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President Bypasses Senate to Make Recess Appointments to the NLRB

By Ilyse Schuman and Jennifer Mora

On January 4, 2012, President Obama announced his intention to make three recess appointments to the National Labor Relations Board, filling vacancies that otherwise would have left the Board without the authority to carry out its functions. Faced with the prospect of losing a quorum upon the expiration of the recess appointment of Craig Becker the day before, the President moved forward with the recess appointments, despite procedural moves in Congress to curb his power to do so. The announcement of the appointments has met with stiff opposition from those both on and off Capitol Hill who contend that, because the Senate was not technically in recess, the President was not authorized to make recess appointments. In fact, on January 13, 2011, the National Federation of Independent Business and the National Right to Work Foundation filed a motion in federal court, as part of their lawsuit against the Board for requiring employers to post notices about employees' rights under the National Labor Relations Act, arguing that the President's appointments were "unconstitutional, null and void," and an illegal attempt to bypass the Senate. While the definition of "recess" and the validity of the appointments are under challenge, employers should prepare for a reconstituted Democrat-controlled Board that is expected to continue an apparent pro-labor adjudicatory and rulemaking agenda.

The move to seat new Board members was prompted by the U.S. Supreme Court's decision in *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). In this June 2010 decision, the Supreme Court ruled that the Board must have at least three sitting members to exercise its full authority. When former member Craig Becker's recess appointment expired at the end of the First Session of the 112th Congress on January 3, 2012, the five-member Board was left with just two sitting members – Chairman Mark Gaston Pearce (D) and Member Brian Hayes (R). Accordingly, the Board ceased to have the ability to act when Becker's term expired.

Recess Appointment Authority

Bypassing the Senate confirmation process, the President appointed Sharon Block (D), Richard Griffin (D), and Terence Flynn (R) to the Board via recess appointments. Flynn had been nominated in January 2011, but the Senate did not take any action on his nomination over the course of the year. The President nominated Block and Griffin to serve on the Board a month ago, in December 2011. The Senate, especially with the intervening holidays, had insufficient time to evaluate their nominations before their recess appointments. Even with ample time, however, it is unlikely that the Senate would have confirmed either Block or Griffin.

Article II, §2, Clause 2 of the U.S. Constitution gives the President the authority to make high-level appointments to the federal government with the "advice and consent" of the Senate. Under normal procedures, individuals the President nominates for these positions must be confirmed by the Senate. The Constitution also provides an exception to the Senate confirmation process when the Senate is in recess. Specifically, Article II, §2, Clause 3 states that "[t]he President shall have Power to fill up vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next Session." The Constitution does not define the length of time that the Senate must be in recess before the President can make a recess appointment. According to the Congressional Research Service (CRS), the Department of Justice has offered differing views on this question, and no settled understanding appears to exist.[1] However, CRS cites a 1993 Department of Justice brief implying that the President may make recess appointments during a recess of more than three days, linking the minimum required recess period to the Adjournments Clause of the Constitution. Article I, §5, Clause 4 of the Constitution provides that neither House of Congress can adjourn for more than three days without the consent of the other House.

At the time the President made the NLRB recess appointments, the Senate had not formally adjourned more than three days, pursuant to a concurrent resolution agreed upon with the House. Instead, the Senate has been holding *pro forma* sessions – in which it convenes every few days but carries out no substantive work. Prior to the NLRB recess appointments and the appointment of Richard Cordray as Director of the Consumer Financial Protection Bureau, President Obama had not made any recess appointments during the time the Senate was holding *pro forma* sessions; that is, in the absence of House consent to a Senate adjournment of more than three days. The CRS report notes that the practice of holding *pro forma* sessions to prevent recess appointments was used by the Senate Majority Leader in 2007 and 2008 during the presidency of George W. Bush. The CRS report also notes that the shortest recess during which appointments have been made during the last 20 years was 10 days.

