

Morgan Lewis

# Independent Contractor Misclassification Issues and the 2013 Postelection Risk Landscape – Webinar

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# What Is the Issue/Problem?

- Worker Misclassification
  - There has been an increased focus on whether workers are properly designated as independent contractors (ICs) or instead should be company employees
- Focus of the Internal Revenue Service (IRS) (audits of more than 2,000 employers)
  - National Research Project Initiative initially proposed to audit 6,600 employers
  - Focus starting in late 2011 has been mostly on large employers
- Focus of the Department of Labor (DOL)
  - DOL Misclassification Initiative
- Focus of the National Labor Relations Board (NLRB)

# What Is the Issue/Problem? (cont'd)

- Focus of Congress and the Executive Branch
- Focus of states through their attorneys general and other state agencies and authorities
- Multimillion-dollar class action settlements
- Plaintiffs' bar very focused on independent contractor (IC) issues

# Why Is This an Issue Now? (The Perfect Storm!)

- If companies have been using large numbers of ICs for decades, why is this an issue now?
- Federal/state budget deficits
  - Increased tax payments
  - Increased unemployment, workers' compensation, disability contributions
- Focus of plaintiffs' attorneys
  - New area of traditional securities/product liability class action firms
  - Big damages that are easy to prove
  - Significant attorneys' fees

# Employee Misclassification: Governmental Stakeholders

## Federal and State Agencies Affected by Employee Misclassification

Agency	Areas potentially affected by employee misclassification
IRS	<ul style="list-style-type: none"> <li>• Federal income and employment (payroll) taxes</li> </ul>
DOL	<ul style="list-style-type: none"> <li>• Minimum wage, overtime, and child labor provisions</li> <li>• Job protection and unpaid leave</li> <li>• Safety and health protections</li> <li>• Immigration/Form I-9 issues</li> </ul>
Department of Health and Human Services	<ul style="list-style-type: none"> <li>• Medicare benefit payments</li> </ul>
DOL, IRS and PBGC	<ul style="list-style-type: none"> <li>• Pension, health, and other employee benefit plans</li> </ul>
EEOC	<ul style="list-style-type: none"> <li>• Prohibitions of employment discrimination based on factors such as race, gender, disability, or age</li> </ul>
NLRB	<ul style="list-style-type: none"> <li>• The right to organize and bargain collectively</li> </ul>
SSA	<ul style="list-style-type: none"> <li>• Retirement and disability coverage and payments</li> </ul>
State Agencies	<ul style="list-style-type: none"> <li>• Unemployment insurance benefit payments</li> <li>• State income and employment taxes</li> <li>• Workers' compensation benefit payments</li> </ul>

# What Is the Issue/Problem?

- *The New York Times* front-page article (2/18/10)
  - “A Crackdown on ‘Contractors’ as a Tax Dodge”
    - *“Federal and state officials, many facing record budget deficits, are starting to aggressively pursue companies that try to pass off regular employees as independent contractors.”*
- *Forbes* (10/2/12)
  - “If Obama Wins, Corporate America Should Brace for Crackdown on Use of Independent Contractors.”
- IRS and DOL are engaged in an initiative to raise **\$7.3 billion** by cracking down on misclassified ICs

# How Will the Election Results Impact These Efforts?

- Goal of today's webinar is to discuss how the election results may impact the legislative, regulatory, and litigation efforts to discover and prosecute alleged misclassification.
- There are several avenues through which that can occur:
  - Proposed legislation (or recycled legislation from previous Congresses)
  - Continued/new IRS audits and regulatory activity
  - Continued/new DOL activity
  - Action by NLRB following removal of backlog
  - Additional private lawsuits including class and collective actions

# How Will the Election Results Impact These Efforts? (cont'd)

- Obama administration
  - Continues to control executive branch leadership (Treasury/IRS and Department of Labor (DOL))
  - Continues to control regulatory agenda
  - Continues to control budget priorities



# How Will the Election Results Impact These Efforts? (cont'd)

- House of Representatives
  - Republicans continue to control agenda
  - Republicans continue to control appointment of committee chairman and committee agendas
    - *Rep. John Kline (R-MN) – Education and Workforce*
    - *Rep. Dave Camp (R-MI) – Ways and Means*

# How Will the Election Results Impact These Efforts? (cont'd)

- Senate
  - Democrats continue to control agenda
  - Democrats continue to control appointment of committee chairman and committee agendas
    - *Sen. Max Baucus (D-MT) – Finance*
    - *Sen. Tom Harkin (D-IA) – Health, Education, Labor and Pensions*

