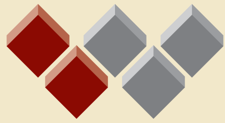

Wimberly Lawson
Wright Daves & Jones, PLLC
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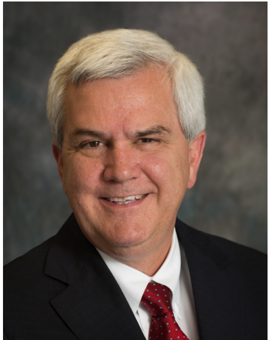
Briefly

September 2022 Volume 22, Issue 9



Howard B. Jackson

"The idea is that unions can single out a group of workers most likely to unionize without bringing in a broader group who might be more inclined to dilute the union support."

UNION ORGANIZING EFFORTS ACROSS THE COUNTRY CONTINUE TO DRAW ATTENTION

Recent Gallup polls indicate that the public has a favorable opinion of unions with a near record high of 68%, and with the "great resignation," and workers demanding their rights, union organizing across the country is drawing attention. For those employers thinking they are beset with employment litigation, consider the fact that the National Labor Relations Board (NLRB) has more than 170 open cases accusing one employer, Starbucks, of anti-union threats, retaliation, surveillance and other labor law violations. The NLRB has found merit in about 50 of those cases, leading to eight complaints filed against the company. The NLRB has gone to court to get injunctions asking the court to order the reinstatement of terminated workers in two cases, based on allegedly retaliatory firings.

In addition, nearly 300 election petitions for individual Starbucks stores have been filed with the NLRB. The union has won 87% of the 113 elections held as of the end of May. Workers at seven Starbucks stores went out on strike in May. Managers recruited replacement workers to help run the stores while pro-union employees picketed outside the stores, telling the public not to buy Starbucks coffee.

The filing of petitions at individual stores rather than in a broader district is an example of the "micro-unit" elections the current Administration allows. The idea is that unions can single out a group of workers most likely to unionize without bringing in a broader group who might be more inclined to dilute the union support.

The union victory at the Amazon warehouse in Staten Island last month gave the union movement further encouragement. On the other hand, the union lost a nearby second election at Amazon. Further, there was a re-run union election at Amazon's Bessemer, Alabama warehouse, following the set aside of an earlier election that the union lost two to one. The election was set aside because Amazon set up a mail dropbox for ballots in plain view from the warehouse, which the NLRB deemed coercive. In the second election in late March, the union was trailing by a little over 100 votes, as challenged ballots that have not been resolved were sufficient to affect the ultimate election results. It should be noted that turnout was down in the second election, from 55% in 2021 to 39% for the second election. Mail balloting results in a much lower turnout than balloting in the employers' facilities, where the turnout is over 90%.

The Starbucks situation is interesting because the Company provides a $15.00 minimum pay and excellent benefits. The company has a history of proceeding without unions. The President of Starbucks, Howard Schultz, wrote a book in 1977 which included him correctly predicted Starbucks' few unionized stores would vote to end their union affiliation after he became CEO, because workers believed in him. "If they have faith in me and my motives, they wouldn't need a union," he wrote. Schultz recently came out of retirement and has again become the spokesperson for the company. Some Starbucks workers still believe the company treats them well such that there is no need for a union contract. Notably, after many of the union election wins, Starbucks rolled out 5% raises for non-union employees and stated: "We do not have the same freedom to make these improvements at locations

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WELLNESS PLAN OVERREACH COSTS YALE UNIVERSITY $1.29 MILLION

Mary C. Moffatt

"... wellness plans have become increasingly popular with employers and employees, and as such they have increasingly become the focus of several governmental agencies regarding compliance issues with existing laws ..."

The parties to a lawsuit against Yale University pending since 2019 have filed for approval of a settlement whereby Yale University agrees to pay a total of $1.29 million based on alleged violations of the ADA and GINA in its corporate wellness plan. (*Kwesell et al., v. Yale University*, Case 3:19-cv-1098, USDC District of Connecticut.) On June 14, 2022, the District Court entered an Order for preliminary approval of the proposed settlement, with a Final Approval Hearing scheduled for November 22, 2022.

As readers will recall, wellness plans have become increasingly popular with employers and employees, and as such they have increasingly become the focus of several governmental agencies regarding compliance issues with existing laws, primarily the Americans with Disabilities (ADA), the Health Insurance Portability and Accountability Act (HIPAA) of 1996 and the Genetic Information Nondiscrimination Act (GINA). The ADA and GINA prohibit employers from requiring the disclosure of medical or genetic information from employees unless that information is provided voluntarily. The ADA generally prohibits employers from requiring employee or applicant medical examinations or gathering medical information but provides an exception to this rule for voluntary employee health programs such as workplace wellness programs, provided the information is kept confidential and is not used for discriminatory purposes.

In 2009, the EEOC opined that workplace wellness programs featuring large monetary incentives to participate or large penalties for failure to participate might violate the voluntariness requirement of these laws. In 2016, the EEOC issued Final Rules on Employer Wellness Program which provided detailed guidance for employers to provide incentives for employees to participate in workplace wellness programs. However, the AARP sued the EEOC over these rules, arguing that the rules violated the ADA and GINA. The 2016 Final Rules were eventually vacated, which left many questions about incentives, penalties, and other compliance issues unanswered. On January 7, 2021, the EEOC released a set of proposed rules which would have limited the value of participation incentives employers may use to "*de minimis*" value items such as water bottles. However, on January 20, 2021, the Biden Administration withdrew those proposed regulations so that the administration's newly appointed EEOC Chair could weigh in on the proposed rules. To date, no new wellness regulations have been issued by the EEOC.

