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# The Greater New York Floor Coverers Association News

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**Also in this Issue:**



## Northwestern Asks NLRB to Dismiss Union Election Petition

The National Labor Relations Board has agreed to review a regional director's decision that scholarship football players are employees who may vote in an NLRB-supervised election to determine whether they want union representation (Northwestern Univ., NLRB, No. 13-RC-121359, request for review 4/9/14).

An NLRB regional director decided March 26 that approximately 85 scholarship athletes at Northwestern are employees under the National Labor Relations Act, and he directed an election in which they would be allowed to vote on representation by the College Athletic Players Association.

The full National Labor Relations Board has agreed to hear the school's appeal of the March ruling that the players are employees and as such can unionize. The board said the case raised "substantial issues." The full board's decision to consider the case, which was expected and could have tremendous implications for college sports, came on the eve of a vote by the Northwestern football team on whether to certify a players' union. The election was held on April 25. The ballots from the vote will be impounded until the board issues a decision.

Earlier this month, Northwestern requested a review of the March decision by Peter Ohr, a regional N.L.R.B. director, arguing that the preliminary ruling relied too much on the evidence of one player, the former quarterback Kain Colter, and overlooked evidence that showed "its student-athletes are primarily students, not employees." Regardless of the union vote's outcome, Northwestern's scholarship football players would still be considered employees if Ohr's decision were upheld. If the football players were considered university employees, they would be entitled to workers' compensation benefits, unemployment insurance and some portion of the revenue generated by the sports program.

The College Athletes Players Association, which seeks to represent the Northwestern players, filed a brief supporting Ohr's decision, which was based on the conditions of scholarships and on testimony that players spend 40 to 60 hours on football during the week. "We have always stated we expected full N.L.R.B. review of the case, and we also fully expect the board to uphold the decision of the regional director," said Tim Waters, the political director of the United Steelworkers, a union that has helped organize the players. "This is just another step up the ladder in the players' climb towards justice and having a voice in the process."

Continued on Page 2.

**Case of Interest: Cooling For Less, Inc.**
National Labor Relations Board, Division of Judges, Case 28-CA-105006.

An Employer that provides heating and air conditioning repair work was found to have unlawfully discharged its Employee, allegedly for using profanity in a customer's house and for threatening supervisor. The Board found that profanity was condoned and used regularly on jobsites by the supervisor. It also found that the employee's statement that his supervisor did not "know shit about installing air conditioning" was an extension of the employee's complaining to co-workers about poor supervision and its effect on employees. Further, the supervisor knew that the homeowner did not hear the exchange between supervisor and employee, and the employee's profane outburst was made only after the supervisor unlawfully threatened him. As such, the outburst did not remove the employee from protection of National Labor Relations Act, and the Employer's reason for discharge of the Employee was pretextual.

## Northwestern Continued from Page 1

Last month's decision sent shockwaves through the world of college sports, prompting sharp criticism from the NCAA, Northwestern and college athletic departments nationwide. While the ruling would apply only to private universities -- they are subject to federal labor law while public schools are under state law -- many saw the decision as a first step toward the end of the traditional "student-athlete."

The N.L.R.B's announcement came as N.C.A.A. leaders in Indianapolis said they were pushing ahead with a restructuring plan that included giving universities in the five wealthiest college sports conferences — Atlantic Coast, Big Ten, Big 12, Pacific-12 and Southeastern — the ability to provide athletes additional benefits including scholarships that cover the full cost of attending school and insurance policies that protect future earnings.

N.C.A.A. leaders have said that their efforts to restructure the organization are not a direct response to the Northwestern case or other lawsuits that allege the N.C.A.A. exploits its athletes. But the challenges have put the N.C.A.A. on the defensive. Under the restructuring, the 65 colleges in the higher-profile conferences would gain autonomy to address the concerns of athletes.

## Paycheck Fairness Act Stalls in Senate

A Senate bill (S. 2199) that would make it easier for workers to get information about pay disparities and to sue for wage discrimination stalled in a procedural vote April 9, as Democrats vowed to continue pushing the legislation.

A motion to invoke cloture on the Paycheck Fairness Act failed in a partisan 53-44 vote, leaving it seven votes short of the 60 necessary to move forward. As expected, the entire Republican caucus opposed the measure after members complained about being shut out of the amendment process a day earlier.

Reintroduced April 1 by Sen. Barbara Mikulski (D-Md.), the legislation would protect workers from being retaliated against for discussing or sharing pay information with one another and place the burden on employers to show that any disparities in pay for employees who do the same job are based on "a bona fide factor other than sex." It also would provide for punitive damages in the event that a worker establishes "that an employer acted with malice or reckless indifference."

