PIETRANTONI MENDEZ & ALVAREZ LLC

Puerto Rico Labor & Employment Alert

Important Developments in Labor and Employment Law

Fair Labor Standards Act, Salary-basis: defined

On February 22, 2023, the United States Supreme Court held in Helix Energy Solutions Group v. Hewitt that **daily rate workers** will **not** meet the "salary basis" test required to be exempt from the Fair Labor Standards Act's protection **unless** the conditions set forth in either §602(a) or §604(b) of the Act's interpreting regulations are met. Section 602(a) of such regulations provides that an employee is paid "on a salary basis" if the employee receives his full salary for any week in which the employee performs *any* work, without regard to the number of days worked. In turn, Section 604(b) requires: (a) that employers guarantee exempt employees a weekly payment of no less than $455 regardless of the number of hours, days or shifts worked and (b) that such payment bear a reasonable relationship to the amount earned in a typical week.

If neither of the two conditions are met, the worker may be entitled to overtime pay regardless of the person's status as "highly compensated", as per the interpreting regulations. Hewitt, for example, earned over $200,000.00 in the preceding year as a result of the daily rate work – making him a highly compensated employee.

While daily rate workers typically will not meet the conditions of section 602(a), the Court's holding in Helix Energy Solutions underscores the need for a guarantee of payment of $455 weekly to meet the salary basis test for exemption, even in cases of highly compensated individuals.

¿Drafting a Waiver and Release Agreement for Union Members? Be careful!

In *McLaren Macomb*, Case 07-CA-263041, the NLRB held that -on its face- the broad non-disparagement provision included in a Waiver Agreement signed by laid-off unionized employees substantially interfered with employees' NLRA Section 7 rights because it prohibited statements to anyone, at any time, about anything, and was not limited to matters regarding past employment with the employer. The Waiver Agreement did not provide a definition of disparagement. The Confidentiality provision was also held to be illegal, as it prohibited employees from disclosing the terms of the Agreement to any third party that could, reasoned the Board, include the Union and, of course, the Board itself. The mere offer of the Agreement to the employees was, therefore, held to be illegal.

Going forward, employers should carefully craft Waiver and/or Release Agreements containing non-disparagement or confidentiality clauses to avoid running afoul of the NLRB's newly minted rule in *McLaren Macomb*.

Puerto Rico Act 41-2022 is declared Null and Void

On March 3, Judge Laura Taylor Swain issued an Opinion and Order declaring Act 41-2022, Puerto Rico's most recent labor reform, null and void *as of the date of its approval* due to the Commonwealth's failure to comply with _Sections 204(a)(2) and 204(a)(4)(B) of the Puerto Rico Oversight, Management and Economic Stability Act, which required it to submit formal estimates of impact and a certification of compliance with the Fiscal Plan issued by the FOMB. In addition to nullifying Act 41, the Court also permanently prohibited and enjoined the Governor –or any other persons who are in active concert or participation with the Governor– from helping private parties to implement or enforce Act 41.

This Order is not yet final, and the Government has already announced its intention to appeal it. Acknowledging a much, through an Advisory Opinion issued on March 10, 2023 the Puerto Rico Secretary of Labor encouraged employers to voluntarily maintain the more generous benefits provided by Act 41, warning that all changes made to employee handbooks and policies pursuant to Act 41 created contractual obligations, unless modified prospectively. We will continue to monitor this case and inform you as soon as new information becomes available.

If you have questions or need assistance, please reach out to one of our attorneys.

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