# How Will the Election Results Impact These Efforts? (cont'd)

- Potential legislation in the 113<sup>th</sup> Congress
  - Employee Misclassification Act
  - Payroll Fraud Prevention Act
  - Fair Playing Field Act
  - Rebuild America Act
  - Independent Contractor Tax Fairness and Simplification Act

# How Will the Election Results Impact These Efforts? (cont'd)

- Employee Misclassification Prevention Act
  - Amends the Fair Labor Standards Act by:
    - *Making misclassification a separate violation*
    - *Requiring businesses to keep records on status of each worker as an employee or IC*
    - *Increasing penalties for misclassification*
    - *Requiring businesses to notify workers of their classification status*
    - *Creating an “employee rights website” to inform workers of their wage and hour rights*
    - *Providing protections to workers who seek to be “accurately” classified*
    - *Permitting DOL and IRS to refer incidents of misclassification to one another*

# How Will the Election Results Impact These Efforts? (cont'd)

- Payroll Fraud Prevention Act
  - Similar to Employee Misclassification Protection Act
    - *Separate violation, recordkeeping, increased penalties, notification of classification status, website notice, worker protections, DOL/IRS referrals*
  - Directs DOL to perform targeted audits focusing on employers in industries that frequently misclassify workers

# How Will the Election Results Impact These Efforts? (cont'd)

- Fair Playing Field Act
  - Amends the Internal Revenue Code by:
    - *Requiring the Treasury Secretary to issue prospective guidance clarifying the employment status of individuals for Federal employment tax purposes*
    - *Amending the provisions of the Tax Code that provide for reduced penalties for failure to withhold income taxes*
    - *Preventing retroactive tax assessments*
    - *Repealing the Section 530 safe harbor*

# How Will the Election Results Impact These Efforts? (cont'd)

- Rebuild America Act
  - Comprehensive jobs legislation that includes the provisions of the Fair Playing Field Act

# How Will the Election Results Impact These Efforts? (cont'd)

- Independent Contractor Tax Fairness and Simplification Act
  - Introduced on December 12, 2012 by Republican Congressman Eric Paulsen (MN), a member of the House Ways and Means Committee
  - Permanently codifies Section 530 (with some modifications)
  - Creates a new “safe harbor” covering both employment and income taxes and covers both the service provider and the service recipient



# Current Enforcement Environment – Proposed Federal Legislation

- What is likely to happen through legislation?
  - Far more government scrutiny
  - Stronger presumption of employer-employee relationship
  - Less reliance on or abolition of safe harbor and industry practice defenses
  - Heightened penalties and fines/damages for misclassification
  - Companies will have to give workers a notice explaining the distinction between IC and employee status and tell them how to challenge their contractor designation
  - Antiretaliation provisions

# Federal Initiatives

- Obama administration's FY '12 Budget Proposal
  - DOL – \$46 million to combat misclassification
  - \$25 million in grants to states to identify misclassification
  - \$15 million for wage and hour personnel to investigate misclassification

# Department of Labor

- \$25 million joint DOL-Treasury initiative
- 90 new investigators
- 10 new prosecutors in Solicitor's Office
- “Plan/Prevent/Protect” Program
  - Employers would have to conduct audits
  - Audit results would have to be shared with employees
  - For every individual designated as an IC, a classification analysis would have to be done; the results would be shared with the individual and would have to be retained

# Current Enforcement Environment – State Enforcement

- State activity is increasing
  - California and New York are significantly stepping up enforcement efforts
  - Other states have already enacted or are considering laws and/or have created task forces (e.g., CA, CO, CT, DE, IA, IL, IN, KY, LA, MA, MD, ME, MI, MN, NC, NH, NJ, NV, NY, OH, PA, RI, VA, VT, WA, WI)
  - Increased penalty legislation in several states (e.g., CA, CT, NE, NY)
- Financial pressure will force more state action

# California SB 459

## Independent Contractors

- Approved by Governor Brown 10/9/11
- Effective 1/1/12
- Adds Sections 226.8 and 2753 to the California Labor Code
- Prohibits persons and employers from:
  - Willfully misclassifying an individual as an IC
  - Charging misclassified ICs for expenses that could not be charged to employees
  - Deducting from the pay of misclassified ICs where the deductions would be prohibited for employees

