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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UAW DECLARES VICTORY IN AUTO STRIKES

There are many "firsts" in the auto strike that appears to have concluded in late October. It was the first time that all three of Detroit's major automakers were on strike at the same time. The union also used an unusual strike tactic in staging short strikes at select plants among the three Detroit automakers increasing their ability to inflict significant harm to the automakers without significant damage to union members or the union's strike funds. Nevertheless, the UAW strike had grown to include more than 45,000 workers at eight assembly plants and 38 parts-distribution facilities. The strike was also the first time a President of the United States has joined a union picket line pushing them to hold out for the 40% pay raise they were seeking, although at the time the union had dropped its demands to 36% (over approximately four and a half years). In any event, the union was successful in gaining public support for its efforts, with polls indicating some 75% of the public supported the union's strike.

The first automaker to settle was Ford, and the last was General Motors on October 30, 2023. The Ford settlement included terms such as:

- 25% general raise over the four-year, eight-month contract.
- Immediate pay increase of 11% for top earners, and elimination of the wage tiers, so that the lowest paid workers get an immediate 88% increase.
- Restoration of cost-of-living increases will likely raise total pay by more than 30%, with the top pay going to $42.60 an hour.
- $5,000 ratification bonus.
- $1,500.00 voucher toward a new vehicle purchase.
- Additional opportunities for profit sharing.
- Temporary workers will be converted to permanent employees after nine months.
- 401(k) retirement savings plans raised to 10% from 6.4%.
- Right-to-strike over future plant closures.
- Two weeks' paid parental leave.
- Juneteenth added as a holiday.

UAW President Shawn Fain was rather brilliant in getting support from the strikers and the public, emphasizing the sacrifices made by the union a little over a decade ago compared to the current large profits, as well as the large paychecks issued to company executives. They also organized regular video reports to union members, with the employers being unable to match the media intensity in favor of the unions.

It should be noted that the union did not achieve all of its goals. The union had originally sought a 40% raise and 32-hour work weeks, as well as going back to the defined benefit pension plans that once existed but were eliminated in favor of 401(k) plans. Further, the union achieved only a limited expansion of the agreement to cover new plants.

In spite of the record gains in the negotiations, early reports indicate that the agreement at GM was approved by only 55% of those voting. In other words, an extremely difficult situation is created from both employers and unions when worker expectations are raised so high that even record increases cannot satisfy them. The three automakers went so far as to even agree to pay the striking workers their time on the picket lines, at least in part. Workers also received up to $500 a week in strike benefits for picketing.

An analyst has estimated that the labor deal will likely add $1.5 billion in annual costs to Ford, and GM indicated that the strike had already cost it around $800 million. UAW President Fain has announced that he plans to use the auto deals to organize non-union auto factories, and claims they are "going to organize like we've never organized before." Fain announced the contract "a huge victory," indicating it offered a "pathway" for future EV workers to be able to come under the union's master agreement.

The UAW settlements are still another union victory in a year of multiplying strikes leading to union contract gains during a strong labor market. Public support for unions reached 71% last year, the highest level since 1965, according to Gallup polls.

But the large wage and benefit gains come at a cost. Automakers will look for ways to offset the higher expenses, since the new contract could add $900 or more per vehicle in additional costs. The higher costs are making it easier for non-union automakers such as Tesla, Toyota, Volkswagen, and foreign automakers, to gain market share. Ford announced that it would delay $12 billion in capital spending on battery plants and other EV projects. Further, the additional labor costs will encourage even more movement towards automation, and thus UAW members could become long-term losers if the increased costs cause their jobs to go away. As an example of this, United Parcel Service, after recently settling a collective bargaining agreement with the Teamsters Union, announced that in their newest warehouse that they will have 200 workers and 3,000 robots.

Fain also seems to be waiving the "class" argument, encouraging workers to take on the "billionaire class." He urges a return to harsher and more militant actions, such as the entire organized labor movement to strike on the date of the three contracts' expiration (April 30, 2028). He urges unions across the country to set their contract expirations on this date, suggesting some type national work stoppage.

NLRB ANNOUNCES NEW JOINT EMPLOYER FINAL RULE, BRINGING MORE ENTITIES UNDER JOINT EMPLOYMENT CONCEPT

Many businesses feel threatened by the new joint employer rule issued by the National Labor Relations Board (NLRB) on October 25, 2023. In the new rule, entities that share control over the terms and conditions of a worker's job could be found to be joint employers for purposes of the collective bargaining law, including in cases where an employer's control is "indirect" or "reserved." Under the new rule, an entity may be considered a joint employer of a group of employees if the entity shares or co-determines one or more of the employees' "essential terms and conditions of employment." These "essential terms and conditions" include:

- Wages, benefits and other compensation.
- Hours of work and scheduling.
- Assignment of duties to be performed.
- Supervision of the performance of duties.

- Work rules and directions governing the manner, means and methods of the performance of duties and the grounds for discipline.
- Tenure of employment, including hiring and discharge.
- Safety and health.

