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.

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.

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.

NLRB ASSERTS THAT TELLING EMPLOYEES TO MAINTAIN CONFIDENTIALITY DURING INTERNAL INVESTIGATIONS VIOLATES SECTION 7 RIGHTS

The National Labor Relations Board (NLRB) has taken the position, in a recent Advice Memorandum dated January 29, 2013, that an employer's confidentiality rule may unlawfully interfere with employees' Section 7 rights. Section 7 of the National Labor Relations Act (29 USC § 157) guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Many employers incorrectly assume that if they do not have a unionized workforce, the NLRA does not apply to them. However, many of the protections afforded under the NLRA apply to both union and non-union

employers alike.

Many employers have written policies providing that employees must maintain the confidentiality of internal investigations for such matters involving employee misconduct, employee theft or workplace harassment. During the investigation process, most employers warn employees involved with the investigation to keep matters discussed during the investigation strictly confidential and not to share such information with other employees. The obvious purpose of such admonition is to maintain the integrity of the investigation and to prevent employees from fabricating or colluding to get their respective stories straight.

The NLRB, however, takes a different view. The NLRB holds that an employer violates Section 8(a)(1) of the NLRA when it maintains a work rule that reasonably chills employees in the exercise of their Section 7 rights. According to the NLRB, employees have a Section 7 right to discuss discipline or disciplinary investigations involving their fellow employees.

An employer may prohibit employees' discussions during an investigation only if it demonstrates that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights. The NLRB's position is that the employer must show more than a generalized concern with protecting the integrity of its investigations. Rather, an employer must show that in any particular investigation that witness(es) needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or that there was a need to prevent a cover-up. Consequently, any blanket rule prohibiting employee discussions of ongoing investigations is invalid and will be held by the NLRB to violate employees' Section 7 rights.

Most, if not all, employers recognize the importance of employees maintaining the confidentiality of any pending internal investigation. Even the NLRB has not gone as far as to hold that employees have an unfettered right to communicate about internal investigations. Employers should review their employee handbook and other policies that address confidentiality of internal investigations and make sure such policies do not contain a blanket rule regarding confidentiality. In addition, where applicable, employers should add savings clauses to their policies providing that the employer's policy shall not be construed or interpreted to interfere with employees' Section 7 rights. Finally, to avoid NLRB interference, employers should address the issue of maintaining the confidentiality of any internal investigation on a case-by-case basis when it can be demonstrated that maintaining confidentiality is significant to preserving the integrity of the investigation. When such a need arises, employees should be instructed on an individual basis regarding the need to maintain confidentiality about the investigation.