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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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EMPLOYERS CAUGHT IN THE MIDDLE FOR ATTACKS ON DEI PROGRAMS

As a result of the Supreme Court ruling on affirmative action in college admissions, employers seem to be caught in the middle in the debate over those in favor of or opposed to diversity, equity, and inclusion (DEI) programs that may go too far. There have been lawsuits, shareholder letters and petitions to the Equal Employment Opportunity Commission (EEOC) for both points of view. One lawsuit accuses Starbucks of violating federal law, and its officials of breaching their fiduciary duty to shareholders by embracing policies that violate anti-discrimination law in areas including employment, supplier contracts and executive compensation. The policies of Starbucks reportedly state that it wants at least 30% of its U.S. workforce at all levels to be Black, indigenous or people of color by 2025. It reportedly plans to implement an analytic tool that lets managers see their progress and uses workforce diversity measures to help set executive pay. There are similar cases against Comcast and Amazon alleging their small-business grant programs aiding minorities are discriminatory, apparently causing Comcast to state that its next rounds of grants would be open to all small businesses, not only minority businesses. A lawsuit against Compass Group involves a claim of religious discrimination and retaliation by an employee stating that the company's DEI emphasis conflicted with her sincerely held religious beliefs holding that all people, regardless of race or gender, are created equal. In one case brought by an executive who was fired and replaced with a Black female against Novant Health, a federal jury in Charlotte in October of 2021 awarded him $10 million in damages. The executive apparently convinced the jury that the DEI program's commitment to diversity resulted in discrimination against him, a White man, as part of Novant's efforts to promote diversity in its management ranks. Employers are frustrated by the potential to get accused of discrimination no matter what the company does in regards to DEI programs.

It doesn't help that the government itself is expressing differing views regarding the interpretation and application of the Supreme Court ruling. The EEOC Commissioners themselves seem to be offering conflicting advice. One Commissioner states that the decision does not affect most corporate DEI programs, while another says that lawyers need to give "a hard look at their corporate diversity programs." A dozen Attorneys General sent a letter to Fortune 100 CEOs to caution their use of race in their hiring and recruiting. The response from certain other Attorneys General states that employers can maintain DEI programs by adjusting their recruiting practices, including promotion or retention policies, and using leadership programs.

It is submitted that there would seem to be at least a starting point addressing these issues. The starting point is using protected classes, such as race, to make employment decisions is illegal under federal law. The application of this concept is that DEI programs that are considered to be "racial quotas" and/or "explicitly race-based practices" are inappropriate and illegal. Nevertheless, it is generally believed that setting "aspirational goals" based on demographics are not illegal. DEI programs can be designed to promote workplace diversity without amounting to illegal racial quotas and preferences.

This concept has been written into our federal contractor rules and is generally considered appropriate. The concept is to implement diversity programs that seek to insure workers of all backgrounds are afforded equal opportunity in the workplace.

Some would argue that this concept is easier said than done. The terminology in DEI programs needs to be carefully reviewed to be consistent with these principles. For example, pledging to increase certain protected classes looks like a type of racial balancing, so employers should reframe the issue as more of an aspiration. Interpreting the Supreme Court ruling as to higher education, the Biden Administration has issued guidance that it is appropriate to have a goal of a diverse student body and to use targeted outreach in recruiting initiatives. The interpretation is that schools cannot provide targeted groups with preference in the admission process itself, which as applied to employers means the hiring process itself. However, the Administration advises that certain types of application elements or standardized testing may be reviewed to ensure there is no adverse impact on protected groups. It is not done to extend preferential treatment but to remove barriers. The interpretation indicates that colleges can continue to collect and analyze demographic data about applicants and admissions, as long as such data are not influencing the admission decisions. The Administration advice also said schools can continue to offer support to under-represented students once they are on campus, to ensure they feel a sense of belonging, such as affinity groups, as long as their activities are open to all students regardless of race.

Applying the Administration guidance more directly to employment issues, it would appear there is nothing inherently discriminatory about DEI programs created to help weed out hiring bias, or to attract a wider pool of job candidates, and to retain an inclusive workforce as long as the individual decisions are not based on race.

The bottom line is that the legality of DEI programs depends on how they are structured and applied. Employers should be cautioned that dangerous fact patterns emerge when candidates not selected for a certain position or employment, are told the DEI program has something to do with it. Such comments likely turn a legitimate program into one likely to create lawsuits by the non-selected candidate.

BIG LABOR IS FRONT PAGE

Big labor is flexing its muscles, and the nation should be concerned. While the most pro-union President in history touts organized labor as good national policy, the effects of this policy show the dangers. Let's look at actions over the last few months as large parts of our national economy were almost shut down over a potential dock workers strike, a potential railroad workers strike last December, and a potential strike at United Parcel Service (UPS) in July. Although UPS and the Teamsters reached a tentative contract on July 25, which was praised by President Biden, the results are that by the end of the five-year contract, full-time drivers will make about $170,000 a year, counting healthcare and other benefits. It puts compensation for UPS drivers well above the median salary for a U.S. engineer, and above the pay of many executives.

