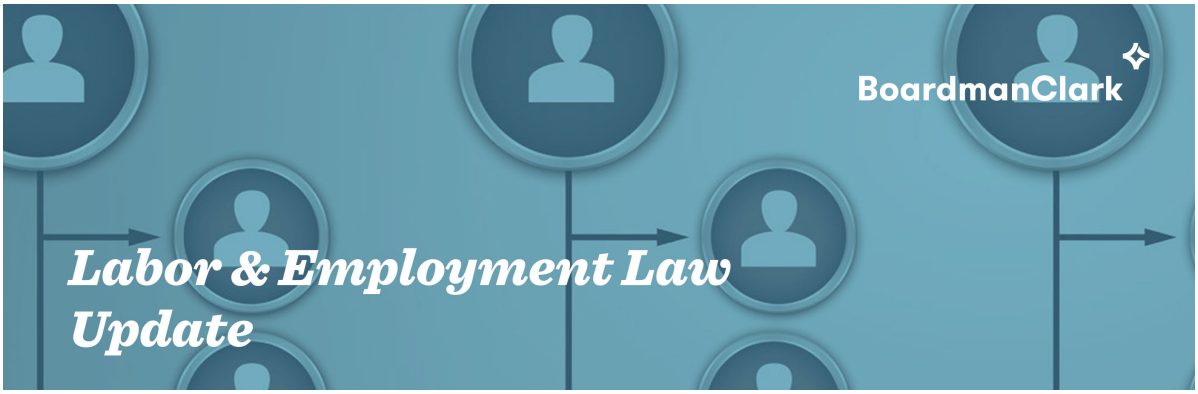

Shipping Company Pays $2.7 Million Due to Use of Conviction Records in Hiring

This and more in this month's roundup of cases impacting the world of labor and employment law.

ROBERT E. GREGG | 09.05.23

LEGISLATION AND ADMINISTRATIVE ACTIONS

Pregnancy Workplace Fairness Act (PWFA) Regulations. The US Equal Employment Opportunity Commission has issued its proposed Rules for implementation of the PWFA and its reasonable accommodation requirements. The proposed rules are extensive and cover a number of factors impacting eligibility, duration of accommodations, pay, work duties and more. Employers should prepare for the final rules to become effective later this year and be prepared to develop policies in compliance. There is still a commentary period before there is a final version.

NLRB Adopts Tighter Standards for Employee Handbooks. The NLRB has jurisdiction over *non-union* as well as unionized employers. It often scrutinizes the policies of *non-union* businesses to see if policies have a "chilling effect" on workers' rights to engage in concerted, protected activity. It will now be giving even closer scrutiny of these policies after its decision *In RE Stericycle, Inc*. (NLRB, 2023). So now is the time to re-

examine handbooks and policies. (See the article *NLRB Significantly Increases Scrutiny of Employer Rules* by Boardman Clark for more details listed at the end of this Update.)

A Busy Time for Wages and Hours

Department of Labor New Prevailing Wage Rules. The new DOL Rule changes how prevailing wages are calculated for federal construction. This affects private contractors and subcontractors who are performing federally funded projects. The new calculation uses a "30% of the local area" factor, rather than the current and often lower "weighted average" figure (this is actually a return to the standard used from 1935 until 1983). It also expands the scope of what is considered a federal construction project. A number of large contractors and industry associations are already preparing suits to challenge the new rule.

Salaried Basis Proposed Rules. On August 30, the Department of Labor issued Proposed Rules which would increase the Salaried Basis for exemption from overtime pay to $55,000 per year, $1,059 per week. The current basis is $35,568 per year or $686 per week. It would have a built-in annual increase for the minimum salary level. The Proposed Rule would also restore the minimum salary level protection to workers in U.S. Territories. That protection was removed in 2019. There is a 60-day comment period before any final rule can be issued. DOL estimates the new salary minimum will affect 3.5 million workers who are currently paid less than the new proposed level.

Raise the Wage Act Introduced. A bill has been introduced in Congress (House Bill 4889/Senate Bill 2488) to raise the minimum wage from the current $7.25 per hour to $17.00 per hour by 2028.

TRENDS

69% Increase in Child Labor Violations and Dangerous Employment. Following investigative reporting exposés in the New York Times and other news media regarding the growing abuse of children in employment settings, the Department of Labor (DOL) is devoting more scrutiny to the

issues. It found a 69% increase in child labor violations since 2018, following the last administration's relaxing of rules and enforcement. Many situations involve highly unsafe work. Employment and exploitation of unaccompanied, vulnerable, immigrant children who have no one to effectively monitor or speak up for them is also a contributing factor. DOL and the Department of Health and Social Services have now created a task force to focus on child labor and increase scrutiny and investigations. The Child Labor Prevention Act has also been introduced in Congress. It would substantially increase the focus and penalties for child labor violations and close "loopholes" regarding Independent Contractors who provide child workers to companies.

