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Another Setback for NLRB Recess Appointments

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The National Labor Relations Board (NLRB) received yet another setback from a federal appellate court on May 16, 2013 as the U.S. Court of Appeals for the Third Circuit, ruling in NLRB v. New Vista Nursing and Rehabilitation, became the second federal appellate court to hold that President Obama's appointments to the NLRB violated the U.S. Constitution's Recess Appointment Clause. As if that were not bad enough, the Third Circuit made this ruling not in the context of President Obama's now-infamous January 2012 "recess" appointments, but in evaluating the legality of former NLRB member Craig Becker's appointment on March 27, 2010, which occurred during a two-week adjournment of the Senate. It is safe to say that this case dramatically expands the scope of potentially invalid NLRB decisions.

To put the issue in context, the U.S. Supreme Court's 2010 *New Process Steel, L.P. v. NLRB* decision held that the NLRB can only act through a three-member quorum, and actions taken by the NLRB with fewer than three members sitting are ineffective. NLRB members must be confirmed by the U.S. Senate, unless the member is appointed through a valid use of the President's recess appointment power. Because the NLRB often acts through three-member panels, if even one member of such a panel is found to have not been properly appointed, the panel's action cannot be binding.

The U.S. Court of Appeals for the District of Columbia Circuit in the case of Noel Canning v. NLRB previously held that President Obama's appointments of Richard Griffin, Terrence Glynn, and Sharon Block on January 4, 2012 - during a *pro forma* session in which the Senate met every three days and performed no official business - were in violation of the Recess Appointment Clause. As noted above, Mr. Becker was appointed to the NLRB on the first day of a two-week adjournment during a Senate session.

The Third Circuit's decision is particularly significant in two respects. First, the court essentially adopted the reasoning of the D.C. Circuit's *Noel Canning* decision in holding that recess appointments could only be made *between* formal sessions of the Senate. It rejected the positions advanced by the U.S. government that recess appointments could be made during significant breaks while the Senate is in session or at any time when the Senate is not available to conduct business. With the NLRB currently petitioning the U.S. Supreme Court to review *Noel Canning* - an effort that seems likely to be successful - the Third Circuit's decision may bolster the strength of the D.C. Circuit's reasoning.

Second, the Third Circuit's ruling invalidates many more NLRB decisions than did *Noel Canning*. The D.C. Circuit's decision, which the NLRB has not yet recognized as binding, rendered every decision from January 4, 2012 forward invalid, since during this period the NLRB never had three validly-appointed members. By addressing Mr. Becker's earlier appointment in 2010, the Third Circuit has effectively jeopardized each NLRB decision in which he participated as part of a three-member panel from March 27, 2010 until January 3, 2012, when Mr. Becker left the NLRB.

The validity of many recent NLRB decisions, stretching back as far as March 2010, will remain in question until the Supreme Court hears and rules on the issues. Since the NLRB is not following the D.C. Circuit's ruling, however, and likely will not follow the Third Circuit's decision, employers should be wary of taking actions, or failing to act, in contravention of NLRB decisions which still appear to be in force.

