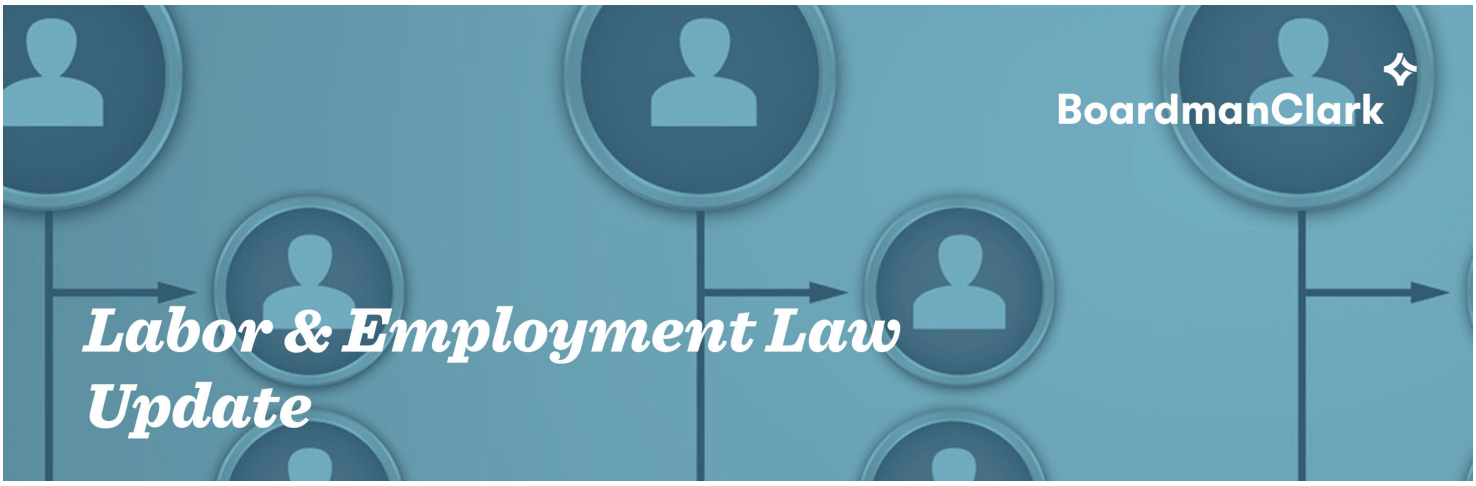

Minor League Baseball Pays $185 Million to End "Starvation Wages" for Players

ROBERT E. GREGG | 08.08.22

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

FTC and NLRB Agree to Cooperate on Closer Scrutiny of Worker Misclassification, Non-Competes and the GIG Economy. Two powerful federal agencies, the Fair Trade Commission and the National Labor Relations Board have issued a Memorandum of Understanding to share information, coordinate, and cooperatively investigate in order "to better root out practices that harm workers in the so-called gig economy" and elsewhere in the workforce. The MOU focuses on misclassification of employees and independent contractors, no-compete agreements, and limits on workers' ability to collectively act and organize. A complaint to one agency may now result in having two agencies with their respective laws and remedies to respond to.

EEOC Issues New COVID-19 Guidance. In July the EEOC issued updated COVID-19 workplace guidance. This release provides additions and revisions to previous guidances. Among other things, the EEOC addresses screening/testing; vaccinations and exemptions; reasonable accommodations; and infection control practices.

LITIGATION

Fair Labor Standards Act

Minor League Baseball Pays $185 Million to End "Starvation Wages" for Players. Minor league players do not get the big bucks. In fact, they get paid as little as $1,100 a month for the five-month season and then nothing for the rest of the year; even though they are expected to continue hours of training and other off-season activities, which also have costs and expenses which are not reimbursed. This compensation is far below minimum wage, yet baseball has long held special "hands-off status" under state and federal wage and anti-trust laws. That may

be changing, as the minor league players have filed suit in several states. This settlement resolves those cases. In addition to the $185 million, the league has agreed to now pay wages in accord with state and federal wage and hour laws, for the regular season, pre-season training, post season, and other mandatory off-season activities. *Senne et al. v. Office of the Commissioner of Baseball, et al.* (N.D. Cal, 2022)

