# EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION WILL PROMOTE A SIGNIFICANT SHIFT IN RECENT FEDERAL LABOR LAW

In our series discussing the new workplace initiatives under the Biden Administration, we will next address the Biden Administration's desire to make significant changes in National Labor Relation Board ("NLRB"' or "Board") policy and to roll back the labor law precedent of the Trump Administration's NLRB. The Biden Administration's labor policy through the NLRB will focus on two primary goals: (1) the promotion of collective bargaining and (2) the protection of employees' rights to join and form unions. In pursuing this focused labor policy, the Biden Administration is keeping the promise it made during the Presidential campaign that it will pursue policies and the development of labor law that serves the interests of unions. All employers will need to pay attention for the next four years to the NLRB's development and application of the Biden Administration's labor policies.

Through the former NLRB's General Counsel, Peter Robb, the Trump Administration made significant pro-management policy changes and shepherded pro-management developments in labor law under the National Labor Relations Act (the "NLRA" or the "Act"). Under the Obama Administration, the Democratically–led Board took an expansive view on how the Act should be interpreted and enforced, including a very broad reading of Section 7 of the Act, which provides that employees have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Trump-era Board then narrowed this expanded reach of Section 7.

During the Trump Administration, many of the Obama-era Board policies and decisions were overturned by the Board or by the federal courts, including: (i) overturning of the Board's *Specialty Healthcare* decision that allowed unions to define their own bargaining units, including the recognition of micro-units; (ii) allowing employers, in the Board's decision of *Johnson Controls*, to withdraw union recognition at the expiration of a collective bargaining agreement if the employer can prove that the union does not continue to have majority support amongst bargaining unit employees; (iii) the U.S. Supreme Court's decision in *Epic Systems* overturning the Board's *Murphy Oil* decision where the Supreme Court held that an employer's requirement that employees agree to class- and collective-action waivers in mandatory arbitration agreements does not violate the NLRA; (iv) the Board's *MV Transportation* decision that applied a "contract coverage" analysis instead of a "clear and unmistakable waiver" standard in determining whether an employer with a collective bargaining agreement has the duty to bargain over, or has the right to implement, work or safety rules without bargaining that are within the scope and compass of the parties' existing

collective bargaining agreement; (v) overturning, in *Caesars Entertainment*, the Board's 2014 controversial *Purple Communications* decision, which had held that employees have the right to use their employers' email systems for non-business purposes, including communicating about union organizing; and (vi) overturning, in *Apogee Retail*, the Board's decision in *Banner Estrella Medical Center* where the Board ruled that employees have a Section 7 right to discuss discipline and ongoing investigations involving themselves and other co-workers despite an employer's confidentiality policy that prohibits such communications during a workplace investigation.

To follow through on his pledge made during his campaign to be "the most pro-union president," President Biden, as part of his first executive actions, took the unprecedented step to fire Mr. Robb as the NLRB's General Counsel. President Biden broke 85 years of tradition by being the first U.S. President to remove an incumbent NLRB general counsel before the end of his term. Mr. Robb's term was set to end in mid-November. President Biden's termination of Mr. Robb signals a shift in NLRB policy objectives under the Biden Administration and sets the stage for a roll back of the Trump-era NLRB policies and precedent.

President Biden quickly replaced Mr. Robb with Peter Ohr as NLRB's acting General Counsel. Mr. Ohr comes from the NLRB's Chicago Regional Office where he was its Regional Director. Mr. Ohr did not waste any time as the NLRB's acting General Counsel when, in a two-day span, he rescinded 10 Trump-era NLRB General Counsel Memoranda and two NLRB Operations-Management Memoranda issued by his predecessor. Mr. Ohr cited that the rescinded memoranda guidances were either not necessary or in conflict with the NLRB's policy objective of encouraging collective bargaining. Those guidances rescinded by Mr. Ohr, among others, included: (i) holding that employers may violate the Act when they enter "neutrality agreements" with unions to assist unions in their organizing efforts; (ii) on handbook rules developed following the Board's decision in *Boeing*; (iii) on a union's duty to properly notify employees subject to a union security clause of their *Beck* rights not to pay dues unrelated to collective bargaining and to provide further notice of the reduced amount of dues and fees for dues objectors in the initial *Beck* notice; (iv) on deferral of NLRB Charges under *Dubo Manufacturing Company* that instructed NLRB Regions to defer under *Dubo* or consider deferral of all Section 8(a)(1), (3), (5) and 8(b)(1)(A), and (3) cases in which a grievance was filed; and (v) on instructing NLRB Regions and Board agents on how to proceed during investigations in connections with securing the testimony of former supervisors and former agents and how audio recordings should be dealt with during investigations.

