

Labor & Employment Law Update

NLRB General Counsel Memo States that College Athletes Are Employees

ROBERT E. GREGG | 11.09.21

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

NLRB General Counsel Memo States that College Athletes Are Employees. In the wake of the *NCAA v. Alston* Supreme Court decision and other recent cases nixing restraints on the compensation of athletes, the NLRB General Counsel issued a memorandum stating that college athletes are employees, at least for collective bargaining purposes. This is a memo by the General Counsel, and not a formal determination or decision. So, it is more of a forewarning that the NCAA or individual schools “may face NLRB oversight” since “players at academic institutions should be protected by section 7 of the Act when they concertedly speak out or self-organize.” This GC Memo also has a limited scope. It does not state anything about wages or overtime, since the NLRB does not enforce the Fair Labor Standards Act. This is only about athletes’ protected rights to engage in concerted activity including forming a union. Also, the NLRB does not have jurisdiction over public institutions, such as all of the various state universities. So, its potential application is only for private colleges and universities (such as Notre Dame, Duke, Howard, Georgetown, etc.).

New Rule To Allow Pension Funds to Consider Environmental, Social, and Governance Factors Again. The Dept. of Labor has introduced a proposed rule which would reverse President Trump’s October 2020 ERISA administrative rules which, in effect, prohibited pension funds from considering a corporation’s environmental, social, or ethical governance factors (ESG) when investing; reversing decades of investment discretion by pension funds. Under the Trump rule, the only fact which should be considered was profitability of the corporation. Some pension funds complained that their members wanted ESG responsible investments and that socially irresponsibility

or poor governance often catches up with a company and causes large income and stock value losses. [There have been several recent suits by pension funds against corporations for poor ESG practices which became public and created losses for the funds.] President Biden directed the DOL to develop a revised rule to again allow pension funds to exercise their own discretion in deciding what factors are important in making investments.

EEOC Issues COVID-19 Vaccination Technical Assistance Memo. The EEOC has revised a Technical Assistance guidance with further explanation on how employers should approach employees' religious exceptions to COVID-19 vaccination requirements. The EEOC seeks to balance the employees' Title VII religious rights with employers' legitimate interests in protecting the health and safety of other employees and the public. The memo can be found at www.eeoc.gov. This covers only the EEOC's Title VII interpretation. It does not address other Federal or state COVID-19 or discrimination-related laws.

Amazon Reverses Drug Testing Policy and Will Rehire Employees Fired for Marijuana Use. Amazon appears to be recognizing the realities that (1) more states are legalizing marijuana and (2) it is difficult to find workers and testing for THC significantly impacts hiring. So, the company is no longer testing for marijuana for non-safety sensitive positions and will rehire people who were fired due to a positive test. In addition, Amazon is actively lobbying Congress for federal marijuana legalization. It is supporting the proposed Marijuana Opportunity Reinvestment and Expungement Act and the Cannabis Administration Opportunities Act.

LITIGATION

Joint Employment

\$137 Million Award Against Tesla for Contractor-on-Contractor Racial Harassment.

The use of contracted workers and independent contractors by companies has steadily increased. Workers provided by a placement agency are the employees of the agency, not of your company. So, you may wish to believe your company is not responsible for their wage rate or benefits, and as their non-employer, you are not liable for any employment law cases they might bring. [i.e.: If they harass each other.] Or so you might think! However, there has also been a growth in joint employer liability. The company where the work is performed controls the environment and can be held liable for allowing improper acts in the facility. Both the placement agency and the company where the workers are placed can be jointly sued. Usually, this occurs where a contracted worker is harassed by a regular employee or customer of the company. That company can clearly be liable for not

controlling the acts of its own employees or customers. Now the case of *Diaz et al v. Tesla et al.* (N.D. Cal, 2021) has taken the concept a step further. Tesla used staffing agencies in one of its production facilities. Some workers from one agency engaged in overt racial harassment, including daily use of the N-word, toward workers from another staffing agency. Tesla was aware of the complaints but took no action. The harassed plaintiffs sued Tesla and the staffing agencies under Title VII and state discrimination laws. Tesla defended by claiming that none of its own employees were involved in the action and it had no responsibility for harassment endured by other staffing agency employees. Tesla expected staffing agencies to do their own investigations of harassment complaints when no Tesla employees were alleged to be involved. The court and jury saw things differently and viewed Tesla's "blame the subcontractors" defense as a "dodge" to avoid liability. Tesla had no procedures for coordinating investigations of harassment involving workers with staffing agencies and did not provide training to its own managers on their responsibility for the general environment in the facility, along with their obligation to report and investigate any instances of harassment regardless of who was involved. Tesla is as much responsible for harassment endured by its contract workers as it is for its own employees.

