Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
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NLRB REGION 2 WELCOMES "NEW" REGIONAL ATTORNEY

On November 26, 2019, National Labor Relations Board ("NLRB") General Counsel Peter B. Robb announced that veteran NLRB attorney Suzanne Sullivan was selected to serve as the Regional Attorney of the NLRB's Region 2, located in Manhattan. As Regional Attorney, Ms. Sullivan will assist Region 2 Regional Director Jack J. Walsh, Jr. in administering and enforcing the NLRA throughout the counties of New York, the Bronx, Orange, Putnam, Rockland, and Westchester.

Having received her B.A. degree from Rutgers University and her J.D. degree from St. John's University School of Law, Ms. Sullivan first joined the NLRB as a Field Attorney in Region 2 in 1989. In 2012, she was promoted to supervisory attorney and has continued in that capacity until her recent selection as Regional Attorney.

The attorneys at Pitta LLP extend their congratulations to Ms. Sullivan and look forward to continuing to work with her in her new capacity.

NEW RULES ON OVERTIME ELIGIBILITY TAKE EFFECT JANUARY 1, 2020

On September 24, 2019, the United States Department of Labor released a final rule concerning overtime pay. Under the new rule, which takes effect January 1, 2020, the minimum salary threshold to be exempted from overtime is increased under the Fair Labor Standards Act ("FLSA") to $35,568 per year. According to the Labor Department, this rule change will increase the number of American workers eligible for overtime (setting aside those covered by collectively bargained rules or state and local laws) by 1.3 million.

While the rule seems to benefit workers, it has benefits for employers as well. The rule also permits employers to include discretionary bonuses and commissions up to 10% of a worker's minimum salary in reaching the exemption threshold. It even allows an employer to provide a "catch-up" bonus to lift a worker over the threshold and avoid paying overtime.

Predictably, the Trump Administration painted the changes as a boon for workers. "For the first time in over 15 years, America's workers will have an update to overtime regulations that will put overtime pay into the pockets of more than a million working Americans," then Acting U.S. Secretary of Labor Patrick Pizzella said in September. "This rule brings a commonsense approach that offers consistency and certainty for employers as well as clarity and prosperity for American workers." Newly installed Secretary of Labor Eugene Scalia said "this proposal offers more options for bonus pay and exemplifies the U.S. Department of Labor's commitment to reduce unnecessary burdens in order to benefit America's workers. At a time when there are more job openings than job seekers, this proposal would allow America's workers to reap even more benefits from the competitive labor market."

The new thresholds are intended to account for growth in employee earnings since the currently enforced thresholds were set in 2004. During the comment period before the rule was finalized, nearly all agreed that the thresholds needed to be updated for this reason. However, there was also ample criticism on the overall impact of the new rules, aside from the obvious that the threshold was too low. "This is a real win for corporate executives and a real loss for workers," said Heidi Shierholz, the former chief economist at the U.S. Department of Labor. "Millions fewer workers will get the overtime protections that the middle class depends on."

Notably, a proposed 2016 rule by the Obama Administration would have resulted in 8 million more workers gaining new or strengthened overtime protections. Moreover, the new rule has no automatic cost of living adjustment, which is significant considering that the last change was over 15 years ago. Finally, there is the usual push and pull over what constitutes a manager and who would therefore be exempt.

NLRB SAYS TO DEFER TO ARBITRATORS IN SOME "UNILATERAL CHANGE" CASES

On November 1, 2019 the National Labor Relations Board ("NLRB") issued an Operations-Management Memorandum to its regional offices to provide guidance related to the handling of charges of illegal unilateral changes of terms and conditions of employment by an employer ("Memorandum OM 20-03"). Pursuant to the policy enunciated in the memorandum, the NLRB may require workers to arbitrate claims when they believe that their employers made illegal changes to the terms of their employment even if their union looks to resolve the dispute through board-adjudicated litigation.

According to the new policy, when a union files an agency charge that accuses an employer of making an illegal unilateral change to an employee's terms of employment and files a grievance with a private arbitrator to resolve the dispute, the NLRB will defer to the arbitrator as to the merits of the case. Even if the union has not filed a grievance, the NLRB should send the case to arbitration when the collective bargaining agreement calls for it.

The guidance letter was prepared in response to a September NLRB decision, *MV Transportation, Inc.*, 368 NLRB no. 66 (2019), that makes it easier for employers to change job conditions without consulting their workers' unions. Under the National Labor Relations Act ("NLRA"), employers are barred from making unilateral changes to job conditions, though unions can agree to relinquish some policy areas to the employer. In *MV Transportation, Inc.*, the NLRB revised the agency's test for determining whether an employer violated a union member's rights by changing the terms of their employment. The NLRB dismissed a test that barred employers from making changes unless the union "clearly and unmistakably" waived its right to bargain. The new test looks at whether the plain language of the collective bargaining agreement lets the employer make the challenged change—the so-called "contract coverage" standard.

