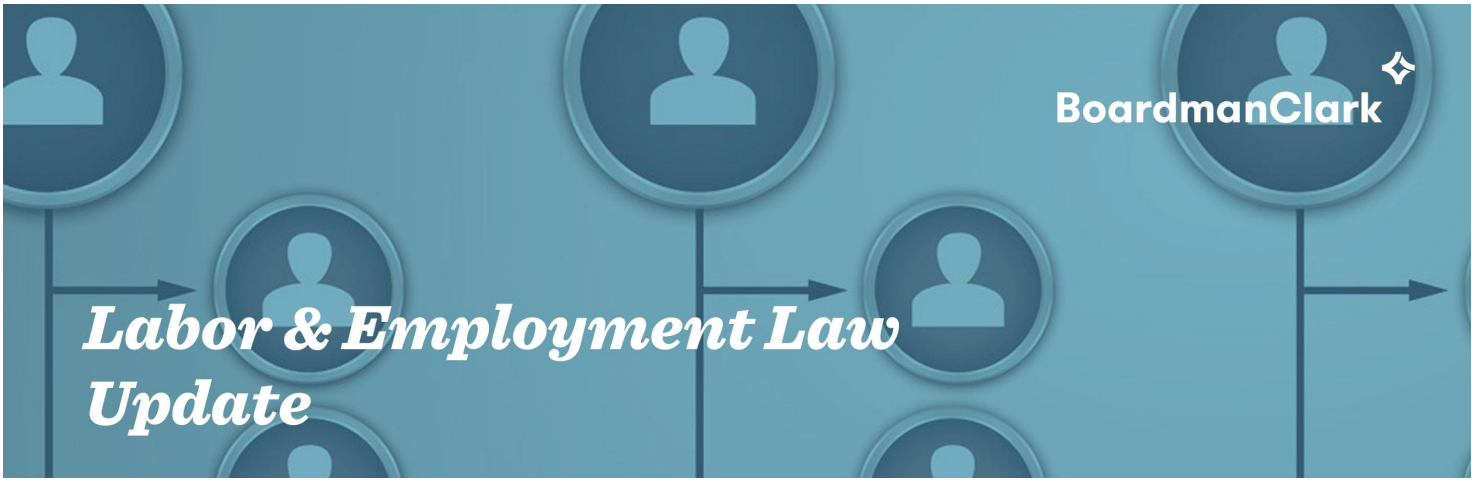

Starbucks Labor Problems Overflow

ROBERT E. GREGG | 12.05.22

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

National Labor Relations Board Memorandum on Electronic Surveillance. The NLRB is taking notice of the growth of workplace technology and its use for employment purposes. Numerous states have enacted Biometric Information laws regarding use or abuse of a variety of biometrics for employee identification, clocking in/out, etc. Now an NLRB General Counsel Memo signals the agency's intent to focus on electronic surveillance issues "which could tend to interfere with or prevent employees from engaging in activities which are protected" by the National Labor Relations Act (NLRA). The main focus is on secret video or electronic surveillance or monitoring. Employers will be expected to show "special circumstances" which require covert monitoring. Otherwise, the employer must inform employees of the existence, methods of, and reasons for the surveillance/monitoring. This NLRB focus applies to all employers, and not just those with a union contract or relationship. Electronic video or algorithmic monitoring should be used only if the employer has a legitimate business reason to do so. The memo advises employers to review their current practices and policies regarding monitoring or surveillance for keeping track of employees.

The 2022 Election Resulted in Employment Changes in a Number of States. Employers with locations or employees in more than one state should pay attention; numerous states had employment related ballot measures which passed and resulted in employment law changes. These measures may change policies, pay practices, and rights regarding employees in these states. Minimum wages were increased in various states and cities, including Nebraska and Nevada. Washington DC's Tip Credit Elimination Act will prohibit hospitality employers from using the Federal Tip Credit and will require a minimum wage to be paid and allow servers to keep all tips, in addition to their hourly wage. Marijuana and psychedelic substances laws have been relaxed or largely eliminated in Maryland, Missouri, and Colorado. Illinois voters passed the first Constitutional amendment in the nation prohibiting Right to Work laws, protecting the

right to unionize and collectively bargain. This will have most application to the public sector, preventing legislatures or governors from curtailing these rights for public employees.