In the meantime, President Biden has nominated Jennifer Abruzzo to become the next NLRB General Counsel. Ms. Abruzzo was the second-ranking NLRB official under the Obama Administration as the agency's Deputy General Counsel. Most recently, Ms. Abruzzo was special counsel for the Communications Workers of America. The White House referred to

Ms. Abruzzo as "[a] tested and experienced leader, [who] will work to enforce U.S. labor laws that safeguard the rights of workers to join together to improve their wages and working conditions and protect against unfair labor practices." Richard Trumpka, president of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) supported Ms. Abruzzo's nomination by stating that "the days of the NLRB actively blocking workers from organizing a union are over." Ms. Abruzzo's nomination will have to be confirmed by consent of the Senate, which is currently evenly divided between Democrats and Republicans. Ms. Abruzzo's road to confirmation could be bumpy given the strong criticism by some Republican Senators of President Biden's unprecedented decision to fire Ms. Abruzzo's predecessor, Mr. Robb, before the end of his term.

**Biden Administration Will Push Pro-Union Legislation, Including the PRO Act**

Besides the change in the NLRB's General Counsel and the effects that change will have on the development of federal labor policy, the Biden Administration, together with the Democratically controlled Congress, is also planning sweeping legislative changes to the Act with the objective to make union organizing easier for employees. The proposed legislation that employers should pay most attention to is the Protecting the Right to Organize (PRO) Act (H.R.2474 and S.1306).

Specifically, pro-union allies of the Biden Administration are pushing the administration to pass the PRO Act, which would be an overhaul of federal labor law under the NLRA. The PRO Act, which the U.S. House of Representatives passed in February 2020, includes in its current form several controversial and seismic shifts in established federal labor law, including:

- Permitting the NLRB to assess civil penalties against employers, ranging from $50,000 to $100,000, for each unfair labor practice violation, which also includes personal liability for managers of alleged violations;
- Providing employees with a private cause of action against an employer for unfair labor practice violations;
- Permitting secondary strikes by a labor organization to encourage participation of union members in strikes initiated by employees represented by a different labor organization;
- Terminating the right of employers to bring claims against unions that conduct such secondary strikes;
- Superseding state's right-to-work laws, by requiring employees represented by a union to contribute fees to the labor organization for the cost of such representation;
- Expanding unfair labor practices to include prohibitions against replacement of, or discrimination against, workers who participate in strikes;
- Making it an unfair labor practice to require or coerce employees to attend employer meetings designed to discourage union membership;
- Prohibiting employers from entering into agreements with employees under which employees waive the right to pursue or join collective or class-action litigation;
- Requiring the NLRB to promulgate rules requiring employers to post notices of

employees' labor rights and protections and establishing penalties for failing to comply with such requirement;
- Prohibiting employers from participating in any NLRB representation proceedings;
- Requiring employers to provide a list of voters to the labor organization seeking to represent the bargaining unit in an NLRB-directed election;
- In initial contract negotiations for a first contract, compelling employers and unions to mediation with the Federal Mediation and Conciliation Service in the event the parties do not reach an agreement within 90 days after commencing negotiations;
- Compelling employers to bargain with a labor organization that has received a majority of valid votes for representation in an NLRB-directed election; and
- Providing statutory authority for the requirement that the NLRB must set preelection hearings to begin not later than 8 days after notifying the labor organization of such a petition and set postelection hearings to begin not later than 14 days after an objection to a decision has been filed.

