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LABOR & BENEFITS UPDATE

In This Issue:

DOL Issues New Overtime Rule

On May 18, 2016, the U.S. Department of Labor issued a final rule governing overtime of salaried employees. The new regulation, which will be effective on December 1, 2016, raises the salary test for exempt executive, administrative, and professional employees from $23,660.00 to $47,476.00 annually or from $455.00 to $913.00 per week. The regulation also raises the highly compensated employee exemption from $100,000.00 to $134,004.00. The salary basis test has also been changed to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the new standard salary level to reach the income threshold as long as those payments are made on a quarterly basis. The regulation also establishes a mechanism for automatically

updating the salary and compensation levels every three years.

DOL Issues Final "Persuader Rule" Requiring Reporting of Indirect Persuader Activity

As labor leaders are aware, employers frequently hire outside consultants to assist in union-busting activity. The Labor Management Reporting and Disclosure Act ("LMRDA"), since its passage, has required labor organizations, consultants, and employers to file reports and disclose expenditures on labor-management activities. This provides employees with access to information about the source of the competing voices heard during an organizing campaign, and aids the employees in making an educated decision regarding their right to representation. However, a longstanding loophole in the regulations allowed employers to hire consultants to participate in backroom scheming during organizing campaigns without disclosing these relationships. The DOL has recently closed this loophole.

Although the LMRDA has always authorized the DOL to require disclosure of consultant activities taken with an object, directly or indirectly, to persuade employees regarding their right to representation, there was no rule requiring the reporting of "advice" given by a consultant to an employer regarding an organizing campaign. By 1962, the definition of "advice" had expanded to the point that nearly all indirect so-called "persuader" activity performed by a consultant was considered "advice."

The DOL has set out to make the process more transparent. The new rule requires reporting on "actions, conduct or communications that are undertaken with an object, explicitly or implicitly, directly or indirectly, to affect an employee's decisions regarding his or her representation or collective bargaining rights." Thus, a consultant may no longer engage in activities such as managing an employer's message in a union organizing campaign, providing persuader materials to employers to disseminate to workers, conducting union avoidance seminars, or developing personnel policies or actions to persuade workers without reporting the activity to the DOL. The rule is applicable to arrangements, agreements, and payments between employers and consultants made on or after July 1, 2016.

Certain employer-consultant relationships remain unaffected. For instance, if a consultant provides only recommendations regarding a decision or a course of conduct, this activity need not be disclosed.

Philadelphia's Anti-Wage Theft Bill to Take Effect July 1, 2016

Philadelphia's anti-wage theft bill will take effect on July 1, 2016. This new law provides numerous protections to employees in Philadelphia and will make it simpler and more effective for employees to reclaim unpaid wages. The City will designate a coordinator who will receive employee reports of employer wage theft, will have the authority to charge the employer with the commission of a wage theft practice, and will then use an established process to adjudicate and enforce the determination. The bill also provides possible financial penalties and gives

the City the authority to deny, suspend, or revoke licenses or permits for violating employers in certain circumstances. Retaliation against an employee who pursues remedies for unpaid wages is prohibited. Philadelphia employers must give notice to employees of this new law both in employee handbooks and by posting.

Non-Union Contractor Held to PLA Requiring Contributions on Behalf of Non-Union Employees

A non-union contractor entered into a project labor agreement ("PLA") in New Jersey which permitted the contractor to employ both union and non-union employees on the project. The PLA further required the contractor to make benefit payments to the appropriate union's employee benefit funds at the rates set out in the union's relevant collective bargaining agreement for *all* employees the contractor employed on the project performing work covered by the PLA, including non-union employees. The contractor did not make payments to the union's fund on behalf of its non-union employees, but did make statutorily-required benefit payments to these employees.

The union and fund objected. The matter proceeded to arbitration and the arbitrator found in favor of the union and funds. The non-union contractor challenged this Award in federal court. The Court found that the arbitrator did not manifestly disregard the law by awarding benefit payments to the union's employee benefit funds for the non-union employees. Thus, the non-union contractor was required to honor the language of the PLA and make a second benefit payment to the funds, in addition to the previously-made statutory benefit payments, on behalf of the non-union employees.