LITIGATION

WARNING of the Month — Read the Fine Print and Give Notice

Harvard Voided its Insurance Coverage by Untimely Notice. Most employers have insurance to cover their litigation defense costs and damages. One form is Employment Practices Liability Insurance (EPLI) insurance which covers most employment complaints, and there are other sorts of litigation coverage policies for claims by students, customers, the public etc. Unfortunately, they are often bundled in with all sorts of other coverage, managed by Finance or another department, and the manager who first receives a complaint is too often unaware that there is insurance which covers the matter. Therefore, they proceed to deal with the complaint without notifying the insurance carrier or agent that something has been received. All insurance policies have notice provisions (sometimes as little as 10 days). Failure to give notice of the issue to the insurance carrier on time will *void the coverage*. That is exactly what happened in *Harvard College v Zurich American Insurance Co*. (D. Mass, 2022) regarding Harvard's defense of the *Students for Fair Admissions, Inc. v President and Fellows of Harvard College* Affirmative Action case which is before the U.S. Supreme Court and has cost Harvard millions of dollars in defense costs. Harvard failed to give the required formal notice within the timeframe. In fact, Harvard waited four months beyond the insurance policy's required period to give notice that it was being sued. Zurich denied coverage. Harvard sued Zurich, claiming that the insurance company did have actual notice because the case was on the front pages and every news program so Zurich clearly knew of it. This argument went nowhere with the court. The policy is a formal contract, and each party must follow the contract terms, "there is no wiggle room to excuse an insured's noncompliance with the provisions of a policy." So, Harvard cannot avail itself of the $15 million coverage it thought it had purchased insurance for. Harvard must bear all costs.

The lesson: Any time a complaint is received, or even a letter from an attorney threatening a case, promptly contact your insurance agent or carrier(s), as well as your legal counsel, to find out if you have coverage – and give prompt notice. Do not delay!

LABOR RELATIONS

Starbucks Labor Problems Overflow

Unfair Labor Practices. Even though employees at multiple Starbucks locations voted to unionize, the company has not reached contracts with those employees. On the other hand, while holding those locations at pre-vote pay and benefit levels, the company has increased the benefits to workers in locations which are not unionized. The unions and NLRB claim this was an act designed to punish those who voted for a union and began an Unfair Labor

Practices proceeding. Starbucks then petitioned the NLRB to halt this proceeding, claiming that the charges were "unconstitutionally vague." An NLRB Administrative Law Judge, however, rejected Starbucks' argument and allowed the NLRB process to continue to trial. *Starbucks and Workers United et al* (NLRB Region 19, 2022)

Baristas Strike 100 Stores Alleging Starbucks is Unfairly Failing to Bargain. Following workers unionizing months ago, Starbucks has not reached contracts with them and has been accused of delaying and dragging out contract talks. Now employees at over 100 Starbucks stores in 23 states have engaged in strikes to protest this and other adverse actions they allege are being taken against those who voted to unionize.

Retaliation Case. The NLRB has filed for an order requiring Starbucks to immediately rehire a discharged employee, with backpay. *Kerwin v. Starbucks Corp* (E.D. MI, 2022) The NLRB found that the company fired the employee after she wore a pro-union button and tried to organize an Ann Arbor, Michigan location. It found the discharge was unlawful retaliation and ordered reinstatement. However, Starbucks has delayed in doing this. So, the NLRB has now asked the court to enforce its decision. This is the fourth such filing by the NLRB against Starbucks. Similar filings have been made regarding Starbucks' actions in New York, Arizona and Tennessee. A Tennessee federal court recently granted the NLRB's request and ordered the company to rehire seven workers in Memphis.

