

D.C. Circuit Invalidates NLRB Recess Appointments

By former Associate Jack Blum

In a groundbreaking decision, the United States Court of Appeals for the District of Columbia Circuit ruled that President Obama's three "recess" appointments to the National Labor Relations Board (NLRB) on January 4, 2012 were unconstitutional. This decision will have a dramatic practical impact on the field of labor law, which increasingly affects non-union employers, because it leaves the NLRB without a quorum and casts doubt on every one of its actions since January 4, 2012.

According to Paley Rothman Employment Law Group Chair Hope B. Eastman, "President Obama's NLRB has greatly expanded its view of its role in the non-union workplace, from the poster requirement to recent decisions on at will employment. Should these be invalidated, non-union employers may see some relief from a wide variety of newly imposed obligations and uncertainties unless and until the full D.C. Circuit or the Supreme Court hears the case and disagrees."

The D.C. Circuit's decision in *Noel Canning v. NLRB* arose out of what would otherwise have been an ordinary case involving a collective bargaining agreement. The NLRB issued its order against Noel Canning, a Pepsi bottler in Washington state, through a three-member panel, including one of President Obama's "recess" appointments. The court, through a close textual analysis of the U.S. Constitution's Recess Appointments Clause, held that the appointments were unconstitutional for two reasons: (1) they filled vacancies that did not "happen" during any recess, and (2) they did not take place while the Senate was in recess. And because only two members of the NLRB panel in Noel Canning had been legitimately appointed, the NLRB lacked the three-member quorum required by the Supreme Court's *New Process Steel, L.P. v. NLRB* decision.

At no time since January 3, 2012 has the NLRB had three properly-appointed members; in light of the D.C. Circuit's decision, it now has only one. This means that none of the actions taken by the NLRB for virtually all of 2012 and thus far in 2013 - encompassing hundreds of decisions - were conducted in legal fashion, and that no action can be done legally until two new members are validly appointed. Given the partisanship currently in vogue in Washington, which prompted the "recess" appointments in the first place, the appointment of replacement members could be a lengthy process, leaving the NLRB effectively neutered.