Second Circuit: Arbitrator Permitted To Reverse Own Short-Form Award Under PLA's Language

In *UBCJA v. Tappan Zee Constructors*, the Second Circuit recently held that an arbitrator acted within his authority under a PLA when he reversed his own short-form decision regarding a jurisdictional dispute. The PLA required that if a jurisdictional dispute was presented to an arbitrator that the arbitrator issue a short-form decision within 5 days of the hearing with a written decision to follow within 30 days of the close of the hearing. In this instance, the arbitrator initially entered a short-form decision in favor of a Dockbuilder's union but, upon further review of the evidence and the criteria set forth in the PLA for such disputes, subsequently entered a written decision in favor of the Carpenters unions and against the Dockbuilders's union. The umbrella labor organization which represented the interest of both unions moved to enforce the short-form decision and the relevant contractor asked that the full written decision be confirmed. The lower court found in favor of the contractor. Upon appeal, the Second Circuit found that it was within the arbitrator's authority to interpret the rules by which the parties agreed to arbitrate as permitting him to change or alter his first

decision in order to ensure a full consideration of the issue and criteria laid out in the PLA in the second decision. As such an interpretation was within the arbitrator's authority, the Second Circuit affirmed the lower court's decision that the latter award should be affirmed and the short-form award vacated.

Jersey City Acting as Market Participant When Requiring a PLA and Apprenticeship Standards on Tax-Abated Construction Projects

A Jersey City ordinance allows the City to grant a tax abatement for contractors engaged in private sector building projects with total costs in excess of $25 million, provided the contractor entered into a labor agreement with local building trades unions. The ordinance further includes provisions that require contractors on covered projects to enter into PLAs that contain work stoppage protections as well as require that each contractor and subcontractor have a federally registered apprenticeship program through which Jersey City resident-apprentices perform twenty percent of the labor, if feasible.

This ordinance was challenged on multiple grounds, including that the apprenticeship requirement was preempted by ERISA and the PLA requirement was preempted by the National Labor Relations Act. The District of New Jersey dismissed the case, rejecting these challenges, permitting the ordinance to survive. The Court found that the tax abatement "functions as a subsidy that finances or invests in each project" and that the City was acting as a proprietor when it granted such a tax abatement. Thus, the City is protecting its proprietary interests when it requires a PLA, and as such, is protected by the market participant exception to NLRA preemption. The Court applied the same market participant exemption analysis the ERISA preemption claims.

U.S. District of Delaware Upholds Responsible Contractor Policy's Apprenticeship Requirements

A New Castle County ordinance requires bidders on public work projects in excess of $100,000 to be participants in a "Class A Apprenticeship Program." It defines such programs as a program registered with the DOL or a state apprenticeship agency that has graduated apprentices for at least three years. The ordinance was challenged on the grounds that it was preempted by ERISA by parties seeking an injunction of its application on a specific project.

The U.S. District Court of Delaware denied the ERISA challenge and did not grant an injunction. The Court reasoned that the county's proprietary interests in the projects it funded were clear and the ordinance was narrowly tailored as the ordinance applied only to county-financed projects.

The Court went further by rejecting the argument that ERISA preemption may apply regardless of the market participant defense. The challengers noted that ERISA specifically includes apprentice training programs in its

definition of employee welfare benefit plans. They argued that due to this inclusion, any state-law mandate regarding the structure or administration of an apprentice training program would be preempted by ERISA. The Court rejected this argument reasoning that the inclusion of apprentice training programs in a definition did not evidence Congress's intention to exclusively control such programs or their standards. It also found that States have long regulated apprenticeship standards and training.

DC District Court Defers to NLRB Decision that Seasonal Musicians Are Employees, May Vote in Union Election

On April 19, 2016, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision in *Lancaster Symphony Orchestra v. NLRB*, which upheld the National Labor Relations Board's findings that musicians who perform seasonal concerts are employees under the National Labor Relations Act, and are not contractors. The Board concluded that because of the substantial control the Orchestra had over the musicians, and because of the musicians' limited "entrepreneurial opportunity," they qualified as "employees" and were permitted to vote in a union election. After the union prevailed in the election, the orchestra appealed to the Court of Appeals. That court found that some reasons favor employee status (the extent of control the orchestra exercises over musicians, the extent to which the musicians' work is part of the orchestra's regular business, and the method of compensation) while other factors favored a finding that they were independent contractors (the degree of skill required for the work, the length of time of the work, and because the orchestra had told employees they were independent contractors when they were hired). After concluding that the traditional factors of agency could point in either direction and presented "two fairly conflicting views," the court deferred to the Board's decision.

The current Board has displayed a willingness to expand the definition of employees who are covered by the National Labor Relations Act in a number of industries. By focusing on the degree of control over working conditions, we can argue that individuals the employer claims are independent contractors should be considered to be employees. This decision also illustrates that the Courts are likely to go along with the Board's efforts and defer to its expertise over an employees' status.

DOL Publishes an Employer's Guide to FMLA

The Department of Labor has recently produced a publication called *The Employer's Guide To The Family and Medical Leave Act*. The Guide explains leave qualification requirements, provides a flowchart illustrating a typical FMLA request, explains the certification process, contains an overview of military family leave, and provides explanation (and a timeline) for the various calculation periods. The Guide is available here: https://www.dol.gov/whd/fmla/employerguide.pdf.

