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Client Alert **Employment & Labor**

Two Significant Victories for Employers Handed Down by the Courts this Week

Supreme Court Deals NLRB Paralyzing Blow: Scores of Precedents Will Now Be Voidable

In a stunning defeat for the Obama Administration, the Supreme Court, in *NLRB v. Noel Canning,* ruled unanimously today that "recess appointments" the President made to the National Labor Relations Board in January 2012 when it lacked a quorum to act were constitutionally invalid.

This decision effectively voids a broad range of controversial NLRB decisions – ranging from restrictions on employment class action waivers to employer regulation of social media policies, which impact unionized and union-free employers alike – and will provide employers with ammunition to legally contest other actions taken in recent years by the NLRB, its General Counsel, and its Regional Offices.

In December 2011, the Senate recessed at a time when the President's nominations of three candidates to fill NLRB seats were still pending. Because NLRB membership would have declined to just two members, one shy of the majority of five needed to issue rulings, the President appointed all three of the non-confirmed candidates to the NLRB in January 2012, invoking the "Recess Appointments Clause" of the Constitution (which gives the President the power "to fill up all Vacancies that may happen during the Recess of the Senate").

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Noel Canning, a Pepsi-Cola bottling distributor, subsequently asked the D.C. Circuit Court of Appeals to set aside an adverse NLRB order, claiming that the NLRB lacked a proper quorum to issue the order because three of the five Board members had been invalidly appointed. The appellate court agreed.

The Supreme Court, in affirming the D.C. Circuit's ruling, held that the Senate, in January 2012, was in fact "in session" when the appointments were made, even though the Senate was not conducting any business during its recess, rendering the challenged appointments invalid. Though not squarely addressed by the Court, today's ruling may also negatively impact decisions issued by the NLRB prior to January 2012, by reason of another recess appointment made by President Obama in 2011 which has been independently attacked.

Although the NLRB has had five confirmed members since July 30, 2013, based on Senate action taken that day, the continued viability of more than 1,300 NLRB decisions dating back to August 2011 is highly questionable because all were issued when one or more of the NLRB members who rendered those rulings were improper recess appointees.

All employers face the dilemma of deciding whether to comply with NLRB rulings that may no longer have precedential effect. Moreover, today's ruling creates a conundrum for the NLRB, which may be paralyzed for months, if not years, as a result of anticipated judicial challenges to the suspect 1,300+ rulings.

Appellate Division Rules that a Contractual Shortening of the Statute of Limitations for Employment Claims Set forth in an Employment Application is Valid

In a significant decision approved for publication by the Appellate Division of the Superior Court of New Jersey on June 19, 2014, *Rodriguez v. Raymours Furniture Company, Inc*., the court upheld the trial court's granting of summary judgment for the defendant based on a provision in an employment application that shortened the statute of limitations for any employment related claims from two years to six months. The application was two pages in length, the prefatory language was in bold-faced large print, and the final two paragraphs, containing the shortened limitation period and jury trial waiver, were completely capitalized. The plaintiff, who was a furniture customer delivery assistant, was barred from pursuing NJ LAD and worker's compensation claims, despite the fact that he filed his lawsuit approximately nine months after his termination.

It is undisputed that the plaintiff was not a "sophisticated" business person (which distinguishes the case from the NJ Supreme Court's decision upholding an arbitration clause set forth in a handbook, in Martindale v. Sandvik, Inc., et al.). The court acknowledged that English was not his first language and his education, which was not acquired in the United States, was limited. The court further found that the contract was one of adhesion, but that this fact did not render the statute of limitations unconscionable, because the limitations provision was reasonable, as distinguished from federal cases which have rejected such arguments.

The court also rejected the plaintiff's argument that the disclaimer language in the application caused an ambiguity that was fatal to the enforcement of the contract. The disclaimer language provided that "my employment does not constitute any form of contract, implied or expressed, and such employment will be terminable at will either by myself or Raymour & Flanigan upon notice of one party to the other." The court determined, however, that the language denying the existence of a contract only applied to the employer's notice that the employment relationship was at will and did not apply to the remainder of the language such as the waiver provision. Unless the New Jersey Supreme Court overturns *Rodriguez*, this decision will have lasting impact on the employment application process and employment litigation in New Jersey.

Clients are advised to consult with the Sills Cummis & Gross Employment and Labor Practice Group for further guidance on what impact today's *Noel Canning* decision has on, among other issues, employer social media policies and mandatory employee arbitration agreements, as well as on the advisability of adding statute of limitation shortening provisions to employment applications in light of the *Rodriguez* decision.

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