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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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VOLUME XXXXII, Issue 11 NOVEMBER 2024

NEW SALARY RULE PASSES ITS FIRST TEST, BUT LITIGATION STILL PROGRESSES

The Fair Labor Standards Act (FLSA) includes provisions known as the white collar exemption, which carves out certain "executive, administrative, professional and outside sales" employees from overtime pay requirements. It grants the Secretary of Labor the authority to "define and to limit" the exemption. For years, the rules required employers to comply with a two-part test: employee must perform specific duties related to their exemption category, and the employee must earn a minimum salary. If both requirements are not met, employees must be paid overtime regardless of their title. Effective July 1, 2024, the minimum salary required for the exemptions increased from $784.00 per week (equivalent to $35,568.00 annually) to $844.00 per week (equivalent to $43,880.00 annually). The amounts will increase again on January 1, 2025 to $1,128.00 per week (equivalent to $58,656.00 annually).

The salary rules issued by the Department of Labor (DOL) survived a major test before the Fifth Circuit Court of Appeals, but the issue in that case was limited to whether the DOL could consider a worker's salary at all, because the text of the statute only mentions a worker's "executive, administrative or professional" job duties. *Mayfield v. U.S. Department of Labor,* No. 23-50724 (5th Cir. 9/11/24). The court upheld the DOL's authority to set a salary threshold, but the decision did not address the amount of the salary threshold. The ruling was quite limited, stating that DOL cannot enact rules that replace or swallow the meaning the statutory terms have, and that the text does not provide a precise line for what is permissible and what is not. Most interpret the ruling as suggesting that a salary requirement that is too high could still be successfully attacked as not a reliable test for the duties set forth in the statute.

Groups are attacking the new salary test in various courts, including Texas and the District of Columbia. A related overtime rule issued during the Obama Administration was set aside by a district court in Texas when a federal judge there found that the DOL exceeded its delegated authority and ignored Congress's intent "by raising the minimum salary level such that it supplants the duties test." Thus, the ultimate outcome of the issue is still unknown, as each side in these cases view the Fifth Circuit ruling as supporting their position.

EMPLOYERS BEWARE - OVERLOOKED ISSUES DEALING WITH MATERNITY LEAVE AND MILITARY LEAVE

Many employers believe they know the ins and outs of handling maternity leave and military leave, but some issues are now rising that bear further review. Let's take the maternity leave issue first.

Parental Lease Issues

Employees subject to the Family and Medical Leave Act (FMLA) are provided leave rights for both maternity and also for parental leave with the new-born child. The FMLA requirements are minimum requirements, but some employers go beyond those minimum requirements. A current case addresses the issue of whether an employer discriminates because of sex by giving more liberal parental leave to female associates compared to their male peers to care for and bond with a new child. *Savignac v. Jones Day*, No. 1:19-cv-02443 (D.D.C., 9/25/24). Court documents indicate the employer's policy entitles new mothers and fathers to 10 weeks of paid family leave, and also entitles new mothers to an additional eight weeks of paid disability leave if they need that time to recover from the physical effects of childbirth. The policy also offers "up to an additional six weeks of unpaid leave" to new mothers "with approval." The plaintiffs in the case argue that in practice, new mothers are always able to take the full 18 weeks afforded by the policy, so that in effect new mothers are given eight more weeks of leave than new fathers. What complicated the case even further, is that the father demanded the treatment given all women with new children, under threat of a lawsuit and adverse public opinion. The father claimed he was "terminated for his unprofessional email," which he contended was retaliation against him for demanding equal treatment. A federal judge on October 3, 2024, ruled that these issues warranted a jury trial.

In addition to the FMLA issues, the law seems to be evolving that, while female parents may be given maternity leave during the time of the effect of the maternity on their job duties, to the extent additional leave is given in the form of parental leave for bonding, the policy and its application must be equal between both mothers and fathers.

Military Leave Issues

A recent development under the federal military leave laws has arisen where the federal law prohibits employers from discriminating or retaliating against employees and applicants over their military status or military obligations. In general, the Uniform Services Employment and Re-Employment Rights Act (USERRA) requires an employer to provide an employee on military leave with the same rights and benefits provided to other employees under comparable non-military leave of absence. The U.S. Department of Labor (DOL) has issued a regulation that provides guidance on what constitutes a comparable form of leave, including a non-exhaustive list of factors for employers to consider. The factors include the duration of the leave, its purpose, and whether the employee can determine when leave is taken. The regulation specifies that when the service member employee performs military service, their leave must be given the most favorable treatment accorded to any other comparable form of leave.

The issue is whether the USERRA requires employers to provide short-term paid military leave if they provide paid leave for comparable non-military absences. A recent case involves the issue of employers who provide paid sick leave and jury duty leave are required to provide the benefit of paid sick leave accrual and vacation time accrual to employees on military leave. The issue can be characterized as to whether the USERRA requires the employers to provide short-term paid military leave if they provide paid leave for comparable non-military absences, such as jury duty, vacation, bereavement or sick leave. In *Synoracki v. Alaska Airlines,* Ninth Circuit Court of Appeals on August 22, followed the doctrine that when addressing the USERRA claims, comparability of the military leave and the other paid leave offered by the employer, is to be determined by examining the length of the leave at issue rather than any type of categorical approach. Several other federal appeals courts including those in the Fifth Circuit, Seventh Circuit, and Eleventh Circuit have ruled that employers that pay employees for some type of short-term leave must provide equal benefits to employees who take short-term leave for military service.

