EMPLOYMENT LAWSCENE ALERT: COLLEGE FOOTBALL PLAYERS ARE "EMPLOYEES" UNDER THE NLRA

The National Labor Relations Board ("NLRB") Regional Director for Region 13 issued a decision on March 26, 2014, finding that college football players receiving grant-in-aid scholarships from Northwestern University who have not exhausted their playing eligibility are "employees" under Section 2(3) of the National Labor Relations Act ("NLRA"). What does this mean for Northwestern football players? It means that those football players who meet the definition of an "employee" of the University can vote for whether they want to be represented by a union and collectively bargain over the terms and conditions of their relationship with the University. In fact, in his March 26th decision, the Regional Director ordered that an immediate secret ballot election be held among the eligible employees in the unit to determine whether they should be represented by the College Athletes Players Association ("CAPA") in collective bargaining with Northwestern.

In finding that the Northwestern football players receiving grant-in-aid scholarships are employees under the NLRA, the Regional Director relied on the broad definition of "employee" under Section 2(3) of the NLRA, which provides, in relevant part, that the term "employee" shall include "any employee . . . ." The Regional Director also relied on the U.S. Supreme Court's holding in *NLRB v. Town and Country Electric*, 516, U.S. 85 (1995), that in applying the broad definition of "employee" under the NLRA, it is necessary to consider the common law definition of "employee." The Regional Director noted that, "[u]nder the common law definition, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."

In finding that Northwestern University football players receiving grant-in-aid scholarships to perform football-related services for the University fall within this definition of "employee," the Regional Director emphasized the significant amount of revenue the football program generates for the University, the amount of time the players spend on football-related activities, the fact that the players who receive scholarships are required to sign a "tender," which the Regional Director compares to an employment contract, that the scholarships the players receive are in exchange for the athletic services being performed, and the amount of control the University and the football coaches have over the players and their daily lives.

Although this decision is just one Region's decision, it is noteworthy, as it is the first case in which the NLRB has ruled that student-athletes at a private university qualify as employees under the NLRA and are therefore allowed to unionize. Northwestern has already released a statement confirming its plan to appeal the Regional Director's decision. We are likely a long way from the ultimate conclusion in the Northwestern case. However, this decision may open

the door for student-athletes at other private universities and colleges to argue that they, too, are considered employees under the NLRA.

Including student athletes within the definition of “employees” under the NLRA may present a whole host of unexpected issues. For example, if student athletes on scholarship are “employees” of their college or university, should their scholarships be considered taxable income? Are these athletes also covered by other labor and employment statutes like the Fair Labor Standards Act, which requires employees to be paid minimum wage and overtime for all hours worked over forty in a given workweek? These are just some of the issues that may be raised with the recent decision issued by Region 13. The ultimate consequences of this decision out of Region 13, and their significance and reach, remain to be seen.

EMPLOYMENT LAWSCENE ALERT: SHOULD YOU CHANGE YOUR WORKPLACE POLICIES TO ADDRESS E-CIGARETTES?

As “e-cigarettes” grow in popularity, employers must decide how to address the use of e-cigarettes in the workplace. Electronic cigarettes or “e-cigarettes” are battery-operated devices that deliver nicotine or other substances to its user in the form of a vapor that is then inhaled. Many e-cigarettes are manufactured to look just like everyday objects that can be found in the workplace, such as pens or USB sticks.

E-cigarettes are currently unregulated by the U.S. Food and Drug Administration, which means the FDA has not evaluated any e-cigarettes for safety or effectiveness. A number of recent independent studies on the effects of e-cigarettes and the emissions from those devices have yielded mixed results, with some indicating that the vapor emitted by e-cigarettes contains some of the same carcinogens that you find in traditional cigarette smoke. So, as an employer, how can you know whether you should be regulating the use of these devices in the workplace?

Currently, there is no federal law regulating the use of e-cigarettes and no state has completely banned their use. Twenty-four (24) states, including Wisconsin, and the District of Columbia currently have “smoke-free” laws that prohibit smoking of traditional tobacco cigarettes in the workplace. Because e-cigarettes are still fairly new, most of these “smoke-free” laws do not address whether the use of e-cigarettes is also prohibited in the workplace. Recently, a number of municipalities and some states have enacted new laws or amended their “smoke-free” laws to ban the use of e-cigarettes in the same way use of traditional

tobacco cigarettes is prohibited in the workplace.

