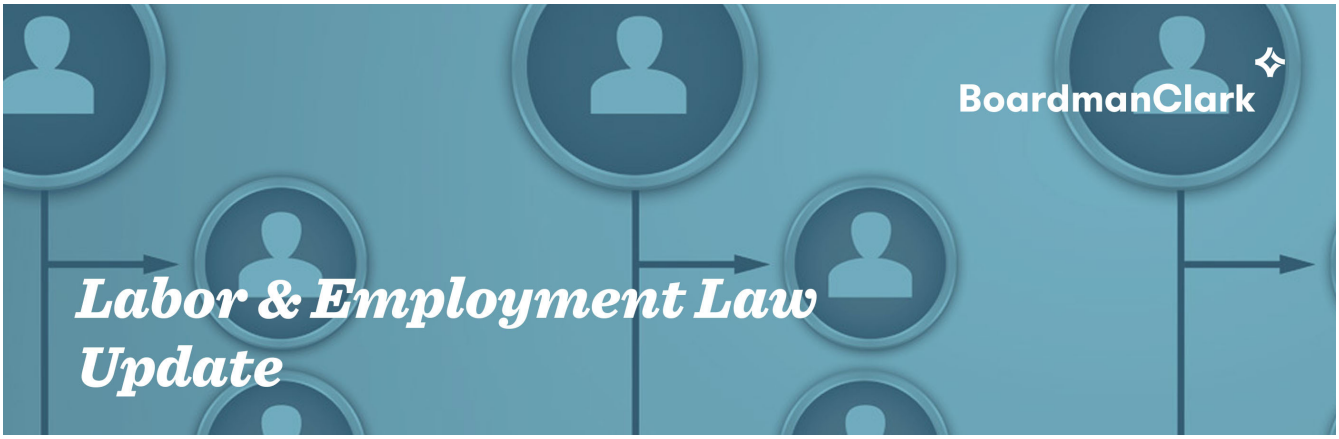

Court Approves Collusion Case Against Burger King and its Franchisees

ROBERT E. GREGG | 10.03.22

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

NLRB Proposed Rule on Joint Employment – Leased Workers Could Unionize. The National Labor Relations Board (NLRB) has issued a proposed rule defining Joint Employers to include leasing companies and the places where the leased employees do their work. The leased worker may be an employee of the staffing company, but they would be able to organize and collectively bargain over the wages and conditions at the place they do the work – with the company which operates the facility. This "new" rule would actually be more in line with the NLRB's "old" pre-2020 standards on joint employment. It also seems to match the Joint Employment Standard under other laws, such as Title VII anti-harassment, when the "client" company controls the environment and conditions of the leased workers. This rule is not designed for Temporary employees who fill-in for a short time, or lease-for-hire when the placement quickly becomes an actual "regular" company employee. It is for those employees who have ongoing placements or where a "client" leases multiple workers for a bargaining unit or has the whole bargaining unit's work done by leased/contracted workers.

LITIGATION

Theme of the month: Concerted Activity

Concerted activity is acting together for a common reason. Some forms of concerted activities, such as collective organizing and bargaining or class actions are "protected activities" under various laws. Other forms of concerted activity, such as

wage or price fixing collusion among businesses, can be illegal and lead to fines or criminal prosecution under other laws. This month's Update emphasizes both. First, the National Labor Relations Board's Proposed Rule on Joint Employment rights of leased workers to unionize and a case on employee rights to wear union insignia. Second, there are cases of employers colluding to restrict hiring, wages, and competition in violation of Anti-Trust laws.

