



**Jerry Pinn**.....

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**NLRB APPOINTMENTS HELD UNCONSTITUTIONAL**

On Friday, January 25, 2013, the United States Circuit Court of Appeals for the D.C. Circuit held that President Obama violated the U.S. Constitution by making recess appointments to the National Labor Relations Board (NLRB) in January 2012. The Obama administration is expected to appeal the decision to the U.S. Supreme Court.

The administration is taking the position that, "This is one court, one case, one company". But Republican lawmakers who have opposed the administration's recess appointments rejected that view. "Today's ruling will certainly cause other opinions unconstitutionally issued by the [Labor] Board to be invalidated," Rep. Darrell Issa, R-Calif., said. "The unconstitutionally appointed members of the NLRB should do the right thing and step down." Issa also urged the NLRB to take the "responsible course" and stop issuing decisions "until a constitutionally sound quorum can be established." Senator Mike Johanns, (R-Nebr.), has called for the appointees' immediate resignations.

..... The NLRB currently only has three members -- the typically five-member board is only allowed to issue decisions when it has at least three members. The court decision pertained to three separate appointees, two of whom are still on the board. If those two cannot serve, there would be just one validly appointed member -- effectively shutting the Board down. If the D.C. Circuit's decision stands, it could also invalidate hundreds of Labor Board decisions made over the past year.

The NLRB claims that the D.C. Circuit's decision will not affect the Board's operations. NLRB Chairman Mark Gaston Pearce said the board "respectfully disagrees with today's decision and believes that the President's position in the matter will ultimately be upheld." He said "we will continue to perform our statutory duties and issue decisions."

The legal challenge had been brought by a business in Washington state challenging the NLRB's authority to issue a decision against it. Supported by dozens of Senate Republicans, the case argued the President didn't have the power to make three appointments to the NLRB. Attorneys for the Obama administration argued that he had the authority because the Senate was away for the holidays on a 20-day recess. The Constitution allows for recess appointments without Senate approval when Congress is in recess.

GOP lawmakers argued that the Senate technically had stayed in session because it was gaveled in and out every few days for so-called "pro forma" sessions. GOP lawmakers used the tactic -- as Democrats had done in the past -- specifically to prevent the President from using his recess appointment power to install members to the Labor Board. The White House argued that the pro forma sessions -- some lasting less than a minute -- were a sham.

But the three-judge panel for the D.C. Circuit held that the appointments were not valid. The court held that the President could only fill vacancies with the recess appointment procedure if the openings arise when the Senate is in an official recess, which it defined as the break between sessions of Congress.

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**Cathy Shuck**.....

**“To be subject to the provisions, an employer must have at least 50 full-time employees or a combination of full-time and part-time employees that is equivalent to at least 50 full-time employees.”**

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receives a premium tax credit to help pay for coverage on an exchange; or (b) the employer offers health coverage to at least 95% of its full-time employees, and at least one full-time employee receives a premium tax credit to help pay for coverage on an exchange, which may occur because the employer did not offer coverage to that employee or because the coverage the employer offered that employee was either unaffordable to the employee or did not provide minimum value. In determining whether the coverage the employer offers is affordable, if an employee’s share of the premium from employer-provided coverage would cost the employee more than 9.5% of that employee’s annual household income, the coverage is not considered affordable for that employee. If an employer offers multiple healthcare coverage options, the affordability test applies to the lowest-cost option available to the employee that also meets the minimum value requirement. Various safe harbors are provided in determining employees’ household incomes, including, but not limited to, wages the employer pays the employee that year as recorded on the Form W-2. In determining whether the coverage offered provides minimum value, there will be a minimum value calculator made available whereby employers can input certain information about the plan, such as deductibles and co-pays, and get a determination as to whether the plan provides minimum value by covering at least 60% of the total allowed cost of benefits that are expected to be incurred under the plan.

