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News for the week of December 28, 2009

Happy New Year !!!

Slowdown in Private Sector Wage Growth to Continue, WTI Finds



The rate of annual wage increases in the private sector likely will slow further in the coming months, according to the revised fourth-quarter Wage Trend Indicator released Dec. 15 by BNA.

The index declined for the seventh consecutive quarter to 97.53 (second-quarter 1976 = 100) from 98.00 in the third quarter, BNA said.

Noting "some signs that the job market may be hitting bottom," Kathryn Kobe, an economic consultant who maintains and helped develop BNA's WTI database, said that "[u]ntil the labor market strengthens, annual increases will remain very weak."

The overall rate of wage growth in the private sector is expected to drop below the 1.4 percent posted in the third quarter, according to the Department of Labor's most recent employment cost index data (60 BTM 357, 11/10/09). That was the smallest year-over-year gain on record and less than half the 2.9 percent increase for the same period in 2008.

Over its history, BNA's Wage Trend Indicator has forecast a turning point in wage trends six to nine months before the trends are apparent in the ECI. A sustained decline in the index is predictive of a deceleration in the rate of hourly wage increases, while a sustained increase is predictive of greater pressure to raise wages in the private sector.

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Employers Grapple With Preventing Violence As More State Laws Relax Gun Restrictions

Senate OKs UI, COBRA Extensions

Justices Seek Solicitor General's Views On Review of Title VII Retaliation Case

Final Passage of Reform Bill Expected Dec. 24

IRS Extends Deadline For PPA Plan Amendments

Second Circuit Upholds Ruling UTC Didn't Breach Its Duties

Ex-Manager May Pursue Sex Bias and Retaliation Claims

Court Rejects Religious Bias Claims

Employee's ADA Claim Dismissed

Visas to Verifying: House Bill Would Overhaul Immigration

Although very few jobs were lost in November, indicating the free fall has ended, most workers have little bargaining power because of double-digit unemployment and other factors, Kobe said.

Only 11,000 payroll jobs were eliminated last month, the fewest since the recession began, but the unemployment rate stood at 10 percent, DOL reported earlier this month (60 BTM 387, 12/8/09).

"We've got a large pool of underutilized labor, not just the unemployed but also people who are working fewer hours," Kobe said. The slack in the labor market will have to be taken up before conditions for wage gains improve, she said.

Reflecting current conditions, five of the WTI's seven components made negative contributions to the revised fourth-quarter reading, while one component was positive and the other was neutral.

Supreme Court to Consider Privacy Rights Of Police Sergeant in Pager Text Messages



The U.S. Supreme Court Dec. 14 agreed to consider whether a police sergeant had a reasonable expectation of privacy in text messages transmitted on a department-issued pager and stored by an outside service provider

(Ontario, Cal. v. Quon, U.S., No. 08-1332, cert. granted 12/14/09).

The city of Ontario, Calif., has asked the justices to overturn the U.S. Court of Appeals for the Ninth Circuit's June 2008 decision that the police department's search of text messages sent and received by Jeff Quon violated his Fourth Amendment rights (529 F.3d 892, 27 IER Cases 1377 (9th Cir. 2008)).

The appeals court found that Quon and three people he traded sexually explicit text messages with had a reasonable expectation of privacy based on an informal policy that the department would not review messages if officers reimbursed the department for messages exceeding their limit.

The appeals court also found that the search was unreasonable in scope. In addition, the court ruled that Arch Wireless Operating Co., which provided the text-messaging service to the city, violated the federal Stored Communications Act by giving the city transcripts of the messages—without consent of either sender or recipient.

The full court, over the dissent of seven judges, later denied en banc review.

Arch, later USA Mobility Wireless Inc., sought high court review but was denied (USA Mobility Wireless Inc. v. Quon, U.S., No. 08-1472, cert. denied 12/14/09).

The city did not have an official policy regarding text messaging but it did have a policy—acknowledged in writing by Quon—limiting use of city-owned computers and equipment to city business and warning that the e-mail system was not confidential and could be monitored, and website activity would be monitored.

