



Weston Hurd NLRB Update - January 2013

NLRB UPDATE: The D.C. Circuit Court of Appeals Rules That President Obama's Recess Appointments to the NLRB Were Unconstitutional

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On Friday, January 25, 2013, the D.C. Circuit Court of Appeals ruled that President Obama violated the U.S. Constitution when he made three "recess" appointments to the National Labor Relations Board on January 4, 2012. This means that for more than 12 months (since January 3, 2012), the NLRB has lacked the necessary quorum of three members to lawfully take action. Unless the U.S. Supreme Court reverses the D.C. Circuit Court's opinion, all decisions made by the NLRB after January 3, 2012, are arguably invalid.

On January 4, 2012, President Obama appointed Members Sharon Block, Terence Flynn and Richard Griffin to the Board purportedly under his power to make "recess" appointments even though the Senate was actually in session at the time. The argument which the Department of Justice made to justify these appointments was that, at the time, the Senate was in session pursuant to a unanimous consent agreement (not in official session) and that, during breaks in this *pro forma* session, the Senate was technically in "recess."

In Friday's ruling, Chief Judge David Sentelle, in a majority opinion, firmly rejected this argument and held that the recess appointment clause - which provides that "the President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate" - means what it says. Specifically, the President only has the power to make recess appointments when the Senate is not in "Recess" (i.e. not in session) and unavailable to consider and vote upon his nominations.

In addition, the Court held that the use of the word "happen" means that a President cannot make a recess appointment unless the vacancy itself actually happened during the recess (i.e., that the recess appointment clause does not give the President the power to sidestep the Senate by waiting until a recess to fill an existing vacancy). This portion of the ruling obviously could have a significant impact on recess appointments across a broad range of executive agencies, not simply the NLRB.

The Court's decision invalidating the appointments of Members Block, Flynn and Griffin means that the Board has not had the necessary quorum of three members to take lawful action since January 3, 2012. From January 3, 2012 until December 31, 2012, there were only two validly appointed members of the Board (Chairman Pearce and Member Hayes). With the expiration of Member Hayes's term on December 31, 2012, there is now only one validly appointed member (Chairman Pearce).

Unless the Supreme Court overturns this ruling on appeal, Friday's opinion could invalidate a whole series of significant pro-union and pro-employee decisions decided in 2012. Just a partial list of the most significant of these decisions includes the following:

- **WKYC-TV, Inc.** which overturned 50 years of Board precedent by ruling that an employer must continue to deduct union dues even after a contract expires until the parties either reach a new agreement or bargain to a lawful impasse;
- **Alan Ritchey, Inc.** which required an employer, in the absence of a binding agreement to arbitrate, to bargain with a union *before* imposing discretionary discipline on a unit employee;
- **Costco Wholesale Corporation** which held that Costco's social media policy violated the National Labor Relations Act ;
- **Banner Health System** which held that an employer may violate the NLRA by requesting employees to refrain from discussing with others an ongoing internal investigation of workplace misconduct;
- **Piedmont Gardens** also overturning long-existing precedent, which held that a witness statement obtained by an employer in an investigation is not protected from disclosure if a union requests it; and,
- **Latino Express** which held that, when calculating backpay, an employer must include any extra taxes paid by the employee as a result of receiving the backpay.

If you have any questions, comments or concerns about this NLRB Update, please contact your Weston Hurd lawyer.



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