President Biden promised during his campaign to sign the PRO Act. This legislation, however, is currently stalled in the U.S. Senate and may face an uphill battle given the Senate's current cloture rule to end a filibuster—which requires 60 votes to cut off debate on most matters. Consequently, to the extent that the PRO Act is subject to a filibuster in the Senate, it is unlikely that the PRO Act will become law in its current form. Nonetheless, all employers should pay careful attention to the PRO Act and its movement through the U.S. Congress.

**What Employers Should and Can Do**

Given the Biden Administration's priority of encouraging employees to unionize, and with the pro-labor individuals that President Biden has placed in top leadership positions in the U.S. Department of Labor, including the nomination of Marty Walsh, the former two-term mayor of Boston and former union leader, to become the next Secretary of Labor, union organizing activity is likely to increase. To lawfully counter those activities, employers can help ensure that employees are accurately informed about unionization to allow employees to make free and clear decisions without coercion about their rights under Section 7. To do so, employers should make sure that their supervisors are properly trained on how to recognize the signs of union organizing activities and how to lawfully respond to employees' questions about unionization.

As always, the labor and employment law team at O'Neil Cannon is here for employers to answer your questions and address your concerns about the changes to federal labor policy and law under the Biden Administration. We encourage you to reach out with any questions, concerns, or legal issues you may have.

# EMPLOYMENT LAWSCENE ALERT: NEW YEAR – NEW LABOR AND EMPLOYMENT LAW DEVELOPMENTS EVERY EMPLOYER SHOULD KNOW

In 2019, several federal agencies, including the U.S. Department of Labor, Equal Employment Opportunity Commission, and the National Labor Relations Board have either issued new regulations, new guidelines, or employer-friendly decisions that every employer should be aware of as we begin our journey into this 2020 election year. Most of the changes coming at the federal level are the result of the Trump administration's agenda to level the playing field for employers by tilting back for employers the shift that occurred in the legal landscape during the Obama administration. Here are the latest labor and employment law developments every employer should know as we venture into 2020.

**U.S. Department of Labor (DOL)**

**New Overtime Regulations Go into Effect January 1, 2020**

Effective January 1, 2020, the salary threshold necessary to exempt executive, administrative and professional employees from the Fair Labor Standard Act's minimum wage and overtime pay requirements increases from $23,660 (or $455 per week) to $35,568 (or $684 per week). The DOL's new rule is the product of the Trump administration's efforts to reset the Obama administration's 2016 final rule that established the salary threshold at $47,476 per year or $913 per week. Now is the perfect time for employers to audit their payroll data to make sure that every employee who is being treated as an exempt executive, administrative or professional employee is being paid at least the salary threshold amount of $35,568 (or $684 per week). Employees who do not meet this new minimum salary threshold should be treated as non-exempt and employers should begin to pay these newly minted non-exempt employees overtime compensation (1.5 times their regular rate) if they work over 40 hours in a workweek.

**DOL Issues Final Rule Clarifying the Regular Rate of Pay**

In December, the DOL announced a final rule clarifying for employers what "perks" and benefits must be included in the regular rate of pay when calculating overtime compensation. The "regular rate" is the hourly rate that is paid to employees and must not only include an employee's hourly wage rate, but it must also include in its calculation other forms of compensation received in a workweek, including bonuses, commissions, and other forms of compensation, subject to eight specified exclusions. Perplexing to employers, and exposing employers to additional risk for overtime liability, was the uncertainty as to whether certain

kinds of “perks,” benefits, or other miscellaneous payments must be included in the regular rate. The DOL attempted to eliminate this uncertainty in its final rule by confirming what employers may offer to employees through the following non-exhaustive list of “perks” and benefits without the risk of additional overtime liability:

- The cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
- Payments for unused paid leave, including paid sick leave or paid time off;EEOC, EE
- Payments of certain penalties required under state and local scheduling laws;
- Reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred solely for the employer’s benefit; the DOL also clarified that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se “reasonable payments”;
- Certain sign-on bonuses and certain longevity bonuses;
- The cost of office coffee and snacks to employees as gifts;
- Discretionary bonuses, by clarifying that the label given a bonus does not determine whether it is discretionary and providing additional examples; and
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

The DOL’s final rule becomes effective on January 15, 2020.