The DOL has also released a new employee rights notice which is required to be posted by

employers. The new notice is available here: https://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf.

Benefits Coverage Update

As you know, health plans are required to distribute a summary of benefits coverage (an "SBC") each year. Plans are required to use a government mandated template for the SBC so that participants can make an "apples to apples" comparison of their various benefit options. (For insured plans, the insurance company produces and provides the SBC, while third party administrators generally prepare the SBC for self-funded plans.)

The Department of Labor, along with the Department of Health and Human Services and the Treasury Department, have proposed updating the SBC template. Plans will be required to use the updated template as of:

- The first day of the first open enrollment period after April 1, 2017 (for plans with open enrollment periods), or
- The first day of the first plan year beginning on or after April 1, 2017 (for plans without open enrollment periods).

Subrogation Rights Hindered

The U.S. Supreme Court recently decided a case that could severely hinder a self-insured health plan from enforcing a subrogation agreement.

In *Montanile v. National Elevator Health Benefit Plan*, a participant who received settlement proceeds from a car accident spent the proceeds on services and disposable assets, such as food and travel, before the plan could enforce its subrogation rights. With the settlement proceeds no longer in the participant's possession (or any assets to which the proceeds could be traced, such as a car), the plan sought reimbursement from his general assets. However, due to a technical provision of ERISA, the Court prevented the plan from doing so. Rather, the Court ruled that a self-insured health plan can only seek reimbursement and subrogation from the specific assets that were paid as part of the settlement (or related traceable assets).

Typically, settlements are held in a separate account until the subrogation matter is settled. However, during negotiations with the plan to recover for benefits paid on behalf of the participant's accident-related injuries, the participant's attorney advised the plan that it would be releasing the settlement money from its separate account to the participant within fourteen days unless the plan objected. The plan did not object to releasing the money until six months later. Because the plan had not made a timely objection, the attorney released the money, which the participant then spent on non-traceable items (e.g., food, services, and travel). Because the identifiable settlement proceeds were no longer available or traceable, the plan's only recourse was to enforce its subrogation rights against the participant's general assets.

Even though the facts of this case are particularly problematic (e.g., the plan failed to object to the attorney's warning about releasing the funds), the ruling could still spell trouble for plans with more favorable factual situations. As such, plans need to be ever vigilant in following up on subrogation claims and may need to initiate a lawsuit sooner than they otherwise might in order to prevent a participant from spending down settlement proceeds.

Because insured plans are subject to state law, the ruling applies only to self-insured plans. For instance, in Pennsylvania, subrogation is not permitted, as participants are not allowed to retain settlement proceeds to the extent of the benefits paid by his or her health plan.

Recent Cleary, Josem & Trigiani Victories in Federal Court

Ortega v. New Mexico Legal Aid

The plaintiff, an attorney, was fired from a legal services organization for misconduct. While the union grieved the discharge and pursued a grievance, she sued both the employer and union in state court in New Mexico, claiming that the employer's decision to discharge her violated the collective bargaining agreement and that the union had failed to represent her by telling her that her remedy was the grievance procedure and not a lawsuit. Through a creative reading of the collective bargaining agreement, the plaintiff insisted that the union was obligated to provide her with a lawyer to sue the employer on her behalf. We removed the case to federal court (the U.S. District Court for the District of New Mexico) and filed a Motion to Dismiss the lawsuit, arguing that the plaintiff was obligated to exhaust the contractual grievance procedure before bringing her lawsuit. The court agreed and dismissed the case. The plaintiff then appealed to the U.S. Court of Appeals for the Tenth Circuit in Denver. On March 29, 2016, the Court of Appeals upheld the dismissal, reaffirming the principal that when a collective bargaining agreement includes a grievance and arbitration procedure, an employee must first exhaust that procedure before bringing a lawsuit against an employer for violating that agreement, or against the union for not representing the employee in the grievance procedure.

Montgomery v. Laborers District Council

The plaintiff filed a lawsuit against his local union and the District Council, as well as several officers of each entity, claiming that both the local union and District Council denied his rights to free speech and assembly under the Labor Management Reporting and Disclosure Act. After taking discovery, we were able to establish that the plaintiff's claims had no merit and also that he had failed to exhaust the union's internal appeal process under the International's constitution. The court granted summary judgment in the union's favor on all claims, and dismissed the lawsuit with prejudice.

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SAVE THE DATE

The Philadelphia Building Trades Council 1st Annual Labor Law Seminar

Learn about the latest developments in labor and compensation issues impacting your members

When: September 29, 2016 @ 10:30 a.m.
Where: 14420 Townsend Rd., Philadelphia, PA