The new rule replaces a prior 2020 policy that excused alleged joint employers from bargaining unless workers could show they had "direct and immediate control." The earlier Trump-era Board promised business it would be a joint employer only if it both possesses and exercises substantial direct and immediate control. Simply exercising such control on a "sporadic, isolated or de minimis basis" was deemed insufficient for joint employment. Now indirect or reserved control can be sufficient to establish joint employer status, even if the entity had never acted on certain reserved control. Similarly, a company can be found to exercise control over another company's workers through a "go-between," an intermediary. The new rule does find certain forms of control to protect brands could be related to the employment relationship but "typically not be indicative of a common-law employment relationship."

The new NLRB rule does not affect the determination of joint employment status under the Fair Labor Standards Act or equal employment laws. The Biden Administration earlier rescinded a Trump-era rule defining joint employment status under the FLSA in a way that generally limited the circumstances under which an employer could be found liable as a joint employer. The Trump-era rule had considered four factors - the ability to hire and fire, supervise and control schedules, set pay rates, and maintain employment records to determine whether a company qualifies as a joint employer under the Department of Labor (DOL) rules. The Biden DOL said the agency would instead return to a broader totality-of-the-circumstances, economic realities approach to joint employment, but hasn't issued any clarifying guidance. Thus, the test under the NLRB rules and that of other laws are slightly different.

The response to the new NLRB final rule on joint employment was strong and immediate. Senators Bill Cassidy (R - LA) and Joe Manchin (D - WV) announced they will introduce a Congressional Review Act resolution to overturn the joint employer rule. Republican senators would be expected to join in this movement, as well as at least two or three other non-Republican senators. However, it is likely that President Biden would veto any such measure. Legal challenges are also likely, contending that the NLRB has not justified why it changed its joint employer standard from the 2020 rule, and on other grounds as well. The rule was originally intended to take effect on December 26, 2023, but recent indications are that the NLRB will postpone the effective date of the new rule.

Editor's Note: The new rule suggests that employers must review the terms of their relationships with temp agencies, subcontractors, and franchisees, among others. Certain terms added to contractual relations suggest that two entities can protect their separate relationships to avoid the possibility of being penalized for another employer's legal claims. Avoiding emphasis on reserved control and indirect control is very significant, and a mere reservation of a contractual right to control may lead one entity to be considered a joint employer of the other's employees. At the same time, a carefully drafted agreement of the relationship can be highly important if not controlling in a particular situation. While the practices under the agreement are also pertinent, sometimes investigations only look at the agreement itself. The effects of the new rule may have unintended consequences, however. Since the determination of joint employment is a highly fact-intensive issue to litigate, a union arguing joint employment in their organizational campaign may face significant delay with the result being that some unions may choose to avoid such situations. An example of such a complicated issue arose in the case in which the NLRB is contending that the University of Southern California, the PAC-12 Conference, and the NCAA, jointly employ USC football players, and that the trio violated federal law by failing to treat the players as employees.

"SINGLE" ULP CAN TRIGGER BARGAINING ORDER WITHOUT VOTE, ACCORDING TO NLRB PROSECUTOR

The dangers of the new NLRB rule in *Cemex* are emphasized in last month's newsletter, whereby an employer can be ordered to bargain with a union where the employer does not itself file an election petition within two weeks and/or commits unfair labor practices that would warrant setting aside an election, even though they are not severe. In the November 2, 2023 Guidance, NLRB General Counsel, Jennifer Abruzzo warns that employers could be hit with bargaining orders if they fail to recognize a union or commit "even one" unfair labor practice in the run-up to a representation election. The NLRB may do so if an employee commits any Labor Law violations (even non-serious violations). NLRB administrative law judges have already handed down *Cemex* bargaining orders in at least two cases.

Additionally, employers need to plan and implement their union-free prevention programs including the training of managers and supervisors concerning how to respond. It is vital to prevent supervisors from unknowingly committing unfair labor practices that would lead to a bargaining order without an election.

Please feel free to contract this firm for information at 404-365-0900 or jww@wimlaw.com if you need information on such preventive plans and programs.

EEOC NOW HAS A MAJORITY AND OF DEMOCRAT COMMISSIONERS

The Equal Employment Opportunity Commission (EEOC) has a three-person Democrat majority, and its new Democrat Chairperson, Kalpana Kotagal, signals she is keen to encourage more diversity and inclusion efforts. Her goal is "to continue to support lawful DEI work and to reassure employers in particular, but also their counsel, about what the contours of lawful DEI programs look like." Further the priorities also include the implementation of Pregnant Workers' Fairness Act and workplace harassment issues. Further, the EEOC has expressed interest in reviving its compensation data collection, relating to equal pay issues.

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WIMBERLY, LAWSON, STECKEL,
SCHNEIDER & STINE, P.C.
Suite 400, Lenox Towers
3400 Peachtree Road, N.E.
Atlanta, GA 30326-1107
ADDRESS SERVICE REQUESTED