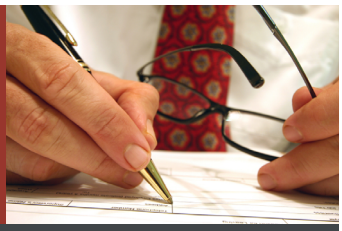
Labor & Employment Alert



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# NLRB Update: Presidential Appointments Ignite Controversy

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By: John P. Rodgers

President Barack Obama's controversial appointments to the National Labor Relations Board ("NLRB") have sparked a constitutional firestorm and subsequent legal battle that could potentially alter the makeup of the labor board.

On January 4th, without the Senate's consent, President Obama appointed three new members to the NLRB as well as the head of the new Consumer Financial Protection Bureau. Under federal law, nominees for the five-member NLRB require Senate confirmation before assuming their posts. The Constitution, however, provides the ability for the president "to fill up all Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2. As a result, the president is afforded the power to bypass the Senate and make recess appointments, provided that the Senate is actually in recess.

The constitutional problem is that when the appointments were made, the Senate was not technically in recess, according to critics of the Obama Administration's appointments. Instead, the Senate had opted to remain in session on a pro forma basis until January 23rd. Furthermore, the Senate was constitutionally required to meet every few days because the House did not consent to the Senate adjourning for more than three days. U.S. Const. art. I, § 5.

As a result, because the Senate was not technically in recess, the recess appointments are unconstitutional, according to several legal experts and Republican members of Congress.

"Yes, some prior recess appointments have been politically unpopular, and a few have even raised legal questions," wrote former U.S. Attorney General Edwin Meese III and former Justice Department counsel Todd Gaziano in a *Washington Post* column on January 5th. "But never before has a president purported to make a 'recess' appointment when the Senate is demonstrably not in recess. That is a constitutional abuse of a high order."

The Obama Administration disagrees. In a Justice Department memo released after the appointments were made, the administration says the pro forma sessions are gimmicks and that the Senate was effectively in recess.

"The purpose of these sessions avowedly is not to conduct business; instead, either the Senate has intended to prevent the president from making recess appointments during its absence or the House has intended to require the Senate to remain in session (toward the same end)," wrote Assistant Attorney General Virginia Seitz in the DOJ memo.

Many critics of the recess appointments predict that action taken by the NLRB and the Consumer Financial Protection Bureau will be "void as a matter of law and will likely be struck down by the courts in legal challenges that are certain to come," former Department of Justice lawyers David B. Rivkin Jr. and Lee A. Casey opined in a column in the *Wall Street Journal* on January 6th. To that end, trade groups like the National Federation of Independent Businesses and the National Right to Work Legal Defense and Education Foundation have sought to amend an already pending lawsuit against the NLRB to incorporate claims that the appointments were unconstitutional. In response, the NLRB has essentially argued the complaint should not be amended because the trade groups lack standing and the issue is not ripe for adjudication.

Before President Obama's appointments, Republicans had threatened to block the NLRB nominees from receiving Senate confirmation because of the board's union-friendly decisions and regulations. The NLRB appointments were made at a time when the agency had only two members and therefore lacked a quorum, which effectively prohibited the body overseeing labor and management relations from taking

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any official action. The three new appointments now guarantee the NLRB a quorum and the ability to take official action, which could be subject to constitutional challenge going forward as a result of the appointments.

## NLRB Rules Employees Can't Be Forced to Sign Class Action Waivers

The NLRB recently struck a blow against employers' abilities to require employees to sign class action waivers.

In a January 3rd decision, the NLRB ruled that employers cannot require covered employees, as a condition of employment, to sign agreements waiving their ability to file class or collective actions over issues like overtime and pay in any judicial or arbitral forum. These waivers, the NLRB ruled, "unlawfully restrict[ed] employees' Section 7 right [under the National Labor Relations Act ("NLRA")] to engage in concerted action for mutual aid or protection." The case was D.R. Horton Inc., 357 NLRB No. 184 (Jan. 3, 2012).

As a result of the ruling, an employer could be subject to an unfair labor practice charge under the NLRA if the employer requires its employees to sign agreements waiving the ability to bring a class or collective action in court and in arbitration.

"These forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7," the NLRB wrote in its opinion, which was authored by Mark G. Pearce and Craig Becker. "Such conduct is not peripheral but central to the Act's purposes."

The NLRB's decision does not strike down all employment-related arbitration agreements. An agreement requiring arbitration of any individual employment-related claims "would not violate the NLRA because it would not bar concerted activity," the board clarified.

The NLRB's ruling is in contrast to recent Supreme Court and circuit courts of appeals decisions favoring arbitration as a means of resolving employment disputes. Specifically, in April 2011 in the case of AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011), the Supreme Court upheld a class action waiver in a consumer contract by finding that the Federal Arbitration Act ("FAA") preempted state laws that invalidated such waivers. In response to the argument that AT&T Mobility should control, the NLRB reasoned that AT&T Mobility was distinguishable because AT&T Mobility involved consumer class actions and not employment agreements. Also, AT&T Mobility involved a conflict between the FAA and state law, which raised a Supremacy Clause issue, while the NLRB was dealing with a conflict between two federal statutes in the FAA and the NLRA.

The decision was the last action taken by Board Member Becker, whose recess appointment ended shortly after the ruling was made. Fellow NLRB member Brian Hayes recused himself from the case. Many expect that the NLRB's decision in D.R. Horton Inc. will be appealed and may eventually make its way to the U.S. Supreme Court.

## NLRB Delays Poster Rule Until April 30

The NLRB has once again postponed the effective date of its poster rule to April 30, 2012. The rule requires all employers subject to the NLRA to put up posters at places of employment informing the workers of their rights under the NLRA. The rule is presently undergoing a legal challenge arguing that the rule exceeds the NLRB's authority.

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