JONES DAY

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NLRB PROCEEDINGS IN THE WAKE OF *NOEL CANNING*

On January 25, 2013, lawyers for Jones Day representing the Coalition for a Democratic Workplace and the U.S. Chamber of Commerce, and arguing on behalf of the Noel Canning Corporation, won a landmark victory in *Noel Canning v. NLRB*, a lawsuit challenging the authority of the National Labor Relations Board ("NLRB" or "Board") in the U.S. Court of Appeals for the D.C. Circuit. In *Noel Canning*, the Court of Appeals ruled that the three "recess" appointments made by President Obama to the NLRB on January 4, 2012, were "invalid from their inception" because the President exceeded the scope of his authority under the Recess Appointments Clause. The court's holding was supported by two grounds, both of which have broad implications. The court held that recess appointments may be made only during the recess between each Session of Congress—which happens, at most, only once per year—rather than breaks occurring during each Session of Congress. In other words, appointments may be made only during "intersession" recesses. The court further held that recess appointments can be made to fill only those positions that become vacant during the recess, such that the President cannot make recess appointments to fill preexisting or longstanding vacancies.

Under the D.C. Circuit's ruling, the Board has not had a proper quorum since January 4, 2012. Nevertheless, in a press statement issued on the date of the decision, NLRB Chairman Mark Pearce indicated that the Board will continue to operate with recess appointees Sharon Block and Richard Griffin despite the ruling of the Court of Appeals. Indeed, Pearce asserted that "The Board respectfully disagrees with today's decision and believes that the President's position in the matter will ultimately be upheld. It should be noted that this order applies to only one specific case, *Noel Canning*, and that similar questions have been raised in more than a dozen cases pending in other courts of appeals." Moreover, it is unclear what steps the Obama administration will take in response to the D.C. Circuit's decision. In a press conference on January 25, White House Press Secretary Jay Carney indicated that they are prepared to be aggressive.

At the present time, it appears that the NLRB and the Obama administration intend to continue litigating the issue of the recess appointments. The Constitutionality of the recess appointments is currently at issue in more than a dozen cases pending in other courts. Further, the NLRB may seek additional

review of the *Noel Canning* decision. According to D.C. Circuit rules, the Board may file a petition for panel rehearing or rehearing *en banc* within 45 days of the decision. The Board will have 90 days to seek certiorari before the Supreme Court, but that deadline may be extended by 60 days with the court's permission.

If the *Noel Canning* ruling is upheld, the impact of the court's ruling will be to deprive the Board of the quorum of three validly appointed members necessary to conduct official business, as required by the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). In the absence of a quorum, the NLRB may not take any official action, including promulgating new regulations, engaging in enforcement proceedings, or issuing orders.

In the meantime, employers involved in NLRB cases should explore their legal options in light of the *Noel Canning* decision.

- Employers involved in any case where the Board has issued an adverse decision without a proper quorum should consider filing a petition for review in the D.C. Circuit. Any decision of the NLRB can be appealed to the D.C. Circuit; however, the Board may petition for enforcement in any circuit where an alleged unfair labor practice occurred, or where an employer resides or transacts business. Because other circuits may not reach an equally favorable conclusion on the recess-appointment issue, employers should consider promptly filing a petition for review in the D.C. Circuit.
- In any Board-related matter already pending in a circuit court of appeals, the issue of the lack of a Board quorum could be raised in a 28(j) letter arguing that the court lacks jurisdiction to enforce a Board order issued without a proper quorum because there is no valid order to enforce. As the D.C. Circuit held in *Noel Canning*, aggrieved parties should be able to raise this issue in court even if they did not raise it before the Board.
- Employers should consider taking action to preserve the issue of the Constitutionality of the NLRB recess appointments in cases pending before the Agency. In any appeal to the Board from an adverse decision of an Administrative Law Judge or Regional Director, employers may want to raise the issue of the lack of a quorum in their appeals or exceptions filed with the Board. If initial briefing has already been completed, the issue could be raised in a supplemental pleading.
- In unfair labor practice charge cases and petitions pending at the regional level, the issue of the lack of a Board quorum can be raised in position statements or briefs filed with regional directors.
- In cases where a complaint has been issued, the absence of a Board quorum can be raised in the answer to the regional director's complaint. If an answer has already been filed, the employer may want to file a supplemental answer. This issue should not be time-barred, because it raises a jurisdictional defect in the proceeding.

Another potential issue raised by the D.C. Circuit's *Noel Canning* decision is the disposition of cases decided between August 27, 2011 and January 3, 2012. During this time period, the Board was operating with a complement of three members, one of which was recess appointee Craig Becker. The logic of the *Noel Canning* decision indicates that Member Becker's recess appointment was also invalid. Accordingly, Board decisions after August 27, 2011 may also be subject to being set aside. This issue is currently being litigated in cases pending before the D.C. Circuit and the Fifth Circuit Court of Appeals and could potentially be raised in other pending cases.

Finally, the court's decision in *Noel Canning* also raises issues as to actions taken by Boards where a proper quorum was not present with respect to appointments of Regional Directors and delegations of Board authority to its General Counsel. The latter issue may be particularly important with respect to Section 10(j) injunction actions filed by the Board's Acting General Counsel, as the AGC may not have authority to pursue injunctive relief on behalf of the Agency.

This *Commentary* does not constitute legal advice but provides practical guidance for employers who have pending or impending cases involving the NLRB in the wake of the *Noel Canning* case. It addresses only some basic, initial steps that employers should consider taking, on the understanding that there are many more complicated questions that will have to be resolved on a longer time horizon.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Noel Francisco
Washington
+1.202.879.5485
njfrancisco@jonesday.com

E. Michael Rossman
Columbus
+1.614.281.3866
emrossman@jonesday.com

Willis J. Goldsmith
New York
+1.212.326.3649
wgoldsmith@jonesday.com

Robert L. Ford
San Francisco
+1.415.875.5740
rlford@jonesday.com

Jessica Kastin
New York
+1.212.326.3923
jkastin@jonesday.com

James S. Urban
Pittsburgh
+1.412.394.7906
jsurban@jonesday.com

Patricia A. Dunn
Washington
+1.202.879.5425
pdunn@jonesday.com

F. Curt Kirschner, Jr.
San Francisco
+1.415.875.5769
ckirschner@jonesday.com

Doreen S. Davis
New York
+1.212.326.3833
ddavis@jonesday.com

George S. Howard, Jr.
San Diego
+1.858.314.1166
gshoward@jonesday.com

Brian W. Easley
Chicago
+1.312.269.4230
beasley@jonesday.com

G. Roger King
Columbus
+1.614.281.3874
rking@jonesday.com

Stanley Weiner
Cleveland
+1.216.586.7763
sweiner@jonesday.com

Lawrence DiNardo
Chicago
+1.312.269.4306
lcdinardo@jonesday.com