



After Obama's 'controversial' NLRB nominee pulled, replacement should get past lame duck Senate

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President Obama's latest nomination to the National Labor Relations Board will likely get Senate approval in the final days of Democrats controlling the chamber, after his first choice was withdrawn amid fierce Republican opposition.

The closed-door approval process for the new nominee, high-ranking Senate staffer Lauren McFarren, is expected to start as early as Tuesday in the Democrat-controlled Senate Committee on Health, Education, Labor and Pension.

And McFarren, the chief labor counsel for the committee, should have little problem passing a full Senate vote, considering she'll need only 51 votes, a GOP Senate staffer told FoxNews.com on Tuesday.

McFarren would fill the open spot of attorney Nancy Schiffer on the five-member board and replace the first Obama appointee, Sharon Block, whose name was withdrawn from the competition earlier this month following the opposition by Republicans and others.

Obama appointed Block in January 2012.

However, she left the board after the Supreme Court unanimously ruled in June that her so-called "recess appointment," without Senate confirmation, was illegal because the chamber was not actually in a formal recess when Obama acted.

Obama had argued the Constitution gives the president the power to make temporary appointments when the Senate is in recess. He also argued the chamber was on an extended holiday break and that the brief sessions it held every three days were a sham intended to prevent him from filling board seats.

Tennessee Sen. Lamar Alexander, the top Republican on the Senate HELP committee, pointed out during a Nov. 20 confirmation hearing for McFarren that the high court's ruling invalidated 436 board decisions. And he expressed major concern about the board becoming too partisan.

“Too often the tilt goes toward the political leanings of the president who appointed the members,” he said. “The trend has been pronounced recently.”

Alexander said he also has problems with the board’s slow decision making and its “free-wheeling” general counsel. He called the Block nomination "controversial" but expressed optimism that McFarren, if confirmed, would strive to be an “impartial decision maker.”

The GOP takes control of the Senate next session, after winning the majority in the midterm elections, which likely would have given Block no chance of getting confirmed.

Committee Chairman Tom Harkin, D-Iowa, began the hearing, in the lame duck session, by saying the 75-year-old National Labor Relations Act gives U.S. employees the right to form and join unions and that the board is the “guardian of these fundamental rights.”

He also argued the board helps employers resolve disputes and that McFarren was an “incredibly talented” lawyer with “deep knowledge of labor law.”

Though McFarren is expected to receive confirmation, right-to-work advocates have urged Congress to wait until next year to vote on McFarren and argue that she will help decide at least two hot-button cases.

One case focuses on whether student-athletes are employees that can be organized under labor law, a position Republicans and others oppose, saying such a ruling would, in part, ruin college sports competition.

The other is related to a ruling by Richard Griffin, the board's general counsel, that states corporations such as McDonald’s and their franchisees are in some cases jointly responsible for employees’ wages, benefits and working conditions.

McFarren avoided answering questions on both issues but vowed to “try to find common ground” with fellow board members when ruling on cases. She also said the board’s role is to “interpret and implement the law as fairly and as efficiently as possible.”

Still, right-to-work advocates are urging Congress to at least wait on McFarren's nomination process.

Richard W. Rahn, a senior fellow at the Cato Institute, says the ruling on the corporate-franchise case is an “attempted overreach” by the board.

“If I were a Republican senator, I would attempt to delay Ms. McFarren's nomination until the next Congress convenes so there is adequate time to fully investigate and determine her views,” he wrote in an op-ed piece for The Washington Times.

Timothy Lee, a vice president of legal and public affairs at the Center for Individual Freedom, also is urging Senate Republicans to wait.

In a recent op-ed for The Hill, he pointed out that Service Employee International Union President Mary Kay Henry has called McFarren an “impressive candidate.”