Pacific Employers
MANAGEMENT ADVISOR
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May 2014

What's News!

Unions Change the Game of College Sports

In a historic move, members of the Northwestern University football team recently took initial steps to form a union and seek collective-bargaining rights with the university. Shortly thereafter, the team filed a petition with the National Labor Relations Board (NLRB).

In a decision that has some experts scratching their heads, the Board's Regional Director in Chicago issued a decision finding that scholarship athletes are, in fact, employees under the National Labor Relations Act and are eligible to vote for union representation.

Never before has a college sports team sought union status. This union-petition page in the college-sports playbook gives rise to a new wrinkle in federal labor law. If the decision stands, (Northwestern has already stated it will appeal to the full five-member Board in Washington) what will it mean for Northwestern as well as the future of college sports programs across the country?

Many observers believe that the student athletes face long odds in their quest for a union. Despite the broad, common-law definition of employee that was ultimately used favorably by the NLRB in its decision, exceptions to that analysis (which denied employee status and therefore the right to unionize) previously applied to graduate-student teaching assistants were considered precedential in this case.

In 2004, the graduate student assistants at Brown University, another private institution, sought union representation and collective bargaining rights. Graduate student assistants receive some type of pay or tuition remission for their work. However, the NLRB denied the students access to a union vote. The key point of the Brown University ruling was that the graduate students were more closely tied to the university for purposes of their own education and not due to their employment as teachers. In other words, they were students who incidentally taught as part of their education.

In this case of first impression, the NLRB decided not to alter the Brown University decision, but instead struck out on its own to create new precedent for scholarship athletes at private universities. In so doing, the NLRB simultaneously stated that the Brown University decision did not apply because football is not related to academic study; it went through each factor in that decision to show why the Brown University factors were not met. Furthermore, the NLRB ruled that walk-ons were not employees, as they did not receive pay, in the form of a scholarship, and thus failed to meet the definition of employee.

This ruling opens up a multitude of different concerns for the student athletes and universities alike. Basic questions are at stake, such as 1) the amateur status of the student athletes; 2) whether a university with a student-athlete union can use that to its advantage in recruiting; or 3) whether a private institution can recognize a student-athlete union where a public-sector institution of higher education may be restricted from doing so under state law.

Regardless of whether the football players ultimately win bargaining rights, the efforts of the Northwestern team are a very interesting development in labor relations. It has a far more sweeping effect than the question of whether these players are allowed to have a union or not. It not only raises the question of whether a student athlete is an employee under federal labor law, but addresses the relationship of colleges and universities and their student athletes. [PE]

Heat Illness Poster Enclosed!

President's Report
~Dave Miller~

UAW Gives Up Fight

The United Auto Workers Union, in a surprise move, on Monday gave up its fight to force a re-vote by workers at Volkswagen's plant in Chattanooga, Tenn., a retreat that leaves the union with an uncertain future.

The withdrawal came an hour before the UAW was to go before the National Labor Relations Board to plead for a new election and comes after it had appeared prepared for a long and bitter fight. Earlier this month, the UAW issued subpoenas to 19 people, including Tennessee Gov. Bill Haslam and Sen. Bob Corker. The union had alleged public comments against the union by Mr. Haslam and Mr. Corker interfered with the February election, which the UAW lost by a vote of 712-626.

"The UAW is ready to put February's tainted election in the rearview mirror and instead focus on advocating for new jobs and economic investment in Chattanooga," UAW President Bob King said.

Gary Casteel, who directs the union's Southern region, said the union's focus is to create more jobs at the plant, which Volkswagen would like to use to produce a new sport-utility vehicle. An expansion for the SUV production would likely add more than 1,000 jobs. The plant currently employs more than 2,000 people.

Mr. Casteel called on Gov. Haslam to reinstate an offer of $300 million in economic incentives to Volkswagen. The offer was suspended just before the union vote. [PE]

Never confuse motion with action.
- Benjamin Franklin, statesman, author, and inventor (1706-1790)

Recent Developments

Davis-Bacon Expansion Nixed!

In a recent decision out of the U.S. District Court for the District of Columbia, Judge Amy Jackson held that the Davis-Bacon Act ("Davis-Bacon") did not apply to a privately-funded development of privately-maintained buildings to be occupied by private citizens and businesses. Judge Jackson's decision overturned the original decision of the Department of Labor's ("DOL") Administrative Review Board ("ARB"), which found that Davis-Bacon applied to the project because it served the interests of the general public.

The case involved the "CityCenterDC" project on the site of the old Washington Convention Center in downtown Washington DC. While the land is owned by the city, the redevelopment will be entirely funded, occupied, and maintained by private parties for the entirety of the developers' ninety-nine year lease. The mixed-use development will consist of two office buildings, a hotel, condominiums and apartments, retail shops, and public spaces. The city entered into an agreement to lease the land to the developers for $2 million per year, but retained the right to maintain an active role in the project. Specifically, DC reserved the right to approve certain design decisions, to approve the choice of contractors, architects and other personnel, to enter and inspect the project site, and to audit the developers' books and records related to the project.

