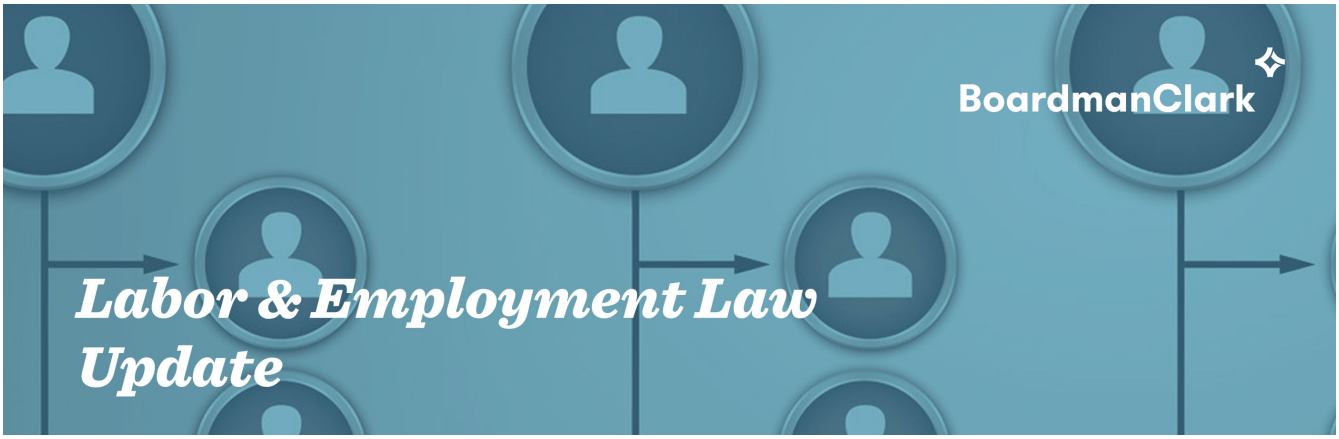

Employers Have a Duty of Care for the Health, Welfare & Safety of Employees

ROBERT E. GREGG | 08.09.21

LITIGATION

Safety and Abrogation of The Duty of Care

Employers Have a Duty of Care for the Health, Welfare & Safety of Employees. There has been a significant increase in civil suits and prosecution of individual executives and managers for violating employment rights. Liability is not confined to the organization or to economic damages; individuals are going to prison. These prosecutions are brought for serious safety violations.

"Volunteer," Independent Contractor or Employee? The distinction is all "regulatorily irrelevant." The federal Aviation Administration cited a small air carrier for failing to properly drug test those performing safety sensitive mechanical work on its planes. The company waited months before requesting the required test results from prior employers and enrolling workers in any testing program. The company appealed the citation and multi-thousand dollar fines. It claimed the workers at issue were either "volunteers" or "Independent Contractors" and therefore not employees covered by the regulations. The federal court did not buy the argument. It pointed out that the regulations state that an air carrier cannot "use any individual to perform a safety-sensitive job unless the individual has been tested" for drugs and enrolled in a testing program. So, the term "employee" is more expansive under this rule. A company cannot evade the requirements by simply using those it calls "Volunteers" or "Independent Contractors" to avoid responsibility for safety. *Regency LLC v Dickinson (FFA) et al.* (9th Cir. 2021).

Company Shouldn't Have Asked Staff to High-Five the Bears. Leading a tour, a new employee at a resort's Wildlife Adventure venue was doing the "high-five trick" with

one of the resort's bears. Instead of taking the usual marshmallow, the bear reached through an opening in the enclosure and took her arm, tearing off her thumb and severely mauling her arm, causing permanent loss of dexterity. Only the fortunate fact that one of the tour group was a surgical nurse saved the employee from fatal blood loss. Though Workers Compensation may cover some of the employer liability, the injured employee has sued the designers of the enclosure for faulty design and construction; the consulting veterinarians for failing to inform the resort and staff that unusually hot weather creates high aggression levels in bears; and the resort and its consultants for negligence in only minimally training the Wildlife Adventure employees. *Alborg v Margaret Knox Trust, et al.* (Allegheny Ct., PA, 2021).

