JONES DAY

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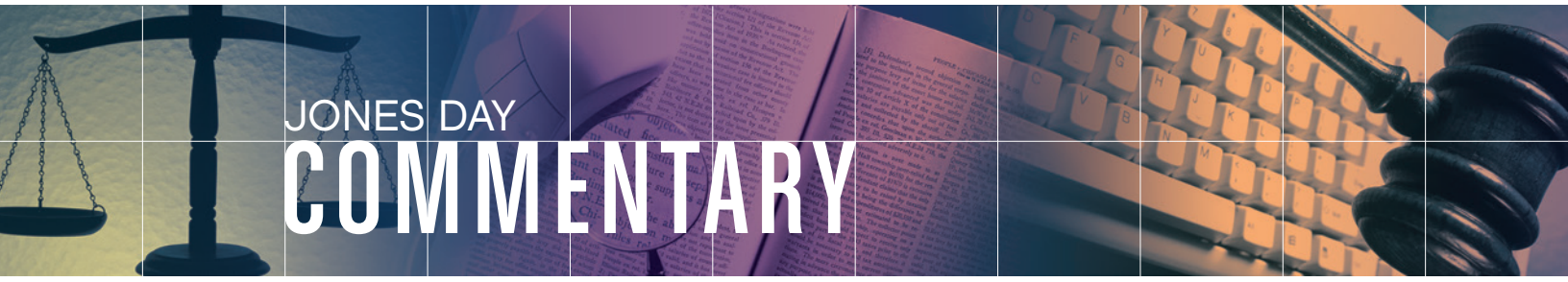

SIGNIFICANT CHANGES AT THE NLRB AND THE U.S. DEPARTMENT OF LABOR–WHAT WILL THEY MEAN FOR EMPLOYERS?

Recent developments in the United States Senate will have a significant impact on the future agenda and initiatives of both the National Labor Relations Board and the United States Department of Labor. For the first time during President Obama's administration, the NLRB will soon be operating with five confirmed Board members—ending, at least prospectively, the firestorm over the Board's ability to operate with the President's recess appointees. Employers can now expect the fully confirmed Board to decide a number of important cases in the pipeline on topics like union access to employer property and social media, and to re-engage in rulemaking on election rules. Whether the confirmed Board will have to revisit the flurry of game-changing decisions that it issued with panels consisting of challenged recess appointees must await the outcome of the Supreme Court's decision in *Noel Canning*, 705 F.3rd 490 (D.C.Cir. 2013).

BACKGROUND

Following a lengthy impasse between Democrats and Republican senators over how and when—if at all—the full Senate would consider certain of the President's nominees for Executive Branch positions, in late July, the Senate leadership and the White House reached a compromise, avoiding a potential change in the Senate's filibuster rules. The Republican Members of the Senate agreed to permit a number of the President's nominees, including NLRB members and the U.S. DOL Secretary, to receive expeditious confirmation votes. In exchange, the President withdrew his two recess appointment nominees to the NLRB, Members Sharon Block and Richard Griffin, and nominated two new Democrat candidates for the Board, Nancy Schiffer and Kent Hirozawa. By essentially a party line vote, the Senate HELP Committee approved Schiffer and Hirozawa and forwarded their nominations to the full Senate, along with the nominations of Democrat Chairman of

the Board, Mark Pearce, and two nominated Republicans, Harry Johnson and Phil Miscimarra. On July 30, the full Senate voted to confirm all of these NLRB nominees.

WHAT TO EXPECT FROM THE NEWLY CONFIRMED BOARD

With a full quorum for the first time in many years and with three confirmed Democratic members, the Board is expected to continue the aggressive pro-labor agenda of the previous Board. On the rulemaking front, the Board will likely renew its efforts to change, through rulemaking, its long-standing election rules to make union elections quicker and more difficult for employers to challenge through agency appeals. The Board's first effort to implement new election rules faced stiff employer challenges and was judicially invalidated based on a technical quorum issue. *Chamber of Commerce v. NLRB*, No. 11-2262 (D.D.C. May 14, 2012).

On the decision-making front, the new Board is also expected to issue significant decisions in a number of areas. For example, the Board should issue the long-awaited decision in *Roundy*'s, the case involving the proper standards governing union access to an employer's private property. 356 NLRB No. 27 (2010). In addition, the new Board will have the opportunity to decide cases in the pipeline that involve the lawfulness of employer social media policies and employee access to employer's email systems.

THE PRIOR BOARD'S DECISIONS

Over the past two years, with panels consisting of challenged recess appointees, the Board issued a number of decisions that uprooted long-settled Board law or otherwise changed the legal landscape for employers. *See, e.g., Jones Day Commentary*, "NLRB Issues Significant Decisions at Year's End," Jones Day (January 2013); *Jones Day Commentary*, "NLRB Finds NLRA Violation for Asking Employees to Refrain From Discussing Ongoing Internal Investigations," Jones Day (August 2012); *Jones Day Commentary*, "Labor Board Purports to Invalidate Class Action Waivers in Employment Arbitration Agreements," Jones Day (January 2012). The fate of the standards announced in those controversial decisions must await the outcome of the Supreme Court's review of the *Noel Canning* case, where the Court is poised to review the D.C. Circuit's decision that the President's January 4, 2012 recess appointments of members Block and Griffin to the NLRB did not meet the requirements of the Recess Appointments Clause of the Constitution, rendering the decisions of the improperly appointed Board invalid.