Wisconsin's legislature has taken an approach quite different from the trend toward banning the use of e-cigarettes in the workplace and other public places. The Wisconsin legislature has introduced a bill that, if passed, would exclude e-cigarettes from the types of smoking devices that are prohibited under Wisconsin's "smoke-free" law, which would mean that using e-cigarettes would be permitted in those places where smoking traditional cigarettes is now prohibited. It is not likely, however, that this bill would require private employers to allow employees to use e-cigarettes in the workplace.

With more employees bringing e-cigarettes into the workplace, employers are faced with the decision whether to permit or ban employees' use of e-cigarettes at work. Some employers find that permitting employees to use e-cigarettes cuts down on the number of smoking breaks employees take each day, thereby increasing some employees' productivity, while other employers find that e-cigarettes create a distraction for users and non-users alike. Absent legal restrictions regarding the use of e-cigarettes in most cities and states, employers in those jurisdictions are free to create their own reasonable policies addressing the use of e-cigarettes just as they would maintain policies addressing or restricting other activities and conduct that could interfere with employees' ability to do their jobs or otherwise disrupt the workplace.

Employers should stay up to date on state and municipal laws and ordinances that could affect how employers may be required to treat the use of e-cigarettes in the workplace.

EMPLOYMENT LAWSCENE ALERT: EEOC ISSUES NEW PUBLICATIONS ON RELIGIOUS DRESS AND GROOMING

On March 6, 2014, the Equal Employment Opportunity Commission announced that it released two new publications addressing religious dress and grooming rights and responsibilities in the workplace under Title VII of the Civil Rights Act of 1964 (Title VII), in response to an increased number of religious discrimination charges filed with the agency.

The EEOC has published a question-and-answer guide and a fact sheet in an effort to provide employers and employees practical guidance for complying with Title VII, which, under certain circumstances, requires employers to provide reasonable accommodations to employees and applicants who wear clothing or follow certain grooming practices for religious reasons, unless doing so poses an undue hardship on the employer's business

operations.

The two publications address a number of topics, including examples of common religious dress and grooming practices and when an employer's duty to consider an accommodation request is triggered, potential claims against employers for failing to accommodate religious requests, tips for preventing and addressing workplace harassment and retaliation against employees who request religious accommodations, and examples of when these requests have posed undue hardship on employers.

If you have questions about religious accommodation under Title VII, please contact one of our Employment Law attorneys.

ATTORNEY JIM DEJONG TO BE INDUCTED INTO PHI KAPPA PHI

James G. DeJong, a 1973 Carroll graduate and president of the Milwaukee law firm O'Neil, Cannon, Hollman, DeJong and Laing, will be inducted into the Phi Kappa Phi National Honor Society during a ceremony at Carroll University in April. Founded in 1897, this highly selective honors society was created to recognize and promote academic excellence in all fields of higher education and to engage the community of scholars in service to others.

A Mequon, Wis., resident, DeJong joined Carroll's Board of Trustees in May 2008. He has served on the Board's Executive and Institutional Advancement committees and was elected Board Chair in 2013. He is serving a three-year term.

CHECKLIST FOR CREATING AN EFFECTIVE SOCIAL MEDIA POLICY

Employers' social media and internet policies are a top enforcement priority for the NLRB. Below is a checklist that employers can use to create an effective social media policy. Please continue to visit the Employment LawScene™ for more policy pointers and practical guidance.

- Evaluate your business' needs and goals.
- Take a stance on social media use—will you encourage, permit, or simply tolerate it?

