PITTA LLP
Labor, Employment & Employee Benefits Law Firm

LABOR & EMPLOYMENT ISSUES

IN FOCUS

FOR CLIENTS & FRIENDS

FEBRUARY 8, 2024 EDITION

BIG GREEN BASKETBALL SET TO DANCE WITH UNIONIZATION

On February 5, 2024, Laura Sacks, the Regional Director for the National Labor Relations Board ("NLRB" or "Board"), Region 1 issued a Decision and Direction of Election ordering a union vote to be held for Dartmouth College's men's basketball team. The case is *Trustees of Dartmouth College*, Case 01-RC-325633. Since 1966, certain employees of Dartmouth have been represented by Service Employees International Union, Local 560 ("Union"). The Union now seeks to represent the college's basketball players.

The Regional Director found that the basketball players were employees under the National Labor Relations Act ("Act"). The basketball players perform work for the college's benefit. They generate alumni engagement and donations as well as publicity, regardless of how profitable basketball is to the college. Additionally, Dartmouth exercises significant control over the players' work. The college determines where and when the players practice and play as well as when they review film and engage with alumni. For away games, Dartmouth controls where and when players travel, eat and sleep. Like employee handbooks, Dartmouth's Student-Athlete Handbook details players' tasks they must complete and rules they must follow.

Dartmouth does not offer athletic scholarships, but the players still work in exchange for compensation. As high school recruits, their college applications get an "early read" by the college's admissions department. Dartmouth also gives its players equipment and apparel, including over $1000 in basketball shoes a year, along with free tickets to games, lodging, meals, exercise facilities and sports medicine. Coaches also persuade high school recruits to choose Dartmouth over schools who provide athletic scholarships because of the "lifelong benefits that accrues to an alumnus of an Ivy League institution."

The Regional Director swatted down Dartmouth's argument that the sports clothing and equipment are provided so that the students *may* play basketball, rather than *because* they play basketball; and that according to the Regional Director's logic, the star of the team should be given more shoes than a bench warmer. However, there is no case law to suggest that employee status relates to the size of one person's salary in relation to his colleagues. Another air-ball was the college's argument that now any student who participates in any extracurricular activity and receives financial aid could be deemed an employee. Nothing in the record suggests that extracurricular activities dominate other students' schedules like basketball does the players' lives. Dartmouth doesn't recruit student actors, journalists or musicians and employs whole departments to monitor those extracurriculars' funds and brand.

A date for the election has not been set yet and Dartmouth announced that it would appeal the decision to the full Board.

BOARD DECLINES REVIEW OF DECISION ON OBJECTIONABLE NURSING HOME RAFFLE, WHICH COULD SET ASIDE UNION ELECTION

A recent decision by the National Labor Relations Board ("NLRB" or "Board") serves as a reminder that employers must be careful what they offer to employees during a union representation election. On Monday, February 5, 2024, the Board ruled that a nursing home in Tacoma, Washington was not entitled to review of a Regional Director's decision that it engaged in illegal conduct when it held a raffle for employees during a union election. Consequently, unless several challenged ballots tip the 19-19 tie in favor of the Union, the election will be set aside. The case is *Heartwood Extended Health Care*, N.L.R.B., No. 19-RC-303544 (Feb. 5, 2024).

When analyzing whether an employer illegally doles out benefits in the time leading up to a union election, the Board determines whether the granting of the benefit would tend to unlawfully influence the outcome of the election. This analysis, established in *B & D Plastics, Inc.*, 302 NLRB 245, 245 (1991), looks at four factors: (1) the size of the benefit compared to the stated purpose for granting it; (2) the number of employees receiving the benefit; (3) what employees reasonably would see as the purpose of the benefit; and (4) the timing of the benefit. The raffle at issue here included the chance to win televisions, a laptop, several $100 gift cards, and expensive stereo equipment. Applying the *B & D Plastics* standard, the Regional Director held that the raffle was improper "based on the objective evidence of its scope, size, and timing," and noted that the raffle presented the opportunity for unit employees to win items worth thousands of dollars, it was held just five days after the Petitioner filed its petition for election, all unit employees were eligible for the prizes, and the raffle as to the Employer was unprecedented, although a predecessor had held smaller Christmas party raffles in the past.

