INVALIDATION OF OBAMA'S NLRB APPOINTMENTS BY D.C. CIRCUIT AND RECENT NLRB DECISIONS

Labor & Employment Alert
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On January 25, 2013, the U.S. Court of Appeals for the District of Columbia held that President Obama's January 4, 2012, recess appointments to the National Labor Relations Board (NLRB) were unconstitutional because the Senate was not in recess at the time the appointments were made. Similar challenges to the NLRB's authority are pending in other courts, and the issue will eventually go to the Supreme Court. If the challenges are upheld, all of the decisions made by the NLRB from January 4, 2012, to the present will be invalidated. It will likely be at least another year before there is a ruling from the Supreme Court that settles the question of whether the NLRB had the authority to act under the recess appointments. In the interim, the President may make additional lawful appointments to the NLRB, and the NLRB could ratify the previous questionable decisions.

In the meantime, several recent NLRB cases have been decided with significant impact for employers. This alert summarizes some of these most recent cases and their effect on employers. Because of the uncertainty of the final outcome of the challenge to the NLRB's authority and because of the current political climate, these cases should be treated as controlling pending review of the NLRB's authority under the recess appointments.

Hispanics United of Buffalo, Inc.

The NLRB has made the use of social networking for protected, concerted activity a focus in the last year. In a 3-1 decision, the NLRB held an employer, Hispanics United of Buffalo, Inc., violated the NLRB by discharging five workers for Facebook comments. The comments related to a co-worker's criticism of the workers' performance on the job. The NLRB held that the Facebook comments were protected, concerted activity. This decision is not a change in NLRB law, but represents the application of well-settled NLRB law to modern technology. The NLRB held that although the workers' mode of communication may be outside the workplace, an employee's discipline or discharge is unlawful if it is motivated by an employee's concerted, protected activity and if the employer knows the activity was concerted. One impact of this decision could be that employees might reveal their wages, benefits, and other terms of employment that could be used by a competitor to lure employees to work for them. Although this type of disclosure would have

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been generally protected under prior laws, the disclosure could now spread to millions of people as opposed to just those employees standing around the water cooler.

Piedmont Gardens

This NLRB decision overruled precedent that allowed employers to refuse to provide witness statements to the union. In *Piedmont Gardens*, the NLRB held that witness statements should be provided to the union because it considered such statements to be necessary for the Union to perform its duties as collective-bargaining representatives. In *Piedmont Gardens*, the NLRB overturned its decision in *Anheuser-Busch*, which provided a categorical exemption that protected the confidentiality of witness statements taken during internal disciplinary investigations. It replaced the blanket exemption with the test previously used to determine whether certain information should be turned over to the union. The "test requires that if the requested information is determined to be relevant, the party asserting a confidentiality defense has the burden of proving that a legitimate and substantial confidentiality interest exists, and that it outweighs the requesting party's need for the information."

The NLRB's decision establishes a new, fact-intensive, case-by-case approach that must be utilized by employers, with unpredictable results. The NLRB's holding in *Piedmont Gardens* could ultimately have a chilling effect on employees' willingness to report on-the-job misconduct and participate in work place investigations.

WKYC-TV, Inc.

This NLRB decision reversed 50 years of precedent by holding that an employer's obligation to check off union dues continues after expiration of a collective-bargaining agreement. The NLRB held that an employer must continue dues deductions following the expiration of a contract until the parties have either reached an agreement or a valid impasse exists, thereby permitting unilateral action by an employer. The NLRB decided to apply the holding only prospectively as employers have relied on the NLRB's previous ruling in *Bethlehem Steel* for the past fifty years, which allowed employers to cease honoring dues-checkoff arrangements following contract expiration. This decision takes away a weapon employers had used during bargaining after contract expiration and is another example of the NLRB's proactive approach to make the law more favorable to unions.

Nurses & Allied Professionals (Kent Hospital)

In *Communication Workers v. Beck*, in 1988, the Supreme Court decided a person could choose not to become a full union member and pay only those dues directly related to negotiations and administration of the union contract. A person who does this is called a Beck objector. The NLRB changed this law last month in a case called *Nurses & Allied Professionals*. The NLRB ruled that "lobbying expenses are chargeable to objectors if they are germane to collective bargaining, contract administration, or grievance adjustment." The NLRB held that although unions may not lawfully charge objectors for purely partisan expenses, certain political expenses for legislative proposals may be directly related to a union's most essential representative functions. *Nurses & Allied Professionals* reduces an individual's economic incentive to be a Beck objector.

Alan Ritchey, Inc.

In the past, if employees had voted for a union to represent them but no first contract was finalized, an employer did not have to bargain with the union about employee discipline or discharges. The NLRB in *Alan Ritchey, Inc.* held last month that employers in this situation must give a union the opportunity to bargain before enforcing any *discretionary discipline* on unionized employees. The NLRB ruled that "the employer has both a duty to maintain an existing policy governing terms and conditions of employment and a duty to bargain over discretionary applications of that policy."

This decision again gives unions more power between an election and establishment of a contract by prohibiting employers from unilaterally imposing certain types of discipline. The new rule applies to discretionary changes in workplace policy, suspensions, demotions, and firings but does not apply to oral or written warnings for misbehavior.