

January 5, 2012

President Obama Makes Three Recess Appointments To The National Labor Relations Board

On January 4, 2012, President Obama “recess” appointed three new members of the National Labor Relations Board: Sharon Block (D), Richard Griffin (D), and Terence Flynn (R). In a press release, President Obama stated, in part, as follows: “The American people deserve to have qualified public servants fighting for them every day... to... uphold the rights of working Americans.” He was “proud to appoint these fine individuals to get to work for the American people.”

These three “recess” appointments mean that the NLRB will now have a full complement of five members for the first time since August 2010. Following the recent expiration of Member Craig Becker’s “recess” appointment, the NLRB would have otherwise lacked a quorum of three members because only Chairman Pearce (D) and Member Hayes (R) continued to serve.

The “recess” appointments of Members Block, Griffin, and Flynn, however, are controversial for several reasons. First, “recess” appointments are made when Congress is in “recess.” The Department of Justice, relying on Article I, Section 5 of the Constitution, had previously indicated that a recess has to be longer than three days in order for the President to make a “recess” appointment. Whether the Senate was in “recess” on January 4th or had been in “recess” for more than three days on January 4th is disputed. Accordingly, there may be a legal challenge to President Obama’s authority to make these “recess” appointments.

Second, on December 14, 2011, President Obama announced his intent to nominate Ms. Block and Mr. Griffin to the NLRB, and those nominations were submitted to the Senate on December 15th. The Senate held no confirmation hearings on those nominations. All 47 Republican Senators, however, signed a letter to President Obama stating that if President Obama “recess” appointed Ms. Block and Mr. Griffin, Republican Senators would block confirmation votes for other nominees.

Third, the “recess” appointment of Member Griffin is controversial because, like Craig Becker, he worked for a labor union directly before his appointment. Member Griffin was the General Counsel for the International Union of Operating Engineers.

Assuming that these three “recess” appointments to the NLRB remain in effect and are not judicially invalidated, the effects will be as follows:

- Members Block, Flynn, and Griffin will serve until the end of 2013, which is when their “recess” appointments will end. If a Republican becomes the next President as a result of the 2012 election, that new President would not be able to replace these three “recess” appointees until 2014.
- With a majority of Chairman Pearce, Member Block, and Member Griffin, the pro-union tendencies of the current NLRB will continue for at least the next two years. A pro-union NLRB majority will apply the law favorably to unions and employees and will reverse pro-employer decisions issued by the Bush NLRB.

- The pro-union NLRB majority may continue to use administrative rule-making, as it did in 2011 with the notice requirement and the revised election rules, to adopt regulations that will facilitate union organizing activity and expedited elections. A particular concern is whether the NLRB will implement further regulations that will shorten the time between the filing of an election petition and the date of a representation election and that create other advantages for unions in the election process. In December 2011, the NLRB promulgated only a portion of the regulations about representation elections that it described in its proposed regulations earlier in 2011. The new NLRB majority of Chairman Pearce, Member Block, and Member Griffin may pursue the promulgation of either the additional regulations that were not implemented in 2011 or new and different regulations for the election process.

If you have any questions about what these “recess” appointments mean to employers, please contact your Butzel Long attorney or the author of this Client Alert.

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