Labor Law Newsletter

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Hayes & Cunningham

LABOR VICTORIES IN 2014

Last year had historic moments, surprise victories, and long overdue justice. Pensions were saved from municipal bankruptcies, no thanks to the federal bankruptcy court. Cheerleaders were given something to cheer about. The Wildcats blitzed the NCAA cartel. Employees who were misclassified as independent contractors found there are some paydays worth waiting for, and worth fighting for. The NLRB actually did something. The Fight for 15 transformed a labor movement into a quest for social justice. This edition is focused on the more remarkable moments in Labor in 2014.

Public Employee Pensions Saved

The bankrupt City of San Bernardino has finally agreed to pay CalPERS in full and keep their retirement plans intact. The agreement calls for San Bernardino to repay CalPERS the overdue amount of $14 million in 24 equal installments, with interest, starting in July of this year. So far, the city has paid $4.5 million of the past due amount. This agreement came three weeks after the bankruptcy judge, Christopher Klein, approved the plan of the bankrupt City of Stockton to pay CalPERS in full. No one lost his or her pension as a result of these bankruptcies. These agreements were entered into despite the earlier ruling by Judge Klein that pension benefits can be legally reduced if their employers go bankrupt. If these cities had reduced payments to CalPERS, it would have triggered a mechanism that would have cut retirement benefits by 60 percent. The cities feared that employees would have quit in droves. As it turns out, cutting pension benefits is not that simple or easy, even if legal.

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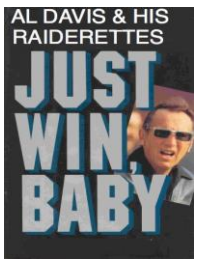
College Football Player's Hail Mary

The union election held by college football players at Northwestern University in Illinois last year, shocked the sports world and started a national dialogue on the right of representation. Professional athletes have long formed labor unions like the National Football League Players Association in the NFL and the National Basketball Players Association in the NBA. Although athletes in the National Collegiate Athletic Association (NCAA) bring in millions of dollars for their colleges and universities, they receive compensation only in the form of scholarships. The recognition by the federal National Labor Relations Board (NLRB), that the college football players are employees, was groundbreaking and historic. The final victory could take years while NCAA schools fight this ruling; and the athletes who voted may no longer be playing when the final decision comes down. Ironically, the name of the team is the Wildcats (as in Wildcat strike).
In California, the Public Employment Relations Board (PERB) would handle any cases filed by college football players who play for a state university such as UCLA because those players would be public employees. In a somewhat related case a federal judge struck down a decades old NCAA rule barring payments to college players as a violation of anti-trust laws. Players may now be paid for the commercial use of their images.

Revenge of the Cheerleaders

Cheerleaders who sued the NFL's Oakland Raiders alleging that the team failed to pay them the legal minimum wage and violated other state employment laws have settled their claim for $1.25 million. (At least someone on the team is winning.) The Raiders will pay back wages to as many as 90 former cheerleaders under the settlement. The suit said the team paid cheerleaders a salary of $1,250, equivalent to less than $5 per hour. The California minimum wage was increased from $8 to $9 per hour last year, which the Raiders will now pay their cheerleaders. Previously, the cheerleaders were not paid any money until the end of the season and were often fined for a variety of infractions, such as bringing the wrong pom-poms to practice.



These wage theft lawsuits spread to other football teams (Bills, Jets, Bengals, Buccaneers) and to major league baseball (minor league players, interns, office workers). It is estimated that approximately 68 percent of low-wage workers will experience wage theft at some point in their working lives.

Wage Thieves Caught

Lawsuits against employers who have been misclassifying employees as independent contractors reaped big dividends in 2014. FedEx lost two cases in the federal court of appeals, one in California and one in Oregon, for misclassifying their drivers as independent contractors. FedEx claimed that these drivers were not employees even though they wore FedEx uniforms, drove FedEx approved vehicles, and were told what packages to deliver, on what days and when. Of course, they could only deliver FedEx packages. The drivers even had to groom themselves according to FedEx appearance standards (e.g. clean shaven). However, they were not fined for delivering the wrong pom-poms.