**Calculation of the Tax**

If the employer is subject to the Employer Shared Responsibility provisions and does not offer coverage during the 2014 calendar year to at least 95% of its full-time employees, it owes the Employer Shared Responsibility payment equal to the number of full-time employees the employer employed for the year (minus 30) multiplied by \$2,000, as long as at least one full-time employee receives a premium tax credit. The payment is computed separately for each month.

Slightly different rules apply if an employer offers coverage to at least 95% of its employees, but has one or more full-time employees who receive a premium tax credit. In this situation, the amount of the payment for the month equals the number of full-time employees who receive a premium tax credit for that month multiplied by one-twelfth (1/12) of \$3,000. The amount of maximum payment for any calendar month is kept at the number of the employer’s full-time employees for the month (minus up to 30) multiplied by one-twelfth (1/12) of \$2,000.

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# **IRS EXPLAINS SHARED RESPONSIBILITY (TAX) PROVISIONS ON EMPLOYERS UNDER PPACA**

On December 28, 2012, the Internal Revenue Service (IRS) issued proposed regulations under the Employer Shared Responsibility provisions of PPACA. To be subject to the provisions, an employer must have at least 50 full-time employees or a combination of full-time and part-time employees that is equivalent to at least 50 full-time employees. Companies that have a common owner or are otherwise related generally are combined together for purposes of determining whether or not they employ at least 50 employees. Those employers that may be close to the 50 full-time employees (or equivalent) threshold need to know what to do for 2014, so special transition relief is available to help them count their employees in 2013. This will provide additional information about how to determine the average number employees for the year. While the Employer Shared Responsibility provisions generally go into effect on January 1, 2014, employers will use information about the employees they employed during 2013 to determine whether they employ enough employees to be subject to these new provisions in 2014.

## **Determination of Liability**

In 2014, an employer meeting the 50 employee threshold will generally be liable for an employer shared responsibility payment only if: (a) the employer does not offer health coverage or offers coverage to less than 95% of its full-time employees and at least one of the full-time employees

## BELIEVE IT OR NOT - MICHIGAN NOW RIGHT-TO-WORK



**Howard Jackson...**

"...Michigan became the 24th right-to-work State in the nation."

In December, Michigan became the 24th right-to-work State in the nation. Michigan is certainly an unlikely candidate for such a distinction, as it has one of the highest unionization rates in the U.S., and is home of the United Auto Workers Union. How did it happen, and what does this mean for the future of right-to-work laws?

State right-to-work laws are allowed under Section 14(b) of the National Labor Relations Act. That provision allows States to pass laws for agreements that require employees to join a union as a condition of employment. These are commonly called "right-to-work" laws. This concept certainly has an appeal on civil rights grounds, and a number of studies have shown that most of the States with the highest personal income growth have right-to-work laws. In fact, the numbers actually show a migration of workers from forced union States to right-to-work States.

The right-to-work issue gained public attention during 2011 when the National Labor Relations Board issued an unfair labor practice complaint against Boeing, relating to its opening a plant in a right-to-work State (South Carolina) rather than the State of Washington. Ironically the NLRB's action highlighted the attractiveness of right-to-work states for employers. The political fall-out of the NLRB complaint was so severe that, allegedly, the Union dropped the complaint to avoid political consequences on the November elections.

Other things were going on in Michigan that created a background for the legislative action. In the November elections, the Union movement in Michigan had attempted to write the collective bargaining concept into the state constitution, a measure that would have barred not only State right-to-work laws but also efforts to control state and local public employee bargaining. The measure gathered only 42 percent of the votes, and encouraged the right-to-work movement. Further, a neighboring State (Indiana) had become the 23rd right-to-work State in February 2012, and there were published reports of job improvements in the State of Indiana following the change. The last previous State to become right-to-work was Oklahoma in 2001.