# California SB 459

## Independent Contractors (cont'd)

- Knowingly advising an employer to treat an individual as an IC, even though the individual is found not to be an IC
  - *Does not apply to employees who advise their employers*
  - *Does not apply to attorneys who provide legal advice to clients*
- Penalties
  - \$5,000–\$15,000 per violation
  - If a “pattern or practice” of violations is found
    - *\$10,000–\$25,000 per violation*

# California SB 459

## Independent Contractors (cont'd)

- Penalties as established by other laws – examples:
  - *Illegal deductions*
  - *Failure to reimburse expenses*
  - *Failure to pay overtime*
- Potential enforcement possibilities
  - Section 98 proceeding with the Division of Labor Standard Enforcement (DLSE) (clear)
  - Civil suit brought by the Labor Commissioner (ambiguous)
  - “Aggrieved employees” through Private Attorney General Act (PAGA) (likely)
  - ICs directly (not likely)

# Other Proposed State Legislation

- Ohio, HB 137
  - Would define employee as any individual who performs services for compensation unless the individual meets a seven-step test that incorporates the ABC test factors
  - Provides for civil and criminal penalties for misclassification of an employee
  - Creates a private right of action for employees, labor organizations, and other interested parties
  - Prohibits retaliation against any individual who exercises any right to oppose misclassification
  - Available at [http://www.legislature.state.oh.us/bills.cfm?ID=129\\_HB\\_137](http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_137)



# Other Proposed State Legislation (cont'd)

- Virginia, Worker Misclassification Act
  - Establishes a presumption that an individual performing services for remuneration is an employee unless the individual meets a “bad” ABC test
  - Provides for the imposition of criminal and civil penalties
  - Gives employees a private right of action
  - Prohibits retaliation, and creates a rebuttable presumption that retaliation has occurred when adverse action is taken against a worker within 90 days of his/her exercising any right to protest misclassification
  - Available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+SB34>

# Other Proposed State Legislation (cont'd)

- North Carolina, HB 790

- Creates a presumption of employee status that could be overcome if the worker satisfied a “good” ABC test
- Would clarify that “it is not necessary for the amount of control to extend to all the details of the physical performance of the duties performed by an individual for an employer to consider the individual an employee of the employer.”
- Prohibits retaliation; contains a nonwaiver provision, would create a private right of action with a three-year statute of limitations, and would require employers that classify their workers as ICs to post notices in English and Spanish advising the workers of their rights under the bill
- Available at <http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H790v1.pdf>



# Information-Sharing Programs

# DOL/IRS Information-Sharing Programs

- Establish governmental partnerships
- Facilitate the exchange of taxpayer data, leveraging resources and identifying/reporting information on emerging tax administration issues
- The three components are:
  - Federal information-sharing
  - State information-sharing
  - Local information-sharing

# Information-Sharing Programs: IRS Federal Intergovernmental Partnering Program (FIPP)

- Seeks to strengthen existing relationships and develop new relationships with other federal agencies
- FIPP increases collaboration and enhances tax administration by:
  - Complementing efforts to identify and address noncompliance
  - Leveraging outreach resources
  - Assisting other federal agencies in achieving their goals
- FIPP has established a number of initiatives with other federal agencies, providing information-sharing, outreach programs, and data-matching activities

# Information-Sharing Programs: DOL-IRS Memorandum of Understanding

- The DOL and IRS announced a joint initiative to improve worker classification compliance
- Purpose:
  - Reduce incidences of worker misclassification
  - Reduce the tax gap
  - Reduce fraudulent filings
  - Reduce abusive employment tax schemes
  - Improve compliance with federal laws
  - Strengthen IRS and DOL relationships
  - Leverage existing resources
  - Send a consistent wage and payroll tax message

# Information-Sharing Programs: DOL-IRS Memorandum of Understanding (cont'd)

- DOL duties under the Memorandum of Understanding:
  - Refer to the IRS wage and hour investigation information “and other data” that DOL believes raise employment tax misclassification compliance issues
  - Share DOL wage and hour training materials “and opportunities” with the IRS
  - Participate in joint outreach events with the IRS