"... DC was a party ... because it "serves the interests of the general public ..."

Davis-Bacon applies to "every contract in excess of $2,000 to which the Federal Government or the District of Columbia is a party, for construction … of public buildings and public works of government or the District of Columbia." The Administrative Review Board found that this was a contract "for construction" to which DC was a party and that the project was a "public work" under DOL regulations because it "serves the interests of the general public" through construction jobs, increased economic activity, public spaces, sidewalks, and increased tax revenue. The developers and the city—which feared being held responsible for the increased costs—both brought suit asking the court to set aside the Administrative Review Board's decision.

Judge Jackson's decision questions a number of the Administrative Review Board's findings, but it ultimately rests on a rejection of the Administrative Review Board's conclusion that CityCenterDC is a public work. She reasoned that the "text, history, and purpose of the Davis-Bacon Act reveal that Congress used the term 'public work' in its traditional sense: work that is either funded by public dollars or used by the public, and usually both." Judge Jackson further noted that the plain language and operation of the Act clearly contemplates that this term was meant to apply to where government funds were involved. For example, Davis-Bacon provides for enforcement against contractors by withholding payment for their work but it is difficult, if not impossible, to see how this enforcement mechanism would work if the government is not making any payments to the contractor. Judge Jackson also concluded that virtually any private project would qualify as a public work if providing jobs and tax revenue were all that was required.

Judge Jackson further questioned the Administrative Review Board's conclusion that the city's lease agreements with the developers were contracts "for construction." She acknowledged that there was precedent holding that agreements under which private parties built facilities for the purpose of leasing them to the government could qualify as contracts for construction but noted that, in all those cases, the government was the lessee and would ultimately occupy and maintain those buildings.

This decision draws a clear line limiting the applicability of Davis-Bacon and holding that it simply cannot apply to private construction projects with only an incidental connection to the government. With the Department of Labor becoming increasingly aggressive in its enforcement efforts, decisions like this set important limits on the reach of Davis-Bacon. [PE]

Fitness For Duty OK After FMLA Leave

Susan White was an investigator for the LA County District Attorney. She made a number of errors and acted erratically over the course of several months. She was making her co-workers nervous about her judgment. She was in a dangerous job, sometimes involving arrest warrants and the like. She had problems giving testimony at trials, resulting in a defense lawyer filing perjury charges against her.

In 2011, White sought a month of medical leave for her own health condition: her mental health problems. She provided medical certification and the DA approved her leave under the Federal Family and Medical Leave Act. The court's opinion does not mention the California Family Rights Act.

"..White had engaged in odd behavior in a job requiring good judgment."

As it turned out, White's doctor was a little overly optimistic about the duration of leave. He extended and extended the leave until the FMLA period expired. The 12 weeks of FMLA were up in August.

White's doctor finally wrote that she could return to work in September 2011. The County approved the extended leave. Then, in September, the County reinstated White to her job, but assigned her to paid leave at home. They had to investigate the misconduct alleged against her before she left.

The County also required White to attend a fitness for duty examination. White refused to attend, claiming that the FMLA required her to be reinstated without anything other than her health care provider's certification.

White sought an injunction against the district attorney, who had sought her medical examination. The trial court granted the injunction, but the Court of Appeal reversed.

The appellate court said that the County was required to reinstate White to her job upon expiration of the leave based only on her own doctor's certification. But the court said that the County did just that.

The fitness for duty was to occur after the reinstatement. White argued that requiring her to undergo this examination was tantamount to interference with her FMLA rights. But the court of appeal was having none of it.

The court held the County was justified under the ADA to conduct a fitness for duty examination that was job-related and consistent with business necessity. Here, White had engaged in odd behavior in a job requiring good judgment to avoid serious injuries or death. There was little doubt that the County had the right to examine her under the ADA. [PE]

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Human Resources Question with Candice Weaver

The Month's Best Question

Confidentiality Provision Violates NLRA

Q: "We must have business record confidentiality. Where can we draw the line?"

A: Employers who use confidentiality agreements to protect their confidential business information should use caution to ensure that the terms of the agreement will not be construed to prohibit employee discussion of wages or other terms and conditions of employment.

Flex Frac is a non-union trucking company based in Fort Worth, Texas, which required its employees to agree to a confidentiality clause containing the following restrictions:

Employees deal with and have access to information that must stay within the Organization. "Confidential Information" includes, but is not limited to, information that is related to: our customers, suppliers, distributors; […] organization management and marketing processes, plan and ideas, process and plans, our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work.

An administrative law judge found that, although the language in the release did not specifically address "wages" or other specific terms and conditions of employment, it was "overly broad" and employees could reasonably interpret the confidentiality clause as restricting the exercise of their Section 7 rights. A three-member panel of the NLRB affirmed the decision. Flex Frac petitioned the Fifth Circuit Court of Appeals for review of the NLRB's order.

