

Legal Update

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Recess Appointment Ruling Casts Doubt on Controversial NLRB Decisions

By Seth A. Stern

In recent Legal Updates, we have discussed troubling decisions from the National Labor Relations Board (NLRB) finding a number of common employment policies to unlawfully restrict employees' rights to discuss working conditions. The U.S. Court of Appeals for the District of Columbia's recent ruling that President Obama's "recess appointments" to the NLRB were unconstitutional, however, calls into question the validity of these and other NLRB decisions.

In invalidating the appointments, the Court of Appeals in *Canning v. N.L.R.B.* held that the NLRB lacked a quorum to transact business. The appointees at issue took office in January, 2012, so, arguably, the NLRB was without a quorum all of last year. Some of the NLRB decisions called into doubt include:

- *Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371*, which found unlawful a policy providing that employees who post online statements that "damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement may be subject to discipline, up to and including termination of employment."
- *Karl Knauz Motors, Inc. d/b/a Knauz BMW and Robert Becker*, which invalidated a policy stating that "No one should be disrespectful or use profanity or any other language which injures the image or reputation of the dealership."
- *Banner Health System d/b/a Banner Estella Medical Center and James A. Navarro*, which shot down an instruction requiring employees to maintain the confidentiality of internal investigations.

Employers should not disregard the NLRB decisions just yet, as the Supreme Court may still weigh in on their validity. In the meantime, the Chairman of the NLRB has stated that the NLRB will continue its usual operations regardless of the *Canning* decision. Moreover, similar decisions from NLRB administrative law judges, while lacking the same precedential value as decisions from the Board itself, remain in effect. Nonetheless, employers may be able to defend against actions by the NLRB by pointing to the uncertain status of the Board's decisions. For further discussion of the NLRB's recent actions, please see our Legal Updates from [September](#), [October](#), and [November](#) of 2012.

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