# Information-Sharing Programs: DOL-IRS Memorandum of Understanding (cont'd)

## IRS duties under the Memorandum of Understanding:

- Evaluate DOL employment tax referrals for purpose of conducting employment tax examinations
- Share DOL employment tax referrals with state and municipal taxing agencies under existing sharing agreements
- Provide DOL an annual report summarizing the results achieved using DOL referrals
- Share employment tax training materials “and opportunities” with DOL
- Participate in joint outreach events
- Annually provide DOL with aggregate data relating to trends in misclassification
- Provide DOL with information (“other than taxpayer return information”) that may constitute evidence of a violation of criminal laws enforced by DOL



# Information-Sharing Programs: IRS-State Programs

- IRS – State Information-Sharing Program:
  - The IRS-state information-sharing program facilitates and expands joint tax administration relationships between the IRS and state and local taxing authorities, such as departments of revenue and state work force agencies
  - The IRS currently shares data through a variety of initiatives
  - The shared information includes:
    - *Audit results*
    - *Individual and business tax return information*
    - *Employment tax information*

# DOL Wage & Hour Division Partnership with State Labor Agencies

- Labor commissioners and other agency leaders representing 13 states signed memorandums of understanding with the DOL's Wage and Hour Division (WHD) and, in some cases, its Employee Benefits Security Administration, Occupational Safety and Health Administration, Office of Federal Contract Compliance Programs, and Office of the Solicitor
  - Coincided with the DOL/IRS partnership announced on September 19, 2011

# DOL Wage & Hour Division Partnership with State Labor Agencies (cont'd)

- Signatory states:
  - California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, Utah, and Washington
  - Agreements have also been announced for the WHD to enter a memorandum of understanding with New York's attorney general
  - Memorandums of understanding arose as part of the DOL's Misclassification Initiative, which was launched under Vice President Biden's Middle Class Task Force with the goal of preventing, detecting, and remedying employee misclassification

# State Cooperation Snapshot: New York

- Cooperation between the DOL and New York had already begun before the partnership was announced in September 2011
  - In 2007, the state created a Joint Enforcement Task Force on Employee Misclassification (JETF)
- In 2011, JETF identified more than 19,600 instances of misclassified employees and \$412 million in unreported wages, and assessed more than \$14.5 million in unemployment taxes

# State Cooperation Snapshot: New York (cont'd)

- The number of investigations rose exponentially after the DOL began assisting the JETF with its efforts under the information-sharing agreement
- In 2011 the NY DOL completed more than 14,800 audits and investigations, finding nearly 131,700 misclassified workers and unpaid taxes of \$48.5 million

# DOL Enforcement

- In the past, investigations...
  - Usually were complaint driven or targeting employers with prior violations (although some random audits were conducted)
  - Usually were targeted investigations
  - Usually provided reasonable documentation requests and time to produce
  - Usually were announced in advance
  - Routinely issued WH-58s
  - Did not ask for civil monetary penalties except for repeat offenders or willful violations

# DOL Enforcement

- Now...
  - More focus on “unannounced,” on-site visits
  - Overbroad documentation requests
  - In some cases, requests are inconsistent with DOL recordkeeping requirements
  - Less flexibility given to employers to produce information
  - Recordkeeping requirements set 72-hour time frame; but not typically utilized by DOL in enforcement history
  - Not permitting “self-audits” after investigation commences
  - Refusal to issue WH-58s when back pay agreed to
  - More use of civil monetary penalties



# IRS Activity



# Current Enforcement Environment – IRS

- IRS Employment Tax National Research Program (NRP)
  - More than 2,000 employers will be audited (all types – large, small, nonprofit, etc.). The original estimate for taxpayer audits was 2,200 per year over three years, but fewer than half that number have been audited
  - Five targeted issues including contingent workforce/IC
  - Treasury’s Inspector General for Tax Administration concluded in a May 2011 report that the IRS’s proposal to target large employers in only 2% of the audits would result in “too small of a sample to produce meaningful compliance estimates,” so in 2011 the IRS started focusing primarily on large employers in these audits

# IRS Payroll Tax Audits: Targeted Taxes

- Federal Income Tax Withholding (FITW)
- Federal Insurance Contributions Act (FICA)
  - Social Security (OASDI)
  - Medicare (HI)
- Federal Unemployment Tax Act (FUTA)
- Self-Employment Contributions Act (SECA)
- Railroad Retirement Tax Act (RRTA)

