Court Decision Raises Questions for Employers Affected by Acting NLRB General Counsel Solomon

In a continuing series of challenges to the president's authority to appoint positions at the National Labor Relations Board, former General Counsel Lafe Solomon was recently declared to have unlawfully filled the position for the period January 5, 2011 to November 4, 2013. The case is titled *SW Gen., Inc. v. NLRB*, and was decided on August 7, 2015 by the District of Columbia Circuit of the United States Court of Appeals. During the period January 5, 2013–November 4, 2013, Solomon served as acting general counsel while his nomination was pending. The D.C. Circuit held that was a violation of federal law.

Solomon had, previously, been appointed acting general counsel, and the D.C. Circuit held that, until January 5, 2011, his service in that position was lawful. However, effective January 5, 2011, Solomon was nominated to be the general counsel, and while his nomination was pending Senate review, he continued to serve as acting general counsel. According to the court, that was what violated federal law, specifically the Federal Vacancies Reform Act (FVRA). Under FVRA, 5 U.S.C. 3345(a), a nominee for a position as high as the NLRB general counsel, in other words, a nominee to be an officer of a federal agency whose nomination is subject to advice and consent of the Senate, cannot serve in an acting capacity in the office, unless the nominee had previously been a "first assistant" to the position. In this case, Solomon had not been "first assistant" to the prior general counsel; therefore, he did not fit the exception. He should not, under FVRA, have served as the acting general counsel while his nomination was pending. Accordingly, the court dismissed the case.

The D.C. Circuit cautioned that its holding was unlikely to be applied in many other cases: "We doubt that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or concluded—will enjoy the same success." In other words, to achieve the same result, an employer must, according to the D.C. Circuit, have had a case initiated against it, during the period January 5, 2011 to November 4, 2013, have objected to Solomon's authority, and finally, have preserved that objection by litigating and appealing it as necessary. In contrast, readers may remember the Supreme Court's 2014 decision, *NLRB v. Noel Canning*, which invalidated the board itself for a period of time, throwing numerous cases into doubt. The D.C. Circuit said, "(T)his case is not son of Noel Canning, and we do not expect it to retroactively undermine a host of NLRB decisions."

Employers against whom the NLRB commenced action during the period January 5, 2011–November 4, 2013, should consult with labor counsel regarding this latest decision.

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