

Another Circuit Court Finds President's National Labor Relations Board (NLRB) Recess Appointments Unconstitutional

SheppardMullin

Article By

[Kevin J. Smith](#)

[Ryan Duffy](#)

[Sheppard, Mullin, Richter & Hampton LLP](#)

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Last month, the United States Court of Appeals for the Fourth Circuit raised the stakes on what has become one of the most prominent topics in the labor law community in recent times with its 2-1 decision in ***National Labor Relations Board v. Enterprise Leasing Co. SE, LLC***, 2013 WL 3722388 (4th Cir. July 17, 2013). Taking up a topic recently examined by the Courts of Appeal for the D.C. Circuit and the Third Circuit, the Fourth Circuit held that President Barack Obama's appointment of three members to the five-person National Labor Relations Board (the "NLRB") on January 4, 2012 (previously discussed [here](#)) was unconstitutional. This means that, according to the Fourth Circuit, the NLRB has been acting without the three-person quorum it is required to have in order to issue valid orders and decisions since January 4, 2012, when the appointment occurred.

The D.C. Circuit first examined this issue in January 2013 in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). There, the court held that President Obama's recess appointment of three NLRB members on January 4, 2012 was unconstitutional because the appointments did not actually occur during the required Senate "recess" period, as defined by the Recess Appointments Clause of the U.S. Constitution. The

Third Circuit followed with its own decision in *NLRB v. Vista Nursing and Rehabilitation*, 2013 WL 2099742 (3d Cir. May 16, 2013) in May, holding that the appointment of one of the NLRB board members by President Obama on January 4, 2012 was invalid based on the argument that the President's recess appointment did not actually take place during a "recess" under the Recess Appointments Clause.

In a timely move, the U.S. Supreme Court recently granted a petition for certiorari in *Noel Canning*, and is expected to hear arguments in the case in early 2014. The implications of the *Noel Canning* decision are significant. If the Supreme Court agrees with the D.C. Circuit Court's holding that President Obama's three NLRB appointments were unconstitutional, hundreds of NLRB decisions and orders issued since January 2012 will likely be invalidated, as they would have been reached without the necessary quorum of three sitting NLRB members.

With its decision in *Enterprise Leasing*, the Fourth Circuit joins the D.C. Circuit and Third Circuit courts. In *Enterprise Leasing* (available [here](#)), the Fourth Circuit was presented with two consolidated cases challenging NLRB orders. The Fourth Circuit first upheld the NLRB orders at issue, but then went on to apply the logic used in *Noel Canning* and *Vista Nursing* to determine the constitutionality of the three January 4, 2012 recess appointments to the NLRB. Ultimately, the Fourth Circuit vacated the two NLRB orders on the same grounds as the D.C. and Third Circuits. The Fourth Circuit was not unanimous, however; Judge Albert Diaz argued in a lengthy dissenting opinion that the majority's interpretation of the Recess Appointments Clause was inappropriately textual given the lack of clarity in the relevant language, and out of keeping with the framers' original intent. Judge Diaz advocated instead for a more functional reading of the Recess Appointments Clause, which, he argued, would support a finding that the NLRB orders issued after the President's January 4, 2012 appointment are enforceable.

Three separate federal appellate courts have now come to the same conclusion regarding the constitutionality of President Obama's January 4, 2012 appointments to the NLRB and the validity of subsequent NLRB orders. While the Senate's July 30, 2013 confirmation of all five of President Obama's nominees to serve on the NLRB now gives the Board an undisputed quorum going forward, employers cannot be certain whether orders issued by the NLRB between January 4, 2012 and then will be vacated or upheld until the Supreme Court rules in *Noel Canning* - which may not happen for another year. The Fourth Circuit decision in *Enterprise Leasing* suggests that the tide of judicial opinion is turning definitively against the NLRB's position, though Judge Diaz's strong dissent demonstrates that there is still room for debate. We will continue to monitor any rulings on the constitutionality of President Obama's NLRB appointments and will keep you apprised of any developments.

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