A union may file charges with the NLRB when it believes that an employer has violated the NLRA by making a unilateral change without the union's consent. However, because disputes over unilateral changes often turn on contract interpretation, arbitrators can resolve them if the applicable collective bargaining agreement contains a process for resolving contract disputes. The guidance memorandum seeks to clarify the jurisdictional overlap between the NLRB's and arbitrator's authority.

The guidance letter established a protocol for examining such situations which includes first, analyzing whether charges filed allege an "arguable violation" of the NLRA. If the Region determines that there is no arguable violation, then the charge should be dismissed. Conversely, if there is an arguable violation of the NLRA and one of the parties has asked for arbitration, the NLRB should defer to the arbitrator's decision. However, even when the union has not filed a grievance, then "regions should consider whether deferral would nevertheless be appropriate" under the NLRB's "Collyer" deferral doctrine which states that unions can be made to arbitrate disputes that are covered by an arbitration process that culminates in binding resolution, if the charged employer does not claim the charge is not timely. The guidance letter also states that if the employer and the union oppose arbitration, the NLRB should investigate the charge and transmit its finding to the NLRB's central office. And, if the union files for a grievance over the employer's objection, the NLRB should defer to the arbitrator's decision.

PBGC FY2019 ANNUAL REPORT: GOOD NEWS AND BAD NEWS

The Pension Benefit Guaranty Corporation ("PBGC") released its Fiscal Year 2019 Annual Report on November 18, 2019. The report detailed the financial condition of the PBGC and the two insurance programs that it operates—the Single-Employer Insurance Program and the Multiemployer Insurance Program—which collectively protect the retirement security of more than 35 million American workers, pensioners, and beneficiaries in both single- and multi-employer private-sector pension plans.

According to the FY2019 Annual Report, the financial condition of the PBGC's Single-Employer Insurance Program demonstrated continued improvement, despite the existence of significant potential risk. As of September 30, 2019, the program's assets of $128.1 billion exceeded its liabilities of $119.4 billion by $8.7 billion. This net positive position improves upon its FY2018 financial condition and reflects an improvement of $6.2 billion during the course of the fiscal year. During fiscal year 2019, the Single-Employer Insurance Program paid out more than $6 billion in benefits to more than 932,000 retirees, and it also assumed responsibility for 51 single-employer plans that terminated with insufficient assets to provide promised benefits to more than 103,000 current and future retirees.

While the continued improvement of the financial condition of the Single-Employer Insurance Program was good news, the report on the financial condition of the Multiemployer Insurance Program, however, was not so. The FY2019 Annual Report indicated that the as of September 30, 2019, the Multiemployer Insurance Program had a record deficit of $65.2 billion with liabilities of $68 billion but assets of only $2.9 billion. This deficit is a significant increase above the FY2018 deficit of $53.9 billion and largely attributable to changes in interest rates that inflated the amounts of PBGC's future payments to failed multiemployer plans. The continued decline of a number of multi employer plans also exacerbated the program's deterioration. During fiscal year 2019, the Multiemployer Insurance Program provided financial assistance in the amount of $160 million to 89 insolvent plans, an increase above fiscal year 2018's payments of $153 million to 81 plans.

Explicitly forecasting a funding emergency, PBGC Director Gordon Hartogensis in his foreword to the Annual Report predicted that the Multiemployer Insurance Program—which provides insurance for the pensions of 10.8 million Americans—would likely become insolvent during fiscal year 2025:

> “The Multiemployer Program faces a crisis that threatens the retirement security of millions of American workers, retirees, and their families. Without reforms, our Multiemployer Insurance Program - the backstop that is the last resort for retirees when a plan fails - is very likely to become insolvent in 2025, leaving participants and beneficiaries with significantly less than the level of benefits guaranteed by the PBGC. The alarm bells are ringing, and legislative changes are necessary.”

Given the current hyper-partisanship in Congress, it is unclear whether we can expect a legislative response to Director Hartogensis’s clarion call. While the House of Representatives passed a measure known as the Butch Lewis Act (H.R. 397) earlier this year to respond to this crisis, there has been no action in the Senate as of yet.

THANKSGIVING MESSAGE

As the Thanksgiving Holiday begins, we at Pitta LLP would like to extend our sincere thanks and gratitude to all of our clients and friends for their confidence and friendships throughout this year and always. May you all celebrate a healthy, peaceful, and happy Thanksgiving, and may you enjoy this Thanksgiving and the coming year with all good things in abundance.

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.

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