- Understand and be familiar with the latest federal and state laws and NLRB rulings and guidance.
- Create a Social Media Policy that addresses your business needs and goals.
- Define “Social Media.”
- Include key provisions:
    - Notify employees that they should have no expectation of privacy when using Company-issued equipment, systems, or networks.
    - Notify employees that the Company reserves the right to monitor data transmitted through Company-issued equipment, systems, or networks.
    - Remind employees that the Company’s computer systems, networks, and equipment are Company property.
    - Remind employees to include a disclaimer when writing personal blogs or posts stating that he or she is a Company employee and that any views and opinions expressed are the employee’s and do not represent official statements or views of the Company.
    - Remind employees of prohibitions against disclosing confidential or proprietary Company information.
    - Notify employees of prohibition against using social media to harass co-workers.
    - Encourage employees to report violations to the Company’s social media policy to management.
- Provide specific examples of prohibited conduct.
- Avoid overly broad statements, especially concerning disparagement of the Company, respectful workplace, and confidentiality.
- Include a clause stating that the employer’s policies are not intended to and should not be interpreted to interfere with or infringe upon employees’ rights to engage in protected concerted activity.
- Notify employees of the Company’s stance regarding social media use during working hours and while using Company resources.
- Clearly identify the consequences for violating the policy.
- Review other existing personnel policies to determine whether they apply to employees’ use of social media.
- Implement your Social Media Policy by distributing the policy to all employees and obtaining acknowledgment of receipt.
- Enforce and apply your policy consistently (be aware that monitoring employee use of social media sites and other off-duty conduct may be prohibited under federal or state law, terms and conditions of social media sites themselves, and collective bargaining agreements).
- Train employees on the appropriate uses of social media.
- Review your policy annually and update according to changes in the law.

ATTORNEY DIZARD QUOTED IN MILWAUKEE

JOURNAL SENTINEL

Downtown Milwaukee office building put in receivership

Milwaukee Journal Sentinel – February 24, 2014

A court-appointed receiver has been named to oversee the operations of a financially troubled downtown Milwaukee office building.

The eight-story building, at 211-219 W. Wisconsin Ave., adjacent to the Shops of Grand Avenue, is owned by 30 separate investment groups, all based outside Wisconsin, according to court records.

Those groups are insolvent. Their debtor is a Bank of America commercial mortgage fund, with U.S. Bank serving as its trustee.

Milwaukee Attorney Seth Dizard was appointed as receiver for the 105,000-square-foot building, which is leased mainly to the Internal Revenue Service.

The IRS moved its regional office there in 2006, the same year the property was sold by Wispark LLC to Chicago-based TSG Real Estate LLC for $20 million. Wispark bought the building in 2004 for $3 million, and remodeled it to accommodate the IRS.

Later in 2006, the building was sold to its current owners. It is now valued at $13 million, according to city assessment records.

EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT AFFIRMS TIME SPENT CHANGING CLOTHES NOT COMPENSABLE WORK TIME

On October 14, 2013, the Employment LawScene™ brought you an article explaining that the Supreme Court would hear oral arguments in *Sandifer v. U.S. Steel Corp.*, a case out of the Seventh Circuit, to resolve disagreement among other circuit courts as to what constitutes "changing clothes" within the meaning of the Fair Labor Standards Act ("FLSA") for purposes of determining whether time spent "changing clothes" at the beginning and end of each

workday is compensable work time.

The *Sandifer* case specifically focused on Section 203(o) of the FLSA, which allows employers and unions to collectively bargain over whether employees must be paid for time spent "changing clothes" at the beginning and end of each workday. The Seventh Circuit held that time spent putting on certain articles of protective gear fell within the definition of "changing clothes" under the FLSA and, accordingly, was not work time that employees had to be paid for pursuant to the parties' collective bargaining agreement.

On January 27, 2014, the U.S. Supreme Court unanimously affirmed the Seventh Circuit's holding that the time employees spent "donning" and "doffing" protective gear was not compensable under the FLSA when, "on the whole", the vast majority of the time was spent "changing clothes" and the employer and employees agreed that time was non-compensable under a collective bargaining agreement.