Further, the UPS contract could encourage other unions to become more militant in other contracts. The pilot's union at American Airlines received up to a 40% pay increase in their new deal with the airline earlier this summer. The FedEx pilots recently rejected an increase of up to 30%. In the recent auto workers negotiations which have just started, the UAW leader refused to even have a handshake ceremony with company executives, stating: "I'm not shaking hands with any CEOs until they do right by our members." UAW proposals would increase hourly labor costs to more than $150.00 per hour, including wages and benefits, doubling current hourly labor costs. UAW is demanding a 46% wage increase and many others costly benefit changes. In contrast, the assembly plants of Asian and European automakers pay something around $50.00 an hour. Unions are playing hardball and getting away with it, but longer term results may tell a different story.

At the same time, strikes are increasing. Strike activity increased by almost 50% in 2022. This writer submits that strikes are bad for the economy, bad for employers, and bad for the workers that lose their paychecks during the strikes, in amounts they may never make up.

President Biden hailed the UPS settlement as wonderful for the workers and wonderful for the economy. Let's look below the surface. These high-cost settlements will result in more automation, more outsourcing to lower-paying contractors, and more unemployment as buyers shift to lower-cost producers. The portion of U.S. private-sector workers belonging to a union in 2022 is only 6%, the lowest percentage on record going back to 1900. Management often will cite unproductive and costly strikes as a reason not to unionize. Such costly contracts can also result in putting companies out of business with resulting unemployed workers. In August, the traditionally largest trucking company, Yellow Corp., closed its doors, leaving its 30,000 employees jobless. The company blamed its collapse on the Teamsters union, and a company official claimed the union refused to help management revitalize the long-struggling business. The chief executive officer said the financial problems were caused by the union's "bullying and deliberately destructive tactics." Another Yellow official accused the union of using the company "as a sacrificial lamb" and said the Teamsters chief would rather "see Yellow destroyed than be perceived as weak in negotiations."

There are some new tactics being used in the current labor disputes and strikes. One of them is technology, including the use by unions of mass video calls and spreading the word through Twitter, Instagram, Reddit, and online message boards for union members. Other recent tactics used by the Teamsters is the "practice strike," in which employees conduct "practice picketing" to show management that they mean business.

A more recent example of the pro-union Administration is a new Davis-Bacon Act rule for federal contractors that requires contractors to pay prevailing wages. Prevailing wages will be considered to be any single rate that is 30% of the workers in job classifications in a geographic area, which often tends to be the union contract rate, particularly in the way the surveys are conducted. This means that a non-union construction company would have to pay union wages to get a contract at a particular federal project, and indeed may have to be "union" on that project under the project labor agreement concept encouraged by the Administration. These efforts may benefit union labor, but what about the 90% of the construction industry that is non-union? Similarly, the Administration praises the big labor pay settlements, but at the same time promotes lower wage gains as part of the fight against inflation. The Kiplinger Letter remarked in August that whether the Fed raises interest rates again in September hinges largely on wage increases.

NLRB SETS FORTH NEW STANDARD FOR JUDGING LEGALITY OF HANDBOOK AND OTHER EMPLOYER POLICIES

Employers have been long awaiting the Biden National Labor Relations Board's (NLRB's) view of what types of employer handbook and other policies are lawful, and what types are overbroad and thus unlawful. On August 2, 2023, the Board announced the new Biden NLRB policies in *Stericycle, Inc.*, adopting a new legal standard to decide whether an employer's work rules that do not expressly restrict employees' protected activity are nevertheless facially unlawful. The new standard basically states as follows: If a rule has a reasonable tendency to interfere with employees' exercise of Section 7 protected activity, such a showing establishes a presumption of unlawfulness. An employer may rebut the presumption by showing that the rule has a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. Thus, employers can only maintain workplace policies so long as they are narrowly tailored to "advance legitimate and substantial business interests," and they must also minimize the risk of interfering with workers' rights to act collectively.

Employers should understand how the NLRB will apply the new standard. First, the standard will be applied to interpret the employer's policy from the perspective of an economically dependent employee (a lay person, not a lawyer), who contemplates engaging in a Section 7 activity. Second, the coercive interpretation of the employer's policy need not be its only reasonable interpretation to be unlawful. In other words, ambiguous rules are properly construed against the employer.

Another way of defining the situation is that the party drafting the work rules - the employer - must narrowly tailor its rules to promote only its legitimate and substantial business interests while not burdening employee rights.

In its 3-1 ruling, the majority concedes that the ruling results in a need for a "case-specific justification" of an employer rule. That is, employer rules will have to be considered in the context of the particular language of the rule in the context of a particular employer. The NLRB will therefore not only examine the specific wording of the rule, but also the specific industry and workplace context in which it is maintained, the specific employer interests it may advance, and the specific statutory right it may infringe. The Board hopes that its case-by-case approach will eventually result in more clarity and predictability for the parties, while many employers will be discouraged by the lack of current clarity. An example of the effect of such limitations, issued around the time of the *Stericycle* ruling, is an administrative law judge (ALJ) ruling finding unlawful the following *Starbucks'* rule: "The partners are expected to communicate with other partners and customers in a professional and respectful manner at all times. The use of vulgar or profane language is not acceptable." The NLRB ALJ found that while *Starbucks'* interest in upholding basic standards of civility is a legitimate interest, the rule was overly broad, vague, and susceptible to application against legally protected activity. Thus, the ALJ found the rule could chill legitimate activity workers might construe to be disrespectful. The case illustrates the need for the legal review that employers should make of their handbook and indeed other employer policies.

Anyone wishing such handbook or policy reviews may contact the firm at www.wimlaw.com.

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