



Labor & Employment Issues In Focus

Pitta LLP
For Clients and Friends
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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

DELAY IN PRESIDENTIAL ELECTION RESULTS LEAVES LEGISLATION AND POLICY DECISIONS IN LIMBO

While the American people await finality in the Presidential election, the Congressional legislative agenda must also wait, including any action in the coming lame duck session of Congress. Among other matters expected to be addressed after the election are a badly needed pandemic relief package, funding to prevent a December 11 government shutdown, and the final push by the current 53-47 Senate majority to fill every last judicial vacancy.

The government shutdown issue appears the easiest to resolve, as Congress has previously passed so-called continuing resolutions for brief periods which maintain current funding levels. In this case, a continuing resolution would likely move the funding questions into the next Congress in January, at which point a budget bill with the Administration would be negotiated for the next year. This would allow Congress to kick additional stimulus, possibly including the long awaited infrastructure bill, down the road once again. Additionally, a bipartisan “surprise billing” law has been awaiting action. Both sides have also expressed interest in aid to the hardest hit industries including tourism and hospitality. Regardless of who wins the Presidency, House Speaker Pelosi has indicated that she wants to strike a deal during the lame duck session as time is of the essence.

Senate Majority Leader Mitch McConnell has said he would like to fill two Circuit Court of Appeals slots and about thirty at the District Court level after blocking President Obama’s attempts to fill judgeships during the last two years of his second term in an effort to hold those spots open for a potential Republican President.

NATIONAL LABOR RELATIONS BOARD WILL DETERMINE THE FATE OF “THE RAT”

For many years, it has been a ubiquitous site at picket lines and protests. The oversized, inflatable rat has, from coast to coast, galvanized union members and their supporters in making their point to the general public. Now, the National Labor Relations Board (“NLRB” or “Board”) may be trying to kill the rat.

The Board, after lengthy advocacy by General Counsel Peter Robb, voted 3-1, along party lines, to seek public comment on whether to restrict the use of Scabby the Rat. In a case called

International Union of Operating Engineers, Local Union No. 150, N.L.R.B., 25-CC-228342, the Board is seeking to determine the circumstances under which Scabby may be used, in spite of numerous court opinions finding that this use is protected under the First Amendment. At least two Circuit Courts of Appeal have found that the use of Scabby was protected free speech, as did the Obama Board.

In *Local 150*, the administrative law judge ruled that the union did not violate the National Labor Relations Act's prohibition on coercion by displaying Scabby alongside large banners on public property at a recreational vehicle show and directed at the safety practices of Lippert Components, an auto supply company. The ALJ was clear that the physical displays "in no way caused a confrontation" which would have intimidated customers. However, in a case from 2018, GC Robb called for a complaint to be issued against a construction union engaging in similar conduct because the union's use of the rat was, in essence, secondary picketing as the dispute was not against the construction company, but against a subcontractor working on site.

EMPLOYERS SUE TO PREVENT NEW JERSEY'S NEW SEVERANCE LAW FROM TAKING EFFECT

A New Jersey law, amendments to the Millville Dallas Airmotive Plant Job Loss Notification Act, requires employers with at least 50 employees to pay severance for workers in the event of a mass layoff. The law, scheduled to take effect at the end of the COVID state of emergency, has been challenged in Court on the theory that it is preempted by federal pension and benefit law. The law is the first such law in the nation and requires one week of severance per year of employment, regardless of how much notice of the layoff was provided.

The suit, filed in the United States District Court for the District of New Jersey, by the ERISA Industry Committee, a group which purports to represent employers with at least 10,000 employees which sponsor benefit plans governed by ERISA, was immediately challenged by the New Jersey State Attorney General based on arguments that the Plaintiffs lack standing to bring the suit and because they named an improper defendant. The named defendant, New Jersey Labor Commissioner Robert Asaro-Angelo, is not, according to the state, a proper defendant because he lacks enforcement power over the law. Moreover, the Plaintiff, the state claims, as a non-profit trade association, has not been affected by the new law and therefore lacks standing.

APPOINTEE RESIGNS OVER TRUMP'S CANCELLATION OF CIVIL SERVICE JOB PROTECTIONS

Ronald Sanders, a Trump appointee to the Federal Salary Council, has resigned in protest of the President's recent issuance of an Executive Order cancelling decades old civil service job protections.

Sanders maintains that the Order serves to force civil servants to place personal loyalty to the President over their duty to provide non-partisan service. The Order reclassifies career employees in “confidential, policy-determining, policymaking, and policy-advocating positions” as now coming under rules which apply to political appointees. Thus, the positions would no longer be subject to the meritocratic, competitive civil service testing and selecting process and, instead, be subject only to service at the pleasure of the Administration. Political appointments require no testing and no public notice of a job opening, nor are they permitted to be titles covered by union contracts or subject to appeals or due process in disciplinary actions.

Under the Executive Order, politically-motivated firings would be illegal, but employees could still be fired for performance-related issues with little to no due process. Government Agencies have a ninety (90) day period, which would end just before inauguration day, January 20, 2021, to submit a list of which job titles would transition from one category to the other. A President Biden would presumably reverse this Executive action, the Order could be challenged in Court, and Congress can pass a law to counter the Order. However, until one of these events occurs, this Order is in effect.

COMCAST AND OTHER CABLE CONTRACTOR AGREE TO PAY \$1.85 MILLION TO WORKERS FOR FAILING TO PAY MINIMUM WAGE AND OVERTIME

Nearly 550 cable installation technicians will be receiving \$1.1 million in unpaid minimum and overtime wages from J&L Cable TV Services (“J&L”) which has contracts with Comcast and other cable operators.

The workers brought a class action suit for violations of the Fair Labor Standards Act (“FLSA”) and multiple state wage laws. *See Jean-Pierre v. J & L Cable TV Servs.*, D. Mass., No. 1:18-cv-11499 (10/15/2020). The class action lawsuit was filed in 2018 by four technicians employed by J&L to perform cable installation for operators such as Comcast. J&L, which operates in the Northeast and Florida, allegedly failed to pay all minimum, overtime, and piece-rate wages and improperly deducted work-related expenses from their workers’ wages as loan repayments.

The class of plaintiffs includes approximately 545 class and collective members, accounting for some membership overlap. The proposed settlement allocates roughly \$1.1 million to the 218 members of the FLSA collective and 470 members of the Massachusetts, Maine, New Hampshire, and Pennsylvania classes. Workers will receive payments based on the number of weeks worked during the relevant period. The average payment to the workers will be about \$2,000.

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