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Employment Law Alert

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U.S. Supreme Court Invalidates Hundreds of NLRB Decisions in *National Labor Relations Board v. Noel Canning, et. al.*

The U.S. Supreme Court has issued its long-awaited decision in *Noel Canning v. National Labor Relations Board, etc. al.*, No. 12-1281 (June 26, 2014), holding 5-4 that recess appointments of three National Labor Relations Board members by President Obama on January 4, 2012, were unconstitutional.

Ordinarily, the Constitution requires Senate confirmation of presidential appointments, but the President may make "temporary" appointments when vacancies occur while the Senate is in recess. The Board appointments at issue in *Noel Canning* took place while the Senate was on an *intra-session* break, punctuated by "*pro forma"* sessions. The Supreme Court majority held that while the recess appointments clause of the Constitution allows for *intra-session* appointments to vacancies that arise before a recess, it did not allow for these particular appointments which were made during a short three-day break between the Senate's *pro forma* sessions.

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The immediate impact of *Noel Canning* is that all Board decisions issued between January 4, 2012 and July 31, 2013 (during which time the three members in question participated in Board decisions) will need to be revisited because the Board did not have the necessary three-member quorum to act. The number of affected Board decisions is in the hundreds. Of particular note to non-unionized employers, the Board will need to revisit (among many others) the following cases:

- *Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012): A Board majority struck down a rule prohibiting employees from discussing ongoing investigations of misconduct with other employees, ruling that the employer must show a legitimate justification for such confidentiality that outweighs the employees' Section 7 rights under the National Labor Relations Act (NLRA).

- *Costco Wholesale Corp.*, 358 NLRB No. 106 (Sep. 7, 2012): This was the first Board decision addressing the impact of the NLRA on employer rules regarding employee use of social media. The Board held that the company's social media

policy violated the NLRA because it provided for discipline, including possible termination, of employees who posted materials which could be deemed damaging to the company, which could defame a person, or which otherwise violated the company's rules. According to the Board, the rule was overbroad, as it could be read by employees as a ban on making comments critical of the company or their working conditions, which are protected rights under the NLRA.

- *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (Dec. 14, 2012): In another case involving social media, a Board majority found that the employer violated the NLRA by firing five employees for comments that they posted on Facebook after learning that a co-worker criticized their work performance. While the employer argued that the employees were fired for harassment, the Board found that the posts constituted protected activity under the NLRA.

- *Flex Frac Logistics, LLC*, 358 NLRB No. 127 (Sep. 11, 2012): A Board majority held that a confidentiality agreement the employer required its employees to sign was unlawfully overbroad in violation of the NLRA. In particular, the agreement prohibited employees from disclosing, among other things, personnel information to persons outside the company. The Board found that employees could reasonably construe this language as prohibiting them from discussing their wages and other terms and conditions of work with non-employees such as union representatives.

In addition to invalidating previously-decided cases, *Noel Canning* also could call into question the acts of several National Labor Relations Board Regional Directors who were appointed by the Board during this time period, as well as actions by the Board's General Counsel pursuant to Board delegation of authority. We can expect additional litigation over these and many other related issues.

Given the potential scope of *Noel Canning*, it may be years before the full impact of the decision can be assessed. At the very least, the Board will now need to re-examine hundreds of its decisions. In the meantime, employers -- whether union or non-union -- should continue to seek counsel when it comes to drafting and implementing policies or taking adverse actions that may potentially impact employee rights under the NLRA.

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