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Labor & Employment Alert
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Supreme Court Invalidates National Labor Relations Board Appointments Supposedly Made During Senate Recesses

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In a case called Noel Canning, the U.S. Supreme Court ruled unanimously yesterday that three recess appointments President Barack Obama made to the National Labor Relations Board ("Board") in January 2012 - Terence Flynn, Richard Griffin and Sharon Block - were unconstitutional, an opinion that effectively invalidates hundreds of decisions issued between January, 2012 and August, 2013, when those appointees were on the Board.

The case centered on the Recess Appointments Clause of the United States Constitution. That Clause gives the President the power to fill "all Vacancies that may happen during the Recess of the Senate," appointments that ordinarily need the Senate's approval. In short, the Court decided that the Senate was not actually in recess when the three members were appointed, hence their appointments were invalid.

The President's nominations of the three members in question were pending in the Senate when it passed a December 17, 2011, resolution providing for a series of "*pro forma* session[s]," with "no business . . . transacted," every Tuesday and Friday through January 20, 2012. Invoking the Recess Appointments Clause, President Obama appointed the three members in question between the January 3 and January 6 *pro forma* sessions.

The Petitioner, a Pepsi bottler named Noel Canning, argued that the appointments were invalid because the 3-day adjournment between those two sessions was not long enough to trigger the Recess Appointments Clause. That argument prevailed at the Supreme Court. The Court ruled that Recess Appointments Clause empowers the President to fill any existing vacancy during both inter-session recess (*i.e.*, breaks between formal sessions of the Senate) and intra-session recesses (*i.e.*, breaks in the midst of a formal session) of substantial length. While the Clause does not state just how long a recess must be for it to be invoked, the Court ruled that in light of historical practice, a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. Ultimately, the Court ruled that three days is too short a time to bring a recess within the scope of the Clause, so the President lacked the authority to make those appointments.

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So what happens to all those cases decided when these unconstitutional appointees were on the Board? Well, this situation is not new to the Board. It really is the same scenario of a few years back, after the Court ruled in a case called New Process Steel that the Board could not operate with just two members, a decision that similarly invalidated hundreds of cases decided by a two-member Board.

In that situation, the Board first requested remand of all pending cases in the federal Courts of Appeals so they could be reconsidered. A large majority of the other cases had already been "closed through compliance with the original Board decision, settlement, withdrawal, or other means". In the end only about 100 of 600 cases were actually contested. In many of those cases, the Board simply affirmed the prior decisions with a general statement such as "the new panel considered the ALJ's decision, the evidentiary record, the parties' exceptions and briefs, and adopted the ALJ's findings and conclusions for the reasons stated in the prior decision". In a few cases, the Board came to a different conclusion than the original decision. One might reasonably expect a similar Board response to the Court's Noel Canning decision.

Mark Gaston Peirce, the current Board Chairman, released a statement in which he stated that the Board is "committed to resolving any cases affected by today's ruling as expeditiously as possible." Dealing with all those cases will inevitably result in another significant backlog at the Board even though the current Board is at full strength with five properly appointed members.

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This Alert was prepared by Geoffrey P. Wermuth, a partner in the law firm of Murphy, Hesse, Toomey & Lehane, LLP. If you have any questions or concerns with regard to this alert, please contact Attorney Wermuth, the attorney assigned to your account, or your own labor counsel.

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