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.

TIME FOR THE INCOME TAX TAIL TO START WAGGING THE ESTATE PLANNING DOG

For a long time, estate planners have been focused primarily on the transfer taxes (estate, gift and generation skipping), while minimizing income tax planning when planning with their clients. An example of this would be lifetime gifting. Many an estate planner has pontificated ad nauseum about the power of the gift; if the annual exemption is used, it removes the value of the gift from the donor's estate, and if the lifetime gift exemption is used, it removes the appreciation in the transferred property. But, there has always been an income tax tradeoff to those transfers. The donee receives the property with the donor's income tax basis. Had that same transfer been made at death, the donee would receive the property with a basis equal to date of death value (generally called a "stepped up" basis under the presumption that property will appreciate in value, but for those beneficiaries unlucky enough to receive bequests in 2008 and 2009, they might use the term "stepped down"

basis to reflect their reality).

So why did these planning strategists place transfer tax avoidance as a higher priority than income tax planning? A few simple reasons are obvious:

1. Until recently, the transfer tax rate (up to 55% through 2000, gradually lowering since then to its current 40%) was higher than the capital gains rate (which has generally hovered around 15-20%).
2. The amount that could be excluded from the transfer tax system, also known as the estate (or gift) tax exemption was relatively low compared to the net worth of a successful client ($1,000,000 in 2001 growing to $3,500,000 in 2009).
3. The use by a married couple of each of their estate tax exemptions resulted in the first spouse to die's estate tax exemption being left to a credit shelter trust. That property would grow estate tax free after the death of the first spouse, but would not get an income tax basis step up on the death of the survivor.

So what has changed?

1. The rate differential between the transfer tax and capital gains has been dramatically reduced. The transfer tax is 40%; capital gains, when you figure in the impact of the net investment income tax and state tax can be as high as 25-30%. But there is still a differential, so all things being equal, the income tax is still lower.
2. The 2012 Tax Act (AFTA) has made the concept of portability permanent. Without going too far in-depth on the mechanics of portability, it allows the first spouse to die to transfer not only property to the surviving spouse, but also the right to use the "first" spouse's estate tax exemption. The impact of portability is that all of the property of the two spouses can get a full income tax step up on the death of the surviving spouse while utilizing both spouse's estate tax exemptions. But while that gives us an income tax planning tool, it does not make income tax more important than transfer tax from a planning perspective.
3. The real paradigm shift comes from the dramatic increase in the estate tax exemption. In 2014, each spouse can leave $5.34 million (10.68 million working in concert) without the imposition of estate taxes. This will remove millions of people from a world of being concerned about transfer taxes. But, those same people, and their heirs, are subject to capital gains taxes at very low income thresholds. For example, assume Mom and Dad are worth $3,000,000 and are in their late 50s. In the past, the game plan would likely have been to give assets that they believed have high appreciation potential to their two children, both of whom are in their 30s, and each of whom make $100,000 per year. The reason, based on the "rule of 72" is that the appreciation in their hands could have been subject to an onerous estate tax; and in the hands of their children would only be subject to a much lower capital gains tax when the children elected to sell the asset. Or, even better, we could sell the asset to an irrevocable grantor trust, have Mom and Dad retain the income tax exposure on future sales and "leverage" the gift to the children. Now, however, the better move likely is to hold onto low basis, highly appreciating assets to get the income tax step up upon the survivor's death, with a closer look at the strategy only coming when Mom and Dad's net worth begins to

> approach the indexed estate tax exemption. In other words, the planning world is now on its head and waiting is the better strategy than giving for clients whose net worth is under the exemption amount.

At the end of the day, clients will want to seek out advisers who can navigate the world of both income and estate taxes, and can help them build a plan to take care of the people they care about while minimizing the impact of all taxes. No more cookie cutter plans; no more cookie cutter planners.

If you have any questions regarding this article, please contact Joe Maier at O'Neil Cannon at 414-276-5000.

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.

LANDLORDS TAKE ACTION! SIGNIFICANT CHANGES IN WISCONSIN LANDLORD/TENANT LAWS CAME INTO EFFECT MARCH 1, 2014

Wisconsin Act 76 went into effect on March 1, 2014. This Act makes numerous changes to Wisconsin's landlord/tenant law, Chapter 704 of the Wisconsin statutes. There are a number of changes that have an immediate impact on the ordinary course of a landlord's business that landlords and their counsel should consider.

