Press Releases

House Passes Bill in Response to Ongoing NLRB Legal Crisis

WASHINGTON, D.C. | April 12, 2013 -
The U.S. House of Representatives today approved the Preventing Greater Uncertainty In Labor-Management Relations Act (H.R. 1120), sponsored by Rep. Phil Roe (R-TN), chair of the Subcommittee on Health, Employment, Labor, and Pensions, the legislation requires the National Labor Relations Board (NLRB) to cease all activity requiring a three-member quorum until the legal uncertainty surrounding the board is appropriately resolved.

"The president's unprecedented recess appointment scheme has crippled the work of the board," said House Education and the Workforce Committee Chairman John Kline (R-MN). "Frothal 600 decisions are now constitutionally suspect and that number grows with each new decision. Workers, employers, and unions are in limbo. Despite claims to the contrary, the overwhelming majority of business before the NLRB is addressed by regional offices and will continue under this proposal. Today the House has simply instructed the board to stop exacerbating a crisis that is harming the American workforce."

"I am pleased the House passed this important legislation," said Rep. Roe. "The NLRB is tasked with ensuring American workers have a fair workplace by administering the law. President Obama's so-called recess appointments left the board in a state of legal chaos and my bill will ensure the NLRB cannot continue with business as usual until new members are confirmed and the nomination process returns to regular order."

In January 2012 President Obama installed three so-called recess appointments to the National Labor Relations Board while Congress was not in recess. The U.S. Court of Appeals for the District of Columbia recently ruled these appointments unconstitutional. In the wake of the court's decision, legal uncertainty surrounding the board has increased. Unions and employers are now citing the court decision in their efforts to void or block board rulings. The AFL-CIO stated the ruling has "seriously undermined enforcement of the law."

As approved by the House, H.R. 1120 will:

- Prevent further labor-management instability by requiring the board to cease all activity that requires a three member quorum. The bill also prohibits the board from enforcing any action taken after January 2012 or appointing any agency personnel that require a quorum.

- Protect the right of workers to petition for union elections. The bill also does not prevent the NLRB regional offices from accepting and processing unfair labor practice charges filed by an injured party.

- Remove restrictions on the board's authority after one of the following events occurs:
  - The U.S. Supreme Court rules on the constitutionality of the recess appointments; or
  - A board quorum is constitutionally confirmed by the Senate; or
  - The terms of the unconstitutional recess appointees expire when the First Session of the 113th Congress adjourns.

- Ensure any action involving the so-called recess appointees is reviewed and approved by a future board that has been constitutionally appointed.

To learn more about H.R. 1120, click here.

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5/28/2013
Support H.R. 1120

President Obama's unprecedented and unlawful "recess appointments" to the National Labor Relations Board¹ (NLRB or Board) has caused unnecessary upheaval, uncertainty and litigation in labor relations. H.R. 1120 is a temporary measure that will reduce this uncertainty and litigation going forward. The measure expires when the Board has a confirmed quorum, the recess appointees' terms end, or when the U.S. Supreme Court rules on the constitutionality of the appointments, whichever occurs first.

Context
In January 2012, President Obama made recess appointments to fill three empty seats on the NLRB, even though the Senate was not in recess at that time.² When the Board issued an order against Noel Canning—a Yakima, Washington, beverage bottler—the company challenged the order on the grounds that the recess appointments were invalid and thus deprived the Board of the lawful quorum it needs to issue orders. On January 25, 2013, in Noel Canning v. NLRB, the U.S. Court of Appeals for the D.C. Circuit ruled that President Obama's purported "recess" appointments to the Board were made while the Senate was in session and, therefore, unconstitutional.³ Because the Supreme Court has ruled that a quorum of no less than three is required for the NLRB to issue orders, decisions, or promulgate rules, the Noel Canning decision has raised doubts as to the validity of many of the current and future Board actions, and may impact prior Board initiatives, as well.

The Problem
With the Board in disarray, those subject to its jurisdiction face ever-growing uncertainty regarding their rights and obligations under the National Labor Relations Act (NLRA). Will Noel Canning be

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¹ The NLRB is the federal government agency charged with enforcing and interpreting the National Labor Relations Act (NLRA). The NLRA, which was enacted in 1935, established the right of most private sector employees to join or refrain from joining a union and governs relations between most private businesses and unions.

² Details on the appointments are available at [http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts](http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts). The president has limited authority under Article II, Section 2 of the Constitution to make appointments without Senate confirmation when the chamber is in recess.

³ President Obama's recess appointments were unprecedented, as no prior administration attempted appointments at a time when the Senate declared itself to be in session. Noel Canning challenged the validity of the recess appointments on that basis, and on the grounds that the Constitution only permits recess appointments during the period between sessions of Congress (intersession recesses)—and only when the vacancy arose during that recess. The D.C. Circuit ruled on the latter grounds. While other presidents have made appointments during break periods that occur during a session of Congress (intersession recesses), few courts have ruled on the constitutionality of such appointments. The administration knew the recess appointments would create uncertainty and litigation, as the White House Office of Legal Counsel (OLC) noted in a memo on the appointments (available at [http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf](http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf)). "[T]he question is a novel one, and the substantial arguments on each side create some litigation risk for such appointments." OLC also noted, "there is little judicial precedent addressing the [p]resident's authority to make intersession recess appointments." In short, the administration knew it was attempting something novel that would invite legal challenges, as there was no judicial precedent on the issue of recess appointments when the Senate was in session and limited precedent on the intersession issue.
applied in other jurisdictions? Will Board decisions and rulemakings issued by the unconstitutional Board be invalidated? Must companies and unions comply with current Board orders? Do Board decisions establish precedent for possible future litigation?