The U.S. Supreme Court noted that employees in *Sandifer v. U.S. Steel Corp.* were required to don and doff twelve (12) items of protective gear, nine of which fell within the definition of "clothes" under the FLSA (flame-retardant jacket, pants, hood, hard hat, "snood," "wristlets," work gloves, leggings, and steel-toed boots) and, therefore, were not compensable. Although the Court did not consider the other three items—safety glasses, earplugs, and a respirator—to fall within its definition of "clothes," it found that, "on the whole", a vast majority of the time was spent donning and doffing the other items that did fall within the definition and, accordingly, the time was not compensable. The Court instructed that in determining whether time spent donning and doffing certain protective gear is compensable under the Act, other courts should examine the time period at issue "on the whole" and determine whether the vast majority of donning and doffing time involves clothing items or non-clothing items as defined by the Court. If a vast majority of the time is spent on items that are "clothes," then the entire period should qualify as time spent "changing clothes" and should not constitute compensable work time under the FLSA pursuant to an applicable collective bargaining agreement.

The U.S. Supreme Court's decision in *Sandifer* makes clear that unionized employees are not entitled to compensation for time spent donning and doffing protective gear under the FLSA where a vast majority of time is spent "changing clothes" and where a collective bargaining agreement excludes such time from working time.

Click here to read the U.S. Supreme Court's complete decision in *Sandifer v. U.S. Steel Corp*.

EEOC OBTAINS VICTORY IN SEVENTH CIRCUIT IN PREVENTING JUDICIAL REVIEW OF PRE-SUIT CONCILIATION EFFORTS

In July, the Employment LawScene™ advised our readers that a federal district court granted the EEOC's motion to seek an interlocutory appeal before the Seventh Circuit as to whether the EEOC's alleged failure to conciliate prior to commencing suit is subject to judicial review in the form of an implied affirmative defense to the EEOC's suit. Title VII of the Civil Rights Act of 1964 requires the EEOC, prior to commencing suit against an employer, to "endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The federal district court granted the EEOC's motion for an interlocutory appeal because the Seventh Circuit had not yet directly addressed the issue and because there was a split between other federal circuits as to the scope of a court's review of EEOC's pre-suit conciliation efforts.

In a somewhat surprising decision, the Seventh Circuit became the first federal circuit court of appeals in the country to explicitly reject an employer's ability to assert an implied affirmative defense that the EEOC failed to comply with its conciliation efforts prior to commencing suit. The Seventh Circuit's decision also breaks ranks with the Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits who have all held that the EEOC's pre-suit conciliation efforts are subject to judicial review, despite the fact that these courts are divided as to the level of scrutiny to apply in reviewing the EEOC's conciliation efforts. The Second, Fifth, and Eleventh Circuits evaluate conciliation under a three-part inquiry whereas the Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith. The Seventh Circuit, based upon the plain language of the statute, rejected the notion that the EEOC's pre-suit conciliation efforts are subject to any level of judicial review or scrutiny.

The Seventh Circuit reasoned that the language of Title VII, the lack of a meaningful standard for the courts to apply, and the overall statutory scheme that Congress set forth in Title VII precluded a court from reviewing the EEOC's pre-suit conciliation efforts and likewise precludes an employer from asserting an affirmative defense on that basis. The Seventh Circuit found the language of Title VII made clear that conciliation is an informal process entrusted solely to the EEOC's expert judgment and that the conciliation efforts between the EEOC and an employer must remain confidential. The Seventh Circuit also found persuasive that there is no meaningful standard to apply is determining whether the EEOC's efforts to conciliate were sufficient. The Seventh Circuit even rejected applying a good faith standard because in applying such a standard, the court reasoned, a reviewing court could not help but to engage in a prohibited inquiry into the substantive reasonableness of particular settlement offers – not to mention using confidential and inadmissible materials as evidence.

In rejecting the application of a good faith review standard, the Seventh Circuit found compelling that Congress granted the EEOC the unreviewable discretion on the choice to settle or not to settle. Finally, the Seventh Circuit held that the broader statutory scheme of Title VII in protecting individuals from unlawful discrimination trumps an employer's interests in asserting an affirmative defense based on the EEOC's failure to conciliate because, according to the Seventh Circuit, "the conciliation defense tempts employers to turn what was meant to be an informal negotiation into the subject of endless disputes over whether the EEOC did enough before going to court."