In support of the President's authority to make recess appointments during these *pro forma* sessions of the Senate, the White House opined that the Senate was "effectively" in recess. Announcing Cordray's appointment, the White House concluded that: "The Senate has effectively been in recess for weeks, and is expected to remain in recess for weeks. In an overt attempt to prevent the President from exercising his authority during this period, Republican Senators insisted on using a gimmick called 'pro forma' sessions, which are sessions during which no Senate business is conducted and instead one or two Senators simply gavel in and out of session in a matter of seconds."[2] The Justice Department weighed-in as well, also expressing the opinion that the appointments were lawful.[3]

Reaction opposing the White House announcement was swift and strong. According to the United States Chamber of Commerce, which immediately issued a statement on the appointments, the President's move "is highly irregular and virtually unprecedented. While the Constitution vests the President with the authority to make recess appointments, the conventional wisdom has been that it requires a recess of more than 3 days in order for the President to exercise this authority." Senator Mike Enzi (R-WY), Ranking Member on the Senate Health, Education, Labor and Pensions (HELP) Committee, also immediately denounced the recess appointments in a similar statement in which he wrote "[t]he president has ignored the Senate's confirmation and vetting process."

What Employers Can Expect from the New Board

On January 9, 2012, Block, Griffin and Flynn were sworn into office, bringing the Board to full five member strength for the first time since August 2010. Their terms will extend through the end of 2013. Although they take office with challenges to their appointments looming, the newly constituted Board is likely to continue its active and union-friendly adjudicatory and rulemaking agenda.

Like former Board Member Becker, Member Griffin comes directly from a union position. Prior to his appointment, he served as General Counsel for the International Union of Operating Engineers (IUOE). He also served on the board of directors for the AFL-CIO Lawyers Coordinating Committee, a position he held since 1994. Since 1983, he has held a number of leadership positions with IUOE from Assistant House Counsel to Associate General Counsel. From 1985 to 1994, Griffin served as a member of the board of trustees of the IUOE's central pension fund. From 1981 to 1983, he served as a counsel to NLRB Board Members. He holds a B.A. from Yale University and a J.D. from Northeastern University School of Law.

Member Block served as Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor prior to her appointment to the Board. Between 2006 and 2009, Block was Senior Labor and Employment Counsel for the Senate HELP Committee, where she worked for

Senator Edward M. Kennedy. She previously served at the Board as senior attorney to Chairman Robert Battista from 2003 to 2006 and as an attorney in the appellate court branch from 1996 to 2003. From 1994 to 1996, she was Assistant General Counsel at the National Endowment for the Humanities, and from 1991 to 1993, she was an associate at Steptoe & Johnson. She received a B.A. in History from Columbia University and a J.D. from Georgetown University Law Center where she received the John F. Kennedy Labor Law Award.

Member Flynn had been detailed to serve as Chief Counsel to Board Member Hayes. He previously was Chief Counsel to former Board Member Peter Schaumber, where he oversaw a variety of legal and policy issues in cases arising under the National Labor Relations Act (NLRA). From 1996 to 2003, he was counsel in the Labor and Employment Group of Crowell & Moring, LLP, where he handled a wide range of labor and employment issues, including collective bargaining negotiations, litigation of unfair labor practices, defense of ERISA claims, and wage and hour disputes, among other matters. From 1992 to 1995, he was a litigation associate at the law firm David, Hager, Kuney & Krupin, where he counseled clients on federal, state, and local employment and wage-hour laws, NLRB arbitrations, and other labor relations disputes. Flynn started his law career at the firm Reid & Priest, handling labor and immigration matters from 1990 to 1992. He holds a B.A. degree from the University of Maryland and a J.D. from Washington & Lee University School of Law.

While the recess appointments of the three new members and the expected challenges to their appointments cast some uncertainty over the Board's actions, employers can expect the Board's dramatic changes to labor law undertaken last year to continue, if not accelerate. On December 22, 2011, the NLRB issued final rules amending representation case procedures.[4] Opting to include only a subset of the changes originally proposed in the final rule, the Board left the remainder of the proposals for "further deliberation." With the recent recess appointments, even more sweeping changes to election procedures may be ahead.

