

THE WASHINGTON REPORT
June 2014

At the Supreme Court

On June 26th, the Supreme Court issued its long awaited ruling in National Labor Relations Board (NLRB) v. Noel Canning, regarding the scope of the President's authority to make recess appointments to federal offices, which allows the appointees to take office temporarily without Senate confirmation. The Noel Canning case specifically involved three recess appointments that President Obama made to the National Labor Relations Board in January 2012 during a three day recess between pro forma sessions of the Senate. All nine justices found that the President lacked the authority to make the NLRB recess appointments at issue in the case (although the court was split 5-4 on the specifics of how the recess appointments clause should be interpreted).

The Noel Canning case is of potential interest to readers of The Washington Report because Consumer Financial Protection Bureau (CFPB) Director Richard Cordray was initially installed in his position by President Obama by a recess appointment at the same time as the NLRB officials at issue in the Noel Canning case. Director Cordray's position is different, however, insofar as the Senate subsequently confirmed Director Cordray to his position in July 2013 and in August 2013 he "reaffirmed" the actions he took prior to his confirmation by the Senate. The Court's opinion focused on the propriety of the appointments and did not address the implications of invalidating them. In the case of the NLRB, the invalidated recess appointments constituted a majority of the Board and could well invalidate a host of NLRB decisions and actions. It is possible that some actions taken by Director Cordray prior to his confirmation by the Senate in 2013 will be subject to challenges seeking to invalidate them as well notwithstanding his post-confirmation reaffirmation of those actions.

On the Hill

On June 10th, the House Education and Workforce Committee's Subcommittee on Workforce Protections held a hearing about the conduct of the Equal Employment Opportunity Commission (EEOC) entitled "The Regulatory Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders." Subcommittee Chairman Tim Walberg (R-MI) delivered an opening statement critical of the EEOC and its 2012 criminal background check guidance. In advance of the hearing the Chamber of Commerce issued a white paper entitled "Review of Enforcement and Litigation Strategy during the Obama Administration—A Misuse of Authority" which, as the title makes clear, is critical

of EEOC enforcement and litigation practices, including the criminal background check guidance and the EEOC's approach to cases involving background checks.

At the FTC

Safe Harbor. On June 25th, the Federal Trade Commission (FTC) announced that it had given final approval to 14 previously announced proposed settlements with companies for alleged violations of the EU/US Safe Harbor Framework arising from allegations that the companies represented that they participated in Safe Harbor without having renewed their required Safe Harbor certifications with the Department of Commerce in a timely manner.

The FTC's enforcement actions come as the EU and the US continue to work on revisions to Safe Harbor to meet concerns raised by EU officials in a November 2013 report. Reports are that the two sides have made significant progress in their discussions. The goal is to reach agreement on Safe Harbor reforms by the end of the summer. In the meantime, companies that participate in Safe Harbor—and many screening companies do—would be wise to ensure that annual renewals with the Department of Commerce are made in a timely manner.

Wyndham and LabMD. The past month has produced further developments in the Wyndham and LabMD information security cases.

In the Wyndham case, Wyndham's challenge to the FTC's authority in information security matters appears on its way to the Third Circuit Court of Appeals for review. On June 24th, the District Court judge hearing the case granted Wyndham's request to appeal the District Court's April 7th refusal to dismiss the case to the Third Circuit. In its April ruling, the District Court rejected Wyndham arguments that the FTC lacked requisite authority to bring the information security case. The interlocutory appeal to the Third Circuit gives the appeals court the opportunity to rule on the question of FTC authority before the District court reaches the merits of the FTC's underlying claims against Wyndham.

While Wyndham is moving forward, the FTC's administrative action against LabMD was put on hold as Congress investigates the actions of Tiversa, the company that found the personal information that gave rise to the breach and provided the information to the FTC. In a June 11th letter to FTC Chairwoman Ramirez, Congressman Darrell Issa, Chairman of the House Oversight and Government Reform

Committee, called into question the truthfulness of information that Tiversa provided to the government in connection with the LabMD matter. The Committee's investigation is ongoing, while the FTC Administrative action has been placed on hold.

At OPM

On June 4th, the Office of Personnel Management's (OPM) Office of the Inspector General Office of Audits issued a final audit report on OPM's Federal Investigative Services review process for background investigations. The audit report found that OPM needed to "strengthen its control over its Contractors and the background investigation review process." The auditors recommended improvements including, enhancing controls to ensure that all reports have been reviewed; procedures to detect individuals conducting an abnormally high number of reviews (the report found that two contractor employees reviewed 15,152 reports in a month, with many approvals occurring within minutes of another approval); improved training of reviewers; and increased oversight of contractor activities.

Disclaimer: The Washington Report provides a general summary of recent legal and legislative developments and is for informational purposes only. It is not intended to be, and should not be relied upon as legal advice. For more information, please contact Kevin Coy at 202-677-4034.