Dress codes — NLRB Changes Standard on Wearing Union Apparel at Work. In *Tesla, Inc.* (373 NLRB No. 131, 2022) the National Labor Relations Board (NLRB) has signaled a tighter standard, the Special Circumstances Test, for employers who wish to restrict workers' wearing of pro-union apparel or symbols at work. Tesla factory workers are required to wear company logo clothing with no zippers, buttons, pins, etc., which could scratch or damage vehicle parts. Each worker classification wears a different color garb. Tesla forbade employees from wearing pro-union badges on their work clothing during a labor organization drive. The union filed an unfair labor practice charge. The NLRB ruled in favor of the union and announced its return to the Special Circumstances Test which had been changed during the prior administration. An employer will now have to show any restriction on wearing union clothing or insignia constitutes a special circumstance. Preventing scratches or damage to vehicles by forbidding pins or buttons would be such a circumstance. However, the Tesla workers sewed cloth union symbols onto their company outfits, which posed no damage hazard and did not change the color of the clothing. So, there was no proof of any special circumstance. Also, the fact that Tesla's dress policy forbids any non-company adornment on the work garb and the policy was "neutral" and equally enforced did not sway the NLRB. The NLRB stated the right to organize has greater legal protection than other sorts of expression, so special circumstances still must be shown to restrict it. Finally, the NLRB pointed out that an employer should not start strictly enforcing a dress code only after a union organizing campaign has begun.

Court Approves Collusion Case Against Burger King and its Franchisees. The 11th Circuit Court of Appeals has validated a class action suit against Burger King and multiple franchise owners for alleged Anti-Trust law violations. Burger King and the franchisees had no-hire agreements in which they would refuse to hire employees seeking to leave one Burger King restaurant and work for another. This restricted people's ability to freely move for better wages or conditions or opportunities and kept wages depressed, since the franchisees did not have to compete against each other for employees. *Arrington, et al. v. Burger King Worldwide Inc., et al.* (11th Cir., 2022)

Chicken Producers to Pay $85 Million to Settle Wage Fixing Scheme Suit. The Dept. of Justice sued Cargill, Inc. and a number of other poultry producers and their consultants for violating the Sherman Anti-Trust Act by colluding to share details on each other's wages, benefits, etc. Thus, they could "fix" their wages to avoid competition and collude to keep wages artificially low throughout the whole industry. The DOJ suit alleges "Through a brazen scheme – these processors stifled competition and harmed a generation of plant workers" from earning a better living. The companies settled the cases. In addition to the payment, the defendant companies and consultants will enter into a 10-year compliance monitoring. **Are Wage & Benefit "Surveys" an Anti-Trust violation?** The sharing of information was facilitated by industry consulting companies which conducted "surveys" of companies in the industry and shared the results with these companies. The consultants will pay a share of the $85 million and are barred from conducting wage, benefit, etc., surveys in any industry "which facilitates the sharing of competitively sensitive information." *U.S. v. Cargill Meat Solutions, et al.* (D.C. MD 2022) This case is just one from a new initiative by DOJ to pursue both civil and criminal prosecution for anti-competition collusion among businesses. This includes wage fixing, No-Poach agreements, and practices which fix or control prices to the disadvantage of consumers. The Poultry industry and fast-food industry have been targets, and recently Star-Kist, Bumble Bee and Chicken of the Sea have been charged with tuna price-fixing of consumer prices. A potential caution from the *Cargill* case is to be careful with any surveys conducted by industry consultants or trade associations. Improper or careless inquiring or sharing of results could lead to anti-trust concerns. Also, can the chicken industry still blame consumer price increases on "inflation" or "supply chain" problems, or could prices be affected by industry price manipulation and it having to pass along penalties like $85 million to the consumers?

WARN ACT

Layoff Drifted into WARN Act — $2.3 Million Settlement. A hotel will pay $2.3 million to settle a WARN Act case brought by hundreds of employees who were "temporarily" but indefinitely laid off during the COVID-19 pandemic. The layoff went on for more than six months. The employees then filed a suit for not having been provided with the Notice and 60 days of pay required by the WARN Act. The hotel claimed it did not intend the layoff to last so long and that the layoff was due to a natural disaster, COVID-19, which creates an exception to the Act. This defense has been used in several WARN Act cases with the courts issuing mixed decisions. In this case the employer decided to settle the case. *Turner et al. v. Rosen Hotels & Resorts, Inc*. (MD FL, 2022).

