

## Noel Canning Be Damned: NLRB Holds D.C. Circuit Decision Does Not Require Complaint Dismissal

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On April 30, 2013, the NLRB for the first time in a decision addressed the D.C. Circuit's controversial *Noel Canning* decision and held that it does not prevent the agency from continuing to act while the case is litigated.

In *Bloomingtondale's Inc.*, 359 NLRB No. 113 (April 30, 2013), the employer filed a Motion to Dismiss arguing that based on the *Noel Canning* decision that President Obama's recess appointments to the NLRB were invalid, all actions of the agency, including the issuance of unfair labor practice complaints, were invalid for a lack of quorum. In its decision, the NLRB first called into question the reasoning of the D.C. Circuit's decision, finding that it was in conflict with three other court of appeals decisions: *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); and *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). The NLRB also rejected Bloomingtondale's argument that Acting General Counsel Lafe Solomon lacked the power to investigate and prosecute unfair labor practice charges. The NLRB found that under the NLRA the General Counsel is an independent office appointed by the President and confirmed by the Senate. The Board concluded therefore the General Counsel's authority to investigate and prosecute unfair labor practice charges is not a "power delegated by the NLRB but rather derives directly from the language of the NLRA."

Stay tuned, as the impact of *Noel Canning* continues to reverberate.

### Additional Resources

The *Bloomingtondale's Inc.* case is [available here](#).

The cert petition for *Noel Canning* [remains pending](#) at the U.S. Supreme Court.

See all our previous coverage of this issue [here](#).

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