The Board Has Made the Situation Worse
Unfortunately, rather than taking measures to address the chaos created by the President’s unconstitutional recess appointments, the Board has made matters worse by continuing to issue decisions, despite the ruling in Noel Canning:

- Richard Griffin and Sharon Block—the two Board members whose appointments were invalidated by Noel Canning—continue to sit on the Board and participate in its activities.
- On the day the Noel Canning opinion was issued, NLRB Chairman Mark Pearce publicly stated that he, along with Block and Griffin, “will continue to perform [the Board’s] statutory duties and issue decisions.”

Although the Board recently announced its intentions to seek the Supreme Court’s review of the Noel Canning decision, there is no guarantee that the Supreme Court will accept the case. Even if the Supreme Court does choose to review Noel Canning, it may be over a year before it issues an opinion. In the meantime, employers, employees and unions are left to wonder about the validity of NLRB-issued orders, decisions and rulemakings. This disorder and confusion is untenable, particularly in this still-fragile economy, where legal certainty is a prerequisite to economic growth.

The Solution
Fortunately, there is a legislative solution available that will help stabilize labor-management relations. The Preventing Greater Uncertainty in Labor-Management Relations Act (H.R. 1120) would alleviate the current confusion by temporarily preventing the Board from taking any action that would require a three-member quorum until:

- The Senate confirms a sufficient number of appointees to constitute a Board quorum;
- The Supreme Court rules on the constitutionality of the appointees in question; or
- The first session of the 113th Congress is adjourned properly, terminating the terms of the appointees in question and allowing for legitimate recess appointments to fill their positions.

Significantly, H.R. 1120 would not prevent NLRB regional offices from accepting and processing election petitions or unfair labor practice charges. Thus, the normal, day-to-day activities of the Board would continue as usual.

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The Coalition for a Democratic Workplace supports the Preventing Greater Uncertainty in Labor-Management Relations Act as a common-sense and temporary solution to the confusion and chaos which has resulted from an unconstitutionally appointed NLRB.
March 20, 2013

The Honorable John Kline
Chairman
Committee on Education and the Workforce
2181 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515

The Honorable George Miller
Ranking Member
Committee on Education and the Workforce
2181 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Kline and Ranking Member Miller:

On behalf of millions of job creators concerned with mounting threats to the basic tenets of free enterprise, the Coalition for a Democratic Workplace (CDW) writes in support of the Preventing Greater Uncertainty in Labor-Management Relations Act (H.R. 1120). This legislation will provide clarity to for employers, employees and other stakeholders affected by the partisan and unlawful actions of the National Labor Relations Board (NLRB), while preserving its noncontroversial functions.

CDW is a broad-based coalition consisting of hundreds of members that in turn represent millions of employers. The coalition is united in opposition to the so-called “Employee Free Choice Act” (EFCA) and EFCA alternatives that pose a similar threat to workers, businesses and the U.S. economy. Although EFCA poses a lesser threat today, politically powerful labor unions and their allies in government have turned to the NLRB to enact EFCA-like policies through administrative rulings and regulations.

On Jan. 4, 2012, President Obama brazenly ignored the U.S. Constitution and the rules of the Senate by packing the NLRB with illegal recess appointees to keep the anti-employer policies rolling. Not surprisingly, numerous legal challenges were filed against the appointments, including Noel Canning v. NLRB, in which CDW intervened. On Jan. 25, 2013, the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) unanimously invalidated the president’s appointments. CDW strongly supported the ruling, hailing it as a major milestone in reining in an out-of-control federal agency seemingly bent on enacting a special interest agenda.

The Board finds itself in a now-familiar position: its legitimacy, and in turn its ability to enforce the nation’s labor laws and promote industrial stability is in doubt yet again. Both the administration and the Board itself could have taken steps to avoid this stain on the NLRB’s reputation and minimize uncertainty. Instead, each has signaled it is more concerned with driving its political agenda than operating a balanced, legitimate Board. On Feb. 13, the White House re-nominated Sharon Block and Richard Griffin to the NLRB after their recess appointment terms were invalidated. And Board Chairman Mark Pearce has said publicly that the Board “will continue to perform [its] statutory duties and issue decisions,” refusing to impose any kind of restraint pending review by the U.S. Supreme Court.

It is now up to Congress to prevent the Board from making matters even worse by continuing to issue harmful, potentially invalid decisions and rulemakings. H.R. 1120 does just that. CDW commends the Education and the Workforce Committee for its swift attention to this matter, and urges the immediate passage of this much-needed legislation.

Sincerely,

Geoffrey Burr
Chair, the Coalition for a Democratic Workplace