

Employment Alert

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Supreme Court Rules Two-Member NLRB Not Enough to Decide Cases, Potentially Putting 500 Decisions in Jeopardy

In a much anticipated opinion, the Supreme Court ruled 5-4 today that decisions made by only two members of the five-person National Labor Relations Board were invalid. This ruling affects over 500 cases decided by the Board over the last few years. While many of the parties involved in these cases already have complied with the Board's order in their case, and thus those claims are probably moot, between 70 and 100 losing parties actively challenged the authority of the two-member Board. All of those cases will go back to the Board. Presumably, what will occur now is a new review of the record in each case, and a new decision by a three-member Board panel, which reflects the normal decision-making process. There have been rumors that in anticipation of this result, the Board has set up a special fast track review process for these cases.

Retiring Justice Stevens wrote the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito. Justice Stevens noted that when the Board was increased from three to five members, a quorum was set at three members. He noted that another provision of the National Labor Relations Act allowed delegation of the full Board's powers to three members. While the Government argued that provisions for Board vacancies, together with language holding that a "group quorum" consisted of two members, permitted the delegation of all powers to a two-member Board, Justice Stevens rejected the Government's position, finding that the three-member quorum and delegation requirements, when plainly read, trumped the government's arguments. The "group quorum" language did not permit the ad infinitum exercise of all powers by two members, and that two-member decisions were contrary to prior Board practice. He noted that Congress could easily amend the law to authorize delegation of powers to a two-member quorum, but that the Court should not do so. Justice Kennedy wrote for the dissenters, also including Justices Ginsburg, Breyer and Sotomayor, who relied on the "group quorum" language to permit the delegation of powers to two Board members.

In general, we think this decision may be of more value to unions or employees than it will be to employers. We think the most likely outcomes are that employers who lost their case before the two-member panel will lose again under the Obama Board appointees. On the other hand, disappointed unions or employees may be more likely to obtain reversals of their decisions before the current Board. Indeed, as the Board can hear only the cases that are brought before it, the remand of these cases to the Board gives it a new "pool" of cases from which to draw to make various policy pronouncements or reversals of previous Board policy. For example, the new Board appointees might use several of these cases to change established policy in areas such as representation for groups of employees, such as first-line supervisors, graduate students and others not presently covered by NLRA organizing provisions, increasing Weingarten rights, or rights to representation in non-union employer investigations, faster union elections, and in many other facets of NLRA practice. Watch this space carefully for word of these developments, and how they affect your company, as they occur.

For more information, please contact Paul Garry, Erika Dillon, or any other MBT labor and employment lawyer at (312) 474-7900.

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