Guilty Plea in Railroad Safety Case. The owners of a rail car cleaning company pled guilty to charges brought after the deaths of two workers. The company had a history of safety violations. The evidence showed it submitted false documents to OSHA, and faked paperwork about testing for hazardous chemicals in the railcars. It claimed it did regular testing, but never actually purchased any equipment to do the tests. The two workers were killed in a tanker car they were cleaning when the chemical benzene exploded, which had supposedly been tested for. This resulted in a 22-count criminal complaint under the Resource Conservation and Recovery Act. The company's president/owner and a vice-president entered a guilty plea. They could each be sentenced to up to 15-20 years in prison plus personal fines of $750,000. The company itself will also be assessed additional fines and penalties. *U.S. v Brasthwait, et al.* (D.C. NE, 2021).

Discrimination

Disability

Jury Awards $125 Million in Wal-Mart Disability Case. A Wisconsin jury found that a Walmart store unfairly fired a disabled part-time (14 hours/week) employee who has Downs Syndrome. The employee had worked 16 years at the store. She depended on public transportation to get to work and had arranged her hours to meet her special medical needs. Then a new computerized scheduling program reorganized the workforce scheduling, including increasing her hours, altering her schedule in such a way she could not get transportation to arrive on time, and could not meet her other needs. The jury found the company failed to reasonably accommodate by readjusting her hours. When she was unable to consistently arrive on time, she was fired for the attendance violations. The jury awarded $130,000 in compensatory damages and $125 million in punitive damages. *EEOC v Wal-Mart Stores East LP* (E.D. Wis, 2021). The large punitive damages award will probably be significantly reduced due to the damage "caps" under the ADA.

Sex

NFL Fines Team $10 Million and Owner Steps Down Due to Sexual Harassment/Bullying. Another toxic environment situation has resulted in the departure of a top executive — in this case, the team owner. Repeated complaints of sexual harassment, bullying, and intimidation finally led to the NFL instituting an outside investigation. The findings, according to Commissioner Roger Goodell: "For many years the workplace environment at the Washington football team, generally, and particularly for women, was highly unprofessional and included bullying, intimidation and one of fear. Many female employees reported sexual harassment and general lack of respect… Ownership paid little or no attention as senior executives engaged in inappropriate conduct that set the tone that disrespectful behavior and more serious misconduct were acceptable. The team's Human Resources Department was inadequate, and complaints were often ignored." The team will pay $10 million in fines, all costs of the investigation, and implement extensive changes in operational practices. The team owner, Dan Snyder, stated that he accepts all responsibility for the workplace culture and will step down from active involvement as CEO and turn over his role in team management and day-to-day operations.

Fair Labor Standards Act

Handbook Wage Policies Are Not Enough – Employer Must Monitor For Compliance. Policies in the Employee Handbook are a good start to inform employees of obligations to comply with various laws, especially wage and hour practices. They are the employer's first line of defense in a suit – employees were clearly informed of the proper practices and should have complied. However, policies are just paper, unless they are monitored and enforced. In *Meadows v NCR Corp* (N.P. Ill, 2021) a Customer Engineer claimed over 1,000 hours in unpaid overtime. He claimed he had to do extensive "pre-work" prioritizing and planning for the day's customer visits, then after-work recording of the day's work, and rarely got a meal break. The company's defense was that its policy clearly stated employees should record "any and all work time" in order to get paid. Thus, his failure to follow the policy and do so, meant he had chosen to not receive pay. There were two problems with this. First, the FLSA requires pay for all hours worked, regardless of whether reported or not. More significant, the company failed to monitor him. All of the engineer's extra work was on the company's system and clearly visible as to the times spent and activities performed. So, the company had ample opportunity to know of this work and either pay or take action to correct the employee. The FLSA requires actively monitoring to assure wage policies are followed and do not slip out of line. In fact, the failure to monitor and correct this clearly obvious electronic record of extra work creates an appearance that management knew of and intentionally sanctioned the

off-the-clock worktime, thus abrogating its FLSA responsibilities. A jury found in favor of the employee. The extent of back pay and additional sanctions and attorneys' fees will now be determined.