At least in the Seventh Circuit, which oversees the federal district courts in Illinois, Indiana, and Wisconsin, the manner in which the EEOC conducts pre-suit conciliation efforts may very well change as its efforts, and whether such efforts were conducted in good faith, are no longer subject to challenge by an employer or review by a court. This lack of oversight gives the EEOC wide-latitude and considerable leverage in negotiations with an employer prior to commencing suit. The question will become whether the EEOC will use that leverage and its relatively large litigation budget to force employers into needless litigation. Employers, on the other hand, as always will have to weigh the cost/benefit of surrendering to the EEOC's attempt to extract a high monetary settlement through the conciliation process versus the high cost of litigating against the EEOC. Given the Seventh Circuit's decision precludes judicial review of the EEOC's conciliation efforts, there will be no watchdog over whether the EEOC's pre-suit settlement demands are made in good faith and commensurate with the merits of a particular case.

The Seventh Circuit's decision and the clear split that now exists between other federal circuits on this issue provides a basis for the Supreme Court of the United States to address this issue and resolve the dispute among the different circuit court of appeals. We will let our blog readers know if the U.S. Supreme Court decides to hear this case to resolve this important issue.

SUPREME COURT MAY FORCE NLRB TO REVISIT PREVIOUS RULINGS

On Monday, January 13, 2014, the U.S. Supreme Court heard oral arguments in *National Labor Relations Board v. Noel Canning*, a case that could potentially result in hundreds of recent rulings by the National Labor Relations Board ("NLRB") being invalidated.

The NLRB is made up of five (5) sitting board members, who are appointed by the President to serve on the Board. Generally speaking, the NLRB has the power to issue rulings in labor

disputes, which can then be challenged in court. NLRB rulings have the potential to shape U.S. labor law and so selecting the individuals to issue those rulings is often a hotly debated political issue.

The issue before the Supreme Court in the *Noel Canning* case is whether a President can use his "recess appointment" power under the Constitution to fill vacant positions during congressional recess, which is what President Obama did in 2012.

Why does this matter? Because, in order for an NLRB ruling to be valid, the ruling must be issued by a "quorum," which is three (3) confirmed Board members. Typically, the President nominates individuals for a Board seat and those nominations are then confirmed by Congress. In 2012, however, after the President's nominations to three empty seats on the NLRB had been blocked repeatedly by Congress, the President made "recess appointments" to give the Board a quorum. Although the President does have the power under the Constitution to make "recess appointments," Senators in 2012 were holding *pro forma* sessions every three days to prevent that from happening. So, the question becomes whether the Senate was actually in recess.

The U.S. Supreme Court's review of the President's recess appointments to the NLRB stems from the D.C. Circuit Court of Appeals' decision in *Noel Canning*, where the court held that a president can only make "recess appointments" during the period between formal sessions of the Senate. The argument goes that the President did not have the power to make the recess appointments because the Senate was not actually in recess and, therefore, his appointments were invalid, leaving the NLRB without a quorum and without the power to issue valid rulings.

During oral arguments on Monday, the Supreme Court Justices expressed doubt and seemed skeptical of the Obama administration's contention that it could bypass the Senate to make appointments during short congressional breaks. The Supreme Court's decision in *Noel Canning* could have far-reaching implications and could potentially force the NLRB to revisit hundreds of rulings issued in recent years if the Supreme Court determines the President's recess appointments were unconstitutional and the Board lacked a quorum to issue rulings.

We will keep you posted as to the final outcome of this case and its impact on the NLRB's rulings and operations.

NEW CHANGES TO WISCONSIN'S

UNEMPLOYMENT INSURANCE LAWS TAKE EFFECT JANUARY 5, 2014

The Wisconsin Legislature recently enacted major changes to Wisconsin's unemployment insurance laws, a number of which will become effective on January 5, 2014. The most significant changes include an expansion of what conduct constitutes "misconduct" and establishes a new standard of "substantial fault," which if proven, can temporarily disqualify an employee for unemployment insurance benefits. Another significant change limits the circumstances under which an employee may be entitled to unemployment benefits following a voluntary resignation. These new changes can be found in Wisconsin's 2013-2015 Biennial Budget Bill, 2013 Wisconsin Act 20 ("Act 20"). The Wisconsin Legislature recently enacted major changes to Wisconsin's unemployment insurance laws, a number of which will become effective on January 5, 2014. The most significant changes include an expansion of what conduct constitutes "misconduct" and establishes a new standard of "substantial fault," which if proven, can temporarily disqualify an employee for unemployment insurance benefits. Another significant change limits the circumstances under which an employee may be entitled to unemployment benefits following a voluntary resignation. These new changes can be found in Wisconsin's 2013-2015 Biennial Budget Bill, 2013 Wisconsin Act 20 ("Act 20").

