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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

CONGRATULATIONS TO JOE BIDEN AND KAMALA HARRIS – WHAT LABOR, EMPLOYEES AND EMPLOYERS MAY NOW EXPECT

Joe Biden and Kamala Harris have won a historic Presidential election. Joe Biden will become the 46th President of the United States. Kamala Harris will become the 49th Vice President and first woman, first African-American and first South-Asian to assume the office. The incoming administration has outlined an ambitious jobs and economic recovery plan for America entitled “Build Back Better.” Below is an outline.

1. **Assistance to Working Families, Small Businesses and Communities**
    a. Get the COVID-19 pandemic under control to effectively reopen the economy. The Biden-Harris Administration believes that an approach that protects the health and safety of Americans will boost economic activity.
    b. Provide state, local, and tribal governments with a bailout to prevent layoffs to educators, police, firefighters and other essential workers.
    c. Extend COVID-19 crisis unemployment insurance to help unemployed Americans make ends meet.
    d. Pass a “comeback package” for small businesses that includes stimulus funds.

2. **Social Contract with Working Americans**
    a. Increase wages and benefits while providing a fair and safe workplace for workers by supporting the Protecting the Right to Organize (“PRO”) Act which will make it easier for workers to organize unions and collectively bargain.
    b. Raise the minimum wage to at least $15 per hour, and end the tipped minimum wage and sub-minimum wage for people with disabilities. The plan also supports the Paycheck Fairness Act to help ensure that women are paid equally for equal work.
    c. The Biden-Harris plan supports universal paid sick days, 12 weeks of paid family and medical leave, and access to quality, affordable healthcare for all Americans.

3. **Modern Infrastructure and Clean Energy**
    a. Investment in a modern sustainable infrastructure with new roads and bridges, energy grids, schools and universal broadband internet connection.

4. **Caregiving and Education Workforce**

a. Establish a workforce that will make it easier to afford child care and to ensure aging relatives and people with disabilities have better access to home and community-based care.
b. This new workforce will free up millions of Americans to join the labor force and help grow a stronger economy in return.
c. Provide this new workforce with opportunities to join unions and earn a decent wage and benefits.

5. **Close the Racial Gap:** The Biden-Harris administration seeks to close the racial wealth gap by among other measures, expanding affordable housing and investment for entrepreneurs in Black, Latino and Native American communities and reducing the cost of education.

DC DISTRICT COURT UPHOLDS CITY LAW CUTTING POLICE CBA DISCIPLINARY PROTECTIONS

As some local governments enact laws aimed at disciplining police, the U.S. District Court for the District of Columbia has upheld against constitutional challenge a District of Columbia act that removes officer protections previously enshrined in their union collective bargaining agreement. *Fraternal Order of Police v. Dist. Of Columbia*, D.D.C. 20-2130(JEB) (Nov. 4, 2020).

In the wake of the killings of George Floyd and other Americans of color by police, the District of Columbia enacted the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 (the "Act") which reserved to the City all matters concerning discipline of sworn law enforcement officers and excluded the issue from collective bargaining agreements after September 30, 2020. The police union quickly challenged the Act as violating officer equal protection, bill of attainder, due process and contract clause rights under the U.S. Constitution, arguing that the Act "does nothing more than give legal effect to … biases and anti-police rhetoric", discriminating against police officers as "a class of people that are presently disfavored politically." U.S. District Court Judge James E. Boasberg rejected each of these challenges, granting the City's motion to dismiss the lawsuit in its entirety.

According to Judge Boasberg, the Act did not violate the Constitution's equal protection clause because it rationally related to the City's legitimate interest in holding officers, as opposed to other City employees, accountable in pursuing their special duties and powers. The Court declined to "second guess" the City's factual findings or policy decisions as "perfection is by no means required." Likewise, bill of attainder protections did not apply because the Act furthers non-punitive as well as arguably punitive purposes. The Act did not violate, the Constitution's ban on impairing contracts since DC enacted the laws after the union CBA had expired and before a new one could be reached, notwithstanding an evergreen provision, and the union could not show how the City's new rules would differ adversely from the CBA's procedures. Finally, and ominously, the Court denied that collective bargaining is a fundamental liberty entitled to substantive due process protections.

In today's world of turbulent, divisive politics, some groups argue police collective bargaining rights perpetuate racial injustice. The DC law and Court's decision lay out a legal blue print to undermine that blue wall.

US DOJ ASKS SECOND CIRCUIT TO RESTORE TRUMP ADMINISTRATION'S JOINT-EMPLOYER TEST

On November 6, 2020, the United States Department of Justice ("DOJ") filed a notice informing the United States Court of Appeals for the Second Circuit that DOJ seeks to overturn a trial court decision finding that the Trump administration pro-employer joint-employer test violates administrative law and the Fair Labor Standards Act ("FLSA"). *New York v. Scalia*, 2020 U.S. Dist. Lexis 163498, 1:20-cv-1689-GHW, (S.D.N.Y. September 8, 2020).

In March of 2020 the United States Department of Labor ("DOL") published its Final Rule which adopted two tests for determining joint employment. The DOL narrowed the joint-employer test at the behest of large franchise brands such as McDonalds and Amazon which have faced separate, private lawsuits arguing that the companies are jointly responsible, along with third-party contractors, for unpaid minimum wages and overtime.

The first test, a four-factor balancing test, is applied to determine joint employment when an employee's work for an employer simultaneously benefits both the direct and the putative joint employer. The four factors include whether the putative employer: (1) hires or fires the employee, (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree, (3) determines the employee's method of payment, and (4) maintains the employee's employment records. Under the DOL's Final Rule, the fourth factor alone is insufficient to establish joint employment. This is most commonly referred to as "vertical employment." Vertical employment situations occur where a worker enters an employment relationship with one company, such as a subcontractor or a staffing agency, but is economically dependent on another employer.

The second test applies when an employee works different hours for different employers within the same week. The two employers are separate unless they are "sufficiently associated." The DOL defined "sufficiently associated" to mean that (1) there is an agreement to share the employee's services, (2) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee, or (3) the employers share control of the employee, directly or indirectly. This is known as "horizontal employment."

The United States District Court for the Southern District of New York found that the first test which applies to vertical employment violates the Administrative Procedures Act ("APA") because it found the rule arbitrary and capricious. The court also found that the first test for vertical employment situations violated the FLSA because the Final Rule relies upon a definition of "employer" inconsistent with the FLSA. The court left in place the second test for horizontal employment situations.

The Second Circuit Court of Appeals will consider arguments on the legality of the Final Rule. The incoming Biden administration may take a different position on this issue. The United States Chamber of Commerce and other business groups have intervened as parties to this case to ensure that the appeal can continue if the new administration were to instruct the DOJ to abandon defense of the Final Rule.

VETERAN'S DAY 2020

As Americans peacefully exercised and celebrated their right to vote last week in record numbers, this week's Veterans' Day reminds us that our rights come at a price, paid out dearly in every generation by our veterans' service and sacrifice, by every color, origin, race, sex, religion and character defining a free, diverse people. This Wednesday, November 11, thank a veteran, and commit to support our troops both in the field and, by grace, on their safe return to grateful home and family.

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