What's in a name? A "Manager" Title Does Not Make a Position Exempt. Red Robin will pay $3 million to settle an FLSA case and pay back overtime wages to a group of Assistant Kitchen Managers (AKMs). Despite a "Manager" title, the AKMs spent 50% or more of their time doing regular kitchen work, alongside the regular non-exempt workers. Budget was a primary issue. According to the allegations, the company did not provide a sufficient budget for these managers to hire enough staff to do the work, so they had to pitch in to accomplish the mission. Perhaps the AKMs qualified as exempt managers at one time, but rising prices, rising wages, and a non-rising budget resulted in the position slipping into non-exempt status. This case is a good reminder that even if one has done a good evaluation in creating an exempt position, it is important to keep up with the times and periodically re-evaluate. *Outlaw et al. v. Red Robin Int., Inc.* (E.D. NY, 2022)

$1.3 Million for Time Trimming – Failure to Keep Track of Meal Breaks. A number of food service workers at Chicago's Midway Airport will receive $15,000 each in hourly pay and overtime in a $1.3 million FLSA case settlement. The employer failed to keep accurate track of unpaid meal breaks and either told or allowed employees to do work on part of their breaks. This meant the workers did not receive their full meal break and thus it could not be counted as unpaid. The company failed to keep accurate records to prove workers actually took the full amount of mealtime. Therefore, all meal breaks counted as paid time and backpay was owed. Plus, this now resulted in the employees having over 40 hours worked in each week and overtime rate was due, thus compounding the damages. *Boyce et al. v. SSP America MDW LLC et al.* (N.D. IL, 2022) This case is a reminder that accurate records of time worked and of whether employees actually take a full lunch break are crucial. Lax recordkeeping or failure to clearly record and pay any deviations from the full meal breaks can result in later pay and OT claims going back for up to three years.

WORKPLACE EXPRESSION

Different Courts and Different Standards

The following cases illustrate how a similar situation can result in differing outcomes, depending on the court and depending on the type of employment.

Whole Foods Can Ban BLM Masks. In *Suverino Frith et al. v. Whole Foods Market, Inc.* (1st Cir. 2022), the First Circuit Court of Appeals ruled that Whole Foods could prohibit employees from wearing masks or other garb with a Black Lives Matter message. The company's position was that social-political messaging was not in accord with its business's message of focusing on

and providing wholesome food and a shopping environment welcoming and comfortable for the whole public; the grocery store is not a "free speech" zone for employees' non-job-related expressions. The Court agreed. It also found that the policy was not selectively enforced and did not target Black employees. White employees also wore BLM logos and were ordered to stop doing so. Therefore, there was not a basis to find discrimination.

Transit Authority Workers Should be Allowed to Wear BLM Masks. In *Amalgamated Transit Workers #85 v. Port Authority of Allegany County/Pittsburgh Regional Transit (PRT)*, (3rd Cir. 2022), the Third Circuit Court of Appeals ruled that Pittsburgh Regional Transit violated the First Amendment Rights of commuter rail and bus employees when it prohibited them from wearing Black Lives Matter logos on face masks. The Court ruled "A government agency can limit the speech of public employees more than it may limit the speech of the public, but those limits must still comport with the First Amendment." There is a balancing test in which the agency "must show its interests outweigh that of its employees." In this case, the PRT had not shown it had a significant interest in banning the masks. There had been no disruptions or incidents between employees wearing BLM or "Thin Blue Line" masks, and the agency could come up with only a single complaint about the masks. The PRT itself had also publicly come out in support of the Black Lives Matter movement. A key difference between the Whole Foods and the Pittsburgh Rapid Transit cases is private sector versus public sector standards. In general, the Constitution's First Amendment does not limit a private sector employer's ability to set rules either allowing or curtailing non-work-related expressions; private employment is not a "free speech zone." Constitutional rights do apply to the public sector so there is a greater burden on the public employer before curtailing speech. Hence the two differing decisions on the same mask issue.

