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No Vacancy: U.S. Supreme Court Invalidates Most Of Former Acting NLRB GC's Tenure

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First there was the *New Process Steel* case in 2010, in which the U.S. Supreme Court ruled that the National Labor Relations Board (NLRB) needed at least three lawfully-appointed members to render decisions. Then, in 2014, the Supreme Court held in its *Noel Canning* decision that former President Obama overstepped his "recess appointment authority" by appointing three members to the NLRB when congress was not in "recess." Now, we have the *Southwest Ambulance* case. Today, the Supreme Court ruled in *National Labor Relations Board v. SW General, Inc. d/b/a Southwest Ambulance* that former NRLB Acting General Counsel Lafe Solomon improperly held that position for nearly three years while his nomination to assume the General Counsel role fulltime was pending. The Court specifically found that Solomon's service as the Acting General Counsel while his nomination was being considered violated the Federal Vacancies Reform Act. That little-known law contains a provision that precludes someone who has been nominated by a president for certain positions from fulfilling the job functions for which he/she has been nominated while the nomination is pending. The Court focused on that provision in its opinion. This ruling effectively invalidates Solomon's three-year tenure as the Acting General Counsel from 2010-2013. The lawsuit arose when Southwest Ambulance challenged an unfair labor practice complaint that had been filed against it by Solomon when he was Acting General Counsel. The Court's conclusion that Solomon was not appropriately in that role means that the complaint against Southwest Ambulance was invalid. While legally interesting and demonstrating further restraints on both the president's and NLRB's powers, this case likely will have little to no practical impact on most companies. Solomon's nomination was withdrawn in 2013, Richard Griffin subsequently was confirmed as the NLRB's General Counsel that same year, and Griffin has maintained that post since. Employers with ongoing unfair labor practice litigation that was initiated by Solomon within the three-year window at issue may be able to move to vacate complaints initiated by Solomon during that time, but the fact that the NLRB has had a lawfully appointed General Counsel for several years at this point likely makes that class of companies very small. A copy of the decision can be found here.

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