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Unionizing College Football

While it might not directly affect many Law Newsletter readers, the most high profile labor relations issue in recent weeks has been the Northwestern University football players' effort to organize a union. On March 26, 2014, an NLRB Regional Director found that the football players were indeed "employees" of the university and could legitimately form a union. The NLRB in Washington, D.C. has granted Northwestern's request for review of the Regional Director's decision (http://www.nlrb.gov/news-outreach/news-story/nlrb-director-region-13-issues-decision-northwestern-university-athletes). The agency has invited amicus briefs (http://www.nlrb.gov/news-outreach/news-story/nlrb-invites-briefs-issues-northwestern-university-athletes-case), a step taken only in cases presenting strong public interests and/or novel issues. The players voted on April 25 in an NLRB-conducted election on whether they desire representation by the union. The ballots were impounded pending the decision of the NLRB. They will be counted only if the Board agrees with the Regional Director that the players are employees entitled to unionize under the statute.

The March 26th Decision

Although the issue of athletes as university employees is novel, the issue of students as employees is not. The NLRB decided that medical interns and residents are employees in *Boston Medical Center* (1999), and has addressed the question of whether graduate teaching and research assistants are employees several times. In *New York University* (2000), the Board found graduate teaching and research assistants to be employees. There, the Board held that the existence of a student relationship did not preclude finding an economic relationship. But in the most recent decision on the issue, *Brown University* (2004) (http://www.makingabetternyu.org/gsocuaw/wp-content/uploads/BROWNDECISION.pdf), the Board found that graduate assistants were students with an academic relationship to the university and not employees with an economic relationship. *Brown University* overruled the *New York University* decision.

The Regional Director's decision in *Northwestern University* relied on the very broad definition of employee (http://www.nlrb.gov/resources/national-labor-relations-act) under the National Labor Relations Act. These football players performed services for Northwestern for which they received compensation in the form of athletic scholarships and stipends for living expenses. Their compensation could also be withdrawn if they ceased playing football. The Regional Director further noted the substantial number of hours that the players must dedicate to football and the significant restrictions on their activities imposed by the university. Given these factors, and the fact that University control extends beyond the academic year, the Regional Director found that the athletes were not primarily students. Additionally, the *Brown University* decision from 2004 did not control the outcome here. The Board in *Brown University* was concerned about interference with the academic relationship between the graduate students and their faculty supervisors. But at Northwestern, the athletes are not supervised by academic faculty while performing football duties, making interference with the academic relationship a moot point. Thus, the Regional Director concluded that *Brown University* did not require a decision that the players were exclusively students.

What's Next?
As noted, the saga will continue with a decision from the full Board in Washington, D.C. Decisions in "representation cases" such as this are not directly appealable into the courts, but if the Board agrees with the Regional Director and the football players' union wins the representation election, Northwestern *can* challenge the decision by refusing to bargain with the union. Should it do so, an unfair labor practice case based on the refusal to bargain is likely, and in that case, the employer *can* appeal to the courts. If the Board decides the athletes are not employees, the union likewise has no appeal to the courts.

The National Labor Relations Act covers only private employers, so the NLRB's decision will create precedent only for private universities. Unionization at public universities will be governed by state law, which varies significantly by state. A union of public employees in North Carolina has voted to allow athletes to join as members (http://espn.go.com/college-sports/story/_/id/10955829/state-employees-association-north-carolina-union-welcomes-student-athletes), although the state does not permit government agencies to bargain with unions. Many other states authorize public employee bargaining and some have recognized graduate assistants at state schools as employees.

Implications
If college athletes are employees, are they covered by minimum wage and overtime laws, discrimination laws, workers' compensation and unemployment compensation insurance? Do they owe taxes on their scholarship monies? What subjects will schools have to negotiate with unions? What will be the effect of the decision on the amateur status of athletes and on the many schools that operate under the umbrella of collegiate athletics? How will other sports that offer fewer scholarships to athletes and produce no revenue for universities be affected? Will unionized athletes trigger a greater interest in unionization among traditional employees?

Congress has even entered the fray, holding hearings (http://chronicle.com/article/Battle-Over-College-Athlete/146453/) on the issue. And the NCAA has begun to address some of the issues raised by the players, voting recently to allow Division I schools to provide athletes unlimited meals and snacks (http://www.dailycal.org/2014/04/24/approved-ncaa-rule-allowing-unlimited-meals-snacks-affect-cal-athletes/). The NCAA is also considering easing some of the restrictions on the major conferences that limit benefits that can be provided to athletes. Regardless of the outcome of the decision, change is in the wind.

