Obama's National Labor Relations Board Recess Appointments Deemed Unconstitutional: How Board Precedent and Employer Practices May Be Impacted

by Jennifer Parda

On January 4, 2012, President Obama appointed three individuals to the National Labor Relations Board ("NLRB" or "Board") while the United States Senate was not in session. The President claimed he had the power to make such appointments without the "advice and consent" of the Senate under the United States Constitution's Recess Appointments clause. Since then, the Board has issued a number of controversial decisions concerning, among other subjects, social media and employer confidentiality rules. Many of these notable opinions have had a great impact on employer policies and practice, as detailed in prior Sebris Busto James monthly *Employment Law Notes*. A recent opinion by the District of Columbia Circuit Court of Appeals, however, effectively held that these opinions were not legally rendered, causing a great deal of uncertainty for employers regarding the applicability of the NLRB's rulings during the last year.

Specifically, on January 25, 2013, the District of Columbia Court ruled in *Noel Canning v. NLRB*, No. 12-1115, slip. op. (D.C. Cir. Jan. 25, 2013) that President Obama's appointment of the three individuals exceeded his powers under the Constitution, thereby nullifying the appointments. Unless the U.S. Supreme Court disagrees with the appellate court on review, the *Noel Canning* opinion will undoubtedly have far-reaching consequences. The NLRB is composed of five members, and the Supreme Court has previously held that the Board cannot issue decisions or take other action in the absence of a valid three-member quorum. *See New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). Presumably, all decisions made by the NLRB since the invalid appointments can now be challenged for lack of quorum. In the meantime, employers are left to scratch their heads as to the best—and lawful—manner in which to proceed in matters involving recent NLRB precedent. Some notable opinions that may be challenged, and ultimately invalidated, include the following:

Social Media

Social media has emerged in recent years as a double-edged sword—on the one hand providing unprecedented marketing and growth opportunities, while on the other creating potential employer embarrassment and liability. To protect their interests, employers have implemented policies addressing, and sometimes restricting, employee use of social media. There has been much confusion, however, over where the NLRB draws the line between employee discussion of terms and conditions of employment, which is protected under the National Labor Relations Act ("NLRA" or "Act"), and simply non-productive and unprotected venting. As detailed in our **May 2012 *Employment Law Note***, the Board's decisions in this area have frequently provided useful guidance for employers. Two such notable opinions were issued in the months following President Obama's purported unconstitutional Board nominations. In *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012), the Board held that an employer's electronic communication policy prohibiting electronic postings that "damage the Company, defame any individual or damage any person's reputation" unlawfully restricted employees' protected rights under the NLRA. Similarly, in *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (2012), the Board held that an employer's handbook rule prohibiting "disrespectful" language or "any other language which injures the image or reputation of the [employer]" violated the NLRA. The legal future of *Costco* and *Knauz*, which provided a few more clues about the Board's view of the parameters for acceptable social media policies, now remain in doubt, potentially leaving employers a bit more in the dark when attempting to implement meaningful and lawful social media policies.

Employer Confidentiality Rules

As detailed in our **September 2012 *Employment Law Note***, in *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012), the Board expressed its disagreement with employers' longstanding practice of requesting confidentiality during workplace investigations. The Board concluded that an employer's general concern of protecting the integrity of an internal investigation is not a sufficient legitimate business justification that outweighs an employee's right under the NLRA to engage in "concerted activity," including discussing issues related to their wages, hours, and working conditions. Under *Banner*, an employer may only request that an employee not discuss the investigation with coworkers if: (1) a witness needs protection; (2) evidence is in danger of being destroyed; (3) testimony is in danger of being fabricated; or (4) there is a need to prevent a cover-up. Similarly, in *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012), the Board held that the employer's prohibition of employee discussions of "private matters of members and other employees" was unlawfully overbroad, in violation of the Act. Finally, in *American Baptist Homes of the West d/b/a Piedmont Gardens*, 359 NLRB No. 46 (2012), the Board overturned longstanding precedent and held that an employer may be required under the NLRA to disclose to the union witness statements taken in internal disciplinary investigations. Under *Piedmont Gardens*, the employer's confidentiality interest must be balanced with the union's need for information. Until and to the extent Supreme Court review of the *Noel Canning* opinion ultimately invalidates *Banner*, *Costco* and/or *Piedmont Gardens*, employers will be left to guess whether, and under what circumstances, they may safely request, require, or rely on confidentiality.

What Does This Mean for Employers? The NLRB has stated its intention to continue to enforce precedent from Board decisions issued since President Obama's purported unconstitutional appointments, though the propriety of those decisions has undeniably been called into doubt by the *Noel Canning* decision. As such, employers should not rush to disregard these recent NLRB decisions. If ultimately upheld by the Supreme Court, however, *Noel Canning* has the potential (if not the likelihood) to make more than a year of these NLRB decisions vanish into thin air. The overall result is a NLRB climate fraught with uncertainty. As a result, before acting on any matter involving recent NLRB decisions, employers should discuss options with experienced counsel.