LITIGATION

Occupational Safety and Health Act

Attempt to void OSHA Regulations Fails. A construction company was cited by OSHA for safety violations. It reacted by suing to void not only the OSHA safety regulations at issue, but to void virtually *all* OSHA regulations in all industries. This was a Constitutional challenge alleging that OSHA had no authority to issue regulations at all. The case alleged a Constitutional "nondelegation doctrine" claiming that Congress cannot transfer its legislative authority or lawmaking ability to other entities without very narrow, well-defined standards. The contractor claimed Congress' directive to OSHA to create "reasonably necessary" and "appropriate" standards to mitigate significant risks of harm in the workplace was too vague and does not provide specific guidance or limitations on exactly what makes a standard "reasonably necessary" or "appropriate" and gives OSHA unfettered, overbroad authority. The court rejected this argument. It ruled that the Act's delegation of authority to OSHA passed the Constitutional "intelligent principle test" because Congress did set up a reasonable framework to guide the agency's discretion within the scope of assuring reasonably necessary safety in the workplace. The U.S. Supreme Court has also upheld this standard in cases challenging other Federal agency regulations. Congress does not have to carefully spell out each standard for each and every regulation. The

agency is supposed to reasonably use its expertise to do so. In order to successfully challenge a regulation or agency interpretation, one must prove it was truly outside the scope of reasonable or truly exceeded the scope of the underlying law (i.e., safety in the workplace). *Allstates Refractory Contractors, LLC v. Julie A. Su et al.* (6th Cir. 2023)

Discrimination

Sex and Race

Demeaning is Not Discrimination. A civilian Budget Analyst for the Army in Japan filed a sex and race discrimination case claiming that her civilian supervisor created a hostile work environment. She alleged that he was consistently hostile, abusive and subjected her to unfair supervision and altered her assignments. However, the evidence showed that many male and female employees of all races raised ongoing complaints about the supervisor being demeaning, abusive, highly critical of their performance, and altering their work assignments. The Budget Analyst had no evidence of any specific gender or racial comments or inferences by the supervisor. So, she appeared to have the same sort of hostile environment as other similarly situated men and people of other races. The courts have often ruled that the law does not provide a remedy for all difficult situations. There are many difficult, unfair and wrongful, even deplorable, things in employment, but they are not illegal unless there is a tangible showing of discrimination due to a protected EEO status or other tangible statutory violation. The Appellate Court upheld dismissal of the case. *Foresyth v. Wormuth* (4th Cir. 2023)

Evidence – "Collection of Women" Statements Were Relevant Evidence. In *Johnson v. Ford Motor Co*. (S.D. MI, 2023) the court made two rulings on relevance of admissible evidence in a Title VII case alleging sexual and racial harassment of a female employee by her male co-worker. The company objected to allowing her to present sexual statements the co-worker had made about other women in the auto plant since they were not about her. This included his comments that he had a "collection of women" he had relations with and crude comments about them and his statement

that he "wanted to add a Black woman to his collection," meaning her. The court found this was directly relevant to whether the plaintiff had experienced a hostile environment based on her sex and race. Other comments by the male co-worker also included explicit sexual statements made about her and other women and a running commentary and jokes about her breasts in front of other employees and managers who laughed at the comments and took no corrective action. However, the court would not allow the plaintiff to introduce evidence of similar situations in other plants, alleging the company had a pattern of allowing sexually and racially hostile environments to exist in general. Discrimination in other plants, with other managers, was too removed to be relevant to her specific situation. The rules of evidence can be complicated. Sometimes, directly hostile behavior can be seen as not relevant to discrimination. (See *Foresyth* case referenced above) and at other times the court will allow evidence of occurrences in some different work unit if there is some sort of a direct tie-in, such as the same director or HR Manager failing to take corrective action in both situations.

