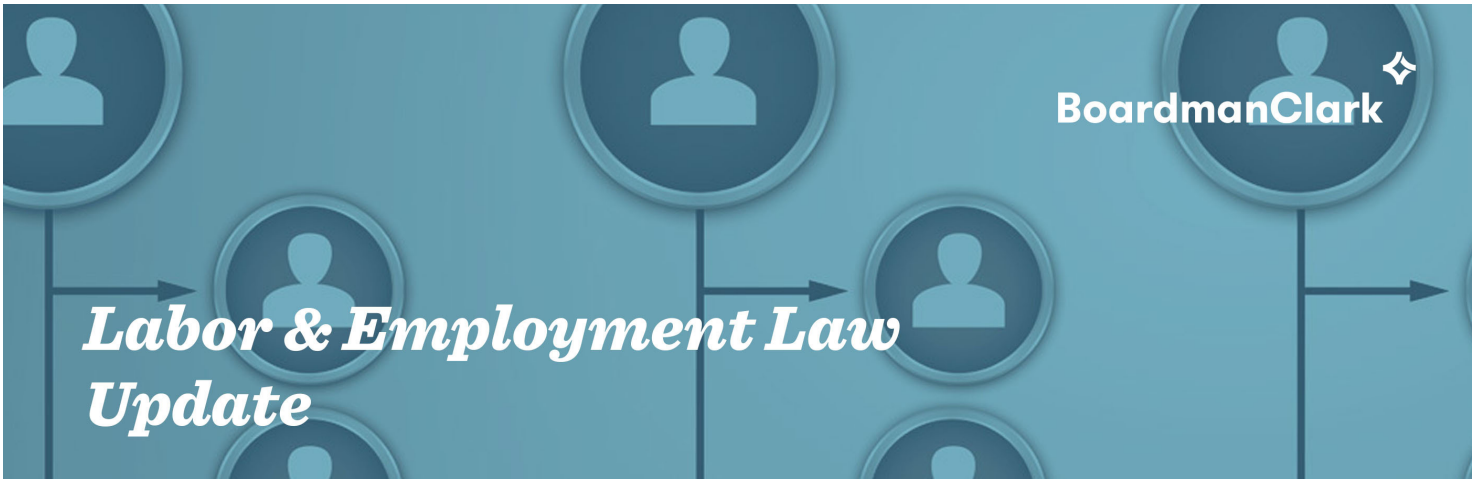

Department of Labor Finalizes Federal Contractor Minimum Wage of $15 per Hour

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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

Department of Labor Finalizes Federal Contractor Minimum Wage of $15 per Hour. On November 22, 2021, DOL finalized the new $15 minimum wage requirement for federal contractors. The new wage applies to contracts entered into or renewed after January 30, 2022. It also provides for inflation increases every two years.

Department of Labor Creates Office of Unemployment Insurance Modernization Under American Rescue Plan. The COVID-19 shutdowns and the federal unemployment compensation supplements enacted by Congress in 2020 resulted in massive overloads for state UC operations. The result was often a traffic jam due to underfunding, understaffing, and very outdated state processes and state electronic systems. For many, benefits never arrived in time to actually help. Many of these systems remain underfunded and antiquated. In response, DOL will use the newly passed American Rescue Plan funding to create the Office of Unemployment Insurance Modernization to identify and help states and federal agencies correct outmoded technology, fund positions, and implement other efforts to prevent future accessibility and payment problems.

Texas New Sexual Harassment Law Expands Supervisor Personal Liability. Texas has now made its sexual harassment laws stronger, and stricter than Federal Title VII. Several other states, including Wisconsin, have laws that hold supervisors to stricter standards for sexual harassment. However, the Texas law also includes a provision allowing plaintiffs to personally name, and collect damages from, individual supervisors who either engaged in unwelcome behavior or "should have known" of such behavior by others and failed to take appropriate "immediate" corrective action. (Title VII has no personal liability and requires only "prompt"

action by the employer.) So, the timeframe to **act** has become shorter, and managers may have to pay damage awards from their personal assets. Multi-state employers who have employees in Texas should be aware of this, give additional information and training to all supervisors, and check their Employment Practices Liability insurance to see if it covers supervisors as well as the company itself.