## National Labor Relations Board (NLRB)

### Employers Can Cut-Off Union Dues Upon CBA Expiration

In a 3-1 ruling, the NLRB overturned an Obama-era decision (*Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015)) requiring employers to continue to honor the dues checkoff provision in an expired labor contract. In *Lincoln Lutheran of Racine*, the NLRB held that an employer’s statutory obligation to check off union dues continues to be enforceable under Section 8(a)(5) of the National Labor Relation Act after expiration of a collective bargaining agreement that establishes the checkoff arrangement. The Obama-era Board reasoned that the “dues checkoff” provision could not just dissipate once a contract expired, but instead could be ignored only if all parties to the contract agreed. On December 16, 2019, the NLRB reversed course in *Valley Hospital Medical Center*, 368 NLRB No. 39 (2019), holding that while dues checkoff provisions are mandatory subjects of bargaining, they also fall into a special “limited category” of unique union rights that are contractual in nature and do not necessarily relate to wages, pensions, welfare benefits, and other terms and conditions of employment. Given its special category, a dues-checkoff provision remains enforceable only during the term of the agreement in which those contractual obligations were created by the parties. Consequently, the Board held that there is no independent statutory obligation to check off

and remit dues after expiration of a collective-bargaining agreement containing a checkoff provision, just as no such statutory obligation exists before parties enter into such an agreement. The Board's ruling brings more balance to the bargaining table and provides the employer some leverage when contract negotiations may extend beyond the expiration of the labor agreement. It also incentivizes the union to reach an agreement before expiration of the labor agreement to avoid loss of union dues. Of course, the right to cut-off union dues under the Board's *Valley Hospital* decision does not exist when the employer and the union agree to extend the labor agreement during the pendency of negotiations.

**NLRB Provides Employers, Once Again, the Power to Control Company-Owned Email**

On December 17, 2019, in *Caesars Entertainment* (368 NLRB No. 143) the NLRB overturned its 2014 controversial *Purple Communications* decision (361 NLRB No. 126) which had held that employees have the right to use their employers' email systems for non-business purposes, including communicating about union organizing. The NLRB's *Purple Communications'* decision overturned its 2007 *Register Guard* decision (351 NLRB No. 70) where the Board recognized the long-standing precedent that the NLRA generally does not restrict an employer's right to control the use of its equipment, which applies to company-owned email systems, and held that while union-related communications cannot be banned because they are union-related, facially neutral policies regarding the permissible use of employers' email systems are not rendered unlawful simply because they have the "incidental" effect of limiting the use of those systems for union-related communications. The *Purple Communications* decision upset this precedent and held, for the first time in the history of the Board, that employees do have the right to use company-owned equipment for non-work purposes. The Board's decision in *Caesars Entertainment* basically restored the standard set forth in the *Register Guard* decision before the *Purple Communications* decision stripped employers of an important property right with the only exception being those rare cases where an employer's email system provides the only reasonable means for employees to communicate with one another. Now, under the *Caesars Entertainment* decision, employers may prohibit employees from using company-owned email systems for non-work-related purposes, including communications concerning union organizing activities. Employers, however, are permitted to implement such a prohibition only if the employer's rules or policies are not applied discriminatorily by singling out union-related activities or communications.

**NLRB Restores Employers' Right to Impose Confidentiality in Workplace Investigations**

On December 16,2019, in a 3-1 decision, the NLRB overruled a 2015 NLRB precedent (*Banner Estrella Medical Center*, 362 NLRB 1108) that required a case-by-case determination of whether an employer may lawfully require confidentiality in specific workplace investigations.

The Board had ruled that employees have a Section 7 right to discuss discipline and ongoing investigations involving themselves and other co-workers. In *Apogee Retail*, 368 NLRB No. 144 (2019), however, the NLRB returned to its previous standard, and now allows employers to implement blanket nondisclosure rules requiring confidentiality in all workplace investigations. The NLRB's ruling aligns itself with the EEOC's position against the backdrop of the #MeToo movement where confidentiality rules imposed during a workplace sexual harassment investigation encourage victims and witnesses to come forward. The standard set forth by the Board in *Apogee Retail* only applies to open and-on-going investigations and only to those employees directly involved in the investigation. Obviously, on the other hand, any confidentiality order or rule imposed by the employer cannot be imposed on employees not involved in the investigation or to an investigation that has concluded. The Board's decision in *Apogee Retail* provides employers an important tool to maintain the integrity of its internal investigations without fear that imposing the safeguards of confidentiality requirements during the pendency of an investigation violates Section 7 rights.