Race & National Origin

Shipping Company Pays $2.7 Million Due to Use of Conviction Records in Hiring. A national shipping company will pay $2.7 million to settle a class action Title VII suit over its blanket use of conviction records to deny employment. This practice largely impacted Black and Hispanic applicants, having a disproportionate "adverse impact" on those groups. The case alleged that the company did not consider whether a given conviction had a substantial relationship for the particular job and did not give any individualized assessment or the opportunity for the applicant to explain the conviction or offer evidence of rehabilitation. (As emphasized by the EEOC's guidance, and as required by several states' EEO laws.) The lead plaintiff in the case was rejected due to an 18-year-old conviction which had no relationship to a job as a forklift operator. This was compounded by the fact that the company had no problem hiring him on as a temporary employee, knowing of the conviction, and letting him work successfully as a forklift operator for over eight months. However, when he applied for the permanent position, he was automatically rejected due

to that same conviction. The settlement will result in payments to a large number of rejected applicants. It is also a warning about the use of "automatic disqualifiers" in the hiring process, without careful consideration *and* awareness of the requirement for them to be "job related" *and* significantly relevant to the actual, specific job at issue. *Pickett, et al. v. Exel, Inc.* (N.D. IL, 2023)

Non-Competition & Confidentiality

Betrayal! (And Beware of Sticking Desk Drawers). In a case described as "An outrageous example of betrayal," two Vice-Presidents of a pediatric therapy clinic must pay $5.2 million for violating their non-compete, confidentiality and trade secrets obligations. While in charge of significant aspects of the company's business, the two VPs engaged in a plan to secretly divert patients and revenues to a competing company they set up. This resulted in over $10 million in diverted lost profits for the clinic, at the same time it was also paying the VPs their executive pay and bonuses as employees. The plot was discovered soon after one of the VPs resigned. The desk left behind by the VP had a defective, sticking drawer. Jammed in the stuck crevices were documents showing details of the diversion of funds and patients. In awarding the damages, the judge found the two intentionally engaged in an "egregious scheme" to syphon patients and millions of dollars from their employer to their own business. *Therapies 4 Kids v. Sobrino-Sanchez, et al.* (17th Judicial Cir. FL, 2023)

Mole Under the Floorboards. The New York Knicks have sued the Toronto Raptors professional basketball team, its head coach and several other Raptors officials for having a former Knicks employee transfer confidential and proprietary information. The employee, a Knicks Video Assistant, was recruited by the Raptors and later went to work for that team. While still employed by the Knicks, he allegedly secretly transferred highly confidential and trade secrets information to his soon-to-be new team. He sent play frequency reports, a prep book for the 2022 – 23 season, confidential diagnostics and spreadsheets about opponents, the team's licensed synergy scouting technology and some 3,000 scouting reports to the Raptors. The Knicks have claimed the Raptors and its head coach, and

the former employee conspired to steal the information in violation of Computer Fraud Act, Defend Trade Secrets Act, and state claims of tortious interference with a contract, conversion, unfair competition, misappropriation, and unjust enrichment. *New York Knicks, LLC v. Maple Leaf Sports & Entertainment, LLC* (S.D. NY, 2023)

Fair Labor Standards Act

Bogus Veneer of Independence. In *Muniz, et al. v. RXO Last Mile, Inc.* (D.C. MA, 2023) the court ruled that a group of 350 delivery drivers were employees, entitled to overtime pay, rather than independent contractors. The judge found that the independent contractors label was only a thin veneer which the company had created by requiring delivery drivers to set up "bogus corporate entities" to create an appearance of being independent businesses. In fact, there was no independence. The company "controlled every aspect of the drivers' work performing deliveries." Being "free from direction and control" of the contractor is one test. However, perhaps the most significant test is whether the relationship is one of independent contract or employment. In this case the company failed the test. This case is yet another of the all too frequent example of companies trying to skirt the employment laws through creative arrangements, or wishful thinking. This does not work in taxes with the IRS, and it does not work with the Department. of Labor regarding the employment laws.

Labor Relations

Captain Collective Joins the Marvel Team. Marvel, the home of Captain America, Black Panther, Spiderman, Storm, The Hulk and a multitude of other superheroes may have to add another: Captain Collective. Visual Effects employees at Marvel Studios are seeking to unionize and join the International Alliance of Theatrical Stage Employees (IATSE) to gain the ability to collectively bargain with their employer. A petition for unionization has been filed with the National Labor Relations Board (NLRB). The organizers state that Marvel workers seek the same collective bargaining rights and protections as their unionized colleagues in the film industry which is now engaged in a far-reaching strike. If the pro-union

vote is successful, then Captain Collective may achieve as much power at Marvel as the other superheroes.

OTHER RECENT ARTICLES

These additional, recent articles can be found at BoardmanClark.com in the Labor & Employment section:

NLRB Significantly Increases Scrutiny of Employer Rules.

By Douglas E. Witte, Storm B. Larson | 08.15.23

Join us for Bagels and Coffee with Boardman, September 15, 2023

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