Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
March 14, 2019 Edition

MORE OVERTIME, PLEASE! DOL PROPOSES NEW OVERTIME RULE

On March 7, 2019, the United States Department of Labor Wage and Hour Division (DOL) released its proposed overtime regulations, which make employees who earn less than $35,308 per year automatically eligible for time-and-a-half pay for all hours worked over 40 in a week. The Trump administration's proposed rule sets the minimum salary for the "white collar" exemption at almost the exact midpoint between the current threshold of $23,660, which was set in 2004, and $47,476, the minimum amount proposed in 2016 by the Obama administration which was subsequently invalidated by U.S. District Judge Amos Mazzant prior to its effective date.

Under the Fair Labor Standards Act, in order for an employee to be exempt from the Act's overtime requirements the worker must be paid a minimum salary and perform tasks that primarily involve executive, administrative, or professional duties, as defined by the DOL's regulations. While the proposed rule does not change the "duties" test, workers will need to be paid a minimum salary of $679 per week (the equivalent of $35,308 annually), but well short of the Obama level of $47,476 annually, up from the currently enforced level of $455 per week ($23,660 annually) to be classified as exempt from overtime. The proposed rule allows employers to count certain nondiscretionary bonus and incentive payments as constituting up to 10% of the minimum salary. The DOL's proposal also seeks to increase the salary exemption for a "highly compensated worker" from $100,000, the minimum set in 2004, to $147,414. The proposed rule also nixed one of the hallmarks of the Obama-era rule: automatic increases in the salary thresholds every three years. Instead, the DOL proposed updating the levels every four years, but doing so only after notice-and-comment periods that precede those increases.

Employers in New York will likely be unaffected by the rule because the State's minimum salary level to qualify for the executive and administrative exemptions is approximately $1,125 per week, with no minimum salary level for professional employees. Moreover, the State's minimum salary includes the cost of meals, lodging and other allowances, while the federal salary level excludes them. If these regulations take effect, those receiving credits for certain allowances should monitor their weekly paychecks to ensure their employers are complying with the federal salary minimums. While the DOL said the proposed rule is expected to make about one million workers newly eligible for overtime, the Obama-era rule would have made more than four million more workers overtime-eligible. In order for the DOL to ensure the regulations take effect before the 2020 election, the agency must publish the proposed rule in the Federal Register, offer the public a 60-day comment period, and finally make changes and issue a final rule.

NINTH CIRCUIT RULES JANUS DOES NOT BAR UNION'S EXCLUSIVE REPRESENTATION RIGHTS

In *Miller v. Inslee*, No. 16-35939 (9th Cir. Feb. 26, 2019), the U.S. Court of Appeals for the Ninth Circuit joined the Eighth Circuit Court of Appeals in *Bierman v. Dayton*, 900 F.3d 570

(8th Cir. 2018), holding that a public sector union's right to exclusive representation for bargaining purposes does not violate a non-member's First Amendment right of association nor the Supreme Court's decision in *Janus v. AFSCME*, *Council 31*, 168 S.Ct. 2448 (2018) barring agency fees.

Two childcare providers in Washington State declined membership in the unit's exclusive collective bargaining representative, SEIU Local 925, then challenged SEIU's right to exclusively represent them against their will in collective bargaining. Plaintiffs, represented by the National Right to Work Legal Foundation, argued that *Janus* prohibited exclusive representation, pointing to a brief dicta reference to exclusive representation as "a significant impingement on associational freedoms." Washington and SEIU defended exclusive representation as consistent with an earlier Supreme Court case, *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) which upheld exclusive representation even of objecting non-members.

The Ninth Circuit sided with *Knight,* reasoning *Janus* barred agency fee payers but never reached exclusive representation. Rather, *Knight* offered the closer analogy by directly upholding exclusive representation for public sector employees. The Court stressed that Plaintiffs remained free to speak as they wished and join whatever groups they liked so their "speech and associational freedoms have been wholly unimpaired." *Janus*' brief reference to exclusive representation as an impingement, noted the Court, came amid other language recognizing exclusive representation as legitimate and could not overrule *Knight* so indirectly. Moreover, the Court found the state's interest in labor peace satisfied exacting scrutiny even under J*anus*. The Court relied heavily on the public interest cited by *Knight* that exclusive representation fosters labor peace by having workers speak in one voice rather than many discordant ones.

Miller along with *Bierman* provide welcome post *Janus* support to private sector unions but hardly settle the question of exclusive representation. Both cases dealt with "partial" state employees since the scope of bargaining was limited and, so too noted the Court, any impingement on the non-members' rights. Challengers may still argue that the impingement is greater and therefore unconstitutional where a public sector union wields full collective bargaining rights. More worrisome, as the Circuit Court acknowledged, the Supreme Court may yet clarify or expand its *Janus* dicta in a new case to prohibit exclusive representation. However, for now, public sector unions can remain the exclusive bargaining representative of all workers in the unit, even those, in the Circuit Court's words, who "abhor" them.

***BECK* REVISITED - NLRB LIMITS UNION CHARGEABLE EXPENSES**

In the latest victory for the National Right to Work Legal Defense Foundation, the National Labor Relations Board (NLRB), in a 3-to-1 decision has ruled that a private-sector union is not permitted to charge nonmember objectors (known as *Beck* objectors) any expenses related to the union's lobbying activities, because lobbying is categorically not a "representational function." *United Nurses and Allied Professionals (Kent Hospital)*, 367 NLRB No. 94 (March 1, 2019). Additionally, the NLRB held that a private-sector union must provide *Beck* objectors with verification from an auditor that the union's calculation of chargeable expenses had been audited.

