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## **President Obama's NLRB Recess Appointments Ruled Unconstitutional by Federal Appeals Court**

President Obama violated the Constitution when he circumvented the Senate to fill three vacancies on the National Labor Relations Board ("NLRB") in January 2012. The U.S. Court of Appeals for the D.C. Circuit ruled that the President's appointments were invalid from the inception for two reasons: i) the appointments were not made during "the Recess" of the Senate; and ii) the vacancies did not "happen" during "the Recess." Therefore, the President did not have the constitutional authority to make these recess appointments to the NLRB.

The NLRB is a five-member board that requires at least a three-member quorum to act. The decision renders the President's appointment of Sharon Block, Richard Griffin, and Terrence Flynn (who resigned after his appointment) invalid. This leaves Chairman Mark Pearce as the only properly installed member of the NLRB and effectively obviates the Board's power to act because it is without a quorum.

The decision also threatens the validity of hundreds of NLRB decisions issued over the past year, as the D.C. Circuit's ruling means that the NLRB has lacked a quorum since January 3, 2012. Under the U.S. Supreme Court's 2010 decision in *New Process Steel*, Board decisions issued when the NLRB lacks a three-member quorum are invalid.

Undaunted, Chairman Pearce responded to the court ruling by issuing a statement that the NLRB would continue its "important work." The White House also indicated that the D.C. Circuit's ruling would likely be challenged. Although the D.C. Circuit's ruling is the first appellate decision regarding the validity of the President's NLRB recess appointments, cases raising the same issue are currently pending before other circuits.

Given the importance of the issue, it is anticipated the case will be taken up by the U.S. Supreme Court. In fact, the D.C. Circuit's logic would render invalid many

prior recess appointments by both Republican and Democratic presidents; the case therefore presents a critical issue regarding the separation of powers between the executive and legislative branches.

Thompson Coburn will continue to keep you advised of any developments. If you have questions regarding the above-referenced decision, or other labor or employment issues, please contact your Thompson Coburn attorney or a member of our Labor and Employment Group.

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