



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

DEMOCRATIC MAJORITIES IN THE U.S. SENATE AND HOUSE OF REPRESENTATIVES INTRODUCE NATIONAL PAID FAMILY AND MEDICAL LEAVE

United States Senator Kirsten Gillibrand (D-NY) and Congresswoman Rosa DeLauro (CT-03) reintroduced the Family and Medical Insurance Leave Act (“FAMILY Act”) which creates a universal, national paid family and medical leave program.

The United States remains the only industrialized country in the world without a federal paid family and medical leave program. Currently, only eight states or federal territories have paid leave programs. These include California, Connecticut, D.C., Massachusetts, New Jersey, New York, Rhode Island and Washington. The states of Colorado and Oregon are in the process of implementing paid leave law soon.

Momentum to pass national paid leave is starting to gain steam. As part of the response to the COVID-19 pandemic, the federal government under President Donald Trump passed the Families First Coronavirus Response Act (“FFCRA”) which included two weeks of paid sick leave for workers under quarantine for COVID-19 or who had to care for an individual quarantined for COVID-19. The FFCRA also included an additional 10 weeks of paid expanded family leave options at two-thirds the employee’s regular rate of pay to care for a child whose school or childcare provider was closed or unavailable for reasons related to COVID-19. The FFCRA was America’s first experience with a national paid family and medical leave program, albeit a temporary one.

The FAMILY Act seeks to create a self-sustaining family insurance program for all American workers – regardless of the size of the employer. The FAMILY Act proposes to do the following:

- Provide up to 12 weeks of partial wages to working people who need to take time away from work to address a serious personal or family health issue, to care for a newborn or newly adopted child, or for circumstances arising from a family member’s illness or a military deployment;
- The fund will be self-funded through payroll contributions from employers and employees of just two-tenths of 1% each (two cents per \$10 in wages), or about \$4 a week total, split between employers and employees;

- The fund guarantees portable coverage so that workers who have multiple jobs, change jobs, or are self-employed are provided with the same security as traditional employees; and
- Provides 66% wage replacement, capped at \$4,000 a month.

To date, the FAMILY Act has 164 co-sponsors in the House of Representatives and 34 in the Senate. The legislation has been endorsed by more than 630 organizations including the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), American Federation of Teachers, Communication Workers of America, Interfaith Worker Justice, Jewish Women International, Labor Project for Working Families, Main Street Alliance, Mi Familia Vota, National Advancement of Colored People (NAACP), Service Employees International Union and Small Business Majority.

**FOR NEXT SEVEN WEEKS WORKERS IN ALABAMA WILL VOTE ON
WHETHER TO BECOME THE
FIRST AMAZON AMERICAN WORKERS TO UNIONIZE**

This week 6,000 Amazon workers at a warehouse in Bessemer, Alabama will vote for the next seven weeks on whether to become the online retail giant's first American workers to unionize.

The only other American Amazon workers to make it as far as a union election was a smaller group of maintenance workers at a Delaware warehouse in 2014. Amazon aggressively campaigned against that unionization effort and has established an extensive record of anti-union hostility. In 2019 at a New York City Council hearing, Amazon refused to support labor neutrality for Amazon workers on its planned Long Island City campus which the company has since abandoned because of opposition from local elected officials.

Alabama is an unlikely place for a historic vote to organize a large American company given the state's right to work laws. The COVID-19 pandemic has been an economic boon for Amazon. The company has posted record earnings and has opened new warehouses at a rapid pace; the company has been hiring hundreds of employees per day. However, Amazon's success and rapid expansion has also highlighted what many workers believe are unsafe and difficult working conditions. During the pandemic, Amazon workers across the country participated in protests and walkouts because of concerns over COVID-19 safety protocols.

Even before the COVID-19 pandemic, many workers have highlighted the difficult working conditions which include utilizing technologies that are used to track the minute-by-minute movements and performance of employees. Such tracking includes employee movements between loading and unloading docks, the amount of miles of shelving each worker should manage during their shift and the number of minutes each worker should use to go to the restroom. At a rally in support of the union election, RWDSU Mid-South Council President, Randy Hadley said "our children, our grandchildren are going to end up working one day at a place like Amazon, and we need to fix it and make it better."

Amazon tried to delay the union election at the National Labor Relations Board (“NLRB”) and appealed to have the elections conducted in person, rather than by mail. Amazon offered to rent out hotels to provide workers an opportunity to vote in-person in a safe manner. The NLRB denied Amazon’s appeal, reaffirming that mail voting is safer than voting in-person and that letting Amazon rent out hotels and monitor voting lines would create an impression of bias and surveillance. Ballots will be sent out on February 8th and need to be returned by March 29th.

TIMING IS EVERYTHING IN TWO SECOND CIRCUIT DECISIONS

Two decisions of the U.S. Court of Appeals for the Second Circuit underscore the critical importance of timing in evaluating discrimination and retaliation claims. These decisions, decided the same day on different causes of action and procedures, illustrate the importance of documenting facts, especially timing in real time.

In *Hawkins v. NY State Office of Mental Health*, 2d Cir. No. 19-3364 (Feb. 4, 2021), Hawkins alleged that she had been terminated only a month after filing several discrimination claims against her employer. Nevertheless, the Court of Appeals affirmed summary judgement against Hawkins because her supervisors had begun progressive discipline against Hawkins on legitimate non-discriminatory grounds prior to her complaints. Hawkins failed to show that her complaints were a “but for” cause for her discharge because, “before Hawkins filed her complaint, her supervisors deemed her performance to be substandard, which is a legitimate reason for termination.”

Similar reasoning was at work in *Ngo v. Oppenheimer & Co., Inc.* 2d Cir. No 20-1193 (Feb. 4, 2021). In that case the Second Circuit affirmed confirmation of an arbitration award which held that Oppenheimer had not interfered with or retaliated against Ngo’s leave rights under the Family and Medical Leave Act (“FMLA”). As explained by the Court: “Ngo was demoted before he took or expressed an intent to take FMLA leave, and thus Oppenheimer’s decision could not have been predicated on his FMLA status.”

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