

President Obama Appoints Three to NLRB During Purported Congressional "Recess"

January 10, 2012 by Gregg Fisch and Jenny Chang

On January 4, 2012, President Obama used his recess powers to appoint three members to the National Labor Relations Board ("NLRB" or "Board"). These appointments were made one day after the NLRB lost a quorum on its five-seat board following the expiration of the 2010 recess appointment of NLRB Member (and former top lawyer with the SEIU and AFL-CIO) Craig Becker. Under the Supreme Court's 2010 decision in *New Process Steel, L.P. v. NLRB*, the Board must have a quorum of three members to decide cases and issue enforceable decisions. These new recess appointments restored the Board's quorum, thereby avoiding a shutdown of the Board's operations.

Specifically, the three new appointees include:

- (1) Sharon Block (Democrat) – Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor, and a former NLRB and Senate committee attorney;
- (2) Terence F. Flynn (Republican) – Chief Counsel to NLRB Member Brian Hayes and who previously was Chief Counsel to former NLRB Member Peter Schaumber; and
- (3) Richard Griffin (Democrat) – General Counsel for International Union of Operating Engineers and who also serves on the board of directors for the AFL-CIO Lawyers Coordinating Committee, a position he has held since 1994.

Nevertheless, the recess appointments have come under fire and likely will be challenged in court as illegitimate on constitutional grounds. According to the U.S. Chamber of Commerce, the President's move "is highly irregular and virtually unprecedented. While the Constitution vests the president with the authority to make recess appointments, the conventional wisdom has been that it requires a recess of more than 3 days in order for the president to exercise this authority."

In the past 30 years, no President has used the recess appointment power in a recess of less than nine days. President Obama's recess appointments were made while the Senate, arguably, was not technically in recess. The Senate has been holding pro forma sessions in which it has been meeting briefly every few days. President Obama contends that he has the authority to make appointments when the Senate is "effectively" in recess. As a result, future Board decisions potentially could be subject to challenge on grounds that the Board's quorum is illegitimate and that it does not have the lawful authority to issue enforceable decisions.

In the meantime, President Obama's recess appointments give the Board a 3-2 Democratic majority. Therefore, employers can continue to expect NLRB decisions that are labor friendly and intended to bolster union organizing efforts.