## Equal Employment Opportunity Commission (EEOC)

### EEOC Rescinds Policy Against Binding Arbitration

The EEOC voted 2-1 to rescind its 1997 *Policy Statement on Mandatory Binding* Arbitration where the EEOC had stated its position that mandatory arbitration agreements that keep workers' discrimination claims out of court clash with the civil rights laws the agency enforces.

The EEOC based its decision to rescind its policy regarding binding arbitration based on the fact that its policy statement did not reflect current law, especially given the Supreme Court's numerous and consistent decisions since 1997 that favor agreements to arbitrate employment-related disputes as being enforceable under the Federal Arbitration Act (FAA). The EEOC found that its 1997 policy conflicted with the arbitration-related decisions of the Supreme Court where the Court rejected the EEOC's previously enunciated concerns with using the arbitral forum – both within and outside the context of employment discrimination claims. It should be noted by employers, however, that the EEOC's decision to rescind its 1997 policy statement on mandatory arbitration should not be construed to mean that employees cannot file charges of discrimination with the agency if they signed an agreement to arbitrate or that the EEOC is prohibited from investigating such charges. Moreover, the EEOC makes clear that its rescission of its 1997 policy should not be interpreted as limiting the EEOC's ability, or that of the employee, to challenge the enforceability of any agreement to arbitrate. This change in the EEOC's policy position regarding mandatory arbitration of employment disputes is not surprising given the long-line of Supreme Court decisions favoring arbitration in employment disputes. Given the positive change in the EEOC's position on mandatory arbitration agreements in employment, along with strong precedent-setting federal court decisions favoring arbitration, employers should consider revisiting whether

they should be utilizing agreements with their employees for mandatory arbitration of employment disputes.

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# EMPLOYMENT LAWSCENE ALERT: WISCONSIN ASSEMBLY PASSES RIGHT-TO-WORK BILL — GOVERNOR WALKER EXPECTED TO SIGN BILL ON MONDAY

Today, Friday, March 6, 2015, the Wisconsin State Assembly after a marathon session passed right-to-work legislation by a vote of 62 to 35. The State Senate had previously approved the right-to-work legislation by a vote of 17 to 15 the previous week. The votes were cast according to party lines. The fast-tracked bill will be sent to Governor Scott Walker for signature, which could occur as early as Monday. The bill is aimed at making Wisconsin more attractive to businesses by prohibiting as a condition of employment membership in a labor organization, and, accordingly, provides employees the freedom to choose as to whether they want to pay union dues. Union supporters strongly opposed the bill arguing that the bill harms unions and slows job growth. However, Republican Assembly Speaker Robin Vos said that in Indiana, which passed a similar bill in 2012, unions have not shrunk and jobs have grown.

Once Governor Walker signs the bill, Wisconsin will become the 25th right-to-work state in the country following recent right-to-work legislation passed in Indiana and Michigan. The right-to-work legislation will affect only private-sector workers. The Wisconsin bill would make it a crime punishable by up to nine months in jail to require a worker who is not in a union to pay dues.

Right-to-work is an often misinterpreted concept, as it does not guarantee any right to employment. Under federal labor law, a union that is elected to represent a bargaining unit must represent all workers, even those who have voted against the union. In states that do not have right-to-work laws, all employees in the bargaining unit are required to pay their fair share of union dues for that representation, even if they voted against the union and do not wish to pay union dues. In right-to-work states, however, which Wisconsin will soon be, employees cannot be compelled to pay any union dues or fees in a workplace where an union represents employees through a collective bargaining agreement even though such employees will be covered by the collective bargaining agreement. Wisconsin’s right-to-work legislation also makes it unlawful to require any individual to become or remain a member of an union.