Obama and Changes to Overtime Laws

In mid-March 2014, President Barack Obama directed the Department of Labor to "modernize and streamline" the overtime regulations associated with the Fair Labor Standards Act. This directive will likely result in changes to the "white collar exemptions," which exempt "executive, administrative, or professional" employees from overtime pay. According to a Fact Sheet (http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr) published by the White House, 88% of salaried workers are ineligible for overtime because of these exemptions. Although observers speculate that these revisions will expand the availability of overtime for many salaried workers, change will not be rapid. The DOL will have to engage in the notice and comment process before making any changes to the regulations, which can take anywhere from one to two years. LERA members can be involved in the process by responding to the proposed rules after DOL issues them. The regulations were last revised in 2004.

For more information, see this article. (http://www.littler.com/publication-press/publication/president-obama-directs-department-labor-revise-federal-overtime-regul)

Hobby Lobby / Conestoga Wood – The Employment Law Context

As most LERA Law Newsletter readers are aware, the Supreme Court of the United States heard oral arguments in the *Hobby Lobby* / *Conestoga Wood* cases on March 25, 2014. In their most simplified form, these cases ask whether a corporation has a Constitutional right to exercise religion. *Conestoga Wood*, in particular, asks whether the contraceptive mandate in the Affordable Care Act violates the free exercise rights of the corporation's owners. This news blurb does not seek to expound on this thorny issue; merely to draw attention to the implications this case may have on the realm of employment law. If the Court holds that a corporation, in reflection of its ownership, can exercise religion, this opens the door for a variety of changes to the employment relationship. Corporations, in the exercise of religion, could, in theory, be free to impose any number of religious restrictions on employees, including requiring that employees attend church services or refusing to hire individuals because they practice a different faith than the ownership. LERA members are encouraged to watch for the Court's opinion in this matter and consider the implications it may have when it comes to the employment relationship.

For general information on the *Hobby Lobby* and *Conestoga Wood* cases, please see the SCOTUSblog. http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/)

New EEOC Guidelines on Religious Accommodation

On March 6, 2014, the U.S. Equal Employment Opportunity Commission issued new guidelines addressing employer responsibilities regarding employee dress and grooming in the workplace. In short, employers must make exceptions for employees following religiously-mandated dress and grooming practices unless the exceptions would pose undue hardship to the employer. While Title VII does not protect secular dress or grooming practices based in personal preference, it *does* protect practices grounded in bona fide religious belief or obligation. Examples of these practices include Muslim hijabs and Sikh turbans, as well as Sikh uncut hair and Rastafarian dreadlocks. These practices even include religious *prohibitions* on certain clothing, such as the Pentecostal Christian women's practice of wearing modest clothing. This blurb should be read in conjunction with the *Hobby Lobby* blurb listed above; these provisions may be subject to change pending the outcome of the above-mentioned Supreme Court cases.

For more information, see the EEOC Q&A
(http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm)
and the accompanying fact sheet
(http://www.eeoc.gov/eeoc/publications/fs_religious_garb_grooming.cfm).

Equal Pay Debate in the U.S. Senate

The LERA Law Newsletter would be remiss if we ignored the recent national discussion on equal pay for women in the workplace. On April 8, 2014, President Obama signed two executive orders (http://www.latimes.com/nation/la-na-obama-equal-pay-20140409,0,5054235.story#axzz2yjG3EDmr) prohibiting federal contractors from retaliating against employees who discuss their pay with one

another, as well as ordering contractors to disclose data on compensation, gender, and race. Additionally, a recent U.S. Senate bill calling for wage equality failed (http://www.washingtonpost.com/politics/senate-republicans-reject-equal-pay-bill/2014/04/09/ce011342-c003-11e3-b574-f8748871856a_story.html)to garner the filibuster-proof threshold required to open debate on the issue. This bill would have essentially accomplished the same things as Obama's executive orders, except in the private sector; prohibiting retaliation against employees discussing wages and requiring data collection on compensation issues. While Democrats cite the continuing wage gap between men and women as support for the bill, Republicans fear that it would increase lawsuits and unnecessarily duplicate laws that already prohibit wage discrimination. As Newsletter readers may know, the National Labor Relations Act already makes it an unfair labor practice for private employers to prohibit employees covered by that statute from discussing their pay. That law also prohibits disciplining employees for violating such illegal policies. Many employers maintain such policies, however, and they are rarely challenged, perhaps because employees are unaware of the illegality. Many notable observers (http://www.nytimes.com/2014/04/09/us/politics/democrats-use-pay-issue-in-bid-for-womens-vote.html)believe that the current pay initiatives are merely electioneering; reaching out to women, a key Democratic Party constituency, in advance of this year's midterm elections. Regardless, LERA members are advised to keep an eye on developments in the sphere of equal pay.