In its request for review, Heartwood argued that the raffle had been planned prior to when the union's petition was filed; that the purpose of the raffle was to "boost employee morale in light of the challenges posed by the COVID-19 pandemic"; that both unit and non-unit employees were eligible to participate in the raffle; and that similar raffles were held at Heartwood's other facilities. The Employer also pointed out that it had not previously held raffles at this particular facility because the facility was only two years old. However, noting that the standard for grant-of-benefit cases is objective, and thus not affected by an employer's subjective intent, the Board said the Employer's purpose for having the raffle was irrelevant to the analysis. It also agreed with the Regional Director's determination that the raffle was objectionable even though non-unit employees were also eligible to win.

STARBUCKS' LOSING STREAK AT THE NLRB CONTINUES

A National Labor Relations Board Administrative Law Judge ("ALJ") found that Starbucks violated federal labor law by asking its employees about strike plans. This is the 45th time in 46 ALJ decisions that Starbucks has been found to have violated the law. ALJ Brian Gee, sitting in Seattle, found last week that mangers in two Starbucks stores in that city had unlawfully asked workers if they were planning on striking during the period from April through July 2023.

A third Seattle Starbucks store saw its workers vote to strike when the coffee behemoth announced that it would shutter the store. One of those strikers received a call from Starbucks corporate offices asking when the strike would end.

Questioning which tends to "restrain, coerce, or interfere" with workers' organizing rights will run afoul of the law. Moreover, any questions about strike plans typically violate the law, though there is an exception allowing managers to assess staffing levels for an impending work stoppage, but employers can only do this if they explain the purpose of their questioning and assure workers that they won't be reprimanded for striking. In the Starbucks case, no such explanations were offered. The ALJ ordered the company to cease and desist its unlawful behavior. The case is *Starbucks Corp.*, N.L.R.B. A.L.J., No. 19-CA-299573, January 31, 2024.

NEW YORK FASHION LAW TAKES ON AI

The New York State Senate has added provisions to the Fashion Workers Act to take on problems caused by Artificial Intelligence ("AI"). The bill, S2477B, focuses on establishing labor protections for models and creators in the fashion industry in New York. Though it previously passed the state Senate, it has not yet passed the state Assembly.

The AI amendments would protect models from brands, agencies and other entities engaging in unauthorized use or alteration of their digital likeness. Some models have already seen firsthand how AI can affect their livelihoods and personal images. Designers have digitally altered the faces of their runway models for purposes of later video and broadcast use.

More than 180,000 people work in the fashion industry in New York, thus the law could have a significant impact, particularly on models. As in most industries, AI is a creeping issue. The Levi Strauss company was recently criticized for saying it would test a program that would supplement human models with AI for more representation; meanwhile, the apparel manufacturer Selkie has been chastised by consumers for using the technology to help design products.

Currently, there are few rules limiting brands and retailers in their use of generative AI.

Legal Advice Disclaimer: The materials in this **In Focus** report are provided for informational purposes only and are not intended to be a comprehensive review of legal developments, to create a client–attorney relationship, to provide legal advice, or to render a legal opinion. Readers are cautioned not to attempt to solve specific legal problems on the basis of information contained in this **In Focus**. If legal advice is required, please consult an attorney. The information contained herein, does not necessarily reflect the opinions of Pitta LLP, or any of its attorneys or clients. Neither Pitta LLP, nor its employees make any warranty, expressed or implied, and assume no legal liability with respect to the information in this report, and do not guarantee that the information is accurate, complete, useful or current. Accordingly, Pitta LLP is not responsible for any claimed damages resulting from any alleged error, inaccuracy, or omission. This communication may be considered an advertisement or solicitation.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.