout.

NLRB Chairman Mark Gaston Pearce said in a statement the board is “analyzing the impact that the Court's decision has on Board cases in which the January 2012 recess appointees participated.”

Pearce noted that the board now has “a full contingent of five Senate-confirmed members who are prepared to fulfill our responsibility to enforce the National Labor Relations Act.” The NLRB chairman said the board intends to resolve any cases affected by the *Noel Canning* decision “as expeditiously as possible.”

Charles I. Cohen, senior counsel in Morgan Lewis & Bockius in Washington, confirmed that about 300 pub-

lished NLRB decisions, as well as approximately 500 unpublished decisions, that were decided by the board between January 2012 and August 2013 depended on the votes of recess appointees.

In addition, Cohen noted, there are more than 100 cases pending in federal appellate courts, where the quorum issue was raised. Litigants in some of those cases may no longer have an interest in having them considered by the newly constituted five-member NLRB, but many will want to revisit the cases, and the board will allow them to do so, Cohen said.

Past Is Prologue? The NLRB weathered a wave of cases returning to the board after the Supreme Court held in *New Process Steel* that the agency could not decide cases with fewer than three members on a panel, but Cohen said the situation after the *Noel Canning* decision is more serious.

Cohen said the “universe” of cases that could return to the board is much larger this time, and the cases have different characteristics. The board that decided cases from January 2012 to mid-2013 “was not shy” about addressing important and sometimes controversial cases, Cohen said, so some of the parties who litigated those cases are more likely to be interested in taking their cases back to the board in hopes of obtaining different outcomes.

Scott J. Witlin, a partner in Barnes & Thornburg, Los Angeles, told Bloomberg BNA that any party that lost a case at the board during the period when the 2012 recess appointees served may want a chance to have the case reconsidered. Witlin said the NLRB was seen as “heavily partisan” during that period, particularly when the resignation of Republican member Flynn left the board for a time with a 3-1 Democratic majority.

While the board issued some significant and controversial decisions in 2012 and 2013, returning the same cases to a board that now has a 3-2 Democratic majority makes “major policy shifts unlikely,” Witlin said. Nevertheless, he said, many parties in NLRB cases may conclude that a future change in board composition, or developments in the courts, will make another effort before the NLRB worthwhile.

Future Impacts. Sources told Bloomberg BNA that the Supreme Court's decision could also limit the White House's ability to fill health-care agency vacancies if Republicans gain control of the Senate.

“Any employer in an industry that is heavily regulated—which certainly includes the health-care industry—is well advised to keep a close eye on administrative appointments and use its industry organizations to register its concerns about potential candidates,” Hoban said.

“It also is a virtual certainty that decisions/authority of federal officers—potentially including federal judges—for whom the President made a recess appointment within or close to the parameters set forth by the Supreme Court in *Noel Canning* was unconstitutional, will be subject to challenge in federal court,” Hoban said.

The decision isn't likely to affect how Congress operates in the coming months, because Obama appointees can be confirmed by a simple majority in the Democratic-controlled Senate. Should Republicans take control of the chamber after the midterm election, however, the ruling gives them a blueprint for shutting down any nominations that they don't like.

Health-Care NLRB Cases Impacted by Noel Canning Decision.

“Many NLRB decisions impacted by the Supreme Court’s ruling involve health-care industry employers or have important implications for them,” said Patrick J. Hoban, with Zashin & Rich, Cleveland. The first four are at issue only if former Member Becker’s appointment is called into question, Hoban added.

- *Grane Healthcare Co.*, 357 NLRB No. 123 (Nov. 30, 2011) (private employer successorship to public employer bargaining obligations);
- *Avanti Health Systems*, 357 NLRB No. 129 (Dec. 12, 2011) (successorship regarding the purchase of a community hospital);
- *Fremont Rideout Health Group*, 357 NLRB No. 158 (Dec. 30, 2011) (employer no-access, solicitation and distribution policies);
- *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012) (mandatory arbitration programs, class action waivers);
- *Northfield Urgent Care*, 358 NLRB No. 17 (March 15, 2012) (restriction of employee communications);
- *El Paso Healthcare Center*, 358 NLRB No. 54 (June 15, 2012) (post-certification Weingarten rights);
- *Quality Health Services of Puerto Rico*, 358 NLRB No. 89 (July 25, 2012) (subcontracting bargaining unit work);
- *Costco Wholesale Corp.*, 358 NLRB No. 106 (Sept. 7, 2012) (employer policy that prohibits employees from making statements on social media that could damage the company or other employees’ reputations unlawful);
- *USC University Hospital*, 358 NLRB No. 132 (Sept. 17, 2012) (unilateral implementation of employee bonuses);
- *Knauz BMW*, 358 NLRB No. 164 (Sept. 28, 2012) (employer policy proscribing employee messages and communications potentially critical of the company deemed unlawful);
- *The Finley Hospital*, 359 NLRB No. 9 (Sept. 28, 2012) (continuation of annual pay increases after contract expiration);
- *WKYC-TV, Inc.*, 359 NLRB No. 30 (Dec. 12, 2012) (contractual dues deduction provisions continue after the expiration of a collective bargaining agreement);
- *Alan Ritchey, Inc.*, 359 N.L.R.B. No. 40 (Dec. 14, 2012) (employers must give notice and offer to bargain before enforcing discretionary discipline on employees of a newly-certified union);
- *Supply Technologies, LLC*, 359 N.L.R.B. No. 38 (Dec. 14, 2012) (mandatory dispute resolution program that does not expressly state that employees retain the right to file NLRB charges unlawful);
- *Piedmont Gardens*, 359 NLRB No. 46 (Dec. 15, 2012) (employer blanket policies protecting confidential employee investigation statements unlawful);
- *JAG Healthcare, Inc.*, 359 NLRB No. 88 (March 28, 2013) (successorship);
- *Gaylord Hospital*, 359 NLRB No. 143 (June 26, 2013) (protected concerted activity in a non-union facility); and
- *Trinity Continuing Care Services*, 359 NLRB No. 162 (July 10, 2013) (unit managers are not statutory supervisors).

Democrats have a slim 53-member majority in the Senate. Out of 36 Senate seats up for grabs in November, 21 belong to that party’s members, while the remaining 15 are held by Republicans.

BY LAWRENCE E. DUBÉ, CHRIS OPFER, CHERYL BOLEN,
AND PEYTON M. STURGES

To contact the reporters on this story: Lawrence E. Dubé in Washington at ldube@bna.com, Chris Opfer in Washington at copfer@bna.com, Cheryl Bolen in Wash-

ington at cbolen@bna.com, and Peyton M. Sturges in Washington at psturges@bna.com

To contact the editor responsible for this story: Barbara Yuill in Washington at byuill@bna.com

Text of the opinion is available at http://www.bloomberglaw.com/public/document/NLRB_v_Noel_Canning_No_121281_US_June_26_2014_Court_Opinion.