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Employer Update

Politics Not as Usual: New York's Protection of Political Activities

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In This Issue

With the presidential election campaign in full swing and dominating the headlines, employees inevitably will be discussing politics in the workplace, whether at the proverbial "water cooler" or in other, less predictable ways. Co-workers may frequently discuss politics in a perfectly amicable manner; however, circumstances may arise where employers may need to impose discipline for misconduct that an employee may claim constituted a form of protected political activity. While the federal employment statutes generally do not cover private sector political activities, employers in New York should remember that New York Labor Law (NYLL) § 201-d, often referred to as the "Legal Activities Law," prohibits employment discrimination based on political and other legal activities. However, the Legal Activities Law does not protect all political activities, and the statute includes several broad exceptions.

In this article we examine the protection of political activities and the related exceptions contained in New York's Legal Activities Law. We also discuss some of the relatively few cases addressing claims of political activities discrimination and provide recommendations for compliance with this law.

Scope and Limitations

New York's Legal Activities Law prohibits employment discrimination based on an individual's political activities, legal use of consumable products, legal recreational activities, or membership in a union. N.Y. Lab. Law § 201-d(2). But these protections are limited in a variety of ways, including the following three key limitations (among others) on the protection for political activities.

"Political Activities"

First, the statute carefully defines "political activities" as "(i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group." N.Y. Lab. Law § 201-d(1)(a). This narrow definition of "political activities" does not cover various activities that one might assume would be protected. For example, if an employer asks an employee to disclose the candidate(s) for whom he or she plans to vote in November and the employee refuses to answer, the employee's refusal to reveal his preferred candidate does not, on its face, constitute "running for public office," "campaigning for a candidate" or "participating in fund-raising activities" and

therefore, would not qualify as protected political activity under the NYLL.

Raghavendra v. Trustees of Columbia Univ., 2008 WL 2696226, at *10 (S.D.N.Y. July 7, 2008) further illustrates the narrow scope of the definition of "political activities" in the NYLL. In that case, the plaintiff claimed his rights under § 201-d were violated when his employment was terminated after he attempted to organize a political advocacy group. However, the plaintiff never actually formed the political advocacy group. Accordingly, the court held that his political activities were not protected because the group for which he was allegedly raising funds never actually existed. The *Raghavendra* decision not only shows how narrowly courts have construed the protections of NYLL § 201-d, but suggests additional unanswered questions under the NYLL. At what point does an individual become a "candidate for public office" – only after they have formally declared their candidacy? Or would campaigning for prospective candidates who *may* run for office, but have not yet officially entered the race, be protected? And what constitutes "campaigning"? As the courts have not yet answered these questions, employers must grapple with these questions as they arise in their workplaces.

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Off-Duty Limitation

Second, political activities are protected only if they are "outside of working hours, off of the employer's premises, and without use of the employer's equipment or other property," as well as "legal." N.Y. Lab. Law § 201-d(2). Thus, the NYLL would not protect employees who share their political views with their co-workers while on the job, but where such sharing is not connected to lawful, off-duty political activities.

The NYLL provides that it does not protect an individual's actions "that were deemed by an employer or previous employer to be illegal." N.Y. Lab. Law § 201-d(4). Such illegal activities may include, for example, assaulting protesters at a rally for a political candidate or trespassing in order to promote a political viewpoint. This suggests that, at least for purposes of the NYLL, employers have some degree of latitude to "deem" certain conduct as "illegal," regardless of whether the individual was actually charged with a crime. However, New York employers must be mindful of City and State laws concerning adverse employment actions based on arrests or criminal convictions.[1] Thus, interpreting these laws together, might an employee's potentially unlawful political activities actually receive greater protection if the employee is arrested for the conduct (in which case the employer would be restricted by the City and State laws governing adverse actions based on arrests) than if the employee were not arrested for the conduct (in which case the employer might still "deem" the conduct illegal and thus outside the scope of the legal activities law)? While this result may be counterintuitive, that appears to be the result of these interconnected laws.

Conflict of Interest

Third, § 201-d does not protect activity which "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest." N.Y. Lab. Law § 201-d(3)(a). Thus, for example, if an employer becomes aware that an employee has engaged in otherwise protected off-duty campaigning or fund-raising for a political candidate, but the employee is staffed on a project for a client who is adamantly opposed to that political candidate's views and would refuse to work with anyone who supports that candidate, could the employer discharge the employee because his or her political activities conflict with the employer's "business interest" in maintaining its relationship with the client? Under the letter of the law, the employer could make a colorable argument that the "business interest" exception applies, but given that the statute does not define "business interest" the employee may argue that the exception

was not intended to cover this situation. Such a dispute could present a novel question as to the scope of the "business interest" exception to New York's legal activities law.