LITIGATION

COVID-19 Fraud

Comedy Club's COVID-19 Fraud Was Not a Laughing Matter. The owner of the Laugh Loft Comedy Club, Omar the Comedian, pled guilty to a scheme to steal over $1.2 million in COVID-19 related unemployment insurance small business relief funds. The plea admits setting up false addresses and filing claims in Massachusetts, New York, and New Jersey, with over 100 fraudulent claims. The case was brought under federal wire fraud conspiracy and state fraud laws. *U.S. v Thompson* (D. Mass, 2021).

Fair Labor Standards Act

Overtime For COVID-19 Testing. As often happens, laws interact and the requirements of one agency's regulations lead to additional complications under other laws. The new OSHA, COVID-19 rules requiring that employees of larger companies be either vaccinated or have weekly testing is an example. Though OSHA does not mention wages and hours, the testing requirement would oblige employees to spend time getting the test. Since it is the time directly related to the job and required for them to be at work, the Fair Labor Standards Act comes into play. It is likely to be paid time. If it is pre or post-regular hours, then the extra time could have overtime pay results. So, thought should be given as to any testing process. If one asks employees to go get the test done at a pharmacy or public testing site, then that may add even greater travel and waiting time to the paycheck, as opposed to testing at the workplace. These "extra time" FLSA issues have already been litigated for a variety of other pre or post-shift required inspection issues and found to warrant pay and overtime. *Santana Regresa v Hatfield Quality Meats Inc.* (Ct. of Pleas, PA, 2021) is a current case over a company's required COVID-19 screening and testing time and pay issues.

Private Contractor Running Detention Facility Loses $1 a Day Wage Payment Case. Private companies contract with federal and state governments to operate prisons, detention centers, and a variety of other facilities. GEO Group has contracts with Immigration and Customs Enforcement (ICE) to operate federal detention facilities for immigrants who are awaiting hearings to determine their legal status. GEO then has the detainees work in food service, laundry, cleaning, painting, barbershop, and elsewhere to do the essential functions necessary for the operation. GEO pays these workers $1 per day for the standard 8-hour day or longer. Detainees and the state of Washington sued GEO over its operations of the 1,575-bed

Northwest Detention Center for failure to pay minimum wage. The state of Washington also claimed that the $1 a day pay disrupted the local job market by denying more local residents the opportunity for living-wage jobs. GEO claimed the detainees were not "employees;" they were simply part of the voluntary work activity program to keep detainees occupied. A jury disagreed. The detainees worked alongside regular employees, doing the same work, and supervised by the same GEO managers. They met all criteria of standard employees, and the facility could not function without their labor. The court ordered $23 million in back pay and fines, and an immediate pay rate of at least minimum wage for all further work. *State of Washington v GEO Group* and *Nwauzer, et al v. GEO Group*. (W.D. Wash, 2021).

Joint Employment

The concept of joint employment has become a hot topic with increasing litigation. Cases are being brought under the FLSA, Title VII, OSHA, Immigration laws, and more.

Nissan Can Be Joint-Employer in Flat-Rate Auto Technician Pay Case. Usually, franchise operations (car dealerships, chain restaurants, hardware stores, etc.) are individual stand-alone entities that simply obtain a franchise from a national brand. The franchisee is the employer. However, this can change if the national brand exercises too much authority over its dealers. *Ayala et al. v Nissan N. America, Inc*. (M.D. Fla, 2021) is a class action in which local franchise employees alleged their "flat rate" pay plan violated the law by not paying auto mechanics the required minimum rates to qualify under the FLSA's special rules for flat rate compensation and that it did not pay them for all hours worked. The court found that Nissan may be liable for damages as a joint employer because of evidence that it "highly controlled the dealership compensation systems" and had a significant role in "establishing the compensation systems." So instead of the local dealers having to bear all liability, Nissan may be the deep pocket.