Other victories have come from the misclassification of drivers working at the Port of Los Angeles. One of these companies, Pacer, had to pay the seven drivers damages ranging from to $85,000 to $388,000.

STATE LEGISLATION

On September 28, 2014, Governor Jerry Brown announced the signing of Assembly Bill 1897, which targets businesses that obtain or are provided "workers to perform labor within its usual course of business from a labor contractor."

Once AB 1897 becomes effective, private employers who have temporary or contract employees will not be able to deny liability for a labor contractor's failure to pay all required wages or to secure valid workers' compensation coverage for contract workers. Employers using the labor services will now "share with the labor contractor all civil legal responsibility and civil liability for all workers supplied" to the company.

Organizing with Company Email

In November 2014, the National Labor Relations Board ruled that employees can use company email for union activity, which gets rid of one of the many hurdles organizers and workers had to clear, especially during union elections.

Excelsior List for the Modern Age

But perhaps the most overdue change is the modernization of the "Excelsior List" rules. Prior to this rule change, employers were required to turn over to the union an Excelsior List, which contained the names and home addresses of workers within seven days after a union election is ordered, so that the union can effectively communicate with all the workers it seeks to represent. The new rule requires the employer to also turn over any employee email addresses and telephone numbers it possesses, and shortens the amount of time management has to turn over the list to two days.

Motive Not Required for Sexual Harassment

In 2014, the California legislature amended the Fair Employment and Housing Act to specifically provide that "sexually harassing conduct need not be motivated by sexual desire." This was done to take away the defense that conduct, although boorish, was not illegal because it was not based upon sexual desire. The change reinforces the point that sexual harassment is about abuse of power, not necessarily about sex.

The Fight for 15

The demands of fast-food workers for higher wages started two years ago and reached a peak in 2014, changing a labor movement into a quest for social justice. Thousands have protested in hundreds of cities against the low wages paid by wealthy corporations, making income inequity a topic of national debate. Taxpayers are realizing that they subsidize corporations through social benefits for the working poor. Without government assistance, poverty would have been twice as high. At first, the goal was a minimum wage of $10 per hour, but now $15 is viewed as attainable. This problem is not new. At a mass meeting of over 10,000 people in Memphis on March 18, 1968, in the midst of a strike of 1,300 Black sanitation workers, Dr. Martin Luther King said, "You are reminding, not only Memphis, but you are reminding the nation that it is a crime for people to live in this rich nation and receive starvation wages." About 40% of those workers were so poor they received welfare benefits even though they worked 60-hour weeks. Today, the working poor are the fastest-growing segment of the poverty population.

Roundup:

- The NLRB found that fast food giant McDonald's can be considered a joint employer of workers employed by its franchise restaurants, meaning the corporation can be found liable for labor and wage violations that previously only franchisees could be found liable for. Super-size that lawsuit.

- The NLRB permitted a small sub-group of employees to unionize within a single location of Macy's department store. The NLRB found that a "micro-unit" of specialized employees working in the company's cosmetic and fragrances department had a separate community of interest from the larger workforce.

- Vessels seeking to enter the Port of Los Angeles were backed up like an L.A. freeway as the ILWU flexed its muscles over a dispute regarding the right to remove an arbitrator at the end of any contract. Wal-Mart, a company famous for the use of strong-arm tactics against its suppliers, complained the most saying that the slowdown will ruin Easter. Yes, Easter is all about profits, right?

- Seattle passed a new minimum wage law requiring employers to pay at least $15 per hour.

- San Francisco's new Retail Workers Bill of Rights requires certain employers to give advanced notice of schedules, improve the treatment of part-time employees, and give current workers the chance to take on more hours before hiring new people.

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