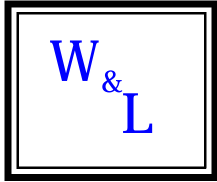
Wimberly, Lawson, Steckel, Schneider & Stine, P.C.
Suite 400, Lenox Towers, 3400 Peachtree Road, N.E., Atlanta, Georgia 30326
E-MAIL:Lawyers@wimlaw.com
(404) 365-0900 FAX (404) 261-3707

EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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JUDGE INVALIDATES JOINT EMPLOYER RULE, AND INDEPENDENT CONTRACTOR RULE TAKES EFFECT

The National Labor Relations Board (NLRB) Joint Employer Regulation, which was set to take effect March 11, 2024, was invalidated by a Texas district court judge. *U.S. Chamber of Commerce v. NLRB*, E.D. Tex. 3/8/24. The rule affects liability and collective bargaining obligations, outsourcing of labor, and the entire franchise industry. The Trump era Joint Employer Rule, enacted by the NLRB in 2020, considers just the direct and immediate control one company exercises over the essential terms and conditions of employment of workers directly employed by another firm. The new standard under the Biden Administration would have taken into account indirect and unexercised control, significantly expanding the joint employer concept. The Texas judge stated that the new standard: " . . . would treat virtually every entity that contracts for labor as a joint employer because virtually every contract for third-party labor has terms that impact, at least indirectly, at least one of the specified 'essential terms and conditions of employment.'"

The NLRB must now decide whether to appeal the decision, refuse to accept the judge's ruling outside of his judicial district, the Eastern District of Texas, or start the rulemaking process over again. The effect of the ruling is to reinstate the Trump era Joint Employer Regulation.

Meanwhile, the Department of Labor's (DOL) new Independent Contractor Rule went into effect March 11, 2024. Several lawsuits contend that DOL violated the Administrative Procedure Act when issuing the rule because the agency failed to provide a reasonable explanation for changing its independent contractor standard, but at least currently the new rule has gone into effect. The new rule would replace simpler classification tests issued during the Trump Administration, making it harder for companies to treat their workers as independent contractors.

THE IMPORTANCE OF FAIRNESS IN EMPLOYMENT TO THE LAW AND TO JOB SATISFACTION

Some of you may have heard about disgruntled employees taping phone conversations of their discharge, and mentioning them on social media to show the unfairness of their treatment. It is a fact of fundamental human instinct that whatever the rights and wrongs of an employee's termination, the manner in which an employee is terminated or how they are treated is critical. In one such social media post, an employee was fired in a summary call with two people she had never met before and for reasons that were never explained and seemed unfair. It is a fact that few things matter more to people than fairness. Questions of fairness arise everywhere in the workplace, not just when

people are fired, but also who gets hired or promoted, who gets the credit when things go well, and who get the perk of the nice workstation by the window. There has even been an experiment that a small group of employees will reject a money bonus because of the unfairness of the distribution, even if it means none of them get any money. Apparently, a fair share matters more than free money.

No termination or layoff will feel fair if it is too impersonal. Promotions may not seem fair if others did not seem to have a fair chance in the opportunity. The fairness is sometimes difficult for managers to determine, but even if people differ on what counts as the right outcome, they can usually agree on what makes for a fair process.

Fairness is not only necessary for employee satisfaction purposes, but for legal purposes. As employment lawyers know, any case going to a government administrative agency, jury, or even a judge, will be influenced by the fairness and logic of the employer's actions. For example, if a jury feels an employee was unfairly treated in termination, there is a likelihood that the jury will rule for the employee in spite of the legal technicalities. On the other hand, if the employer follows a fair protocol in carrying out the disciplinary process, it will improve the employer's chances of winning the case even if the reasons for the termination are more questionable.

This writer is personally familiar with a case in which there was every reason for the employee to be terminated. Unfortunately, the Human Resources manager did not interview the employee about the incident, getting the employee's side of the story, before the employee was terminated. The labor arbitrator found that this act alone amounted to a denial of industrial due process. The arbitrator set aside the termination, and ordered the employee reinstated with back pay.

This writer believes that perhaps the single biggest mistake an employer can make is not getting the employee's side of the story before carrying out a major employment action. It not only shows fairness and due process, but often the employee makes admissions in the investigatory process that actually protect the employer. Even if the employee does not make such admissions, the employer knows the employee's side of the story prior to the termination. This is a far better way of getting an employee's side of the story rather than getting it later after a former employee and now plaintiff has legal representation.

MAJOR EMPLOYERS CHALLENGE CONSTITUTIONALITY OF LABOR ACT

Amazon is the most recent major employer to challenge the constitutionality of the National Labor Relations Act (NLRB), joining Trader Joe's, Starbucks and SpaceX. Elon Musk's company, SpaceX, first raised the constitutional issue in a Texas federal court in January. A company announcement from Amazon stated: "NLRB proceedings violate Article III of the United States Constitution and the Seventh Amendment to the Constitution by seeking to adjudicate private rights outside an Article III court and award a broader range of legal remedies beyond just equitable remedies without trial by jury." These developments of Constitutional claims will likely become a standard part of employers' defenses against NLRB complaints until there is a definitive legal ruling on the issues.