COSTCO Wins Classification Case. A federal court ruled that the people who give out samples to customers are independent contractors and not joint employees of COSTCO. A staffing company provided sample-givers who provided this sort of service in COSTCO stores and other retail establishments. A sample-giver filed a case, seeking class-action status, alleging she was not paid properly for hours, breaks, and overtime, and that COSTCO was her joint employer who should be held liable for the additional amounts due for the work she did in the stores. The court disagreed and found the sample-givers were properly classified as independent contract workers. A significant factor is whether the workers are working alongside the regular employees, performing services that are also done by regular employees and are part of the company's standard operations. COSTCO employees did not give samples and COSTCO's floor staff operations were limited to stocking inventory and making sales. Providing samples was a collateral service, and there was no direction, control, or supervision of the sample-givers by COSTCO managers, except for allowing the sample-givers

to set up and use products to give out as samples. Otherwise, they were under the direction and scheduling of the staffing agency. *Williams v COSTCO* (9th Cir, 2021).

Beware that joint employment is an increasingly litigated concept. Misclassification of independent contractors is also a hot topic and employers often lose these cases. So, the COSTCO case seems like an exception to the general trend. Also, this case was over a wage and hours issue. The result could have been very different had it been a harassment/ workplace environment case, in which standards can be very different. An employer generally has sole control of its premises and is held more responsible for improper discriminatory/ harassing conduct toward those who work or perform services there. So, a court may be much more likely to find joint employment for hostile environment cases, than in this wage and hours matter – as illustrated by the $137 million verdict in Diez et al. v Tesla cited last month in the November 2021 Update. [For additional information, request the article Independent Contractors by Boardman Clark.]

Tesla Can Be Joint Employer Under Trafficking Victims Protection Act. Tesla has recently taken some rough hits as a joint employer. It lost a $137 million case due to racial harassment of its subcontractor's employees in one of its plants. Now a court has found Tesla may be held liable for a subcontractor's illegal trafficking and forced labor of immigrant workers. Tesla subcontracted the paint operation in its plant. The subcontractor brought in Eastern European workers. The case alleges the subcontractor took their visas, threatened them with violence if they did not continue work under dangerous conditions, underpaid them, and threatened to withhold payment if they were sick or reported any work injuries. The court found Tesla can be liable as a joint employer because it had its own managers on-site observing and even supervising the subcontracted work and directly witnessing the alleged conditions. "Tesla knew or should have known of the subcontractor's coerced labor" and other violations.

DISCRIMINATION

Harassment

National Hockey League Fines Chicago Blackhawks $2 Million For Improper Handling of Sexual Harassment Complaint and Team Manager Steps Down. A rookie player complained that he was being verbally and physically sexually harassed by the team's video coach. According to findings of an outside investigation conducted by the NHL, the team was in the running for the Stanley Cup and decided to keep the issue quiet and do nothing to disturb things until after the playoffs. So, the player was required to continue working with the video coach who continued the physical and verbal sexual harassment. Then the video coach was given the opportunity to resign without any investigation, but he still got to participate in all the post-season Cup events and accolades. The investigation concluded that at least six senior team officials had met to discuss the harassment allegations and decided to do nothing for several weeks and not report it to Human Resources until after the playoffs were concluded. One of the officials,

the General Manager, resigned from his position upon release of the report. The NHL states that it may issue further individual sanctions in addition to the $2 million team fine.

Race and Sex

Jury Awards White Male Former Executive $10 Million for Discrimination. *In Duvall v Novant Health, Inc.* (W.D. NC, 2021), a jury awarded $10 million to a former senior VP of Marketing who alleged he was fired in order to clear space to hire a female or minority manager. The executive was fired without warning or any documented evidence of performance issues. In fact, the company's defense stated that he was terminated because he was a "high performing, but low potential" manager. The jury found that defense to be weak, and seemingly a pretext for discrimination. The evidence also indicated that the fired VP was himself very supportive of the company's diversity and inclusion initiatives.

