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## SB on HR

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### **Party Battle Over National Labor Relations Board Continues**

On April 12 the Republican-controlled House of Representatives passed a bill that would freeze the NLRB and its recent decisions until questions about its authority to act are resolved.



The five-member board currently has only three members, two of whom President Obama appointed in January 2012 while the Senate was on a break. It needs a quorum of at least three sitting members to conduct business.

The bill, The Preventing Greater Uncertainty in Labor-Management Relations Act, would "prohibit the National Labor Relations Board from taking any action that requires a quorum of the members of the Board until such time as Board [sic] constituting a quorum shall have been confirmed by the Senate, the Supreme Court issues a decision on the constitutionality of the appointments to the Board made in January 2012, or the adjournment sine die [adjournment until the next session of Congress] of the first session of the 113th Congress." The bill would also prevent enforcement of any actions or decisions in the past year unless and until considered and acted upon by a valid Board quorum.

The bill was in response to the NLRB continuing to act, despite the recent D.C. Circuit Court decision in *Noel Canning Corp. v. NLRB*, that held President Obama's three January 2012 appointments to the Board invalid. The decision reasons that Obama's appointments were in violation of the Constitution, because they were not actual recess appointments as contemplated in the Constitution. Senate Republicans, concerned with what they viewed were anti-business appointees, had been blocking approval of Obama's appointees. In response, the President exercised his recess appointment power as other presidents have done. However, the Senate did not officially recess but instead held "pro forma" sessions every few days and even conducted occasional business. The D.C. Court reasoned that this type of recess appointment was not what the founders of the Constitution intended nor was it how they defined "recess." As a result, the Court held that the appointments were unconstitutional and the Board's decision in the Canning case was void, since a proper three member quorum did not exist. The D.C. Court's decision casts doubt over all NLRB actions and decisions since January 2012. The NLRB says it will appeal the decision to the Supreme Court.

In the meantime, the party battle over the Board continues. Although the House bill, which passed largely along party lines, will likely not pass in the Democratic-controlled Senate, Senate Republicans may continue to block Obama nominees to the Board. Obama recently nominated two republicans and one democrat (the current sitting chairman properly appointed for his first term). While republicans have praised their party's nominees, they have indicated that the Chairman's nomination should receive greater scrutiny in light of his decision to carry on Board business without a constitutionally valid three-member quorum.

### **So What?**

Why should a design professional firm care? Aside from the broader implications on jobs, overseas outsourcing, the strength of labor unions versus management, and other issues that the Board and its decisions arguably impact, the Board has recently been issuing decisions that can impact non-unionized employers' businesses:

- Striking down class-action waivers (collective pursuit of workplace grievances is protected),
- Regulating employer confidentiality instructions related to internal investigations (holding unlawful an employer's instruction not to discuss a complaint or investigation with co-workers or face discipline or discharge),
- Holding a mandatory dispute resolution program unlawful (could lead an employee to believe she could not file an unfair labor practice charge),
- Protecting employee social media speech (cannot ban social media statements that damage the company or any person's reputation), and
- The Acting General Counsel has even issued advice that at-will employment law clauses can be in violation of the National Labor Relations Act depending on how they are worded (cannot include clause in employee handbook or elsewhere that indicates at-will status cannot be altered).

So the battle to control the makeup of the NLRB is one that can have ramifications for your workplace, whether you have unionized employees or not.

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