# Employee Misclassification: Payroll Taxes

## Differences Between General Tax Responsibilities

Type of Tax	Employees		Independent Contractors	
	Businesses' general responsibilities	Workers' general responsibilities	Businesses' general responsibilities	Workers' general responsibilities
Federal income tax	Withhold tax from employees' pay	Pay full amounts owed, generally through withholding	Generally, none	Pay full amounts owed, generally through estimated tax payments
Social Security and Medicare taxes	Withhold one half of taxes from employees' pay and pay other half	Pay half of total amounts owed, generally through withholding	None	Pay full amounts owed, generally through estimated tax payments
Federal unemployment tax	Pay full amount	None	None	None
State unemployment tax	Pay full amount, except in certain states	None, except pay partial amount in certain states	None	None

# Employee Misclassification: Benefits and Business Expenses

## Differences Between Benefits Responsibilities

Type of benefits	Employees		Independent Contractors	
Retirement Plans	Employers sponsor benefit plans	Employers and employees contribute	Contractors sponsor plans	Contractors bear the full financial cost of the plans
Healthcare	Employers sponsor on a tax-free basis	Employers and employees contribute	Contractors obtain coverage	Contractors bear the full financial cost, but receive tax deduction
Reimbursed Expenses/ Accountable Plans	Employers can reimburse	Nontaxable to extent paid under an accountable plan	Service recipient can reimburse, although generally expenses are unreimbursed	Reimbursed expenses are nontaxable if under an accountable plan
Unreimbursed Expenses	Many employers don't fully reimburse expenses	Unreimbursed expenses subject to 2% floor and AMT	Businesses don't generally reimburse expenses	Not subject to 2% floor or to AMT

# IRS Payroll Tax Audits: Tax Relief Provisions

- Significant statutory and administrative payroll tax relief exists:
  - Section 530
  - Section 3509
  - Classification Settlement Program (CSP)
  - Voluntary Classification Settlement Program (VCSP) (including two modifications to this program, announced December 17, 2012)

# IRS Payroll Tax Audits: Section 530 Relief

- “Off-Code” relief provision
- IRS bears burden of proof
- Under attack by Congress, Obama administration, and the IRS
- If applicable, reduces the employer’s federal employment tax exposure to zero for all past and future years
- If applicable, businesses can continue to treat their workers as ICs for payroll tax purposes
- Must have reasonable basis for IC treatment

# IRS Payroll Tax Audits: Statutory Relief: Section 530

- Provides employer-only relief
- Provides complete relief both retroactively and prospectively
- Three tests
  - Reporting consistency
  - Substantive consistency
  - Reasonable basis (prior audit, industry practice, “judicial” precedent, or any other reasonable basis)

# IRS Payroll Tax Audits: Example of Tax Exposure and Tax Relief

- The annual “full rate” federal tax exposure for 60 misclassified ICs earning \$50,000 each is approximately \$1,210,000 (in 2013), or \$4,718,000 over 2010-2013. (Rates were slightly lower in 2011-2012)
- Relief provisions can reduce the \$5 million four-year liability:

<u>Relief Provision</u>	<u>2013 Exposure*</u>	<u>Total Four-Year Exposure</u>
Statutory relief	320,400	1,257,600
100% CSP Offer	320,400	320,400
25% CSP Offer	80,100	80,100
VCSP Offer	32,400	32,400
Section 530 “Off-Code” Relief	0	0

\*Calculations do not include FUTA, SUTA, and SITW liabilities. Liabilities in 2011-2012 were slightly lower, due to rate reductions.



# Voluntary Classification Settlement Program

- VCSP seeks to encourage prospective worker reclassification
- VCSP is an alternative to CSP, and thus VCSP does not apply to taxpayers actually under an employment tax audit (per Ann. 2012-45)
- The IRS will not conduct a payroll tax audit for workers covered by a VCSP agreement for prior years in exchange for:
  - a taxpayer's agreement to treat a class of workers as employees for future tax periods for payroll tax purposes, and
  - a payment of 10% of the Section 3509 rates

# Voluntary Classification Settlement Program

- Important Characteristics
  - Is an optional program
  - Limited to federal payroll taxes
  - Requires prospective reclassification
  - Pays 10% of the Section 3509 tax calculations
  - Provides no interest or penalties
  - Must execute a closing agreement
  - Must extend the statute of limitations
  - Provides no relief to the worker
  - Will not be audited for worker classification for prior years
- Note: Employers are not longer required to extend the statute of limitations to participate in VSCP, per Ann. 2012-45