Once Governor Walker signs the bill, the new right-to-work law will apply upon the renewal, modification, or extension of any private sector collective bargaining agreement. This means that for collective bargaining agreements currently in place as of the time of enactment of the law, employees would still be required to pay their fair share of union dues and remain members of the union for the remaining term of the agreement. However, for any collective bargaining agreement entered into, renewed or modified after enactment of the legislation, any union security clause requiring employees to be members of the union or any requirement for employees to pay union dues would no longer be enforceable.

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# EMPLOYMENT LAWSCENE ALERT: NLRB ISSUES NEW RULES FOR UNION ELECTIONS

On Monday, December 15, 2014, the National Labor Relations Board (NLRB) issued rules that will speed up the union election process. Although the rules do not take effect until April 14, 2015, employers should be aware of them and start preparing for the changes now.

Under the current rules, representation petitions are filed seeking to have the NLRB conduct an election to determine if employees wish to be represented by a union for the purposes of collective bargaining with their employer. The Board then investigates these petitions to determine if an election should be conducted and will direct the election, if appropriate. There is currently a 25-day minimum period of time between the filing of a petition and the date of an election. Parties must agree prior to the election on the voting unit and other issues. If the parties do not agree, the 25-day minimum can be extended in order to hold a pre-election hearing and, if necessary, a post-election hearing. Currently, that date as to when the pre- and post-election hearings are held can vary by Region. Also, under current rules, parties are not required to identify all specific issues in dispute, and litigation on voter eligibility and inclusion can occur prior to the determination of whether an election should be held.

Under the new NLRB rules, the road to a representation election will be substantially different and quicker. There will no longer be a minimum time frame between the date of the petition and the date of the election. This means that since representation elections will happen more quickly and with a shortened time frame to an election; and employers will be severely limited in their ability to properly and effectively communicate with their employees about the pros and cons of union representation. While the NLRB did not specify any date certain as to when an election must be conducted, under the new expedited election rules, it is anticipated that an election will now occur between 10 and 21 days after the filing of a petition as compared with the current 38 to 45 day time frame.

Now petitions can be filed and transmitted between the parties electronically. With the filing of a representation petition, the petitioning union must also file a letter of position and

evidence that employees support the petition (the "showing of interest"). Upon receipt, an employer must post and distribute to employees an NLRB notice about the petition and the potential for an election to follow.

The regional director will now set a pre-election hearing eight (8) days after a petition is filed. The purpose of the pre-election hearing is limited in scope and is designed to determine whether there is a "question of representation." Employers will be required to file a letter of position prior to the pre-election hearing identifying all issues that the employer wishes to litigate before the election. In addition, employers must also provide a list of the names, shifts, work locations, and job classifications of the employees in the petitioned-for unit, and any other employees that it seeks to add to the unit based upon a community of interests. Based upon the evidence presented at the hearing, the regional director will decide whether an election should be held and which, if any, voter eligibility questions should be litigated prior to the election.

If an election is directed, the regional director will ordinarily transmit the notice of election at the same time as the direction of election and will specify in the direction of election the election details, such as the date, time, place and type of election and the payroll period for eligibility. An election date will be set for the earliest date practicable. Now there is a new *Excelsior* list requirement as an employer, within two (2) days after a direction of election is issued (as opposed to seven (7) days under the previous rules), must provide a list of employees eligible to vote that now must include employees' personal phone numbers and email addresses, if available.

The NLRB regional office will then conduct the election and, if necessary, hold a post-election hearing to resolve any challenges to voters' eligibility and objections to the conduct of the election or conduct affecting the results of the election. While objections to voter eligibility had been a pre-election issue, it will now be held off until after the election in the event that the objection becomes moot. However, any issues not raised in the employer's position statement will most likely be considered waived by the NLRB. The post-election hearing will be scheduled 14 days after the filings of objections.

Although there is already a pending legal challenge to the new NLRB rule, a suit filed by the U.S. Chamber of Commerce and several trade associations, and there are likely to be others, employers should prepare for these rules to be enforced as the NLRB's new rules are game changers for employers. Employers will have less time to effectively communicate with their employees and employees will have less time formulate their true desires as to whether union representation serves their best interests.

