O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

SUPREME COURT MAY FORCE NLRB TO REVISIT PREVIOUS RULINGS

On Monday, January 13, 2014, the U.S. Supreme Court heard oral arguments in *National Labor Relations Board v. Noel Canning*, a case that could potentially result in hundreds of recent rulings by the National Labor Relations Board ("NLRB") being invalidated.

The NLRB is made up of five (5) sitting board members, who are appointed by the President to serve on the Board. Generally speaking, the NLRB has the power to issue rulings in labor disputes, which can then be challenged in court. NLRB rulings have the potential to shape U.S. labor law and so selecting the individuals to issue those rulings is often a hotly debated political issue.

The issue before the Supreme Court in the *Noel Canning* case is whether a President can use his "recess appointment" power under the Constitution to fill vacant positions during congressional recess, which is what President Obama did in 2012.

Why does this matter? Because, in order for an NLRB ruling to be valid, the ruling must be issued by a "quorum," which is three (3) confirmed Board members. Typically, the President nominates individuals for a Board seat and those nominations are then confirmed by Congress. In 2012, however, after the President's nominations to three empty seats on the NLRB had been blocked repeatedly by Congress, the President made "recess appointments" to give the Board a quorum. Although the President does have the power under the Constitution to make "recess appointments," Senators in 2012 were holding *pro forma* sessions every three days to prevent that from happening. So, the question becomes whether the Senate was actually in recess.

The U.S. Supreme Court's review of the President's recess appointments to the NLRB stems from the D.C. Circuit Court of Appeals' decision in *Noel Canning*, where the court held that a president can only make "recess appointments" during the period between formal sessions of the Senate. The argument goes that the President did not have the power to make the recess appointments because the Senate was not actually in recess and, therefore, his appointments were invalid, leaving the NLRB without a quorum and without the power to issue valid rulings.

During oral arguments on Monday, the Supreme Court Justices expressed doubt and seemed

skeptical of the Obama administration's contention that it could bypass the Senate to make appointments during short congressional breaks. The Supreme Court's decision in *Noel Canning* could have far-reaching implications and could potentially force the NLRB to revisit hundreds of rulings issued in recent years if the Supreme Court determines the President's recess appointments were unconstitutional and the Board lacked a quorum to issue rulings.

We will keep you posted as to the final outcome of this case and its impact on the NLRB's rulings and operations.