Definition of Misconduct Wis. Stat. § 108.04(5) currently provides that claimants who are terminated for "misconduct" are temporarily ineligible for unemployment compensation benefits. Act 20 amends Wis. Stat. § 108.04(5) to incorporate the longstanding definition of "misconduct" that was set forth by the Wisconsin Supreme Court in Boynton Cab Co. v. Neubeck and Industrial Comm'n, 237 Wis. 249, 296 (1941). Boynton set a high standard for misconduct that was difficult for employers to meet. Act 20 incorporates, but further expands that standard to include actions and conduct that may not have been considered "misconduct" under the Boynton standard.

Act 20 also eliminates the stringent requirements relating to termination for absenteeism and tardiness (formerly set forth in Wis. Stat. § 108.04(5g)) and incorporates absenteeism and tardiness within the new definition of "misconduct." Pursuant to Wis. Stat. § 108.04(5)(e), absenteeism or excessive tardiness by an employee in violation of the employer's policy, if the employee does not provide both notice and a valid reason for the absenteeism or tardiness, constitutes misconduct.

This new definition of misconduct applies to new unemployment compensation claims filed on or after January 5, 2014.

Substantial Fault Act 20 also creates a new standard – the "substantial fault" standard – intended to cover conduct by an employee that does not rise to the level of misconduct, but

can still temporarily disqualify employees for unemployment compensation benefits. An employee who is terminated for “substantial fault” of the employee connected with the employee’s work, will be temporarily ineligible for benefits. “Substantial fault” includes acts or omissions over which an employee exercised reasonable control and which violate reasonable requirements of the employer. Substantial fault does not include: minor rule violations, unless the violation is repeated after the employee is warned; inadvertent errors by the employee; and any failure of the employee to perform work due to insufficient skill, ability, or equipment.

Voluntary Resignation/Quit Exceptions Act 20 changes the law with respect to the current statutory exceptions that allow an employee to voluntarily resign from employment and still collect unemployment benefits if the resignation involved certain circumstances. Act 20 eliminates 8 of the previously recognized exceptions and modifies four of the remaining exceptions. These changes will first apply to claims for unemployment benefits filed on or after January 5, 2014.

The following exceptions are no longer recognized under Wisconsin law and will no longer be valid reasons for an employee to collect unemployment benefits after he or she has voluntarily resigned employment:

1. Employee terminated his or her employment to accept a recall to work for a former employer within 52 weeks after having last worked for that employer.

2. Employee maintained temporary residence near the work terminated, maintained a permanent residence in another locality, and terminated the work and returned to his or her permanent residence because the work available was reduced to less than 20 hours per week in at least 2 consecutive weeks.

3. Employee left or lost his or her work because of reaching the employer’s compulsory retirement age.

4. Employee terminated part-time work because of loss of other full-time employment makes it economically unfeasible for employee to continue part-time work.

5. Employee terminates work with a labor organization if termination cause employee to lose seniority rights granted under a collective bargaining agreement and if termination results in loss of employee’s employment with the employer that is party to the collective bargaining agreement.

6. Employee terminated work in a position serving as a part-time elected or appointed member of a government body or representative of employees, employee was engaged in work for an employer other than the employer in which the employee served as the member or representative, and employee was paid wages in terminated work constituting not more

than 5% of employee’s base period wages for purpose of entitlement for benefits.

7. Employee owns or controls an ownership interest in a family corporation and employee’s employment was terminated because of an involuntary cessation of the business of the corporation under certain conditions.

Employers should be sure to update their employee handbooks, policies, and procedures to reflect these new changes that will take effect January 5th. If you have questions about which policies you should update or would like assistance in reviewing your existing policies to ensure compliance with these updates, please contact us.