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Noel Canning Decision Invalidates Many Critical NLRB Decisions

On June 26, 2014, the U.S. Supreme Court issued an opinion in National Labor Relations Board ("NLRB") v. Noel Canning. The 9-0 decision affirmed the holding of the U.S. Court of Appeals for the D.C. Circuit that the appointment of Board members Sharon Block, Richard Griffin and Terence Flynn was unconstitutional. The Court did hold that the Constitution's Recess Appointments Clause gives the President the right to appoint individuals to vacant seats on the Board during both intra- and inter-session recesses of the Senate, regardless if those vacancies arose during the recess or prior to the recess. However, in this case, the Court determined that the Senate was not in recess when the appointments were made, which rendered them invalid.

Because the NLRB needs to have a quorum of three members to hear cases and issue rulings, the Court's decision in Noel Canning will invalidate numerous Board decisions issued while Griffin, Block, and Flynn were members. Further, Board administrative actions may also be void, such as the appointment of Administrative Law Judges and certain Regional Directors.

The Supreme Court's holding in Noel Canning means that the NLRB will have to revisit many decisions that proved to be controversial. Some of the more notable NLRB decisions that are likely no longer controlling include the following:

- WKYC-TV, Inc., 194 L.R.R.M. (BNA) 1289 (2012), where it was held that employers could no longer unilaterally suspend dues check-off after the expiration of a collective-bargaining agreement. This decision reversed a 50-year Board precedent.
- Alan Ritchey, Inc., 195 L.R.R.M. (BNA) 1003 (2012), where the Board held that newly unionized employers must bargain with the union before imposing discretionary discipline on employees represented by the union even before a collective-bargaining agreement has been executed.
- Banner Estrella Medical Center, 193 L.R.R.M. (BNA) 1161 (2012), where the Board held that employers must have a legitimate reason for ordering employees to maintain confidentiality during company investigations of employee complaints or misconduct. The Board held that "blanket rules" prohibiting employees from discussing the matters being investigated are not allowed.

POSTED:

Aug 3, 2014

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- Hispanics United of Buffalo, Inc., 194 L.R.R.M. (BNA) 1303 (2012), where the Board held that the termination of five employees for posts they made on Facebook was unlawful. Employers were urged to be cautious when making any employment decision based on social media sources.
- In re Piedmont Gardens, 194 L.R.R.M. (BNA) 1406 (2012), where the Board overturned a 30-year NLRB precedent that was established in Anheuser Busch. Piedmont Gardens held that employers will now be required to turn over to the union witness statements obtained during internal investigations if the statements are requested for arbitration or grievance purposes.
- Both union and non-union employers will need to stay informed about any action the Board takes regarding these, and other, invalidated decisions. Employers will have to review and revise their policies as necessary to comply with any decisions made by the Board in light of Noel Canning.

If you have any questions regarding the Noel Canning decision, please contact your Reinhart attorney, or any member of Reinhart's Labor and Employment group.

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