Employers will be watching for the real possibility that the new Board will overturn significant decisions made by the Bush Board. These decisions include:

- ***Register-Guard***. In this decision, the Board held that an employer may lawfully prohibit its employees from using their employer's e-mail system for organizing activities. It also changed the analysis to be applied when determining whether an employer is unlawfully discriminating against union and other communications and activities protected by Section 7. If the pro-labor viewpoint of the dissent in *Register Guard* is adopted by the newly- created Obama Board, employers will likely be required to allow employees to use the employer's e-mail system to solicit on behalf of a union (or presumably against unionization) unless the employer can demonstrate "a legitimate business reason [for the ban] that outweighs the interference" placed on the exercise of Section 7 rights.
- ***Lutheran Heritage Village-Livonia***. The Obama Board may modify its approach to reviewing employer handbooks and other written policies to allow greater protections to employees and to restrict the ability of employers to maintain rules that discourage conduct that might result in employer liability.
- ***IBM Corporation.*** The pendulum on the applicability of *Weingarten* rights to non-union employees has swung back and forth several times during past administrations, and it may soon swing again under the Obama Board. In 2004, the Bush Board held in *IBM Corporation* that *Weingarten* rights applied only to unionized employees. Given the fact that the applicability of *Weingarten* rights to non-union employees has shifted depending upon the makeup of the Board, the Obama Board likely will shift back to the rule articulated by both the Carter Board and the Clinton Board.
- ***Oakwood Healthcare***. The Obama Board may take the opportunity to narrow the definition of "supervisor" under the NLRA and, therefore, increase the number of employees who are covered by the protections of the NLRA and, importantly, allowed the ability to vote in a union election.

As debate over the authority of the President to make recess appointments continues in Congress and likely the courts, employers need to be prepared for even more dramatic changes from the Board. Employers should consider conducting an audit of their policies, preferably working with experienced legal counsel, in an effort to maintain attorney-client privilege where feasible. In doing so, employers should consider the following:

- Review all personnel policies and handbooks and modify any ambiguous policies that may be interpreted as interfering with employees' exercise of Section 7 rights. In addition, seek to clarify that the policies are not intended to so impede on such rights and will not be applied

in an unlawful manner. Consider including a "disclaimer" in employee handbooks that makes clear to employees that the handbook policies are not intended to interfere with employees' Section 7 rights. Employers whose policies are consistently enforced and do not infringe on employees' Section 7 rights remove a potential issue from a union's arsenal of campaign topics and also reduce the likelihood that the employer will be involved in a "test" case before the Board challenging the employer's policies.

- Review both written job descriptions and the actual duties performed by front-line supervisors to ensure that they have sufficient authority and responsibility to satisfy the Section 2(11) analysis set out by the dissent in *Oakwood Healthcare*. Develop a record-keeping system to document when and how these supervisors exercise their independent judgment in performing supervisory duties.
- Review e-mail policies to ensure that they are state-of-the-art, as well as to ensure that they are consistently enforced. In the past, when the Board or a union has challenged an employer's e-mail policies, this issue has usually stemmed from an inconsistently enforced policy.
- Monitor Littler ASAP® newsletters and subscribe to Littler's Labor Relations Counsel blog (www.laborrelationscounsel.com) and Washington D.C. Employment Law Update blog (www.dcemploymentlawupdate.com) to stay abreast of significant developments and decisions issued by the Obama Board.
- Conduct periodic attorney-client privileged labor-relations audits to ensure compliance with new decisions issued by the Obama Board.

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[1] U.S. Congressional Research Service. Recess Appointments: Frequently Asked Questions (RS21308; Dec. 12, 2011), by Henry B. Hogue.

[2] *See* Posting of Dan Pfeiffer to The White House Blog, http://www.whitehouse.gov/blog/2012/01/04/americas-consumer-watchdog? utm_source=010412&utm_medium=topper&utm_campaign=daily (Jan. 4, 2012, 10:45 EST).

[3] *See* Assistant U.S. Attorney General Virginia A. Seitz, Memorandum Opinion to the Counsel to the President: Lawfulness of Recess Appointments During A Recess of the Senate Notwithstanding Period Pro Form Sessions (Jan. 6, 2012), *available at* http://www.justice.gov/olc/2012/pro- forma-sessions-opinion.pdf.

[4] 76 Fed. Reg. 80,138 (Dec. 22, 2011).