

LABOR & EMPLOYMENT BULLETIN

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Retaliation Claims Once Again Take the Lead *EEOC Releases FY 2012 Statistics*

The U.S. Equal Employment Opportunity Commission ("EEOC") recently released statistical data on EEOC filings during fiscal year 2012, which ended September 30, 2012. The data revealed that the EEOC received 99,412 private sector workplace discrimination charges during fiscal year 2012, which is down slightly from fiscal year 2011. Retaliation charges filed with the EEOC continued to be the most frequently filed charge with 37,836 charges filed. Race discrimination and sex discrimination charges followed closely behind with 33,512 and 30,356 charges filed, respectively. Notably, while retaliation, sex, and disability charges all increased slightly in fiscal year 2012, race, national origin, religion, and color discrimination charges all slightly decreased.

In fiscal year 2012, the EEOC recovered a record-high \$365.4 million from private sector and state and local government employers through its administrative process, plus an additional \$44.2 million through its litigation program. Specifically, the EEOC filed 122 lawsuits, including 86 individual suits, 26 multi-victim suits, and 10 systemic suits.

The number of EEOC charges filed in Alabama slightly increased in fiscal year 2012, with 3,246 charges filed. The most frequently filed charge in Alabama last year was race discrimination, with 1,611 charges filed, and retaliation charges accounted for the next highest category, with 1,199 charges filed.

Although the number of charges filed across the country slightly decreased, the number in Alabama continues to increase. Given this upward trend in the number of charges filed in Alabama and the continued existence of the struggling economy across the country, employers should remain vigilant in their adherence to all anti-discrimination policies and in their education of employees on such policies.

- Breanna R. Harris

Court Rules President Obama's NLRB Recess Appointments Unconstitutional

On January 25, 2013, in *Noel Canning v. National Labor Relations Board*, the U.S. Court of Appeals for the D. C. Circuit declared President Obama's three appointments to the National Labor Relations Board ("NLRB") during January of 2012 unconstitutional. The Constitution provides the President authority to make appointments without U. S. Senate confirmation to "vacancies that may happen during the recess of the Senate." However, the White House's January 2012 appointment of three members to the NLRB was made while the U.S. Senate was meeting in *pro forma* sessions every three business days. The U.S. Department defended the case and argued that the President has discretionary authority to determine when the U.S. Senate is in session versus recess. Holding that the appointments were invalid as being made while the U.S. Senate was in session, the Court of Appeals wrote: "Allowing the President to define the scope of his own appointment power would eviscerate the Constitution's separation of powers." The Court of Appeals also stated, based on the constitutional language, "the President may only make recess appointments to fill vacancies that happen - or *arise* - during the recess," whereas the vacancies filled by President Obama during January of 2012 did not *arise* during the U. S. Senate recess.

The NLRB is comprised of five members but needs a quorum of at least three members to conduct business. In August 2011, a Board member's term expired and left the NLRB without quorum. Presently, the Board only has one other member besides the three January 2012 appointees, which were intended to fill the vacancies and provide quorum. Without those appointments, the NLRB cannot maintain quorum. Thus, the *Noel Canning* decision could call into question any action taken since August 2011 when the NLRB first failed to maintain quorum. Since the *Noel Canning* decision, several companies have sought relief from or taken the position that any NLRB cases

decided without quorum are invalid. In the meantime, the NLRB has stated that the *Noel Canning* decision pertains only to the issues in that case and continues to conduct business in hopes that the President's petition will ultimately be upheld. It is not clear whether the White House will request a rehearing before a full panel of the Court of Appeals or if it will appeal the ruling to the U. S. Supreme Court.

Recently, on February 14, 2013, President Obama resubmitted two of the three January 2012 recess appointees to the U.S. Senate for confirmation. In addition, the NLRB reported on March 12, 2013 that it would not seek *en banc* rehearing in *Noel Canning*. However, the NLRB, in consultation with the Department of Justice, intends to file a petition for certiorari with the United States Supreme Court for review of the decision. The petition is due on April 25, 2013.

Approval of these two nominees by the Senate would provide the NLRB with quorum, but it would not provide any answer to the validity of decisions in which the January 2012 appointees participated in prior to any such approval. During this period of uncertainty, businesses are encouraged to implement policies that are consistent with recent NLRB rulings.

- *Alexandra S. Terry*

NLRB Acting General Counsel Releases Summary of Operations for FY 2012

In January, the National Labor Relations Board's Acting General Counsel, Lafe Solomon, released his annual Summary of Operations for fiscal year 2012. Solomon's memorandum summarized the activities of the General Counsel's office, which is responsible for the investigation and prosecution of unfair labor practice charges and the handling of representation cases. Representation cases are requests from a union, employee, or employer to conduct a secret ballot election to determine whether employees desire union representation.

The report indicated that the NLRB beat its target of 42 days for conducting elections. In 2012, the median number of days it took from the filing of an election petition to conducting the secret ballot election was only 38 days. Furthermore, 93.9 percent of all initial elections were conducted within 56 days of filing a petition. This data seems to undermine the NLRB's continued push to speed up the election process.

Additionally, the NLRB recovered approximately \$44.3 million on behalf of employees as backpay or reimbursement of fees, dues, and fines. This recovery amount is down from \$60.5 million in fiscal year 2011. The number of employees for whom reinstatement was obtained likewise fell to 1,241 from 1,644.

Overall, case intake declined 3 percent, with unfair labor practice charges dropping 2.5 percent to 21,629 and representation case intake falling 6.5 percent to 2,645. These numbers are in line with the Bureau of Labor Statistics data which showed a drop in union membership in 2012. Specifically, the union membership rate was 11.3 percent (14.4 million workers), down from 11.8 percent in 2011. To put these numbers in perspective, in 1983, the first year for which comparable union data became available, the union membership rate was 20.1 percent.

- *Allison J. Adams*

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