



## Some 600 Board Decisions Potentially Invalidated

### Supreme Court Rules Two-Member NLRB Lacked Authority to Issue Decisions

By: Bayard Harris, Tom Winn, Victor Cardwell

The National Labor Relations Board (“NLRB” or “Board”) operated with just two members (instead of the usual five) from early January 2008 until late March 2010. The U.S. Supreme Court decided today that the two-member Board did not have the authority to issue some 600 decisions during that time period. *New Process Steel LP v. NLRB*, U.S., No. 08-1457 (June 17, 2010).

The two-member Board had relied on a March 2003 Department of Justice memorandum finding that “if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained.” Justice Stevens disagreed, concluding that the Board must maintain a membership of at least three members. Stevens explained:

*“If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress’ decision to require that the Board’s full power be delegated to no fewer than three members, and to*

*provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances.”*

The Court’s decision casts into doubt the validity of some 600 decisions issued by the two-member Board in unfair labor practice and representation cases. It is unclear whether or how those cases may have to be reheard. It is also unclear what impact this decision will have on decisions that were appealed. In some cases, the parties may have complied with Board and/or reviewing court directives (e.g., reinstatement of discharged employees, payment of back wages, recognition of unions, bargaining orders, etc.), and it is uncertain what effect this decision will have in those circumstances. The re-composition of the Board under the new administration further clouds this issue. Stay tuned for further developments as this situation continues to unfold.

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## DOL Issues New Donning/Doffing Guidance

By: Victor Cardwell, Tom Winn and Tom Bagby

The Department of Labor (“DOL”) has reversed its previous opinions concerning the scope of its “donning/doffing” rules under the Fair Labor Standards Act (“FLSA” or “the Act”). *Administrator's Interpretation, 2010-2* (June 16, 2010). The FLSA, permits an employer to exclude from compensable hours an employee's time spent changing clothes or washing at the beginning or end of a workday if the time is excluded by “the express terms of or by custom or practice under a bona fide collective-bargaining agreement.” DOL now says, however, that the provision does not extend to protective equipment worn by employees, despite prior opinion letters to the contrary.

Under this new interpretation, an employer must pay an employee for time spent donning and doffing protective equipment that is “required by law, by the employer, or the nature of the job.” The new interpretation also finds that “clothes changing” covered by the FLSA provision may be a principal activity marking the start of a workday, triggering the obligation to pay an employee for subsequent activities, including walking and waiting time.

Employers that require employees to change clothes or don protective equipment would be well advised to seek further guidance on these issues to avoid liability for unpaid wages under the FLSA.

## Labor & Employment Group:

**THOMAS R. BAGBY, Chair**

540.983.7766  
bagby@woodsrogers.com

**VICTOR O. CARDWELL**

540.983.7529  
cardwell@woodsrogers.com

**AGNIS C. CHAKRAVORTY**

540.983.7727  
chakravorty@woodsrogers.com

**ELIZABETH HOPE COTHRAN**

540.983.7525  
hcothran@woodsrogers.com

**BAYARD HARRIS**

540.983.7717  
bharris@woodsrogers.com

**RJ LACKEY**

434.797.8202  
rjlackey@woodsrogers.com

**JOSHUA F.P. LONG**

540.983.7725  
jlong@woodsrogers.com

**ANTHONY H. MONIOUDIS**

434.797.8202  
monioudis@woodsrogers.com

**WILLIAM B. POFF**

540.983.7649  
poff@woodsrogers.com

**DANIEL C. SUMMERLIN**

540.983.7546  
summerlin@woodsrogers.com

**JOSHUA R. TREECE**

540.983.7730  
jtreece@woodsrogers.com

**THOMAS M. WINN, III**

540.983.7702  
winn@woodsrogers.com

**DUDLEY F. WOODY**

540.983.7683  
woody@woodsrogers.com