Importantly, employers should not wait until an election petition is filed to address workplace issues that may lead to a representation petition being filed. Employers will need to be proactive in informing their employees about their stance on union-related issues and making

sure that employees feel that their concerns are being heard and addressed by the employer.  Employers should also train supervisors to be aware of issues that could lead to employees' desire to unionize. If an employer anticipates or suspects that any type of union organizing activities is occurring within its workplace, delaying a response is no longer a viable option.  Now, employers will be required to immediately begin the process of drafting communications to employees upon any indication of organizing activities and devise a sound and lawful strategy as to how it will confront any attempt to organize well before a petition is filed. Waiting to act until a petition is filed may be too late!

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## EMPLOYMENT LAWSCENE ALERT: NLRB DECIDES THAT WORKERS CAN USE THEIR EMPLOYERS EMAIL — EVEN FOR UNION ORGANIZING

On December 11, 2014, in *Purple Communications, Inc.*, the NLRB overturned its 2007 *Register Guard* decision and held that employees have the right to use their employers' email systems for nonbusiness purposes, including communicating about union organizing. The NLRB emphasized the importance of email as a critical means of communication for employees, especially in today's workplace culture, and noted that some personal use of an employer email system is common and often accepted by employers.  Because communication among employees is a foundation for the exercise of Section 7 rights, the NLRB held that employers who have chosen to give employees access to their email systems must now permit those employees to use those systems for statutorily protected communications on nonworking time.  Employers are permitted to monitor employees' email use to ensure that it is being used properly.  Employers will not be engaged in unlawful surveillance of Section 7 activity unless they do something "out of the ordinary," such as increasing monitoring during an organizational campaign or focusing monitoring effects on protected conduct or union activists.

In an attempt to balance the employees' Section 7 rights to communication with the legitimate interests of employers, this decision only applies to workers who have already been given access to their employers' email systems; employers are not required to provide access to employees.  Businesses may also be able to justify a complete ban on non-work use of email if they can point to special circumstances that make such a prohibition necessary to maintain production or discipline.  It will be the employer's burden to show what the interest at issue is and demonstrate how that interest supports any email use restrictions the company has implemented.  The decision did not address email access by non-

employees or any other type of electronic communication systems.

Employers should review their computer use and e-mail policies in light of this decision. Employers should determine which employees should or need to have access to their computer and e-mail systems and whether there is any business justification to impose a complete ban on non-work use of email.

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## EMPLOYMENT LAWSCENE ALERT: 2014 COULD STILL DELIVER IMPORTANT DECISIONS FROM THE NLRB

Although we previously posted an article outlining that the mid-term elections could improve the landscape for employers regarding administrative agency enforcement, including the National Labor Relations Board ("NLRB"), employers may still see a significant pro-union push from the NLRB before the end of 2014.

Democratic-appointee Nancy Schiffer's term on the NLRB ends December 16, 2014. The Obama Administration has nominated Senate Health Education and Pensions Committee chief labor counsel Lauren McFerran to take Schiffer's place on the five-member board. However, the now Republican-controlled Senate must approve all NLRB nominations. If the Senate does not confirm McFerran, or any other proposed nominee, the NLRB could be locked in a 2-2 partisan stalemate. Therefore, many believe that the currently Democratic NLRB will try to get major changes pushed through while they are still in the majority. This could include changes to union election procedures and changes to the definition of joint-employer status.

The NLRB has proposed rule changes that would significantly change the union election process. If issued, they would shorten the period between filing of an election petition and the election itself to only seven days. If this happens, employers will have less time to inform workers of the pros and cons of unionizing. Among other changes, the new rules would also require employers to submit a "statement of position" on the election petition by the time the pre-election hearing is held and waive any issues not raised in the statement.

Also, the NLRB could expand the standard for determining joint employer status in the Browning-Ferris case. A decision from the Board on this important topic is expected soon. For the past thirty years, the NLRB has analyzed whether two or more companies are joint employers under a "degree of control" test. The Board, in its expected decision in Browning-Ferris, could change that standard to a "totality of the circumstances" standard. A broader

standard from the Board in finding joint employer liability would be expected given the NLRB's General Counsel recent decision to permit 43 unfair labor practice charges against McDonald's, USA, LLC to move forward under a "joint employer" theory finding that McDonald's should be held liable, along with its independently-owned franchisees, based upon allegations that the franchisees violated workers' rights in responding to workplace protests. If the NLRB expands the definition of "joint employer," as expected, more companies that do not use direct employees could potentially face unfair labor practice charges for the conduct of other companies or could even be required to recognize and bargain with unions.