Management Trainees Do Not Qualify for Salaried Exemption - $7 Million Overtime Pay. Once again we learn that a job title does not create a salaried exemption and even a position description does not either. The person actually has to be doing the Executive, Administrative or Professional duties listed on the position description. New management or professional employees often are learning or in training in order to come-up-to the expected performance level. Some junior engineers or junior accountants are actually under close supervision for a year or so before they can do the exempt level work on their own. So, they do **not** qualify as salaried, and must be paid overtime for any hours worked over in a work week. This was the case for Lumber Liquidators which misclassified store Managers and Assistant Managers in the training period as salaried exempt. The company will pay $7 million in back OT pay plus up to another $2.3 million in attorneys' fees. *Maron, et al. v Lumber Liquidators* (E.D. NY 2021). The salaried exemption is serious business. Employers should devote serious attention to carefully studying whether a position qualifies and assure the person is actually performing the work.

Restraint of Trade

CEO Indicted For No-Poach Agreements. The U.S. Dept. of Justice's aggressive pursuit of No-Poach agreements has resulted in a 22-count indictment of medical company, DaVita, and its CEO, Kent Thining, for conspiracy in restraint of trade for Antitrust Act violations due to entering agreements with other medical companies to not recruit or hire each other's employees. According to the DOJ, "Those who conspire to deprive workers of free-market opportunities and mobility are committing serious crimes that we will prosecute to the fullest extent of the law." Mr. Thining and DaVita deny any violations of law. *USA v DaVita, Inc. et al* (D. Col. 2021). This criminal indictment immediately resulted in a civil class action filed by a related company's former healthcare Operations Director on behalf of all management employees. The case claims, "The company's No-Poach agreements reduced competition for senior level employees and depressed senior level employees' compensation below competitive levels." *Pena v Surgical Care Associates* (N.D. IL, 2021).

NCAA Student Athletic Decision Spins-Off Into Employee No-Poach Cases. Both Plaintiffs and Defendants Claim It Supports Them. The Supreme Court's June 2021 *Alston* decision was about compensation for student athletes. It had nothing to do with employee no-competition arrangements. It did, however, adopt a "test" for determining if a practice is or is not a restraint of trade under the Sherman Antitrust

Act. The court used a "rule of reason in complex situations" test, which is harder to prove where the alleged practices is not specifically prohibited by a statute. The plaintiffs must clearly identify the markets harmed and show tangible harm to employees in order to maintain a class action. Now, in *Butler v Jimmy Johns Franchise, LLC* (S.D. IL), the company is arguing that this test must be applied to the employee class action challenging its no-poach agreements among Jimmy Johns franchises and the case should be dismissed. However, the plaintiff employees in the no-poach agreement cases of *Turner et al. v McDonalds USA* (N.D. Ill) and *Arlington et al, v BKW (Burger King) et al,* (11th Cir) are arguing that the rule of reason test supports their cases and they can identify the elements necessary to show the antitrust effects. These cases illustrate how a standard from one sort of case can quickly be applied to other sorts of situations. The law is like a spiderweb, with connections being spun between numerous different parts.

Labor Relations

Union Sues Union Pension Fund Over Vaccinations. Teamsters Local 743 has sued the Teamster Central States Health & Welfare Pension Fund (N.D. Ill, 2021). The union represents the Pension Fund's employees. The Pension Fund implemented a mandatory COVID vaccination policy without consulting with the union and stated it would refuse to allow anyone at work without vaccination. The union grieved the policy, but the Fund moved to implement the policy prior to any arbitration under the collective bargaining agreement (CBA). So, Teamsters Local 743 brought an action in Federal Court to enjoin the Pension Fund from implementing the policy and to compel it to arbitrate the matter under the CBA.

Author

Robert E. Gregg
(608) 283-1751