What Is the REAL Impact to Employers of the *New Process Steel v. NLRB* U.S. Supreme Court Decision?

On June 17, the United States Supreme Court issued its anxiously-awaited opinion in *New Process Steel v. National Labor Relations Board*, holding that, under Section 3(b) of the National Labor Relations Act, a two-member panel does not have statutory authority to issue decisions on behalf of the National Labor Relations Board ("Board"). The Respondent had challenged two decisions issued by a two-member Board, arguing that such a panel did not constitute a quorum as required by Section 3(b). The Supreme Court agreed with this position.

By law, the Board is made up of five members who are appointed for five-year terms with one member's term expiring each year. Section 3(b) of the National Labor Relations Act allows the Board to delegate its full authority to any group of three or more members. Part of the intent of this provision was to cover those periods when a member's five-year term ended or there was otherwise a vacancy to allow the Board to continue functioning while a new member was sought and appointed by the President.

Due to political bickering over the last two years, neither Presidents Bush nor Obama were able to get Senate approval for any of their Board nominees. Consequently, as member terms expired, the Board was left with only two members. During the 27 months the Board had only two members, it issued over 600 decisions. *New Process Steel* challenged the legality of a two-member Board, and the case ended up before the Supreme Court.

The Supreme Court found that "having three members harmonizes and gives meaningful effect to all of the provisions of Section 3(b) and is consistent with the Board's practice of reconstituting three-member groups when a member leaves." The Court also emphasized that "if Congress had intended to authorize the Board to act with just two members, it could have easily done so with straight-forward language just as it has expressly authorized the Board to act with only three members."

How much of an impact this case will have is up for debate. Certainly, those cases still winding their way through the courts will be impacted, but many of the 600 or so cases decided by the two-member Board have not been appealed and have been settled or otherwise become final. Perhaps the biggest challenge will come from employers who have been ordered to bargain with a union by the two-member Board and have done so. If the order to bargain was invalid, may the employer withdraw recognition and try again? After all, there is no time limit to file a request for review of a Board order. What if the employer was ordered to bargain by the two-member Board, did so, and reached a contract? Can the employer disavow the contract and challenge the bargaining order? These and many other questions are sure to arise as *New Process Steel* is dissected and analyzed through our federal court system.

Much of the potential procedural impact (i.e., getting another bite at the apple) may be illusory from a results perspective for employers at this point. The Board now has four members, as President Obama made two recess appointments which did not have to be approved by the Senate. However, with this makeup, the Board is now much more friendly to labor than in the Bush years. So, even if a two-member Board decision is re-litigated, employers who lost before should not expect a different result from the current Board.

If you have any questions regarding this alert or any other Labor & Employment matter,

please contact Bill Trumpeter, Starlette Harris, or any other member of Miller & Martin's Labor & Employment Practice Group.

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ATLANTA

1170 Peachtree Street, N.E., Suite 800
Atlanta, GA 30309-7706

CHATTANOOGA

832 Georgia Avenue, Suite 1000,
Volunteer Building
Chattanooga, TN 37402-2289

NASHVILLE

150 Fourth Avenue North, Suite 1200, One Nashville Place
Nashville, TN 37219