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5 Takeaways From NLRB V. Noel Canning

Law360, New York (June 26, 2014, 6:08 PM ET) -- On June 26, 2014, the U.S. Supreme Court issued a landmark ruling in National Labor Relations Board v. Noel Canning, which in key respects limited the scope of the president's recess appointment power.

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The Supreme Court ruled that the January 2012 recess appointments of three members to the NLRB were unconstitutional, because those appointments were not made when the Senate was in a recess within the meaning of the Constitution. Rather, President Obama made those appointments when the Senate was in a short recess, which lasted only three days.

The Supreme Court rejected a broader, more restrictive rationale applied by the lower court in this case and in other recent decisions, which would have limited the recess appointment power to all but the rarest of circumstances in which a vacancy both occurred and was filled by recess appointment during the sole "intersession" recess that occurs every two years.

Instead, the Supreme Court ruled that the recess appointment power applies to any recess (i.e., intrasession or intersession) of sufficient length, which the high court indicated typically is a recess of at least 10 days.

While the many of the implications of this decision are likely to be determined by subsequent litigation and political developments, here are five key takeaways now:

Hundreds of NLRB Decisions From 2012 and 2013 Are Likely Invalid — For Now

The Supreme Court's ruling likely has the effect of nullifying — for now — all of the NLRB's rulings from Jan. 9, 2012, (i.e., the date of these recess appointments) until Aug. 5, 2013 (i.e., when the Senate confirmed a second batch of nominees for these three positions).

The NLRB typically comprises five members, but requires a quorum of three members to act. Because the Supreme Court has now ruled that the three recess appointments made on Jan. 9, 2012, were unconstitutional, the NLRB was only acting with two properly appointed members from that date until Aug. 5, 2013. Under the Supreme Court's 2010 decision in New Process Steel, the NLRB has no power to act when it has less than a three-member quorum, and so it appears that all of the board's rulings during that period will be deemed invalid.

These likely include a number of controversial cases with broad implications for employers:

- Banner Health Systems, 358 NLRB No. 93 (July 30, 2012): Restricted the ability to require employee confidentiality during internal investigations.

- Sodexo America LLC, 358 NLRB No. 79 (July 3, 2012), and Marriott International Inc., 359 NLRB No. 8 (Sept. 8, 2012): Expanded the rights of off-duty employees to access employer property.

- Alan Ritchey Inc., 359 NLRB No. 40 (Dec. 14, 2012): Required employers to bargain with newly certified unions before imposing certain disciplinary actions.

- WKYC-TV, 359 NLRB No. 30 (Dec. 12, 2012): Required employers to continue dues checkoff after expiration of collective bargaining agreement, reversing decades of precedent.

- A series of decisions restricting employer ability to regulate employee use of social media, even where sharply critical of an employer or individual managers, including Costco Wholesale Club, 358 NLRB No. 106 (Sep. 7, 2012)

However, any relief from the voiding of these decisions may be short-lived. As was the case after the Supreme Court's 2010 decision in New Process Steel nullified hundreds of decisions, the NLRB likely will review and reinstate most of those decisions. For now, however, it appears that these decisions are off the books.

Delays at the NLRB are Likely to Grow

With the NLRB likely to take on the task of reconsidering hundreds of decisions issued between January 2012 and August 2013, until that backlog is cleared, employers involved in cases pending before the board should expect longer-than-usual delays in obtaining rulings in their cases. This can have a substantial impact where a case involves the potential for back pay, rescinding employer changes or other actions that the NLRB later rules improper.

Expect a Wave of Challenges to Other Recess Appointments

The Supreme Court's ruling did not expressly address the validity of prior recess appointments, both at the NLRB and in other contexts, but expect those challenges to begin almost immediately. For example, the high court acknowledged, but did not rule upon, the validity of the controversial recess appointment of Craig Becker to the NLRB, who was appointed in March of 2010 and served until January 2012. (It appears that Becker was appointed during a recess which lasted approximately 16 days).

Moreover, every president dating back to at least 1980 has made recess appointments to the NLRB and elsewhere, and to the extent those appointments were made during a relatively short recess, the possibility exists that actions taken pursuant to those appointments will be challenged.

This Issue is Likely to Reappear at the NLRB During the 2016 Election Campaign

Currently, the NLRB is operating at full strength, with all five members having been confirmed by the Senate. The terms for each of these positions is staggered, with one scheduled to expire each year. By Aug. 27, 2016, just as the 2016 presidential campaign will move into high-gear, the terms of three of the current five members will expire, leaving the NLRB with only two members — and no quorum.

Therefore, a real possibility exists that if gridlock on Capitol Hill continues to be a prominent theme in the national political discourse, this could be a major issue during the 2016 election campaign, and the NLRB may lack a quorum to act for a substantial period of time until the president and Congress compromise on new nominees, or the president is able to force Congress to adjourn so that the recess appointment power is triggered (see below).

The Real Impact of the Court's Ruling on the President's Recess Appointment Power is Uncertain and Will Turn on Larger Political Considerations

On the one hand, the Supreme Court's decision may have the practical impact of drastically limiting the president's ability to make recess appointments. Because either the House or the Senate has the power to limit the length of a Senate recess, either body could effectively prevent a recess that would be long enough to trigger the president's recess appointment power.

However, under Article II, Section 3 of the Constitution, in circumstances where the House and Senate disagree "with respect to the time of adjournment" the president is empowered to force Congress into adjournment "to such time as he shall think proper."

Conclusion

By clarifying that the president's recess appointment power largely turns on the length of the recess, the Supreme Court, perhaps intentionally, has left the larger question of how robust the recess appointment power will be to the political process. Whether the House, Senate and/or president would attempt to invoke these powers to limit — or force — a recess of the Senate is likely to turn on the larger political context at the time the issue arises.

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