In the lawsuit against Yale, the employees sued alleging the University's "health expectations program"(HEP), was not "voluntary" because employees either had to participate and undergo medical exams, medical inquiries or pay $25 per week for opting out of the HEP. The HEP required employees and spouses to get a series of tests, vaccines and examinations, including "mammograms, colonoscopies, and blood testing," and, the suit claims, some employees/spouses with particular medical conditions or risk factors were required to consult with a "health coach," who would routinely question employees and spouses about their physical health, weight, frequency of exercise as well as mental health. The annual testing or "health care requirements" were based on age categories, with staggered increasing tests required for individuals over 40, 50 and 65 years of age. In addition, Yale allegedly released health information of employees and their spouses to a wellness vendor without the appropriate authorization from either the plaintiff or the spouse. Plaintiffs alleged Yale's HEP violated the ADA and GINA because the program was not "voluntary." At $25 per week, the annual cost to opt out for some employees totaled $1,300 and was subject to increases in subsequent years under the Program. HIPAA was indicated as well because one of the two third-party vendors Yale used was not subject to HIPAA and therefore the health-related information of employees and spouses was not covered by the HIPAA protections.

Under the proposed settlement agreement, Yale does not admit liability but has agreed to cease requiring the opt out fees for a four-year period. Yale also agreed that its business associate will no longer send data to the HEP vendors for purposes of health coaching without express consent and Yale will instruct its vendor to purge all previously provided health-related data from its records. The $1.29 million settlement will be paid into a common fund to be distributed to the members of the class action and to pay attorneys' fees (not to exceed $200,000) and court costs.

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Jerome D. Pinn

"Most of the cases are based on an allegation that the COBRA notices do not contain required information, that they are too complicated for people to understand . . ."

COBRA COVERAGE NOTICES BEING WIDELY CHALLENGED IN COURT

The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires employers' group health plans to issue notices to employees that there are options to continue healthcare coverage at their own expense following their termination or certain reductions in work hours. While applicable rules set forth the requirements of such notices, COBRA provisions also include a potential for fines of as much as $110 per employee per day. As a result, certain plaintiffs' law firms are getting involved in suing large employers for failure to meet the legal details in the notices. Over 50 cases have been filed in federal court over the last four years, many of them resulting in large settlements: Home Depot settled a case for $815,000, Fiat Chrysler settled for $600,000, and Costco agreed to pay $750,000. Most of the cases are based on an allegation that the COBRA notices do not contain required information, that they are too complicated for people to understand, or that they were designed to scare people from filing for COBRA by warning against filing false information. In an unusual move, the U.S. Department of Labor has filed an amicus brief supporting one employer, Southwest Airlines, saying the argument used by many plaintiffs' law firms is wrong. The plaintiffs' firms have argued that COBRA notices incorrectly fail to include contact information for health plan administrators, but the DOL in its brief says that their regulations allow for COBRA notices to include contact information for those responsible for administering COBRA benefits.

Because of this new litigation target by plaintiffs' firms, wise employers may seek a legal review of their COBRA notices to ensure they are clear and consistent with legal requirements.

"UNION ORGANIZING EFFORTS ACROSS THE COUNTRY"

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that have a union," due to the NLRB rules concerning union bargaining.

In relation to the recent organizing efforts, Schultz has indicated that collective bargaining wasn't the answer. "We can't ignore what is happening in the country as it relates to companies throughout the country being assaulted, in many ways, by the threat of unionization." After declaring that he wasn't anti-union, just pro-Starbucks, he added: "We didn't get here by having a union."

Workers have been trained by union organizers to anticipate the company's arguments against unionization, and to prepare workers to expect them. They are trying to approach new hires to unionize, and in anti-union meetings, to ask uncomfortable questions. Unions also have the support of volunteers from various unions and community groups to run phone banking operations.

In the union campaigns, Starbucks appears to rely heavily on small group meetings, and "one-on-one" conversations with managers. This is a common approach.

In another development the first NLRB election in an Apple store was set to take place in Atlanta in June. As unions sometimes do, they filed an unfair labor practice charge claiming that" "captive audience" meetings set up by management were unlawful. The term "captive audience" refers to meetings that an employer holds with the employees the union seeks to represent. It is a setting in which the employer provides its views regarding unionization. Employers have held such meetings for years, but as noted below there is an effort at the current NLRB to change that. Apple's meetings apparently had some impact because the union withdrew its petition and no election was held.

The current General Counsel at the NLRB, Jennifer Abruzzo, is a former union attorney. She has stated as among her goals seeking to obtain a ruling that mandatory meetings held by an employer are unlawful as inherently threatening or coercive. There is no guarantee she will succeed in this effort. But if she does that would be a huge and unprecedented change in the rules applicable to organizing campaigns.

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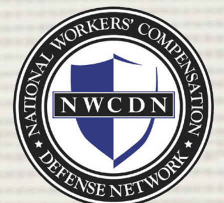

"WELLNESS PLAN OVERREACH COSTS YALE" continued from page 2

The pandemic has brought about unprecedented health-related issues for everyone, and these issues have impacted the types of benefits that are trending in wellness plans. In terms of plan features, employers have recently focused more on informational webinars, stress management options, telemedicine, and mental health benefits (most of which can be accessed digitally) and focused less on in-person activities such as on-site gyms, health fairs, and on-site clinics.

Trends in wellness plans come and go but legal compliance remains. The Yale case and the magnitude of the proposed settlement underscore the need for employers with wellness programs to ensure participation is truly voluntary, that the terms of the program are in compliance with the applicable regulations as well as the ADA, HIPAA and GINA, and that any incentives to participate are not so great as to constitute compulsory participation.

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