If the Supreme Court agrees with the D.C. Circuit in *Noel Canning*, the Board will presumably have to review all of the controversial decisions that it issued without a proper quorum, consistent with the Supreme Court's decision in *New Process Steel*, __U.S. __, 130 S. Ct. 2635 (2010). Whether the new Democratic-majority Board will reach different outcomes in those cases remains to be seen. Cases to watch include:

- *WKYC-TV*, 359 NLRB No. 30 (Dec. 12, 2012), where the Board overruled 50 years of precedent in holding that an employer's obligation to automatically deduct union dues from employees' paychecks continues after expiration of a collective bargaining agreement containing a dues check-off provision.

- *Banner Health System*, 358 NLRB No. 93 (July 30, 2012), where the Board held that an employer's blanket policy requiring confidentiality from its employees involved in an ongoing internal investigation violated the Act.

- *Piedmont Gardens*, 359 NLRB No. 46 (Dec. 15, 2012) and *Hawaii Tribune-Herald*, 359 NLRB No. 39 (Dec. 14, 2012), where the Board reversed a rule established in 1978 privileging employers to withhold confidential witness statements obtained by an employer during an internal investigation.

- *Alan Ritchey, Inc.*, 359 NLRB No. 40 (Dec. 14, 2012), where the Board held that employers must give notice and offer to bargain before enforcing discretionary discipline on its union-represented employees where the parties are negotiating a first contract and do not yet have a grievance and arbitration process in place.

- *Finley Hospital*, 359 NLRB No. 9 (Sept. 28, 2012), where the Board held that an employer had to continue paying annual wage increases on employees' anniversary dates, even though the contract providing for those increases had expired, as part of the status quo.

- *Albertson's, LLC*, 359 NLRB No. 147 (July 2, 2013), overruling 29 years of precedent in holding that an employer violated the Act by soliciting grievances during a union campaign even though the solicited employee did not respond to the solicitation.

The confirmation of the new five-member NLRB is not expected to affect the U.S. Supreme Court's decision to hear the *Noel Canning* case in its October 2013 Term. Two additional Circuit Courts of Appeal, the Third Circuit in *NLRB v. New Vista Nursing & Rehab. LLC*, No 11-3440 (3d Cir. May 16, 2013) (*petition for reh'g filed* July 1, 2013), and the Fourth Circuit in the *NLRB v. Enterprise Leasing Co. Se. LLC*, No. 12-1514 (4th Cir. July 17, 2013) and *Huntington Ingalls Inc. v. NLRB*, No. 12-2000 (4th Cir. July 17, 2013), have now also followed the same rationale of the D.C. Circuit and found that the recess nominees to the NLRB violated the Recess Appointments Clause. Oral Argument in the *Noel Canning* case is likely to occur early in 2014, and Jones Day and the National Chamber of Commerce Litigation Center will be representing the Noel Canning Corporation in the Supreme Court.

DOL DEVELOPMENTS

The Senate also approved, on a party-line vote, the President's nomination of Thomas Perez to be the new Secretary of the U.S. DOL. Mr. Perez has faced substantial Republican opposition in the Senate, including criticism of his handling of certain matters while he was an Assistant Attorney General with the Department of Justice. With Mr. Perez's confirmation, the Department can be expected to continue to pursue an aggressive agenda with respect to wage and hour audits and active enforcement of OSHA rules and regulations, and to continue an aggressive agenda by the Office of Federal Contract Compliance Programs ("OFCCP"). Indeed, the OFCCP can be expected to issue final rules later this year with respect to requirements that federal contractors and subcontractors reach an "aspirational goal" of up to 7 percent of their workforce consisting of individuals with veteran status and individuals who are disabled. There is substantial employer opposition to these initiatives based on practical and legal concerns with respect to meeting such goals, and litigation certainly can be expected to challenge the rules.

The Department, according to its recent regulatory agenda filing, can also be expected to issue its regulations implementing the public disclosure requirements of the Labor Management Reporting and Disclosure Act ("LMRDA"). Under Section 203 of the LMRDA, employers are required to file a report (Form LM-10) with the Department concerning any agreements with third parties to persuade employees concerning their rights to organize and bargaining collectively. The Department's earlier proposed rulemaking in this area met with substantial employer and trade association opposition, and it would impose significant new reporting burdens on employers, consultants, and lawyers who advise employers on labor relations matters by limiting the exception to the filing requirement for third parties that provide "advice" to employers regarding union organizing and collective bargaining issues. The impact of such proposed rules will be to add an additional regulatory burden on employers, attorneys, and consultants, and potentially make it more difficult, particularly for small and medium-size businesses, to obtain effective counsel regarding union-related matters.

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