DISCRIMINATION

Sex

$1 Million to Settle Pregnancy Case. An investment firm has agreed to settle a case brought by a former vice president, claiming that she was denied accommodation and punished due to her pregnancy. The VP had a high-risk pregnancy and requested work from home. The company insisted she come to the office. She could not do so. When she did return, following the birth, she alleges the firm took $65,000 from her bonus and diverted her best clients to others. During the time the VP was denied work from home during her pregnancy, she alleged the company did allow other non-pregnant employees to work remotely due to COVID-19 and it could have accommodated her in similar fashion. The company settled the case without any admission of violating applicable federal or state laws. *McKenna v Santander Investment Securities, Inc., et al.* (S.D. NY, 2022) The Pregnancy Discrimination Act (part of Title VII) requires employers to treat pregnancy related conditions and accommodation requests similarly to the treatment of other employees' medical conditions. Thus, the accommodation of COVID-19 situations was a relevant similar situation.

Race

Court Dismisses Race Case. In *Groves v South Bend Community School Corp* (7th Cir., 2022), the court found no evidence that race played any role in hiring a Black applicant instead of the

White plaintiff for an Athletic Administrator position. The case was based on the plaintiff's claim that he had more years of experience than the successful Black candidate. However, the court found that years listed on a paper resumé do not automatically equate to quality experience. Further, the plaintiff could not show that the poor "off-putting" interview evaluation, where he bragged about having fired 24 assistant coaches, was a pretext. There was no actual evidence of race ever being mentioned in the hiring process — only speculation by an unsuccessful applicant. Therefore, there was insufficient evidence to even warrant a trial.

Court Finds Evidence of Racial Discrimination in Promotion Case. A White city employee alleged she was passed over for promotion to be the city's Purchasing Agent due to her race and was then retaliated against in pay for complaining about the discrimination. The court found sufficient evidence to support the claim of both racial discrimination and retaliation to send it to a jury trial. Among the causes for that decision were the conflicting reasons given by the city for its decisions. The White plaintiff had a number of years more experience and supervised the Black applicant who was hired. The mayor apparently offered the Black applicant the job before he ever saw her resume or conducted an interview. Other managers gave conflicting reasons as to why the plaintiff was not hired. When the plaintiff complained about the racial discrimination, she then suffered retraction of a $5000 pay increase. The city gave contradictory reasons. There was no documentation of any of the reasons. The mayor "could not remember" why he had authorized retracting the pay. All of this created several levels of apparent pretext, warranting a trial. *Runkel v City of Springfield* (7th Cir., 2022)

Wages and Hours

Starting Up Computers is Paid Time. The Portal-to-Portal Act (part of the Fair Labor Standards Act) allows employers to not pay for certain activities which are preliminary or postliminary to actual work. Customer Connexx, LLC did not pay call center workers until they actually started using their computers to do calls and schedule appointments; booting up and logging in or shutting down were considered preliminary and postliminary. The employees filed an FLSA case for pay and resulting overtime wages due to these activities (a few minutes a day adds up each week to more than a de minimis amount). The court has sided with the workers. They need to have a functional computer in order to do their work and "waking up their computers is integral and indispensable to the primary activities." Thus, it is part of the work and not pre or postliminary. It must be paid. *Cadena, et al. v Customer Connexx, LLC, et al.* (9th Cir, 2022)

Whistleblowing – Retaliation

Saddest Case of the Month

Supervisor Gets 48-Year Prison Sentence for Arranging Murder of Whistleblower. Usually, whistleblower cases involve civil suits with monetary damages for those who retaliate against

the reporting employee. Sadly, in this case the retaliation had a tragic outcome. A federal court gave a 48-year sentence to a former tree trimming company manager for the murder of an employee who had reported fraud to federal authorities. The manager, in collusion with the company owner, took over $3.5 million from immigrant workers through paycheck fraud or intimidation. An employee, who was a U.S. citizen, discovered the scheme and reported it to the Department of Labor and EEOC. The manager arranged a drive-by shooting. A few days after the complaints were made, the whistleblower was shot near his home. The U.S. Dept. of Justice pursued the case. In addition to the prison sentence for the manager, the company will pay $2.6 million to the family of the deceased. Also, the company owner, who entered a plea deal, will serve a 20-year sentence. The actual shooter and driver are awaiting sentencing. *U.S. v Rangel-Rubio, et al.* (S.D. GA, 2022)

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