Employers should monitor the NLRB's decisions and actions through the end of the year and look for rulings that could impact them and their employees.

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## EMPLOYMENT LAWSCENE ALERT: NLRB DECISION INCREASES EMPLOYER RISK IN UNFAIR LABOR PRACTICE LITIGATION

In a move that could significantly increase the risk associated with unfair labor practice litigation for employers, the National Labor Relations Board ("NLRB") issued a decision on October 24, 2014 that stated it has authority to order expanded remedies for violations of the National Labor Relations Act ("NLRA") that are "egregious and pervasive."

In HTH Corporation, 361 NLRB No. 65 (2014), the NLRB recognized violations by a Hawaii hotel chain for repeated violations of the NLRA, including unlawfully terminating an employee for engaging in protected activity, eliminating contributions to unionized employees' retirement plans, maintaining an unlawful anti-solicitation policy, bargaining in bad faith, and failing to comply with NLRB orders.

The NLRB ordered, among various other remedies, the employer to reimburse both the NLRB General Counsel and the union for several years of litigation expenses, including counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses, per diems, and other reasonable expenses. In addition to expenses, the employer must comply with increased posting requirements. Typically, employers who are found in violation of the NLRA must post, for 60 days, a notice informing employees of their rights under the NLRA and a statement that the employer will not violate those rights. In HTH, because of the egregious and pervasive conduct, the NLRB required the employer to post the standard notice and an Explanation of Rights, outlining employees' core rights under the NLRA and

giving specific examples of violations, for three years. In addition, the company will be required to give all new hires in that three year period copies of the notice and the Explanation of Rights. The NLRB is also requiring the company to publish the notice and the Explanation of Rights in two local publications twice a week for eight weeks.

And, although the NLRB did not exercise its right to do so in this particular case, it did note that front pay is an available remedy under the NLRA as part of a make-whole remedy. Front pay is money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement. The NLRB did not specify how front pay would be calculated in the event that reinstatement was not awarded and left that question for a later decision.

This decision underscores the NLRB's recent aggressive enforcement agenda and the NLRB's willingness to deal the unions a winning hand in unfair labor litigation. The NLRB is active in enforcing the NLRA and will continue to use its broad discretionary powers to do so. This decision is likely to increase unfair labor practice charges being filed, as now unions have additional incentive to pursue such claims because they can recover their costs, and employers will be pressured to settle such charges to avoid the risk of liability for the union's costs and fees.

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## EMPLOYMENT LAWSCENE ALERT: IS YOUR BUSINESS EXPOSED TO LIABILITY FOR YOUR COMPANY'S LEASED EMPLOYEES/TEMPORARY WORKERS?

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## EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT UNANIMOUSLY REJECTS PRESIDENT'S NLRB APPOINTMENTS

Earlier this year, we alerted employers when the U.S. Supreme Court heard oral arguments in *National Labor Relations Board v. Noel Canning*, a case involving the President's appointment of three members to the National Labor Relations Board ("NLRB") without U.S. Senate approval while the U.S. Senate was on break.

Today, Thursday, June 26, 2014, the U.S. Supreme Court unanimously held that the President exceeded his authority in appointing those three members to the NLRB while the U.S. Senate was on an extended holiday break. Although the Supreme Court ultimately found that the President does indeed have the power under the U.S. Constitution to make "recess appointments" during breaks *between formal sessions* of the Senate and also during breaks in *the midst of a formal session*, the Senate breaks during which the President made his appointments to the NLRB were not considered to be in a formal "recess" within the meaning of the Constitution.

The Supreme Court's decision in *Noel Canning* opens the door for both employers and unions to call into question hundreds of decisions issued by the NLRB in recent years. This could force the NLRB to revisit certain of its decisions and may force the Board to issue new decisions in those matters. We will continue to keep you informed of the latest developments and effects of the Supreme Court's decision in *Noel Canning*.

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## 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.