The Fifth Circuit upheld the NLRB's order, applying the general principle that a "workplace rule that forbids the discussion of confidential wage information between employees patently violates Section 8(a)(1)." The Fifth Circuit adopted the NLRB's reasoning that the terms used in Flex Frac's confidentiality agreement, including "financial information" and "personnel information," "necessarily includes wages and thereby reinforces the likely inference that the rule proscribes wage discussion with outsiders." As such, the court held that Flex Frac's employees would reasonably construe the confidentiality policy to prohibit discussion of wages in violation of Section 8(a)(1).

Bottom Line: All employers (even those without a union) must use care in drafting employee confidentiality agreements. Even if a confidentiality agreement does not expressly prohibit discussion of the terms and conditions of employment, provisions in the agreement that could reasonably be construed as doing so may create liability under the NLRA. [PE]

Sexual Harassment Prevention Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on July 23rd, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members $35 - Non-members $50
Certificate – Forms – Guides – Full Breakfast

Future 2014 Training date: 10-22-14

No-Cost Employment Seminars

Pacific Employers hosts this Seminar Series at the Builders Exchange at 1223 S. Lover's Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256.

- Our Next 2014 Seminars -

♦ **Leaves of Absence -** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.
Thursday, May 15th, 2014, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 19th, 2014, 10 - 11:30am

♦ **Hiring & Maintaining "At-Will" -** Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!
Thursday, July 17th, 2014, 10 - 11:30am

These mid-morning seminars include refreshments and handouts.

Seminar Topic Talk with Dawn

Leaves of Absence

Depending on how many employees you have, you may have to grant up to 24 different leave laws! It's important to know about pregnancy disability leave and family medical leave laws, but there are many other leaves of absences that employers need to understand. We'll cover them all and provide you with a CA Leave Law Cheat Sheet to refer to in the future.

This seminar will help attendees clarify California specific leaves, how they interact with the Federal Medical Leaves, and how to apply leaves accurately and consistently. Learn best practices for controlling medical absences and necessary actions to be taken when leave policies are violated.

We will provide an overview of California Medical Leaves Regulations – Pregnancy Disability Leave (PDL), California Family Rights Act (CFRA), FMLA, ADA, Fair Employment and Housing Act (FEHA) and Paid Family Leave (PFL). We will focus on how California leave related laws such as FEHA and CFRA interact with Federal medical leaves regulations such as the FMLA and ADA. You will learn which leaves can run concurrently and how to document the transition from one leave type to the next.

The seminar will show how to properly handle employee performance management. It will help the attendees understand specific situations that allow them to discipline employees for performance management issued even if protected by state or federal ADA, FMLA and Workers' Compensation regulations.

See you at the Leave Law Seminar on Thursday, May 15th. [PE]

Pacific Employers
306 North Willis Street
Visalia , CA 93291
559 733-4256
(800) 331-2592
Fax 559 733-8953
www.pacificemployers.com
email - peinfo@pacificemployers.com

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NLRB Requires Hospital To Pay Union's Negotiating Expenses

On April 14, the NLRB found that a California hospital had repeatedly failed to bargain in good faith with a union representing its registered nurses and that an order requiring the hospital to reimburse the union for six months of negotiating expenses was warranted. Fallbrook Hospital Corp., 360 NLRB No. 73. The decision highlights the broad remedies available to the Board when an employer fails to bargain in good faith, and outlines what not to do when negotiating with the union.

The Board therefore ordered the hospital to reimburse the union for the negotiating expenses it incurred between July 2012 and January 2013 and explained that such expenses could include reasonable salaries, travel expenses, and per diems. The Board did, however, decline the union's request that the hospital be ordered to reimburse its litigation expenses and the union's request that the hospital be ordered to read the Board's remedial notice to assembled employees during paid working hours. [PE]

Banning Criminal Background Check San Francisco

In February 2014, San Francisco passed the San Francisco Fair Chance Ordinance and became the latest national municipality to "ban the box" and limit the use of criminal background checks in employment hiring decisions.

The deadline for San Francisco employers to comply with the San Francisco Fair Chance Ordinance is August 13, 2014. The "ban the box" campaign continues to gain momentum – San Francisco joins other cities (Buffalo, Newark, Philadelphia, and Seattle) and states (Hawaii, Massachusetts, Minnesota, and Rhode Island) who do not allow employers to ask about prior criminal convictions on initial job applications, and similar legislation is currently pending at state and local levels around the United States. [PE]

California's New Laws Protect Undocumented Workers

The California Immigrant Policy Center recently estimated that there are approximately 2.6 million undocumented immigrants working in California.

Over the years, their advocates claim employers take advantage of their "illegal" status, e.g., by paying substandard wages. According to the National Employment Law Project, employers threaten to turn over these workers to Immigration and Customs Enforcement ("ICE"), after they try to organize a union or seek the benefits of wage and hour laws.

Other acts can include:

- improperly conducting I-9 self-audits after employees filed workplace-based complaints, or in the midst of labor disputes or collective bargaining;
- the misuse of the federal "E-Verify" system, which matches employees identification information against databases maintained by the Social Security Administration;
- threatening to report employees' family members immigration status to ICE; and
- filing false reports to law enforcement causing review of employees' immigration status. [PE]