

ALERTS**Labor & Employment Law Alert - Third Circuit Follows D.C. Circuit, Holds NLRB Recess Appointment Invalid**

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In *NLRB v. New Vista Nursing & Rehab.*, issued on May 16, 2013, the Third Circuit echoed the reasoning of the D.C. Circuit's groundbreaking *Noel Canning* decision and found the recess appointment of former NLRB member Craig Becker invalid because the Senate was not in recess at the time President Obama appointed Becker in March 2010. In *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), the D.C. Circuit had previously found that three other NLRB recess appointments also were invalid.

The Third Circuit, like the D.C. Circuit in *Noel Canning*, focused on the text of the Recess Appointments Clause in Article II of the Constitution. The Third Circuit similarly found that the meaning of "Recess" in the clause is limited to the time between official sessions of the Senate. For decades, Presidential administrations had interpreted the clause more broadly to allow the President to make recess appointments during any break in Senate business of significant duration, not just during the time between official sessions of the Senate (which often occur only at the end of the year and for a few number of days, if at all). Because of this, the decisions of the D.C. Circuit in *Noel Canning*, and now the Third Circuit in *New Vista Nursing*, if upheld, would significantly curtail a President's ability to make recess appointments when compared to past practice.

Notably, the Third Circuit chose not to address the second textual interpretation issue that the D.C. Circuit had analyzed – namely, when a vacancy in an appointed position must "happen" in order for the position to be eligible for a recess appointment. The D.C. Circuit had found that the vacancy itself must occur during the recess of the Senate in order for a recess appointment to be valid. The Third Circuit declined to take up this issue.

As a result of the Third Circuit's interpretation of the Recess Appointments Clause, it found that NLRB Member Becker, who had participated as one of the three NLRB members deciding the *New Vista Nursing* case that was in front of the Third Circuit, was not validly appointed. Therefore, the NLRB's decision was also invalid and must be vacated.

However, the Third Circuit's analysis of this issue differed somewhat from the D.C. Circuit's analysis in *Noel Canning*. The *Noel Canning* opinion had focused on the statutory requirement that the NLRB must have a quorum in order to act on any issue – i.e. it must have three validly appointed members (of a possible five members total). But the Third Circuit's *New Vista Nursing* opinion instead focused on the ability of the NLRB to delegate its authority to three members, not on the quorum

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requirement. Citing the U.S. Supreme Court's decision in *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010), the Third Circuit found that such three-member "delegee groups" also must be constituted of three validly appointed members in order for their decisions to be valid. So even if the NLRB as a whole had a quorum (i.e. at least three validly appointed members), the actions taken by a delegee group may still be invalid if a member of the delegee group was not properly appointed. In fact, the Third Circuit pointed out that the original NLRB decision in the New Vista Nursing case had been decided while the NLRB had a quorum of three validly appointed members. However, the decision was still invalid because one of the members of the delegee group that decided the case (Member Becker) was not validly appointed and therefore the panel did not have three validly appointed members.

This distinction between the quorum requirement and the requirement of having a properly appointed three-member delegee group is significant when one considers the application of the Third Circuit's opinion. While the Noel Canning decision potentially put in jeopardy any action or decision taken by the NLRB when it did not have at least three validly appointed members due to invalid recess appointments, the New Vista Nursing decision goes further and puts into jeopardy any decision of the NLRB that was made by a three-member delegee group that included a recess appointment, even if the Board as a whole had a quorum at the time. In the recent past, that would include any decision in which Member Becker participated going back to his appointment in March 2010, even though the NLRB had a valid quorum for much of this period.

The Third Circuit opinion also included a lengthy dissent by Circuit Judge Greenaway, who took issue with the majority's definition of the "Recess" of the Senate as limited only to intersession periods and argued that it should include any time the Senate was not available for "advice and consent," including intrasession breaks. Judge Greenaway would have found that all of the members of the NLRB, including the appointments held invalid by the D.C. Circuit were valid recess appointments.

The Third Circuit's adoption of the D.C. Circuit's reasoning on the recess appointment clause bolsters the credibility of the D.C. Circuit's Noel Canning decision, which many, including the NLRB, dismissed as wrongly decided. It also virtually ensures that the NLRB's petition of certiorari in the Noel Canning case, which is currently pending before the U.S. Supreme Court, will be granted and the issue ultimately decided by the Supreme Court.

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