Mikulski told reporters that the bill is necessary to ban what she called "paycheck secrecy," saying many employers currently forbid workers from discussing pay with one another. She also said the bill would close "loopholes" through which "meaningless excuses" are used to justify pay disparities.

Mikulski and Majority Leader Harry Reid (D-Nev.) said the Senate will continue to vote on the measure.

# STRUCTURE TONE, INC. CONVICTED OF FALSIFYING BUSINESS RECORDS

On April 30, 2014 Manhattan District Attorney Cyrus R. Vance, Jr., announced the conviction of STRUCTURE TONE, INC. (STI), a Manhattan-based company, for falsifying purchase orders with the intent to defraud their construction management clients. The company was charged with and pleaded guilty to Falsifying Business Records in the First Degree and will forfeit $55 million.

"Interiors construction is a multi-billion dollar industry in New York City and is vital to our city's economy," said District Attorney Vance. "Structure Tone's felony plea and forfeiture of $55 million – one of the largest forfeitures ever imposed on a construction company – sends a clear message that this type of criminal activity will not be tolerated"

Firms in the interiors construction industry focus on building the interiors of commercial and large residential buildings. STI is one of the largest interiors construction companies in New York City and performs projects for commercial clients, including banks, law firms, financial institutions, and advertising agencies. STI enters into two basic types of contractual relationships with its clients, acting as either a construction manager or as general contractor to the CM client.

On a Construction Manager (CM) project, Structure Tone is hired by the client to oversee or "manage" a project. Under these contracts, STI is required to act in the best interests of the client, making certain that the client receives the best value for the money spent. In addition to paying for sub-contractors, the CM client also pays a percent-based management fee to Structure Tone (typically 3 percent of the overall contract value), a fixed fee for management of the entire project and, at times, other incentives. Other than its management fee for a particular subcontractor, there are no legitimate circumstances under which STI is entitled to additional profit based upon the subcontractors' costs

On a General Contractor (GC) project, Structure Tone charges clients a lump sum, or fixed price. As a GC, STI is simply required to complete the client's project to their specifications. STI's profit is the difference between the agreed upon lump sum price of the contract and the actual cost incurred by STI to complete the project. The lower the costs of the work performed by the subcontractors, the more profit STI makes. According to Structure Tone's guilty plea and documents filed in court, between 2005 and 2009, the company, with the intent to defraud, falsified subcontractors' purchase orders.

Here is how the practice worked:

- STI required the subcontractors on CM jobs to increase their bids by adding, in many cases, unnecessary contingencies listed in an addendum provided by STI called the Rider B. This practice was concealed from the CM clients.
- Once the CM clients agreed to pay the subcontractors' increased bids, STI also procured additional discounts and savings from these subcontractors that were not passed along to the clients.
- STI then created fraudulent purchase orders containing these increased amounts (from the Rider B) and omitting any discounts provided by subcontractors – in many cases caused the CM clients to overpay. The subcontractors held these overpayment amounts for STI.
- STI recovered these overpayment amounts by inducing these same subcontractors to provide discounts to STI on other, unrelated GC projects.

# Employees Who Signed Waiver Can't Bring FLSA Collective Action

Two former employees of a windshield repair company in Georgia cannot proceed with a proposed Fair Labor Standards Act collective action because they signed arbitration agreements waiving the right to bring collective or class actions and the contracts are enforceable under the Federal Arbitration Act, the U.S. Court of Appeals for the Eleventh Circuit ruled March 21 (*Walthour v. Chipio Windshield Repair, LLC*, 22 WH Cases2d 310, 11th Cir., No. 13-11309, 3/21/14).

Plaintiffs began working for Chipio as windshield repairers around August 2011. Joint employer Kingco Promotions Inc. entered into identical arbitration agreements with the workers in October 2011. The agreements contain provisions requiring all employment-related disputes to be submitted to binding arbitration, mandating that employees can only bring claims individually, and prohibiting arbitrators from considering class actions or representative proceedings.

After Plaintiffs' employment ended, they filed a putative FLSA collective action under 29 U.S.C. § 216 (b), alleging that their former employers failed to pay them the minimum wage and overtime and failed to keep accurate time records. The employers moved to compel arbitration, but Plaintiffs argued that the right to file a collective action under Section 216(b) is non-waivable, and as such the arbitration agreements are invalid.

The appeals court held that nothing in the FLSA establishes a substantive, non-waivable "right" to proceed as a collective action. The court said that Plaintiffs may still vindicate their substantive rights by submitting their minimum wage and overtime claims to arbitration, but only individually rather than as class representatives, according to the terms of the arbitration agreements.

The employees failed to show that Congress intended to preclude a waiver of FLSA collective action rights in arbitration agreements, the court decided.

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