The Employment Regime Governing Veterans of the Armed Forces

The role of—and protection of—veterans in the workforce is an issue in today's economy. Servicemembers are increasingly returning to the civilian workforce as the conflicts in the Middle East draw down, and both the federal government and states are responding accordingly. Recently, there has been some reinterpretation of the Uniformed Services Employment and Reemployment Act (USERRA). Passed in 1994, USERRA aims to "minimize the disadvantages to an individual that occur when that person needs to be absent from his or her civilian employment to serve in" the armed forces. For more background on this law, see this DOL resource (http://www.dol.gov/elaws/userra.htm). Pursuant to this goal, the Act includes an "escalator principle," which essentially states that servicemembers returning to their jobs should be reemployed into the positions that they *would have* had if they had never left, and not necessarily the position they *actually had* when they left. Employers can place returning servicemembers in their previous jobs *only if* they are not qualified to perform the position they *would have had* if they had not left. This provision is particularly relevant in the context of servicemembers that miss out on promotions when serving overseas.

In *Rivera-Melendez v. Pfizer Pharmaceuticals, LLC*, (http://media.ca1.uscourts.gov/pdf.opinions/12-1023P-01A.pdf) the First Circuit Court of Appeals reinterpreted the "escalator principle" to expand the protections available for uniformed servicemembers. While Luis Rivera-Melendez was on active duty in the Navy, Pfizer restructured his department, eliminated his "Group Leader" position, and informed the Group Leaders that they could apply for a promotion to a newly created "Team Leader" role. By the time Rivera-Melendez returned from service and was placed in a comparable position at Pfizer, all Team Leader jobs had been filled. Rivera-Melendez brought suit alleging that he was unlawfully denied a promotion in violation of USERRA, but lost his suit in the U.S. District Court for the District of Puerto Rico. The District Court found that USERRA's "reasonable certainty" test meant that reemployment in a promoted position is only available as of right when the servicemember "would have attained [the position] with reasonable certainty." Since the Team Leader promotion was not automatic, Rivera-Melendez had no right to be reinstated as a Team Leader upon his return.

But the First Circuit Court of Appeals reversed, holding that the District Court applied the wrong standard. According to the First Circuit, "the appropriate inquiry in determining the proper reemployment position for a returning servicemember is not whether an advancement or promotion was *automatic*, but rather whether it was *reasonably certain* that the returning servicemember would have attained the higher position but for his absence due to military service." (emphasis added). In light of Department of Labor regulations and USERRA's broad remedies, the First Circuit vacated the lower court judgment and sent it back for reevaluation. While this does not guarantee that Rivera-Melendez will ultimately prevail, the judicial interpretation of USERRA here is seen by many as an expansion of servicemember rights. Moreover, the U.S. Government filed a brief in this case in *support* of Rivera-Melendez's position. This case is only binding authority in the First Circuit, which comprises the districts of Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico. However, it is persuasive authority in all other courts, and can be used at the discretion of trial judges across the country. At this time, it is unknown whether Pfizer will appeal this ruling to the Supreme Court of the United States. More information here (http://www.nutter.com/United-States-Court-of-Appeals-Clarifies-USERRA-Reemployment-Right-10-04-2013/).

Moreover, as of March 24, 2014, there are relevant new regulations (http://www.dol.gov/ofccp/regs/compliance/vevraa.htm)on what information federal contractors are required to disclose to veteran job applicants. All EEO taglines in job postings must be updated to state that veterans and the disabled will be given equal consideration in employment. Additionally, contractors must establish annual benchmarks for veteran hiring, using either the national percentage of veterans in the workforce or establishing an individual percentage goal. Notably, however, the benchmarks are an aspirational goal; there will be no penalties for failing to meet these self-imposed benchmarks. The regulations also include a number of other data-collection requirements aimed at protecting veterans and the disabled. Additionally, employers are now required to conspicuously post an "EEO is the Law" poster in physical locations for walk-in applicants, as well as provide electronic access to the poster in online application portals.

But the Federal Government is not the only entity stepping up to help veterans returning from armed conflicts; state governments are doing their part as well. In February 2014, Nebraska expanded its Veterans Preference Act to allow *spouses* of permanently disabled veterans to receive preference in hiring (http://www.shrm.org/LegalIssues/StateandLocalResources/Pages/Neb-State-Extends-Veterans-Preference-to-Spouses-of-Disabled-Vets.aspx). While this "derivative preference" has been available on the federal level for some time, many states have been updating their laws to include this protection for military spouses. At this time, the new Nebraska law applies only to applications for state government positions, but other state versions of the law allow private employers to offer preference to spouses of disabled military veterans as well.

Over the next five years, it is anticipated that roughly one million (http://www.vedderprice.com/userra-employer-risk-discretionary-promotions/) servicemembers will return to civilian life and the civilian workforce. Against this backdrop, LERA members are advised to keep abreast of developments governing the nexus of veterans and employment law—on both the state and federal levels. A great place to start is the U.S. Department of Labor's Veterans' Employment and Training Service, available here (http://www.dol.gov/vets/), as well as state-level resources in your jurisdiction.

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