

Doubling Down – The NLRB Shuns *Noel Canning* Implications Again

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Fingers In Ears

Since it was decided in January, the D.C. Circuit's *Noel Canning* decision has been easy ammunition for employers to shoot at the NLRB in response to any adverse decision. [As we previously reported](#), the NLRB's response has been to effectively "put their fingers in their ears" and refuse to recognize the ruling of the D.C. Circuit as controlling.

Most recently, the ability of the NLRB to act was challenged by the Respondent in [Ampersand Publishing, LLC](#), 359 NLRB No. 127 (May 31, 2013). In response, the NLRB again "shooed" away the argument that the NLRB lacks a quorum. In doing so, the Board relied upon the same rationale that it did in previous decisions, dismissed the legitimacy of the *Noel Canning* decision by arguing that it is still in litigation and no "definitive resolution" on the recess appointments issue has been reached. However, in doing so, the Board completely ignored the [more recent Third Circuit decision](#) in *New Vista Nursing* that adopted much of the D.C. Circuit's reasoning in *Noel Canning* and also found that the Board's actions could be invalidated due to improper recess appointments. The *New Vista Nursing* decision was handed down two weeks before the Board's *Ampersand Publishing* decision, but the Board's footnote addressing the *Noel Canning* argument fails to even acknowledge it, while citing instead to several older cases that allegedly conflict with *Noel Canning*'s reasoning to support its argument.

In a most certain case of ignoring that which you wish were not true, the Board continues to act as though the decisions of two federal Courts of Appeals have no effect on its on-going operations. Given the more aggressive posture of the Obama Board, this is not particularly surprising. The Board has filed [a cert petition](#) on the *Noel Canning* decision with the U.S. Supreme Court and it is a virtual certainty that the Supremes will agree to hear the case. But in the meantime, the Board keeps issuing decisions, all of which are subject to being invalidated if the U.S. Supreme Court agrees with the D.C. Circuit. The Obama Administration has also attempted to stem the tide on the effect of *Noel Canning* by pushing [the nominations](#) of a new slate of NLRB members through the Senate, but no confirmation votes have been scheduled.

Despite all of this uncertainty, the Board keeps issuing decisions, apparently willing to double down on its bet that the Supreme Court will overturn *Noel Canning*, and now *New Vista Nursing*. This is a risky strategy, and it remains to be seen how the cards come up.

See all of our previous coverage on *Noel Canning* and the recess appointments challenge [here](#).

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