# Labor & Employment Issues

# In Focus

Pitta LLP
For Client
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*"All that serves labor serves the Nation. All that harms labor is treason to America. No line can be drawn between these two. If any man tells you he loves America, yet hates labor, he is a liar. If any man tells you he trusts America, yet fears labor, he is a fool. There is no America without labor, and to fleece the one is to rob the other."*

*Abraham Lincoln*

## FIFTH CIRCUIT JOINS THE SIXTH CIRCUIT IN APPLYING THE "SALARY BASIS" TEST TO DETERMINE WHETHER A WORKER IS OVERTIME EXEMPT

The United States Court of Appeals for the Fifth Circuit joined the Sixth Circuit Court of Appeals in applying the "salary basis" test when determining whether a worker is overtime exempt under federal wage and hours law. In *Escribano v. Travis County*, 5th Cir., No. 19-50236, 10/5/2020, the Fifth Circuit applied the salary basis test to determine that detectives from the Travis County Sheriff's office were salaried employees under the Federal Labor Standards Act ("FLSA") and thus overtime exempt. The Fifth Circuit followed the salary basis test that it first applied earlier this year in *Hewitt v. Helix Energy Solutions Group*, No. 19-20023, 4/27/2020.

Under the salary basis test to be overtime exempt, a worker must "know the amount of his compensation for each weekly (or less frequent) pay period during which he works, before he works." The Court used an example of a worker that is paid on a bi-weekly basis to illustrate the application of the salary basis test for a salary worker. For example, a worker that receives a salary on bi-weekly basis can easily determine what "he will receive every two weeks before he works – just divide his annual salary by twenty-six."

In *Hewitt*, a rig worker received a flat rate of pay for each day that he worked. The worker received his pay on a bi-weekly basis. The worker worked more than forty hours per week and brought a lawsuit contending that he was entitled to overtime payment. The employer argued that he was overtime exempt under the FLSA because he was a salaried worker. The Court applied the salary basis test and concluded that the worker was not on salary because he did not receive a "constant fraction of his annual compensation – akin to the 1/26th amount mentioned above." The Court reversed a lower court's decision that held that the employee was a salaried worker and remanded the proceedings to the lower court.

In *Escribano*, the Court applied the salary basis test it used in *Hewitt* and concluded that the detectives were salaried employees because they earned the same predetermined amount each pay period regardless of how many hours they worked. Each detective knew the amount of compensation for all pay periods.

## DEMOCRATS CONTINUE ATTACK ON DOL'S GIG WORKER PROPOSAL

Democratic members of Congress and Democratic State Attorney Generals are engaging in a coordinated attack against the United States Department of Labor's ("DOL") proposal for independent contractor status by requesting extensions to the abbreviated public comment period. This is likely a preview to a potential legal challenge to the DOL's proposal that seeks to classify "gig" workers in a way that promotes independent contractor status.

A coalition of 17 Democratic Senators and State Attorney General's from 21 states plus the District of Columbia submitted letters of opposition to the United States Labor Secretary Eugene Scalia criticizing the DOL for only providing 30 days to receive public input on its proposed rule that provides employers with a simpler legal framework to classify workers as independent contractors rather than employees. Executive agencies customarily provide the public with at least 60 days to comment on regulations. The letter from the Democratic Coalition argues that the abbreviated comment period "would fail the APA's notice-and-comment requirements for reasoned agency decision making."

As the economy has experienced the proliferation of "gig workers", the issue of classification has become controversial. Last year California passed A.B. 5 which expanded upon a landmark Supreme Court of California case, *Dynamex Operations West, Inc. v. Superior Court*. In that case, the Court held that most workers are employees and ought to be classified as such, and the burden of proof for classifying individuals as independent contractors belongs to the hiring entity.

Other states have sought to pass similar legislation which the business community and members of the Republican Party oppose. Labor unions and members of the Democratic Party favor legislation similar to A.B. 5 that expands the definition of employee status. They argue that this prevents companies from avoiding legal responsibility over workers' wages while simultaneously controlling the worker's economic conditions.

## TRUMP DOL FACES BACKLASH OVER PROPOSAL TO LIMIT PROXY VOTING POWER

The Trump administration's Department of Labor ("DOL") has proposed a new rule that prohibits fiduciaries and other asset managers from voting proxies or exercising other shareholder rights that would impact a retirement plan unless a matter has a proven economic impact on pension and 401(k) plans. Last month, during the comment period, investors, labor groups, state and federal agencies and Democratic members of Congress inundated the DOL with comments criticizing the proposal which effectively limits the activities of fiduciaries and asset managers.

The proposed rule received more than 7,000 comments. Critics argue that if the new rule is enacted, it would violate fiduciary duties and increase costs for pension funds and 401(k) plans. Democratic members of the Securities and Exchange Commission, Allison Herren Lee and Caroline Crenshaw argued that the DOL lacks evidence to propose the new rule. In their

comments, they said, "the Proposed Rule suggests that the costs of proxy voting exceed the benefits, but does not offer evidence to support that claim. In fact, the Department acknowledges the costs to vote proxies are extremely low and that it lacks evidence to prove otherwise."

Noted investment advisory firms, Vanguard and T. Rowe Price Group Inc., also criticized the proposed rule. Vanguard said that the proposal "effectively give ERISA plan participants and beneficiaries less ability to exercise corporate voting rights' than participants in other types of accounts." T. Rowe Price argued that "such a striking change would impose substantial new burdens on plan fiduciaries, and new costs on ERISA plans without any demonstrable benefit in outcomes."

## OFFICE OF LABOR-MANAGEMENT STANDARDS SOLICITS COMMENTS FOR NEW LM-2 FORM

As detailed in the last issue of In Focus, the Office of Labor-Management Standards ("OLMS") issued a notice of proposed rulemaking to promulgate a rule that updates and revises Form LM-2 Labor Organization Annual Report. Below is the official notice from the OLMS soliciting public comments before the new Form is promulgated. We suggest that anyone wishing to submit public comments should coordinate with counsel.

**Notice of Proposed Rulemaking: Labor Organization Annual Financial Reports: LM Form Revisions**

The Office of Labor-Management Standards (OLMS) published, on October 13, 2020, a Notice of Proposed Rulemaking (NPRM) to promulgate a rule that updates and revises 29 CFR Part 403 in order to improve the Form LM-2 Labor Organization Annual Report and introduce a Form LM-2 Long Form (LF). OLMS initiated this rulemaking pursuant to the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 401 et seq., in order to promote the statutory interest of labor organization financial integrity and transparency. See: **https://www.govinfo.gov/content/pkg/FR-2020-10-13/pdf/2020-21685.pdf**.

**To Submit Comments:** You may submit comments by December 14, 2020, identified by RIN 1245-AA10, only through the Federal eRulemaking Portal http://www.regulations.gov. To locate the proposed rule, use RIN 1245-AA10 or key words such as "Labor-Management Standards" or "Labor Organization Annual Financial Reports" to search documents accepting comments. Follow the instructions for submitting comments. Please be advised that comments received will be posted without change to http://www.regulations.gov, including any personal information provided. All comments must be received by 11:59 p.m. on the date indicated for consideration in this rulemaking.

**For Further Information Contact:** Andrew Davis, Chief of the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5609, Washington, DC 20210, OLMS-Public@dol.gov, (202) 693-0123 (this is not a toll-free number), (800) 877-8339 (TTY/TDD).

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