DISCRIMINATION

Sex and Retaliation

Kiss and Retaliate. A court has found that one unwelcome kiss is sufficient to establish a case for sexual harassment and retaliation. A female county Sheriff's Deputy was clasped and given an "open mouth kiss" by a male supervisor. When she reported the incident, the department placed her on suspension during the investigation. It then concluded that the one incident was not sufficient to establish sexual harassment under its policies and it believed her complaint was not credible. She was then fired because of the insufficiency of the complaint and the belief she was not credible. She sued under Title VII for harassment and retaliation. The county defended by claiming the one instance was insufficient to create a hostile environment case under the law, and its belief she had filed a noncredible complaint. The court found otherwise. It found that an unwelcome, nonconsensual open mouth kiss is an overt act which can create a sexually hostile environment with one instance. Even if the situation had not met the harassment standard, the investigation and discharge could constitute retaliation for having engaged in the protected activity of making the complaint. *Alkins v. Gwinnett County* (11th Cir, 2022) Beware of having a policy which threatens discipline for filing a "frivolous or false complaint". The EEOC has opined that such policies seem designed to "chill" employees from raising concerns, rather than preventing problems. Also, an employee does not have to be "correct" to raise a complaint – just have a good faith belief about a concern. Employees are protected from retaliation even if the investigation finds insufficient evidence or a mistaken belief. The employer's conclusion or "feeling" that something is frivolous is immaterial in a retaliation case. The law does not provide protection to those who actually make intentionally false complaints. However, this requires actual, solid proof of intentional falseness, not an employer's mere "belief" or loosely supported conclusions. The County's conclusion of "not credible" in this case was not sufficient to meet this proof standard.

Disability

Applicant Must be Qualified for Job Before Entitled to Sign Language Interpreter or Other Accommodations. A court dismissed the ADA case of a deaf applicant for a warehouse stock worker position at the New York bus system. He requested a sign language interpreter for the testing-interview process but was denied that request because he was not chosen for an interview. The Transit Authority claimed the applicant was not a "Qualified applicant." The position required a person with prior warehouse stock working experience. The applicant had none. The court agreed, ruling that applicants do not have a right to receive accommodations to go through

a hiring process for a position which they are not qualified and would not be hired for. The employer has a right to set valid qualifications for a job, and not consider applicants who do not meet them. *Williams v. New York Metro Bus Company* (2nd Cir., 2022).

Race — National Origin

OFCCP Cites Contractor for Not Hiring Non-Hispanic Workers. The Department of Labor Office of Federal Contract Compliance Programs (OFCCP) oversees federal contracts. It cited a contractor for discriminatory hiring practices alleging the company passed over applicants who were not Hispanic when hiring laborer positions. It discriminated against White, Black, and Asian applicants. The charge also alleged the company failed to follow its Affirmative Action requirements to keep accurate records and failed to post jobs so veterans could effectively be considered. The company has settled the case and will make compensatory payments to several hundred passed-over applicants and may be denied future federal contracts. In *re Midwest Canvas OFCCP Charge* (2022).

INDEPENDENT CONTRACTORS — MISCLASSIFICATION

Uber Again — $100 Million for Misclassifying Drivers. In a long and continuing saga of suits by drivers, federal agencies, and state taxing authorities, Uber has lost or settled case after case, paying multi-multi-millions in wages and/or penalties. Uber has recently paid New Jersey $100 million to resolve a claim that it and a subsidiary "shorted" the state on employment taxes by misclassifying drivers as independent contractors rather than employees. No suit was actually filed; the state indicated it would pursue the collection action and the company decided to resolve the matter. Uber continues to maintain that many of its drivers are independent contractors – and continues to face ongoing suits by employees and tax claims by other states.

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