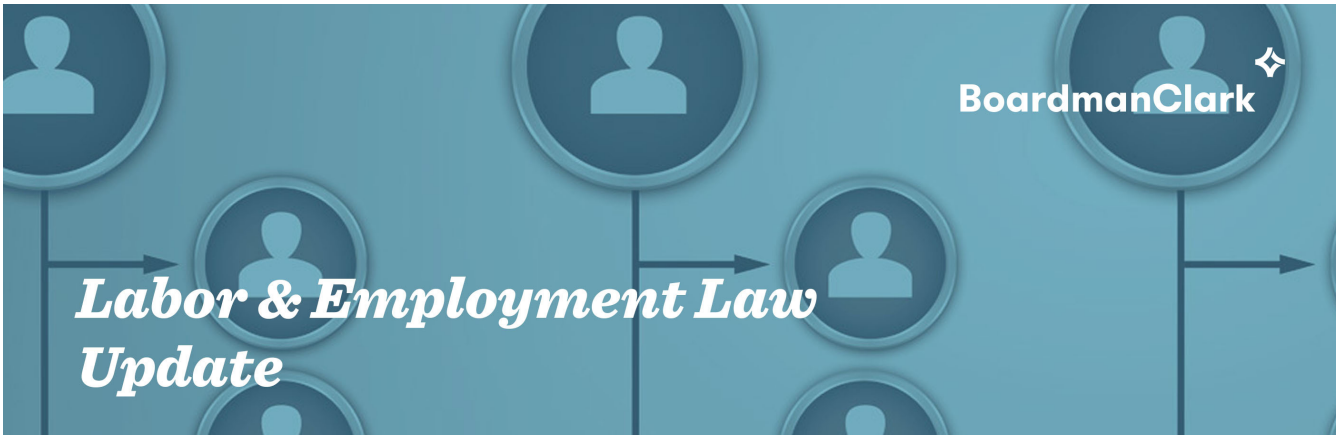

Biden Administration Uses Trade Laws Enforcement Section Regarding Mexican Factory Working Conditions

ROBERT E. GREGG | 07.08.21

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

Biden Administration Uses Trade Laws Enforcement Section Regarding Mexican Factory Working Conditions. The US-Mexico-Canada Agreement on trade has a "rapid enforcement" provision under which the US can bring charges that a company in Mexico or Canada is violating basic working conditions or workers' rights, thus creating unfair pricing and competition for US companies, in addition to human rights concerns. The Biden administration has made such a charge against a Mexican company, Tridonex, which has allegedly intimidated, fired, and even had workers and their representatives jailed when they pushed for basic rights and fair working conditions. The matter goes to a "rapid resolution" process which gives the Mexican government the opportunity to review the issue. If not resolved, the US can impose sanctions and tariffs against the company.

Bill Would Fund Whistleblower Programs. Whistleblower programs have been so successful that they are running out of funds. Congress has passed the CFTC Fund Management Act. The US Government has collected billions of dollars due to reports of fraud by government contractors and others who bilked the United States. The whistleblower also receives a reward based upon the amount collected from the violators [See later Whistleblower case]. However, none of the collected amounts go back into the fund to pay the whistleblower, so it is running out – a victim of its own success. The new law will fund these payments through 2022.

LITIGATION

Most Unusual Cases of the Month

Boat Captain's Injury Caused by Crocs. No, this was not Captain Hook and the crocodile. It was Capt. Taylor of the oilfield trawler Dusty Dawn. He sued under the Jones Act to recover damages due to an injury he suffered when he had a major fall (fell on deck and tumbled down a deep hatchway) aboard the boat, claiming the company had allowed unsafe conditions. However, the court found that he was wearing Crocs (slip-on foam clogs) at the time, instead of the safety shoes with non-slip soles which were required for all crew members. The court ruled that the Crocs were the reason for the fall and "Capt. Taylor's footwear choice makes him fully responsible" for his own injury. "He is the only one to blame." As Captain, he was responsible for enforcing the rules and assuring all crew, including himself, wore proper safety garb. *Taylor v B&J Martin, Inc. et al.* (E.D. LA, 2021).