Substantial Factor Analysis

Of course, even if an employee can show that he or she engaged in protected political activities and suffered an adverse employment action, the § 201-d inquiry does not end there. Rather, at that point, the burden shifts to the defendant to show that the plaintiff's political activities "did not play a substantial part in its decision."[2]

For example, in *Rusk v. New York State Thruway Auth.*, 37 F. Supp. 3d 578 (W.D.N.Y. 2014), the plaintiff alleged that he was engaged in fundraising activities for the Republican Party throughout his employment with the New York State Thruway Association (NYSTA), and that his employment was terminated after a change in leadership of the NYSTA Board from Republican to Democrat. However, despite finding that the plaintiff's political activities were so "extensive and public" that NYSTA could or should have known of them, the court nevertheless granted summary judgment to NYSTA on the plaintiff's § 201-d claim because "there [was] absolutely no evidence other than conjecture by the Plaintiff that his political activities or affiliation had anything to do with his termination." Significantly, the court noted that some of the individuals whom the plaintiff had charged with discriminating against him were also affiliated with the Republican Party. The plaintiff argued that those individuals had agreed to terminate his employment "in order to protect their own careers," but the court rejected that argument as "pure speculation."

On the other hand, courts have allowed § 201-d claims to proceed where the plaintiff submits evidence sufficient to show that his or her protected political activities were a substantial factor in the adverse employment action. In *Fishman v. Cty. of Nassau*, 2013 WL 1339466 (E.D.N.Y. Apr. 1, 2013), the plaintiff alleged that he was fired from his job as a records clerk in the Nassau County Legislature less than four months after an election in which Republicans took control of the Legislature. The court found that the plaintiff had stated a prima facie case under § 201-d by testifying about his active campaigning for a Democratic candidate, including going door to door to obtain signatures, volunteering at phone banks, and distributing campaign literature. While the Legislature argued that it had discharged the plaintiff for legitimate budgetary reasons, the plaintiff responded that the need for budget cuts arose only because the Legislature had hired three new employees—all Republican—into the Clerk's Office a month after the election, and that these individuals "were not hired to 'reorganize' the Clerk's Office but rather to replace the existing Democratic Committee employees with Republicans." On that basis, the court found that the plaintiff had "provided sufficient evidence from which a jury could infer that his political activities and affiliation were a substantial factor in his termination" and therefore denied the Legislature's motion for summary judgment.

Employers have some degree of latitude to "deem" certain political conduct as "illegal," regardless of whether the individual was actually charged with a crime.

Key Takeaways

Political campaigning or fundraising may not be the first thing that comes to mind when thinking of protected activities under the employment laws, and most employers neither include "political activities" as one of the protected activities listed in their anti-discrimination policies nor provide special training to human resources staff regarding how to deal with political discussions in the workplace. However, during this highly contentious political season, New York employers would be wise to keep Labor Law § 201-d in mind. Specifically, employers may wish to train their human resources professionals in New York to be aware that running for public office, campaigning

and fundraising are protected activities, and employers may not take adverse employment actions because employees engage in such activities. As discussed above, given the nuanced definitions contained in the statute and its several limitations, human resources professionals also should consider seeking legal advice before deciding on any disciplinary actions connected to off-duty, lawful political activities.

1. *See, e.g.*, N.Y. Correct. Law Article 23-A, §§ 750-55; N.Y. Exec. Law § 296 (15) – (16); N.Y.C. Admin. Code §8-107(11).
2. *Shabbir v. Pakistan Int'l Airlines*, 2008 WL 938427, at *3 (E.D.N.Y. Apr. 7, 2008) (citations and internal quotations omitted).

DOL Issues Final Rule on "White Collar" Overtime Exemption

By Millie Warner and Justin M. DiGennaro

On May 18th, 2016, the Department of Labor (DOL) issued its final rule amending the so-called white collar exemption from the Fair Labor Standards Act's (FLSA) overtime requirements (the "Final Rule").[1] The Final Rule, which becomes effective on December 1, 2016, increases the minimum salary that executive, administrative, professional, computer, and outside sales employees must receive to qualify as exempt under the FLSA, and will result in approximately 4.2 million formerly exemption-eligible employees becoming entitled to overtime pay, according to DOL estimates.

In this article, we analyze the DOL's new rule and offer suggestions for steps employers may consider taking as they prepare for the new rule to become effective.

Background

The FLSA requires employers to pay their employees a minimum wage and overtime for hours worked in excess of 40 hours per week (typically at a rate of one and a half times the employee's regular hourly rate).[2] The FLSA, however, exempts five categories of so-called white collar workers from these requirements: executive, administrative, professional, computer, and outside sales employees.[3] These employees must (i) be paid a salary[4] (ii) of at least $455 per week[5] and (iii) their "primary duties" must fall within one of the exemption categories (the "Duties Test").[6] Employees who are paid at least $100,000 per year,[7] perform office or non-manual work, and "customarily and regularly perform[] at least one of the" duties of an executive, administrative or professional employee, are exempt as "highly compensated" employees.[8]

The DOL regulations interpreting the FLSA's exemptions were last revised in 2004. On March 13th, 2014, President Obama signed a Presidential Memorandum calling on the DOL to "modernize" the "white collar" overtime exemption regulations to make them more "consistent with the intent of the [FLSA]."[9] According to the memorandum, the minimum salary level to qualify as exempt has failed to keep up with inflation, and, as a result, millions of American workers who should be eligible to receive overtime pay are instead classified as exempt under the FLSA.[10]

