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**ALLEGHENY COUNTY LABOR COUNCIL  
REPORT OF LEGAL COUNSEL  
March 14, 2013**

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**NLRB APPEALS THE *NOEL CANNING* DECISION TO U.S. SUPREME COURT**

On January 4, 2012, the D.C. Circuit ruled in *Noel Canning v. NLRB*, that the recess appointments of Members Richard Griffin, Terrence Flynn (who has since resigned), and Sharon Block to the NLRB were unconstitutional because they did not occur during an intersession recess of the Senate. Without those three members, the court held that the Board did not have a quorum and could not act lawfully

In a press release just issued, the National Labor Relations Board has elected not to seek *en banc* rehearing in *Noel Canning*, before the U.S. Court of Appeals for the DC Circuit, but rather, in consultation with the Department of Justice, the Board intends to file a petition for certiorari with the United States Supreme Court for review of that decision. The petition for certiorari is due on April 25, 2013.

**THE USE OF CREDIT REPORTS IN THE HIRING PROCESS**

A federal court in *EEOC v. Kaplan Higher Learning Edu. Corp.*, No. 1:10 CV 2882 (N.D. Ohio Jan. 28, 2013) dismissed the EEOC's challenge to Kaplan Higher Learning Education Corporation's use of applicants' credit information in hiring.

Kaplan reviewed applicants' credit information for "financial stress or burdens" or for information that might suggest the applicant would commit fraud or theft. Information that might disqualify an applicant for employment included bankruptcy, unpaid child support, and unpaid debts or other obligations greater than \$2,000. In some instances Kaplan reviewed credit information only for applicants for certain positions, and in other instances, all applicants' information was subject to review.

The EEOC sued Kaplan, alleging that the use of credit information in hiring had a disparate impact on African-American applicants and therefore violated Title VII. In other words, the EEOC alleged that Kaplan's use of credit information operated to disproportionately exclude African-American applicants from employment.

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The district court dismissed the case holding that the EEOC failed to provide any reliable statistical evidence that the use of credit information disparately impacted African-American applicants, which it must do in a disparate impact case. The court focused on the methodology used by the EEOC's expert. The expert determined the race of many Kaplan applicants by asking a panel to view the applicant's driver's license photograph and attempt to agree on the applicant's race. The court agreed with Kaplan that this methodology was unreliable, and thus the expert's statistical analysis was unreliable.

Among others, the primary lesson from this case is that future challenges to the use of credit information-by the EEOC or by individuals-will depend in large measure on a battle the experts.

**RESPECTFULLY SUBMITTED,  
JOSEPH S. PASS, ESQUIRE**