Not surprisingly, Michigan became a right-to-work state during a time when the state has a Republican governor and Republican majorities in its state legislatures. Even so, this is a surprising turn of events in a traditional union stronghold.

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### KNOW YOUR ATTORNEY ANDREW J. HEBAR

ANDREW J. HEBAR is a Senior Associate in the Knoxville, Tennessee office of the firm, joining in June 2008. His law practice includes an emphasis on workers' compensation defense, employment law, general civil practice and subrogation. Andrew is a native of Black Creek, Wisconsin and a 1997 graduate of the National Academy of Railroad Sciences in Overland Park, Kansas. He worked several years with the Burlington Northern and Santa Fe Railway as a switchman, foreman, conductor, and locomotive engineer. Andrew graduated *summa cum laude* with a B.B.A. in Business Management from the University of Memphis in 2002, as the top student in the Business Management program. He also minored in Political Science and received top student recognition in that program. He obtained his Doctor of Jurisprudence degree from the University of Tennessee College of Law in Knoxville, Tennessee, graduating in 2005. Andrew worked in various positions in the subrogation department of a large insurer of commercial trucking before reaching a position as in-house subrogation counsel prior to entering the private practice of law. Andrew is a member of the Knoxville Bar Association and the Blount County Bar Association.

## “NLRB APPOINTMENTS”

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Given the importance of the issues raised, the matter will likely be decided by the U.S. Supreme Court. Until that happens, it appears that the NLRB will continue to render decisions. Those decisions may ultimately be held to be of no force and effect. The result is great upheaval and uncertainty in labor law in the coming year. Stay tuned.

## “IRS EXPLAINS SHARED RESPONSIBILITY”

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The IRS will contact employers to inform them of their potential liability and provide them an opportunity to respond before any liability is assessed and before notice and demand for payment is made.

### Special Transition Rules for 2014

Special transition rules apply during 2014 for employers' health plans run on fiscal year plan year basis which start in 2013 and run into 2014. First, for any employees who are eligible to participate in the plan under its terms as of December 27, 2012 (whether or not they take the coverage), the employer will not be subject to a potential payment until the first day of the fiscal plan year starting in 2014. Second, if (a) the fiscal year plan was offered to at least one-third (1/3) of the employer's employees at the most recent open season; or (b) for the fiscal year the plan covered at least one quarter of the employer's employees, then the employer also will not be subject to the Employer Shared Responsibility payment with respect to any of its full-time employees until the first day of the fiscal plan year starting in 2014, provided that those full-time employees are offered affordable coverage that meets minimum value no later than that first day.

Other transition relief is available to help employers that are close to the 50 full-time employees threshold to determine their options for 2014. Rather than being required to use the full twelve months of 2013 to measure whether it has fifty (50) full-time employees, an employer may measure using any six-consecutive-month period in 2013.

Also, for 2014 only, the regulations offer transitional relief for employers that do not currently provide dependent coverage. After 2014, employers that do not offer coverage or that offer coverage to less than 95% of their full time employees and the dependents of those employees will be subject to the Employer Shared Responsibility payment.

### Status of Proposed Regulations

Written comments are due on the proposed regulations by March 18, 2013, and there will be a public hearing on April 23, 2013.

*Coming in next month's **Briefly**: Wondering how PPACA's employer mandate will apply to your seasonal and temporary employees? Next month's **Briefly** will examine the proposed regulations' treatment of these workers. Even though many of them are "full-time" under the law, the regulations may exclude them from PPACA's coverage requirement. This should be welcome news for many employers.*

## “BELIEVE IT OR NOT”

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Possible candidates for State right-to-work laws in the future include Ohio and Pennsylvania, both with Republican governors and GOP-lead legislatures. However, both governors indicate that such legislation is not a priority. Another possibility is Missouri, where Republicans hold veto-proof majorities in both the State house and senate.

It will be interesting to observe in the coming years, whether other states adopt right-to-work laws, as well as how organized labor responds to this trend.



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