BOND INFORMATION MEMO

Labor and Employment Law

June 2014

U.S. Supreme Court Declares President Obama's NLRB Recess Appointments Unconstitutional

On June 26, 2014, the U.S. Supreme Court affirmed the decision issued by the U.S. Court of Appeals for the District of Columbia Circuit that President Obama's recess appointments to the National Labor Relations Board (NLRB) on January 4, 2012, were unconstitutional. The Supreme Court's decision in *NLRB v. Noel Canning* means that the NLRB did not have a valid quorum of three members from the date of the recess appointments to early August of 2013, when four new members were sworn in after being confirmed by the Senate. Every decision issued by the NLRB during that approximately 19-month time period without a valid quorum has been rendered invalid by the Supreme Court's *Noel Canning* decision. It remains to be seen how the NLRB will deal with this development, but it may now have to reconsider and issue new decisions in each and every case that was decided without a valid quorum in place. However, in light of the fact that the majority of the NLRB members is still staunchly pro-union, it would be unrealistic to expect significantly different outcomes in cases that were decided against employers.

Although the Supreme Court affirmed the D.C. Circuit's conclusion that President Obama exceeded his authority under the Recess Appointments Clause of the U.S. Constitution, the Supreme Court disagreed with the D.C. Circuit's narrow interpretation of the Recess Appointments Clause. The Recess Appointments Clause permits the President to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." The D.C. Circuit held that the phrase "the Recess of the Senate" applies only to recesses that occur in between sessions of the Senate – not to breaks in activity that occur during a session of the Senate. The January 4, 2012, recess appointments were not made during a recess that occurred in between sessions of the Senate. The D.C. Circuit also interpreted the phrase "Vacancies that may happen during the Recess of the Senate" to mean that the vacancy actually must arise during the Senate's inter-session recess in order for the President to have the authority to fill the vacancy without going through the Senate confirmation process. None of the three vacancies that President Obama sought to fill on January 4, 2012 arose during the Senate's inter-session recess.

The Supreme Court adopted a broader interpretation of the scope of the President's authority under the Recess Appointments Clause. The Supreme Court held that the phrase "the Recess of the Senate" applies both to inter-session recesses (breaks that occur between sessions of the

Senate) and intra-session recesses (breaks that occur in the midst of a formal session of the Senate) of substantial length. The Supreme Court also held that the phrase "Vacancies that may happen during the Recess of the Senate" applies both to vacancies that first arise during a recess and vacancies that initially occur before a recess but continue to exist during the recess. The Supreme Court nevertheless determined that President Obama's recess appointments during a three-day intra-session recess of the Senate were unconstitutional because the three-day recess was not of substantial length. The Supreme Court held that a recess of less than ten days is presumptively too short to permit the President to make recess appointments, but left open the possibility that unusual circumstances might require the President to exercise recess appointment authority during a recess of less than ten days.

Some of the NLRB decisions that have now been rendered invalid include: (1) the NLRB's September of 2012 holding in *Costco Wholesale Corp.* that an employer's social media policy was overly broad and in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA); (2) the NLRB's December of 2012 holding (and reversal of 50 years of precedent) in *WKYC-TV, Inc.* that an employer's obligation to check off union dues continues after the expiration of a collective bargaining agreement; (3) the NLRB's December of 2012 holding (and reversal of 35 years of precedent) in *American Baptist Homes of the West d/b/a Piedmont Gardens* that witness statements related to employee discipline are not necessarily shielded from disclosure to the union; and (4) the NLRB's July of 2012 holding in *Banner Health System* that an employer violated Section 8(a)(1) of the NLRA by asking employees not to discuss ongoing investigations with their co-workers.

Although these decisions and many others will likely be revisited, it seems unlikely that the NLRB will issue significantly different rulings. Accordingly, employers should assume at this point that the invalid decisions will be affirmed by the current NLRB.

To learn more, contact Subhash Viswanathan at (315) 218-8324 or suba@bsk.com.