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# EMPLOYMENT LAW ALERT

Summer 2014 Issue

## TENNESSEE LEGISLATURE PASSES NEW EMPLOYMENT LAW REFORMS

The Tennessee legislature has passed significant new employment law reforms aimed to benefit employers which apply to actions accruing on or after July 1, 2014. Several of these amendments serve to place employment claims arising under Tennessee state law on equal footing with similar claims arising under Federal law. Practically speaking, the reforms should also help employers limit or more readily determine their exposure in employment law claims.

The first reform places caps on certain damages available for Tennessee Human Rights Act (THRA), Tennessee Disability Act, and Tennessee Public Protection Act (TPPA) (retaliatory discharge) claims. The caps apply to compensatory damages for future pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. The new limits for each claimant vary depending on the number of employees an employer has at the time of the alleged adverse employment action. The caps range from \$25,000 (8 to 14 employees) to \$300,000 (500 or more employees). However, the caps do not apply to back pay, interest on back pay, front pay, or any other equitable relief.

The second reform precludes an employee from pursuing simultaneous claims against employers in both state court and federal court, where both claims are based on a common core of operative facts. The reform requires the dismissal of the state court action if the employee is pursuing a federal case against the employer under the THRA, Tennessee Disability Act, and/or TPPA at the same time. A third reform eliminates individual liability of employees. An employee or an employer's agent (such as a supervisor or manager) cannot be held individually liable for an employer's violations on THRA-based discrimination claims.

Fourth, the definition of an "employer" covered under the Tennessee Disability Act has changed. Previously, that Act applied to the State of Tennessee, any department, agency, or subdivision of the State, and any private employer. Under the new language, a covered "employer" is limited to the State, any political or civil subdivision of the State, and persons employing 8 or more persons within the state. This should aid small businesses with less than 8 employees to avoid coverage and potential discrimination claims under the Tennessee Disability Act.

Lastly, the burden of proof is heightened and attorney fees and costs awards are eliminated in "whistleblower"-based retaliatory discharge claims under the TPPA. Even if an employee can prove that termination occurred solely because the former employee refused to participate in or to remain silent about illegal activities, their awards are limited to the new sliding scale caps based on employer size. Attorney fees for such claims are no longer allowed by Tennessee statute. Further, the amendment deletes Tennessee common law claims for retaliatory discharge based on an employee refusing to participate in or to remain silent about illegal activities. This effectively places the higher statutory burden on the employee to show that the "whistleblowing" was the sole cause of the termination thereby reducing the risk of employee judgments in "whistleblowers" lawsuits.





# EMPLOYMENT LAW ALERT

## U.S. SUPREME COURT REJECTS NLRB BOARD APPOINTMENTS – VALIDITY OF NLRB DECISIONS LEFT IN QUESTION

The U.S. Supreme Court's June 26, 2014, decision in NLRB v. Noel Canning has heaped turmoil onto several recent actions by the National Labor Relations Board (NLRB).

In Noel Canning, the NLRB had ordered a Pepsi-Cola distributor to execute a collective-bargaining agreement with a labor union. The distributor appealed this order on several grounds, including whether the NLRB had a quorum of three "duly appointed" members at the time of its order. Before the NLRB issued its order, President Obama had appointed three members to the NLRB on January 4, 2012 under the "recess appointment" provision to the U.S. Constitution, claiming the U.S. Senate was not in session then. However, the Senate had voted to meet in pro forma sessions (during which the Senate was called to order but senators were not required to attend) every three days during its 2011-2012 winter break. As a result, the Senate considered itself "in session" at the time President Obama made his recess appointments to the NLRB. The Court found that the President had no authority to make such recess appointments and his three appointed NLRB members were invalid. Without these three members being properly appointed, the NLRB did not have a quorum of three "duly appointed" members from January 4, 2012 to August 5, 2013. Interestingly, this was the first time the Supreme Court decided a case requiring an interpretation of the Constitution's "Recess Appointments Clause" since the ratification of the U.S. Constitution.

In labor law policy and practice, the Noel Canning decision may have a tremendous effect. Between January 4, 2012 and August 5, 2014, the NLRB issued approximately 1,000 decisions on allegedly unfair labor practices by private employers and unions and on employees' rights to organize and bargain through unions. Those decisions are now questionably void and may be re-litigated. Among those decisions were NLRB v. Costco, in which the NLRB prohibited an employer from sanctioning electronic postings by its employees which "damage the company;" NLRB v. Karl Knauz Motors, in which the NLRB invalidated an employer's handbook that provision prohibiting "disrespectful" language or "other language that injures the image or reputation of the [employer];" and NLRB v. Sodexo, which held that an employer violated the National Labor Relations Act by asking an employee who was the subject of an internal company investigation not to talk about the matter during the employer's investigation. In addition, rules adopted without a proper quorum are likely invalid, including the NLRB rule allowing a "quickie" election for union representation to take place 10 days after a petition is filed.

While the NLRB has since ratified all its administrative, personnel, and procurement decisions between January 4, 2012 and August 5, 2013, the validity of larger matters involving rulemaking and contested case decisions during that period remains unclear. Because the validity of these decisions are in question, the Noel Canning decision will impact the labor law landscape for some time to come.

## SAVE THE DATE: FALL EMPLOYMENT LAW SEMINAR

We will present our Fall Employment Law Seminar on November 12, 2014, in partnership with the West Tennessee SHRM chapter, at Union University in Jackson, Tennessee. This event always provides a great opportunity for employment law updates and HR training. More details will be available at a later date. Please make plans to join us!

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