

WILL THE NLRB'S LACK OF A QUORUM CAUSE THE LABOR BOARD TO STAGNATE?

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The National Labor Relations Board is an independent government agency charged with, among other things, investigating and resolving unfair labor practices. At its best, the Board is composed of a panel of five persons, plus a General Counsel, all of whom are appointed by the President with the consent of the Senate. However, a President may make an appointment without the consent of the Senate, if the Senate is at recess. This is called a "recess appointment." The panel members are appointed to five-year terms, whereas the General Counsel is appointed to a four-year term. As established by the Taft-Hartley Act, three members of the panel are required for a quorum.

Yet, the National Labor Relations Board has been without a full five confirmed-members panel since 2003. Being shy a few members and lacking a quorum have not stopped the Board from carrying on with business and continuing to prosecute cases and issue decisions. However, that may change in light of the bill passed in April by the U.S. House of Representatives. This bill, which, if passed by the Senate, would freeze NLRB funding until a legitimate quorum is obtained, was passed by the House in an effort to address the issue of the NLRB's acting without a quorum.

In December 2007, the terms of three panel members were going to simultaneously end. President George W. Bush nominated replacements, but the Senate did not consent to the new appointments. This meant that at the end of December 2007 the Board would be left with only two members and no quorum. In attempts to remedy the upcoming loss of a quorum, before the three panel members departed, the Board delegated its powers to a three-person

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panel, attempting to set the quorum at two members. The two remaining members, Wilma Liebman and Peter Schaumber, then proceeded to issue more than 500 rulings between December 2007 and March 2009.

With more panel members' terms expiring, and despite Presidential appointments, difficulty in staffing a full Board continued throughout 2010. Although members of the Board cycled in and out, at the end of 2011, the Board was again reduced to only two members. So in January 2012, Obama made recess appointments of three members.

In late April, the Board petitioned the U.S. Supreme Court to address the issue of the validity of Obama's recess appointments. While a formal decision from the Supreme Court is likely months out, in the meantime the House has passed a Bill that attempts to address the ongoing chaos that surrounds the predicament of the President's recess appointments. The legislation, known as the *Preventing Greater Uncertainty in Labor-Management Relations Act*, hereinafter the Act, if enacted into law, would require the Board to cease activity, at least until the issues are settled.

Regardless of an employer's involvement in past, future, or pending Board proceedings, all employers should keep their eyes on the developments in this area, as further Supreme Court or Senate actions could substantially change the way the game is played. If the events unfold in such a way as to invalidate any past decisions by the Board, then employers who have been ruled against, may have a means to undo what was done.

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