RETALIATION

Wrongful Discharge for Reporting Safety Concerns

Alki David Loses Another Case and \$7 Million for Wrongful Discharge. Major national corporations often have a number of employment cases in litigation. However, it is highly unusual for one small entrepreneur to be sued numerous times – and to lose so many. Alki David is a highly successful media billionaire. He and his company have been subject to multiple employee suits, mostly for sex discrimination and harassment. He defends himself in court, with long, arrogant, belligerent, often profane arguments which alienate the juries, and then he loses. Just in the past year, juries have awarded \$74 million to former employees in several sex discrimination-harassment cases. The most recent case, *Zirpel v. Alki David Production Inc., et al.* (Superior Ct LA County CA), was different in that the plaintiff was a male employee who alleged he was fired for reporting illegal construction and safety concerns regarding a theatre the company was about to open to the public. In court, Mr. David stated that he did not fire Zirple for whistleblowing regarding public safety; rather he told the jury that he fired him "for being a (profane terms)." The jury awarded Mr. Zirple \$1 million in compensatory damages and \$6 million in punitive damages, finding the termination was the result of malice, oppression, and fraud.

Workers Compensation Retaliation

Should Have Promptly Reported Work Injury. A court dismissed the retaliation case of a Frito-Lay route salesman who alleged he was fired because he filed a Workers Compensation claim for an on-the-job injury. The company claimed the discharge was due to falsifying timecards. The salesman claimed the physical demands of the work caused a leg injury and limp, and he eventually did make a W.C. filing. However, there was no evidence that his own management even knew of his injury, and he had told his supervisor that the limp “was just part of getting old,” with no mention of any work-relatedness. The salesman could not refute the company’s false time reporting defense. He had been suspected of fudging time and was under observation. The triggering incident occurred when he filled out a timesheet claiming he started work at 5:00.a.m. However, building security video showed him arriving at 7:00 a.m. and the company had photographed his car still parked at his house after 5:00 a.m. that morning. The salesman could identify no other person who had falsified a time record and not been fired. The court found valid nonretaliatory reasons for the discharge and dismissed the case. *Marquez v. Frito-Lay, Inc.* (D. Col. 2021).

Family and Medical Leave Act

Must-Follow the Procedures. A discharged custodian claimed she was fired for having exercised her FMLA rights. However, the court dismissed the cases. The employee wanted leave for treatment of a fibroid condition. She was informed of her FMLA rights and the procedures for taking FMLA. She was granted FMLA leave on several occasions. Then she could not get her doctor to certify the need for additional leave. The company informed her that unless it received the FMLA forms from the doctor, it could not approve the leave. She took leave anyway and was cited for unauthorized absence. Then she had a second instance of taking leave without submitting the FMLA certification. She was discharged. The court found this evidence showed the employee was not fired due to FMLA leave. Instead, she was fired for unauthorized absences because she did not properly follow the required process for FMLA, resulting in no FMLA leave job protection. *Watson v. Drexel Univ.* (3rd Cir, 2021).

Uniformed Services Employment and Reemployment Rights Act (USERRA)

Walmart Settles Military Leave Case for \$10 Million. Walmart has settled a class-action case alleging it discriminated against those who took military leave by paying

them less than employees who took other forms of leave. When Walmart gave full pay to employees for several types of short-term leave, it paid nothing or only partial pay to those called up for short-term active duty or military training. Walmart denies any violation of the USERRA but has settled and changed its practices. *Tsili v. Walmart, Inc.* (D. Mass, 2021).

Fair Labor Standards Act

Domino's Settles Pizza Delivery Drivers' Expense Case. Expenses employees must pay can create FLSA minimum wage and overtime issues. Unreimbursed expenses required to do the job can be seen as actually reducing the hourly pay. If subtracting the number of expenses results in a rate less than minimum wage (or less than the Salaried Basis Test for exempt employees), there is an FLSA violation. In *Hurt et al v. RT Pizza Inc.* (M.D. GA, 2021), a class of delivery drivers claimed that the company reimbursed them car expenses at only \$0.15 per mile, far below the standard IRS rate. Thus, having to pay the extra actual cost from their own pockets resulted in an effective net pay of less than the minimum wage. The company will settle the case, but the overall total has not yet been certified by the court. A Papa John's franchise in Ohio recently paid \$3 million to settle a similar case. The same minimum wage problem can also result when employees are charged for items, such as uniforms, equipment, or cleaning of work clothes, especially when the charges are deducted from the paycheck.

Author

Robert E. Gregg
(608) 283-1751