The Board's decision in *United Nurses* considered two issues of first impression that stem from the United States Supreme Court's decision in *Communications Workers of America v. Beck,* 487 U.S. 735 (1988) relating to the rights of nonmembers subject to a union security requirement: whether the union must provide an audit verification letter to *Beck* objectors to substantiate the union's claim of chargeable expenses and whether the union's lobbying expenses were chargeable to the objectors. Under the standard articulated in *Beck*, objectors may be charged for the costs of collective bargaining, contract administration, and grievance adjustment.

In *United Nurses*, Jeanette Geary and several other bargaining unit members withdrew their membership in the Union and objected to dues assessment for activities unrelated to collective bargaining, contract administration, or grievance administration. Responding to their objection, the Union provided them with a reduced fee calculation and claimed that the expenses had been verified by a certified public accountant. In its calculation of chargeable expenses, the Union had determined that a portion of its lobbying activities were chargeable to the *Beck* objectors, since the lobbying activities related to legislation that concerned terms and conditions of employment.

In considering these issues, the NLRB departed from its prior treatment of *Beck* objections. While the NLRB had never previously required a union automatically to provide *Beck* objectors with an audit verification letter to substantiate its calculation of chargeable expenses, the majority in *United Nurses* saw fit to establish this new requirement. The majority reasoned: prior Board precedent "has already made clear that the financial information provided to *Beck* objectors must be independently verified by an audit. It inevitably follows from this precedent that we should explicitly hold that unions must take the modest additional step of supplying verification from the auditor that the provided financial information has been independently verified." Furthermore, while the NLRB had previously considered the changeability of lobbying expenses on a case by case basis, the majority in *United Nurses* established a bright line rule that no lobbying activities can be chargeable, even when the subject lobbying activities are targeted at legislation that involves matters that are the subjects of collective bargaining.

For additional discussion on the post *Janus* environment, please click on the following link: 2-18-19 VRP NLMC Janus Presentation.pptx

WHEN THINGS GET HAIRY: NYC BANS DISCRIMINATION BASED ON HAIR

On February 18, 2019, the New York City Commission on Human Rights ("Commission) released new guidelines (the "Guidelines") that give legal recourse to individuals who have been harassed or whose employment has been adversely affected because of their natural hair texture or hairstyle. In the Guidelines, which may be the first of their kind in the United States, the Commission is seeking to protect hair and related styles because the Commission claims they are so inherent to one's race and can be closely associated with a person's racial, ethnic, or cultural identities. Therefore, targeting people because of their hairstyles at work, school, in housing or in a public space will now be considered racial discrimination under New York City's Human Rights Law (NYCHRL).

The Guidelines focus on prohibiting hair and hairstyle discrimination against Black people, defined as "those who identify as African, African American, Afro-Caribbean, Afro-Latin-x/a/o or otherwise having African or Black ancestry." Specifically, it seeks to protect the right to

have “natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state.”

While the Guidelines focus on hair-based discrimination at work, they also prohibit such discrimination at school, in housing or in a public space. In particular, the Guidelines advise employers that they may be held liable under the NYCHRL for: (i) maintaining grooming or dress-code policies that “ban or require the alteration of natural hair or hair styled into twists, braids, cornrows, Afros, Bantu knots, fades and/or locs”; or (ii) enforcing facially neutral appearance policies in a discriminatory manner. The Guidance gave the following examples of employer policies that the Commission would find unlawful:

- A grooming policy prohibiting twists, locs, braids, cornrows, Afros, Bantu knots, or fades;
- A grooming policy requiring employees to alter the state of their hair to conform with the employer’s appearance standards, including having to straighten or relax hair; and
- A grooming policy banning hair that extends a certain number of inches from the scalp, which would limit Afro hairstyles.

Since hair-based discrimination may implicate other categories protected under the NYCHRL, such as race, religion, disability, age, or gender, employers should be concerned about restricting hair or hairstyles to promote a certain corporate image, because of customer preference, or for claimed health or safety concerns. For concerns the Commission deems arguably legitimate, such as those workers dealing with food, the Guidelines require employers to “consider alternative ways to meet that concern prior to imposing a ban or restriction on employees’ hairstyles” including, but not limited to hair ties, hair nets and head coverings. The Guidelines remove hair from a company’s prerogative about the employee appearances because, according to the Commissioner’s jurisdiction, an “employee’s hair texture or hairstyle generally has no bearing on their ability to perform the essential functions of a job.”

NLRB TO REVIEW 2016 STANDARD REGARDING ITS JURISDICTION OVER CHARTER SCHOOLS

On February 4, 2019, the National Labor Relations Board ("NLRB" or "Board") issued an Order in *KIPP Academy Charter School*, 02-RD-191760, granting review in part and inviting the filing of briefs on whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) of the National Labor Relations Act (NLRA). Section 14(c)(1) states generally that the Board may decline jurisdiction over labor disputes involving any class or category of employers where the effect of the dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.

The Board's review could result in the 2016 decisions, *Hyde Leadership Charter School—Brooklyn*, and *Pennsylvania Virtual Charter School* being modified or possibly overruled entirely. The aforementioned 2016 decisions held that the Board should exercise jurisdiction over charter schools. If the decisions are overruled completely, the Board could then decline to assert jurisdiction over all charter schools, which would carry significant ramifications for all employees at charter schools. The decision to grant review is being interpreted as a signal

that there is a serious possibility that the NLRB is considering declining to assert jurisdiction as to all charter schools.

The Board's decision to review the 2016 standard was granted at the United Federation of Teachers, Local 2, AFT, AFL-CIO's request for review of the Regional Director's Decision and Direction of Election concerning a decertification petition filed by several teachers at a charter school. Briefs on review from parties were due on February 19, 2019. Amicus briefs were due on or before March 6, 2019. Replies to amicus briefs are due on or before March 20, 2019.

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.