THE ECONOMIST, THE OLDEST MAGAZINE IN CONTINUAL PUBLICATION, PUBLISHES AMERICA BECOMING LESS "WOKE"

Supposedly the oldest magazine in continual publication, The Economist, published in London, has devoted its September 21-27, 2024, edition to America becoming less "woke." The magazine notes that the greatest decline in woke thinking has been among young people and those on the Left, apparently because it has become associated with the most strident activists, who tend to divide the world into victims and oppressors. The article goes on to discuss that wokeness is also in retreat in corporate America, even though it appeared there relatively recently. The DEI (diversity, equity and inclusion) concept still remains important to corporate America, however, although it peaked in the second quarter of 2021, but is still three times more common than before the death of George Floyd. The share of new job listings that mention diversity continues to grow, but the number of people employed in DEI is recently down over 10%. A part of the explanation is belt-tightening, while some suggest it springs from the Supreme Court ruling on affirmative action. Another possibility is that corporations are taking note of declining public enthusiasm for corporate social activism. Currently, less than half of the public think businesses should speak out on racial issues or LGBTQ rights, with the most dramatic example being that of Bud Light. Interestingly, the magazine concludes that it is much more likely that there will be a revival in woke activism on the Left if Mr. Trump wins the election, compared with Ms. Harris.

PRO-UNION POLICIES ARE HURTING AMERICA

Many politicians are running on pro-union platforms and often say unions are good for our economy. But look at what is going on right now, with strikes in process at Boeing and recently the Eastern and Gulf Coast dock workers. Looking at the dock workers first, the union rejected a 50% wage increase offer over six years, along with major improvements in benefits. The International Longshoremen's Association (ILA) wants to raise the base hourly rate for its roughly 45,000 members to $69 from $39, a 77% pay increase, over these years. They also want to limit automation, which the union wants to prohibit, making the dock workers less efficient. The U.S. General Accountability Office reported earlier this year that the top 10 U.S. ports are already behind in automation compared to foreign ports. The World Bank ranks U.S. ports among the least efficient in the world. In the financial year that ended in 2020, more than half of the dock workers at the Port of New York and New Jersey earned more than $150,000 a year, and one in five dock workers earned over $250,000 back in 2020. The cost of benefits runs almost $100,000 a year as well.

J.P. Morgan estimates that the port strike will cost the U.S. economy between $3.8 billion and $4.5 billion a day. The American consumer will come up short, inflation will increase, and the union head tells management, "I will cripple you." The union leader making this statement made more than $900,000 last year himself, owns a 76-foot yacht, and drives a Bentley car. This same union leader was prosecuted two decades ago for alleged ties to the Genovese crime family, but was acquitted at trial in 2005.

President Biden responded to the situation, "Now is not the time for ocean carriers to refuse to negotiate a fair wage for these essential workers while raking in record profits." Donald Trump is not in disagreement when he said, "American workers should be able to negotiate for better wages, especially since the shipping companies are mostly foreign-flag vessels."

It should be noted that the reason most ocean carriers are foreign is because union work rules and high costs in the U.S. have stopped ship building in the U.S. This is not only adversely affecting our economy, but also our defense, as the U.S. Navy can no longer depend on U.S. production of military ships. The inefficiency and high cost of the American workforce is affecting our nation's ability to accomplish many worthwhile tasks, not only our defense, but also in infrastructure improvements and even climate control. To add on top of the cost of doing business in the U.S. today, the red tape in getting government approvals and the like, we are at a distinct disadvantage in keeping America the world leader. The new infrastructure and technology Congressional initiatives give, in this writer's opinion, too much preference to union employers, to the detriment of our country and the 94% of the American workforce that do not belong to a labor union. General government contracting rules are designed to require government contractors to pay union wages, and project labor agreement requirements in construction basically require union contractors.

After three days of striking, an agreement was announced which will include a pay increase of about 62% and the contract will be extended through January 15, 2025, to address other issues, including the critical automation issue. The interim deal avoids a potential serious political issue for the campaign of Vice President Harris as otherwise the situation would have required her to confront a crippling strike of the union constituency she is courting. According to reports, the tentative deal will result in dock workers at the New York-New Jersey port earning more than $500,000 a year on average. According to data recently released by the New York State Comptroller, this makes dock worker salaries higher than in Wall Street's securities industry.

According to The World Bank, the consequence of low port productivity is that "instead of facilitating trade, the port increases the costs of imports and exports, reduces competitiveness, and inhibits economic growth." Not one U.S. port ranks in the top 50 globally in productivity.

At the same time, unions are also striking Boeing, where the union has already turned down a 30% pay increase over four years. At Boeing, the Machinists Union wants a 40% increase plus a restoration of defined-benefit pensions that were stopped a decade ago. Boeing has offered almost $10,000 a year in 401(k) contributions, far more than most employees receive in the U.S. This offer is especially generous after Boeing has lost more than $25 billion over the last six years. Indeed, the union seems to want to take advantage of Boeing's financial situation to force a gigantic settlement. A Boeing tactic backfired when it quickly presented a 30% pay raise directly to workers with an ultimatum to respond, but union leaders refused to schedule a vote and criticized Boeing for going directly to the workers. They say the tactic gave union members the belief that they've got the upper hand, and the union has backtracked going back to some of its original demands of 40% pay raises and reinstating defined benefit pensions rather than 401(k)s.

The unions claim that the laws are skewed against them, but the monopoly power granted to unions under the labor laws actually puts the laws more on their side. These laws give unions monopoly power that would violate the anti-trust laws in any other comparable situation.

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