In response, on July 6th, 2015, the DOL proposed several major changes to the "white collar" overtime exemption to effectuate the President's agenda.[11] Following its receipt of over 270,000 comments, the DOL announced on May 18th, 2016, the publication of its final rule updating the regulations, to take effect on December 1, 2016.[12]

Key Changes to the "White Collar" Overtime Exemption

The final rule makes the following changes to the current "white collar" exemption from the FLSA's overtime pay requirements:

- The minimum salary threshold required to qualify as exempt will increase by over 100% from $455 per week ($23,660 per year)[13] to $913 per week ($47,476 per year).[14]

The Final Rule, which becomes effective on December 1, 2016, increases the minimum salary that executive, administrative, professional, computer, and outside sales employees must receive to qualify as exempt under the FLSA.

- The salary threshold to qualify as exempt under the "highly-compensated" exemption will increase from $100,000 per year[15] to $134,004 per year.[16]
- The standard minimum salary level and the "highly compensated" employee threshold will automatically update to keep pace with increases in the cost of living and prevent them from

becoming outdated. On January 1, 2020, and every three years thereafter,[17] the standard salary level will re-set to the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census Region,[18] and the "highly-compensated" employee exemption compensation level will re-set to the 90th percentile of weekly earnings for full-time salaried workers nationally.[19] The DOL will publish the updated rates in the Federal Register at least 150 days before they become effective.

- Nondiscretionary bonuses, incentive payments, and commissions may be used to satisfy up to 10 percent of the new standard minimum salary threshold, as long as such amounts are paid at least quarterly.[20]

While the DOL said in its proposed rule that it was considering amending the Duties Test, the final rule makes no changes to the Duties Test. As explained in the final rule, the DOL decided against changing the Duties Test because "changes to the duties test can be more difficult for employers and employees to both understand and implement" and "the standard salary level adopted in th[e] Final Rule coupled with the automatic updating in the future will adequately address the problems" with the Duties Test.

Advice for Employers

Employers would be well advised to begin their compliance preparations for these new regulatory requirements. As an initial step, employers should identify which employees are currently classified as exempt, but whose salaries are below the new minimum salary thresholds. When doing so, employers should factor in any nondiscretionary bonuses, incentive payments, and commissions paid to such employees, as such forms of compensation may be used to satisfy up to 10% of the minimum salary level under the new rules.

For currently exempt employees whose salaries are below the new minimum salary thresholds, employers will have to decide whether to increase their compensation or reclassify them as non-exempt and thus overtime eligible. To make this decision, employers may wish to track and analyze the number of hours worked by employees who will no longer qualify as exempt under the Final Rule. For employees who regularly work more than 40 hours per week, but whose salaries are just below the new standard minimum salary threshold, raising their salaries to the new minimum may be the more economical solution than having them track their hours and paying them overtime. Employers also may wish to consider restructuring shifts or hiring additional employees to minimize overtime payments. Indeed, the DOL expects the Final Rule to result in the creation of new jobs "due to the financial incentive for employers to spread overtime hours of employees newly entitled to overtime pay."[21]

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To the extent that employees are reclassified as non-exempt, employers may wish to review their procedures for monitoring overtime work and train reclassified employees on recordkeeping for overtime hours.

1. 81 Fed. Reg. 32391 (effective Dec. 1, 2016) (to be codified at 29 C.F.R. § 541).
2. 29 U.S.C. § 207(a).
3. 29 U.S.C. § 213(a)(1).
4. 29 C.F.R. § 541.602 (2016).
5. 29 C.F.R. § 541.600 (2016).
6. 29 C.F.R. §§ 541.100–541.106 (2016); 29 C.F.R. §§ 541.200–541.204 (2016); 29 C.F.R. §§ 541.300–541.304 (2016).

7. Nondiscretionary bonuses, incentive payments, and commissions can only be used to meet the salary threshold amount for the "highly-compensated" employee exemption, but may not be counted towards meeting the standard minimum salary threshold. 29 C.F.R. § 541.601 (2016); 29 C.F.R. § 541.602 (2016).
8. 29 C.F.R. § 541.601 (2016).
9. 79 Fed. Reg. 18737 (Apr. 3, 2014).
10. *Id.*
11. 80 Fed. Reg. 38516 (July 6, 2015).
12. 81 Fed. Reg. 32391 (effective Dec. 1, 2016) (to be codified at 29 C.F.R. § 541).
13. 29 C.F.R. § 541.600 (2016).
14. 81 Fed. Reg. 32391, 32404–32405 (effective Dec. 1, 2016) (to be codified at 29 C.F.R. § 541).
15. 29 C.F.R. § 541.601 (2016).
16. 81 Fed. Reg. 32391, 32427–32430 (effective Dec. 1, 2016) (to be codified at 29 C.F.R. § 541).
17. *Id.* at 32340.
18. *Id.* at 32430.
19. *Id*. at 32430.
20. 81 Fed. Reg. 32391, 32423–32427 (effective Dec. 1, 2016) (to be codified at 29 C.F.R. § 541).
21. https://www.dol.gov/whd/overtime/final2016/faq.htm#S3

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