Netiquette

Jury Selection Became a Virtual Circus. During COVID-19, many trials have been conducted virtually. The Texas Supreme Court mandated an in-person trial after attorneys objected to the "circus-like" virtual jury selection process conducted via Zoom video. Prospective jurors were observed during the court proceeding sleeping, driving cars, gaming/wearing headsets, periodically disappearing off camera, playing with pets, eating meals, watching TV, lying in bed, drinking alcohol, applying make-up & false eyelashes, and vaping, all while they were supposed to be listening to instructions and answering crucial questions. When the attorneys asked the higher court to nix the scheduled virtual trial and order an in-person proceeding, they claimed that the virtual selection process was "an insult to the entire civil justice system…when a juror is drinking wine at a restaurant or driving around town while being questioned." Therefore, a trial under the same virtual process would not be the "serious endeavor" required for a fair and valid trial. The attorneys also requested replacement of the judge who allowed this sort of jury selection process. In re *Willis and Allied Aviation Fueling Co.* (TX S. Ct. 2021).

U.S. Supreme Court

The Supreme Court decided several significant employment related cases at the end of its 2020-21 term.

California et al v Texas et al and Texas et al v California et al. ACA Survives Again. The Supreme Court has rejected several attempts to void the Affordable Care Act. Several states, led by Texas, challenged the law, again. In a 7 to 2 decision, the Justices ruled that the plaintiff states do not have standing to challenge the law. The states could not show a past or present "concrete particularized injury" which can or could be "fairly traceable" to the alleged unlawfulness of the ACA. The states' arguments were conjectural and "largely rest on speculation."

Cedar Point Nursery et al v Hassid et al - Farm Worker Organizing. The court ruled 6 to 3 that labor unions cannot go onto farms or private property, to organize agricultural workers. The case found a California law which allowed unions to enter on private farms for up to three hours a day was unconstitutional since the law granted an entitlement for invading private property and it amounted to a "taking of private property without compensation" under the 5th Amendment. This is a setback for the unions, since many farm workers work, live and spend almost all their time on the farms, and leave the property only occasionally.

NCAA v Alston. In a unanimous decision, the Supreme Court moved student athletes a step further toward being paid employees. The justices concluded that the NCAA and over 1,200 member colleges were in violation of the Sherman Antitrust Act by agreeing to limit how much each member school can compensate athletes for academically related costs. This case does not open the flood gate to wage payments, nor dictate exactly what athletes are entitled to. Instead, it frees each school to be able to make its own decisions, free from NCAA control, over what other academic-related compensation to provide, such as computers, graduate assistantships, internships and other education-related benefits. This case does, however, open the way for student athletes to push for other forms of compensation.

In a Related Case. In the wake of the *Alston* decision, a federal judge, Claudia Wilken, refused to dismiss antitrust suits against the NCAA over its rule which prohibits college athletes from earning money from the use of their names, images, and likenesses; and that the athletes should be able to share in television revenue generated by their school's sports contracts with the media. The judge ruled that the athletes had alleged cognizable injury "in the artificial suppression of the price of the goods and services that student athletes can receive in exchange for their labor." *House et al. v NCAA* and *Oliver v NCAA* (N.D. Cal. 2021). [Judge Wilken is the same judge who originally ruled on the *Alston* case and whose decision was upheld by the U.S. Supreme Court.] Following this ruling, on June 28th the NCAA suspended enforcement of its name/image rules awaiting further developments, and leaving schools free to adopt their own policies, for now.

Fair Labor Standards Act

This month's cases again illustrate the major focus the Dept. of Labor and plaintiffs are giving to misclassification issues. ***A Title Is Just A Word – Calling Someone A "Manager" Does Not Make Them Salaried-Exempt***.

Barnes & Noble will pay approximately $1 million in back overtime wages and attorneys' fees to bookstore café managers who actually did much the same work as

the other workers, rather than spending the majority of their time actively doing executive "management" duties. *Broan et al. v Barnes & Noble, Inc.* (S.D. NY, 2021).

