EPSTEIN BECKER GREEN | LABOR AND EMPLOYMENT PRACTICE

ACT NOW ADVISORY

January 25, 2013

NLRB Recess Appointments "Invalid From Their Inception" and "Void" for Lack of Constitutional Authority Rules the D.C. Circuit

by Adam C. Abrahms, Kara M. Maciel, Evan J. Spelfogel, and Steven M. Swirsky

---

In a time when employers do not receive much good news out of Washington D.C., the U.S. Court of Appeals for the D.C. Circuit may have given some very welcome relief to employers facing issues before the National Labor Relations Board ("NLRB" or "the Board") in light of recent precedent reversing NLRB decisions. Quoting from early Constitutional authority including *The Federalist Papers* and *Marbury v. Madison*, the D.C. Circuit ruled today that President Obama's "Recess Appointments" of three new NLRB members in January 2012 were unconstitutional and as a result the Board lacked any constitutional authority to act since that time. *Noel Canning v. NLRB*

In a unanimous panel decision written by Chief Judge Sentelle that The New York Times called "an embarrassing setback for the President," the Court analyzed two constitutional questions, both focusing on whether the Board lacked authority to act because three Board members were never validly appointed. The first issue examined whether the Senate was "in Recess" when the appointments were made, and the second whether the vacancies these three members purportedly filled "happen[ed] during the Recess of the Senate," as required for recess appointments under the Constitution.

As to the first issue, after dissecting the Board's arguments, the Court ruled that "the Recess" referred to in the Constitution to permit a presidential recess appointment is limited to the Recess between Sessions of the Senate and does not include brief adjournments or other intrasession recesses. Likewise, the Court ruled that the power to appoint during the Recess was limited and could only be issued if the vacancy both first arises (i.e., "happened") during the Recess and also was filled during that Recess.

Noting that the Board conceded on appeal that the appointments at issue were not made during the intersession Recess because the President made them on January 4, 2012, after Congress began a new Session on January 3, 2012 and while that new Session continued, the Court held that "[c]onsidering the text, history and structure of the Constitution, these appointments were invalid from their inception."

The Court also found, and the parties did not dispute, that based on the Supreme Court's ruling in *New Process Steel, L.P. v. NLRB*, if the vacancies were not properly and lawfully filled, the Board would only be left with two valid members and would therefore be left without a quorum to act. Consequently, the Court ruled conclusively

that the Board's order in the underlying case was "outside the orbit of the authority of the Board because the Board had no authority to issue any order [because] it had no quorum," stating that the "lack of quorum raise questions that go to the very power of the Board to act and implicate[s] fundamental separation of powers concerns."

The Court further rejected any argument that its ruling otherwise would make government inefficient through an ineffectual federal agency, stating: "The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience, or facilitation of the functions of government."

In short, the Court vacated the Board's order, finding that the company's "understanding of the constitutional provision is correct, and the Board's is wrong. The Board had no quorum, and its order is void."

This decision, which certainly will be appealed to the U.S. Supreme Court, provides much anticipated relief to business groups and employers who have been struggling with the aggressive, pro-labor agenda of the current Board. It also leaves the Board with only one validly appointed member, Chairman Mark Pearce, whose term is set to expire in August 2013, effectively shutting the Board down with respect to any ongoing activity. That's good news for employers who were anticipating new regulations on the speedy election rule or the notice posting requirement. In addition, for those Board rulings that have been issued since January 4, 2012, there is a strong argument that those decisions are similarly invalid, certainly if those cases are pending within the jurisdiction of the D.C. Circuit.

What Employers Should Do Now

All employers with cases pending before the Board or on appeal should review this decision closely with legal counsel to examine its impact on current cases and potentially cases recently decided but yet appealed. NLRB Chairman Mark Pearce issued a statement today in response to and disagreeing with the Court's decision, "the Board will continue to perform our statutory duties and issue decisions."

Epstein Becker Green will follow future developments. For more information about this Advisory, please contact:

Adam C. Abrahms
Los Angeles
310.557.9559
AAbrahms@ebglaw.com

Kara M. Maciel
Washington, DC
202.861.5328
KMaciel@ebglaw.com

Evan J. Spelfogel
New York
212.351.4539
ESpelfogel@ebglaw.com

Steven M. Swirsky
New York
212.351.4640
SSwirsky@ebglaw.com

This Advisory has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice.

About Epstein Becker Green

Epstein Becker & Green, P.C., founded in 1973, is a national law firm with approximately 300 lawyers practicing in 11 offices, in Atlanta, Boston, Chicago, Houston, Indianapolis, Los Angeles, New York, Newark, San Francisco, Stamford, and Washington, D.C. The firm is uncompromising in its pursuit of legal excellence and client service in its areas of practice: Health Care and Life Sciences, Labor and Employment, Litigation, Corporate Services, and Employee Benefits. Epstein Becker Green was founded to serve the health care industry and has been at the forefront of health care legal developments since 1973. The firm is also proud to be a trusted advisor to clients in the financial services and hospitality industries, among others, representing entities from startups to Fortune 100 companies. Our commitment to these practices and industries reflects the founders' belief in focused proficiency paired with seasoned experience. For more information, visit www.ebglaw.com.