City Can Ban Police Officer from Flying Confederate Flag on Her Own Property. A public employer must meet a "balancing test" in order to curtail employees' expression, but for some employees that can extend to their off-the-clock personal life as well. Certain jobs are so critical that they justify a greater scope of attention. Police officers are in this category. In *Cotriss v. City of Roswell* (11th Cir. 2022), the Court found that the city was justified in firing a police officer when she flew a Confederate flag from a flagpole in the front yard of her home, where her police cruiser was also parked. She claimed the flag "honored her southern heritage." The court found that the city had met its obligation to show its interest in ensuring the police department could effectively fulfill its obligations, outweighed her interest in displaying the flag. The court went on to state that the Confederate flag is often used as a symbol of racial animosity and to a large portion of the public it "symbolizes slavery, segregation and hatred." Police are sworn to protect and defend the public; all the public. Having an officer who personally openly displays symbols seen as antagonistic to a segment of the public destroys public trust that the officer or the department, as a whole, can equally and fairly protect, defend and enforce the laws. The individual First Amendment rights of an officer cannot be allowed to appear to contradict or seem in opposition to the Constitutional Rights of equality and fair administration of justice for the entire public.

NON-COMPETITION: RESTRAINT OF TRADE

Dept. of Justice Says No-Poaching Agreements Between Employers Are Always Illegal. The Dept. of Justice has been prosecuting employers, both civilly and criminally, for restraint of trade violations regarding no-poaching compacts in which two or more employers agree to not hire each other's employees. This can prevent employees from moving to better wages or jobs in their area or profession. The DOJ has been attacking the specific provisions of each agreement it challenges, case-by-case. In its latest case, the Department has stated that all such agreements are "always illegal" regardless of the nuances of each. In this case the DOJ intervened on behalf of plaintiffs suing trucking companies over a no-poach arrangement. *Markson v. CRST Int., et al.* (C.D. Cal, 2022) This "always illegal" position signals that DOJ is taking a much tougher stand on this anti-competitive practice and is likely to bring more actions. It is not, however, a new agency regulatory pronouncement. It does not mean the courts will actually agree to this position in any specific case. It is a "signal" of DOJ's position and a warning to employers.

DISCRIMINATION

Sex

Gaming Company Pays $100 Million to Settle Harassment/Discrimination Case. A major gaming company has settled a class action lawsuit filed by female employees and contractors under federal and state discrimination laws. The suit alleged a pervasive "bro culture" rampant with unchecked sexual harassment, wage discrimination, and discriminatory hiring practices. There appeared to be ample evidence to support the allegations. The company previously tried to settle the allegations for $10 million but the state Division of Labor Standards Enforcement objected to this as too little in regard to the situation. In addition to the $100 million payment, the company will also make pay adjustments to equalize the compensation of some 3,000 female employees and contractors going forward; pay for an independent expert analysis of pay and hiring practices; and, pay for an independent monitor to oversee and verify workplace improvements. *McCracken et al. v. Riot Games, Inc.* (Superior Ct. of Cal. LA, 2022)

Race

Black Agents Have Viable Race Discrimination Case Against State Farm. A federal court has found significant evidence of racially adverse treatment to support a 42 U.S.C. Section 1981 class action by Black insurance agents. The agents allege a nationwide practice of the company engaging in greater scrutiny, unequal standards, and providing fewer business opportunities for Black agents as compared to agents of other races, and that the company engaged in "race matching," by assigning Black agents to poorer minority areas in which the residents and businesses could not afford many of the financial products and would purchase fewer products. In one example cited by the court, a successful Black agent was refused an agency in an

upscale, affluent, predominantly white area – where he lived – and was told he could have an agency in the poorer, minority area because "he'd fit right in, and would understand the demographics or something along those lines." Then he was told to build that agency business from scratch. At the same time, two non-Black agents were allowed to start agencies in the very area he was denied and were provided an already existing base of business to get them started. There were a number of other examples of differing treatment cited by the court in granting the class action. *Williams et al. v. State Farm Mutual Auto Ins. Co*. (N.D. IL, 2022)

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