Jimmy Johns Will Pay $1.8 Million for Misclassifying Restaurant Managers. In another case of calling someone a "Manager" doesn't make it so, Jimmy Johns Sandwich Shops will pay $1.8 million to settle an FLSA case. The people it paid as salaried managers in fact worked primarily doing sandwich-making, order-taking, stocking, and other non-executive exemption level duties. Thus, they are entitled to overtime pay for the extra hours they worked each week. In Re *Jimmy Johns Overtime Litigation* (N.D. Ill, 2021).

Discrimination

Race

"Not The Right Minority" For NFL Job. The NFL is investigating a complaint by an Asian- American former player and coach that in an interview for a head coach job, he was told he was "Not the right minority." The NFL states the "comment is completely inappropriate and contrary to league values and workplace policies." In Re Eugene Chung Complaint, Mr. Chung played five seasons as an offensive lineman for the Patriots, Jaguars, and Colts and was an assistant coach for the Chiefs Super Bowl LII team. He is currently seeking to become a head coach, which would be the first Asian head coach in the NFL.

Sex

Judge Was Joint Employer Regarding Sexual Harassment. A federal court has ruled that a former state judge can be sued personally in a case alleging he retaliated against a court contracted employee by having her fired when she rejected his sexual advances. The judge, who resigned a day after the State Judicial Conduct Commission started a removal process due to the harassment claim, argued that he was not the person's employer. She was employed by a private company which contracted to provide services to the courts. However, the evidence showed the judge had all day-to-day supervising authority and control over the work environment and any authority to hire or fire the contract employees. So, he was a joint employer who could be held liable. The federal court also rejected the judge's claim that he should have sovereign immunity from being sued, though the state courts as an entity might claim immunity. *Cagel v Estes, et al.* (D.C. Mass, 2021).

Conflicting Explanations Result in Harassment Case Going To Trial. A gay bartender at a music club sued for sexual harassment, claiming he was fired when he rejected his male manager's advances. He claimed the manager told him "I used to sleep with my manager to get better shifts. Do you want better shifts?" When he rejected the proposition, the bartender's shifts were suddenly decreased and then he was

allegedly fired in retaliation for rejecting the advances. The company first claimed the discharge was due to an overall workforce reduction. Then it claimed it fired the bartender due to customer complaints about his behavior at work. These arguments are inconsistent and create a perception that they could be made up as after the fact justifications for a wrongful discharge-pretext. Therefore, the case will proceed to a jury trial. *Kane v Club Helsinki* (N.D. NY, 2021). This case is a good reminder that inconsistencies in documentation and in managers' testimony regarding the basis for employment actions are a major cause of litigation and liability.

Whistleblowers

Navistar Will Pay $50 Million Settlement Due to Whistleblower Report of Defrauding Marine Corps. Navistar, a defense contractor, was reported by its former contract manager for having defrauded the Marine Corps. The report alleged Navistar inflated prices, overcharged, and created fraudulent invoices for sales which had not taken place. The person who reported will receive $11.6 million under the False Claims Act whistleblower provisions. *Burgess v Navistar Int., LLC* (D.C. D. C., 2021).

SEC Levies Fine For Anti-Whistleblower Employment Policy. The NLRB and a number of other federal agencies review employment handbooks to find policies which seem to violate employees' rights. Then the agency will bring an Unfair Labor Practice charge or another sort of related charge, even if the policy never actually operated to discipline anyone. The mere existence of the policy is seen as a form of intimidation to deter employees from engaging in rights or from reporting wrongdoing. In the case of *In Re Guganheim Securities, LLC* (SEC 2021), the Securities and Exchange Commission has fined the securities firm $208,000 for having a policy prohibiting employees from speaking to any federal agencies or regulators without permission of management. This would effectively prohibit any whistleblower from reporting violations, fraud, or misconduct without first obtaining approval by the very management which was allegedly committing the violations. This case is a good reminder for all employers to carefully consider their employment policies for perhaps unintended effects – and resulting government scrutiny – before issuing an employee handbook.

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