Editor's Note: This writer believes these legal claims, while highly unusual, are not frivolous. This writer has always wondered about the jury trial issue, and why employers have not raised it more prominently. Recently, a 2022 ruling from the federal Fifth Circuit Court of Appeals found the U.S. Securities and Exchange Commission's in-house court unconstitutional. The Supreme Court is currently reviewing that case.

STARBUCKS' BIG CHANGE IN LABOR POLICIES

Starbucks' new public commitment to work with its union antagonists to resolve issues has been called a landmark in labor relations. In an earlier December public announcement, the Starbucks President wrote a letter to the unions suggesting cooperation, and in late February, the company and the Starbucks Workers United announced they were beginning negotiations intended to resolve collective bargaining agreements and litigation. As part of the announcements, Starbucks said it will begin providing union members with the same benefits that it had previously restricted to non-union stores.

An NLRB judge had ruled last September that Starbucks had violated federal law across the country by providing improvements and higher pay to non-union stores and refusing to do so at unionized locations. An administrative law judge found that Starbucks' argument that it legally couldn't extend those improvements to the union stores because of the collective bargaining rules, was incorrect and not made in good faith.

Editor's Note: There was no public announcement of reasons for the change of the approach by Starbucks' management. This writer has opinions about possible reasons. First, Starbucks had been losing almost 100% of the 100 or so NLRB complaints issued against it. It is even possible that the new NLRB *Cemex* ruling played a role in Starbucks' decision-making, as the new case established that even a single unfair labor practice could result in a "card-check" type bargaining order against the employer. Further, litigation and public relations attacks were being made even involving Starbucks and the union's position on the Hamas-Israeli war, and stockholder resolutions proposed to require Starbucks to improve labor relations. Apparently, there was an increased concern on the part of Starbucks about certain customers that might oppose Starbucks' tactics in opposing union representation. Also, a former Starbucks' President, Howard Schultz, who had become a poster child for resisting union organizing, retired, and the new leadership may have had different approaches.

Some commentators call this a major, major development, that may not only encourage similar efforts at other retail operations, but for the labor movement as a whole.

Despite the fact that organized labor had more major publicized victories over the last year than in recent memory, the U.S. Bureau of Labor Statistics reported in January that union membership was at 10% last year, just below the 10.1% in 2022. In 1983, by comparison, the overall membership rate was 20.1%, twice what it is today. In the private sector, moreover, union membership among private employers remains unchanged at approximately 6% in 2023. About one-third of public sector workers are union members.

Many cite polls showing that 67% of Americans approve of labor unions - up from a historic low of 48% in 2009 and close to 1953's historic high of 75%. In addition, a record-high 61% think unions help rather than hurt the U.S. economy.

However, in the same report, Gallup takes data from the U.S. Bureau of Labor Statistics to reveal that, as of 2022, only 10% of the U.S. workforce actually belongs to a union - a record low. And six in 10 U.S. workers tell Gallup they have no interest in joining one.

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JUDGE ORDERS SURVEY DATA TO BE REVEALED FROM EMPLOYER EEO-1 REPORTS

Employers are supposed to file annually the EEO-1, Standard Form 100, with the U.S. Department of Labor (DOL). This requirement applies to private employers of 100 or more employees and to federal contractors who have at least 50 employees and hold a federal contract worth at least $50,000. In the Obama Administration, the Equal Employment Opportunity Commission (EEOC) implemented an EEO-1 Component 2 data collection, and required around 70,000 private employers as well as certain federal contractors with 100 or more employees to annually report pay data by race and gender. The EEOC had already been collecting basic demographic data for years, but not pay data. While the practice was discontinued in 2019, many predict the EEOC, which now has a Democrat majority, to restore the pay data collection process in the coming months.

A news organization submitted a Freedom of Information Act (FOIA) request to the DOL for the EEO-1 reports of all federal contractors from 2016 through 2020. The Office of Federal Contract Compliance Programs (OFCCP) gave the contractors an opportunity to object to the release of their reports, but four-fifths of the contractors failed to file written objections. The OFCCP subsequently released the reports of the non-objecting contractors. Subsequently, the news organization contended all such reports had to be released. In December, a district court judge in California ruled that DOL must provide the requested reports and that such reports were not protected by exemptions to the FOIA. The DOL has indicated it plans to appeal the ruling that such reports were not protected from disclosure as either commercial data or trade secrets. The ruling has broader implications to the disclosure of business information held by all government agencies.

On March 12, 2024, in honor of Equal Pay Day, the EEOC released the raw results of the pay data surveys for 2017 and 2018, reported by Pay-Band and broken down by race, sex, ethnicity and job group. The recently released data shows significant gaps in national median pay between men and women. The agency also highlighted which States and industries had the biggest difference in median pay.

Editor's Note: Ultimately, it is likely that the EEOC plans to use such pay data reports to target employers for investigation. Further, in making the information available in some cases to third parties, plaintiffs will be encouraged to use the data to bring discrimination lawsuits. Even if the information is not disclosed by the government, such reports will be requested by plaintiffs in litigation.

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Suite 400, Lenox Towers
3400 Peachtree Road, N.E.
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