First, Wis. Stat. § 704.05 potentially expands a landlord's ability to treat a tenant's personal property as abandoned in an eviction action in the absence of a written agreement to the contrary. The statute's technical revisions have arguably broadened the circumstances which trigger a landlord's rights with respect to abandoned property.

Second, the law now addresses costs associated with "infestation of insects or other pests, due to the acts or inaction of the tenant…" The landlord may elect to allow the tenant to repair such damage at his or her own cost, or alternatively, may take such action as is necessary to repair such damage and seek reimbursement for the reasonable costs associated with such action.

Third, while landlords are still required to provide a check-in sheet to new tenants, landlords no longer need to provide a "standardized information" check-in sheet.

Finally, the Act created Wis. Stat. § 704.14 which requires a "Notice of Domestic Abuse Protection" be included in all residential rental agreements. The required notice sets forth protections for tenants facing eviction in certain instances of domestic abuse as well as tenant termination rights pursuant to Wis. Stat. § 704.16.

Copies of the new legislation can be read here. There are a number of other changes landlords and their attorneys will find particularly of interest. Further information about this bill and its impact on Wisconsin landlords can be obtained by contacting any member of our firm's Real Estate Practice Group, or if a dispute has arisen, by reaching out to our firm's Litigation Practice Group.

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.

AN UPDATE ON DEVELOPMENTS REGARDING THE WISCONSIN AND FEDERAL RULES GOVERNING E-DISCOVERY

It has been estimated that more than 90% of all information created today is stored electronically. This electronically stored information, or ESI, is crucial information in most business disputes.

The Federal Rules of Civil Procedure were amended in 2006 to address ESI, and additional amendments to these federal e-discovery rules have been proposed that could go into effect in late 2015. The Wisconsin Rules of Civil Procedures were amended in January, 2011, and again in January, 2013, to address ESI too. The state and federal e-discovery rules significantly broaden the concept of what constitutes a “document” for purposes of discovery and confirm that discovery of ESI in civil lawsuits stands on equal footing with discovery of paper documents.

The Wisconsin e-discovery rules for the most part parallel the federal e-discovery rules, making it easier for federal authority to be used in discovery disputes in the Wisconsin courts. But the Wisconsin rules differ slightly from the federal rules. For example, unlike Fed. R. Civ. P. 26(a), Wisconsin documents have a rule requiring mandatory initial disclosures. The drafters of the Wisconsin rules decided that certain portions of the federal e-discovery rules would be better addressed by substantive law rather than procedural rules changes.

Highlights of the January 2013 amendments to the Wisconsin e-discovery rules include:

• Wis. Stat. § 804.01(2)(c), which provides that the trial materials privilege is not automatically forfeited because of the inadvertent disclosure of ESI and that claims of forfeiture of this privilege must be considered under Wis. Stat. § 905.03(5) as if they involved privileged attorney-client communications.
• Wis. Stat. § 804.01(7), which creates a Wisconsin “clawback” rule allowing for the recovery of privileged ESI inadvertently produced in discovery and establishes the procedure to be

followed in order to recover such information.
• Wis. Stat. § 805.07(2)(d), which adds ESI to the materials which may be discovered by subpoena and permits subpoenas for inspection, copying, testing or sampling of ESI.
Highlights of the proposed amendments to the federal e-discovery rules include:
• A proposed amendment to Fed. R. Civ. P. 1 which would encourage cooperation by the parties as to the efficient determination of a case, including e-discovery issues.
• A proposed amendment to Fed. R. Civ. P. 26 which would add a new "proportionality" test to the scope of allowable discovery.
• A proposed amendment to Fed. R. Civ. P. 30 which would reduce the limit on the number of depositions in a case from 10 to 5 and would reduce the maximum length of a deposition from 7 hours to 6 hours.
• A proposed amendment to Fed. R. Civ. P. 33 which would reduce the limit on the number of written interrogatories from 25 to 15.
• A proposed amendment to Fed. R. Civ. P. 36 which would limit the number of requests to admit to 25.
• A proposed amendment to Fed. R. Civ. P. 37 which would provide a uniform national standard for evaluating discovery preservation efforts and for the imposition of sanctions for failures to preserve discovery.

The public comment period for the proposed federal amendments runs until February 15, 2014. If approved, the federal amendments currently are expected to go into effect on December 1, 2015.

For more information about the state and federal e-discovery rules or ESI issues, please contact Grant Killoran at 414.276.5000, or at grant.killoran@wilaw.com.

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*.