# Voluntary Classification Settlement Program

- Relevant Requirements

- Must prospectively reclassify independent contractors as employees
- Must have consistently treated the workers as “nonemployees”
- Must have filed all required Form 1099s for previous three years
  - *Subject to a special exception until 6/30/2013, applicable if unfiled returns are filed, and the VSCP participant pays 25%, not just 10%, of the section 3509 rates). (See Ann. 2012-46.)*
- Must not currently be under any IRS employment tax audit (of either the employer, or any employer in the affiliated group)
- Must not currently be under any DOL or state agency audit addressing worker classification issues
- If previously under audit, must have complied with audit results



# IC Status Under the National Labor Relations Act (NLRA)

# NLRA Background

- ICs do not have the right to organize
  - Section 2(3) of the NLRA defines an “employee” and specifically excludes “any individual having the status of an independent contractor”
- Common law of agency standard applicable
  - *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968)
  - Restatement (Second) of Agency § 220(2)
  - Examination of all factors, not just “right of control.” *Roadway Package System*, 326 N.L.R.B. 842 (1998); *Dial-A-Mattress*, 326 N.L.R.B. 884 (1998).

# Ongoing Concern Under an Obama Board

- Narrowing the definition of IC is another opportunity for the National Labor Relations Board (NLRB or Board) to promote union organizing and expand the application of the NLRA.
- Focus on “economic dependence” or “economic realities.”
- Member Wilma Liebman’s dissent in *St. Joseph News-Press*, 345 NLRB 474 (2005):
  - Increasing use of “contract labor” and other “nontraditional” relationships “makes the question of labor law coverage worthy of a fresh evaluation.”
  - “[I]t is entirely appropriate to examine the economic relationship . . . to determine whether the carriers are economically independent business people, or substantially dependent on the [employer] for their livelihood.”

# The First Four Years with an Obama Board

- Continued use/application of common of agency standard.
  - Analysis continues to be highly fact specific
- Recent focus by the D.C. Circuit on “entrepreneurial opportunity for gain or loss.”
  - But Regional Directors and the Board have declined to adopt a new standard following the D.C. Circuit’s decision
- Approximately 10 Board and Regional Director decisions addressing IC status over the last two years—IC status found in only two cases.

# How Do We Explain the Last Four Years?

- Significant backlog of cases following the Supreme Court's decision in *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010)
  - Two-member Board lacked authority to issue decisions
- Board was focused on other initiatives
  - “Quickie election” and notice posting rulemaking and resulting legal challenges
  - Other pro-union and pro-employee decisions following the failed battle over the Employee Free Choice Act (EFCA) in Congress
- Absence of the “right case” to introduce a new IC standard
- Board was getting the results it wanted under the current standard



# NLRB Outlook: Board Composition

## Democrats

### 1. Mark Pearce

- Chairman
- term expires 8/27/2013



### 2. Sharon Block

- recess appointment
- term would expire 12/16/14



### 3. Richard Griffin

- recess appointment
- term would expire 8/27/16

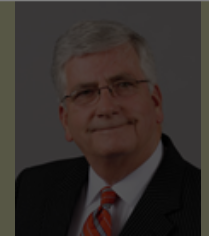


## Republicans

### 4. Brian Hayes (Rep.)

- term expires 12/16/2012

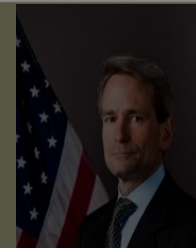
**TERM EXPIRED**  
12/16/2012



### 5. Terrence Flynn (Rep.)

- recess appointment
- term would expire 8/27/15
- prior nomination pending since 1/27/2011

**RESIGNED**  
7/24/2012



- Legal challenges questioning constitutionality of Member Block's and Member Griffin's recess appointments are pending. See, e.g., *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir., filed 2/24/12)
- President Obama likely to seek confirmation of a package of new nominees to the Board in the next year, including one or two Republicans.

# NLRB Outlook: Issues and Initiatives

- Board will continue to look for opportunities to revisit the IC issue.
- Difficult to predict whether the right case will come before the Board or whether standard will have to change to get the desired results.
- Significant potential for the Board's attention to be directed elsewhere.
  - Challenges to “recess” appointments could leave Board with only a single member and invalidate more than a year of decisions.
  - Board will be focused on correcting technical or other deficiencies to the extent the Notice Posting and/or Election rules are struck down.

# Polling Question

- Would you like us to follow up with you directly after the webinar today? Please answer the polling question on the right-hand side of your screen.

# Presenter Contact Information

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