National Labor Relations Act

Disabled Janitors Were Employees, Not "Clients" or "Trainees." The NLRB found that a unit of disabled janitors are entitled to collective bargaining rights. The company claimed they were "clients" and "job trainees" who were receiving services under a federal disability employment program, Ability One, in order to transition to other gainful employment. However, the NLRB found the reality was that the work was not "primarily rehabilitation" or training. The janitors did standard work the same as other custodians; they were not given significant "vocation support;" they were held to the same standards; were disciplined and discharged the same as regular janitors; they continued to work for the employer for long periods; there was no program for outplacement after any 'training," and, only two of the more than 50 disabled janitors had ever found other jobs. The company's "lack of focus on training and transitional employment" rendered the janitors as regular employees. The NLRB is seeking enforcement of its ruling. *Sunai Hospital of Baltimore v. NLRB* (4th Cir, 2021)

Worker's Compensation

Happy Hour Injury Results In Worker's Compensation Award. Office parties and social events can generate several sorts of liability under the employment laws for issues including harassment, assault and battery, FLSA wages and overtime, ADA accommodation, and Worker's Compensation. In *Peters v WCAB (Centas Corp.)* (S. Ct. PA, 2021) a court found that a salesman's auto accident injury following a workplace Happy Hour Event was a workplace injury covered by Worker's Compensation. Please do not rush to stop having employer-sponsored social events. Each case is fact-specific and can also depend on the state's WC laws. However, this case is one that should be considered when planning special "off work" events. Especially now, since many organizations have their year-end office parties in January or February. In this case, the Happy Hour was a special event held during a high-intensity

"sales blitz." It was designed to help the sales staff have a little decompression and relieve the pressure for an evening and recharge for the rest of the blitz. Mr. Peters had been out on sales calls, came back to town, and went directly to the Happy Hour event without going home or to the office to drop off his sales materials and papers. He then had the auto accident when leaving the party location. In a unanimous opinion, the court held that the injury was covered by Worker's Compensation. First, the event was a work-related activity, clearly in the interest of the employer. It was specially designed for the company's sales blitz purposes to help the salesforce recharge in order to go make more sales, a sales motivator. Unlike most organizations' general social events, which are not tied to a specific sales or promotional event, and are simply a social gathering. The court also cited the state Worker's Compensation "traveling employee doctrine" (similar to that in many other states) which gives a broader definition of the scope of work for any injury during travel status. An employee is in travel status until they return to their personal residence or report back to the regular workplace, and then leave again from there. In this case, Mr. Peters did neither. He came into town from his last sales call and went directly to the Happy Hour event. So, he had not broken his workday-travel connection. Once again, this was a special "sales blitz" event and fact-specific, so do not react by being fearful of all employee social gatherings. They can have very positive effects. However, this case is a reminder to carefully consider liability factors when setting up such social events. [For more detailed information on the various cautions and legal factors regarding company social events, request the article Office Parties – When Good Times Turn Bad, by Boardman Clark. The article may also be useful for hospitality industry companies that cater to or provide venues for such events.]

STRANGEST CASE OF THE MONTH

US Inspector General Tries to Track Employee Who Mailed Fake Poop to Harass Supervisor. The U.S. Office of Inspector General (OIG) sought an order to force a mail-order company, PoopSenders, to identify the customer who sent a package of fake feces to a USPS supervisor. The USPS believes the sender is a postal employee who is abusing their position, using the mails in a campaign of harassment against a supervisor. According to the OIG's filing, "The package of poop was only part of the abuse, which also included derogatory texts and voicemail messages, offensive email, postings on social media, and vandalism of property." The OIG served two subpoenas on the company that advertises it allows users to anonymously send "cow dung," "elephant crap" and "gorilla dung," which looks and smells real as a gag gift or "sweet revenge." However, the company did not comply with the subpoena and an enforcement action has been filed in court. PoopSenders' website states that its services are not to be used "to threaten, constitute harassment, violate a legal restraint, or any other unlawful purpose," that it is for entertainment purposes only. However, the site also includes stories by customers who use the service on ex-boyfriends, unfair bosses, irritating neighbors, and dog-walkers who don't pick up. The case is *United States v PoopSenders* (W.D. PA, 2021).

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