Labor Inspector Who Wasn't



A Northern California man is scheduled for a Dec. 23 court appearance on charges he masqueraded as a state government labor inspector to extort "fines" of \$173 to \$13,000 from mostly minority-owned small businesses, Alameda County prosecutors allege (California v. Bolanos, Cal. Super. Ct., No. 555440, hearing postponed 12/2/09). Michael Bolanos of Hayward, Calif., is accused of impersonating state or local officers and attempted grand theft in an alleged scheme of shaking down store owners in Oakland, Calif., supposedly for not posting labor notifications, the complaint alleged. Victims said a man dressed in slacks and a jacket flashed a badge or photo identification, and told victims they needed to purchase posters from him, according to victim and police statements.



Court Issues First Ruling on Cutbacks of Plan Transfer Rights



The Employee Retirement Income Security Act's anti-cutback rule prohibits sponsors from amending their plans to eliminate or reduce an early retirement benefit. In this case, the court had to decide if the employer violated ERISA by prohibiting transfers between pension plans.

"You won't let me transfer my retirement funds from one plan to another?" complained retiree Brian Jenkins.

"We think the law allows us to decide whether you can transfer funds between your plans," countered HR Director Diane Rogers.

Are the restrictions allowed?

Facts: The worker was employed by a domestic air express delivery service acquired by a larger, foreign-owned airborne delivery service. He had participated in the first employer's defined benefit and defined contribution plans, which contained provisions under which he could transfer the balance of the defined contribution account into the defined benefit account, a practice often referred to as a "floor offset arrangement." The transfer allowed the employee to collect a larger combined total from his retirement plans than if he elected to receive his defined contribution and defined benefit plans separately.

When the merger took place, the employer merged the acquired company's plans into its own defined contribution and defined benefit plans, and eliminated the right of participants to transfer their defined contribution plan balance to the defined benefit plan. A year later, the employee retired, but he had not yet reached normal retirement age under the plans.

When the retired employee qualified and attempted four years later to receive his benefits under the two plans, he was told he could not transfer his defined contribution plan account to his defined benefit account.

The retiree sued, contending the employer violated ERISA's anti-cutback rule by taking away participants' right to transfer their defined contribution plan accounts to their defined benefit plan accounts.

The employer filed a motion to dismiss the retiree's anti-cutback claim, arguing that the right to transfer benefits between the two plans was not an "optional form of benefit" protected by the anti-cutback rule.

Award: In an issue of first impression for the federal courts, the U.S. District Court for the District of Massachusetts Nov. 20 ruled that the employer did not violate ERISA when it took away plan participants' ability to transfer funds from their defined contribution pension plan to their defined benefit plan (Tasker v. DHL Retirement Savings Plan, D. Mass., No. 09cv10198-NG, 11/20/09).

Discussion: The court declined to decide whether the right to transfer benefits between the two plans would qualify as an "optional form of benefit" under the anti-cutback rule. Instead, it addressed the employer's argument that tax code Section 411(d)(6), as interpreted by Treasury, specifically allows for plans to be amended to take away transfer rights.

After looking at the Treasury regulation, the court agreed with the employer that the regulation explicitly allows for plans to be amended to eliminate the right to transfer funds between plan accounts. The court rejected the retiree's contention that the regulation should be interpreted as allowing the elimination of the right to transfer funds only so long as the amendment does not reduce the monthly annuity benefit to which he was entitled. The court said the regulation made it clear that Treasury allows for the elimination of the ability to transfer funds between plans, even if the amendment taking away the right to such transfer reduces or eliminates a participant's benefits.

"For this reason, even if the right [to transfer] constitutes an optional form of benefit, it may be eliminated without running afoul of the anti-cutback rule," the court said.



Pointers: The plaintiff's attorney said that his client plans to appeal to the U.S. Court of Appeals for the First Circuit. "The judge's decision reads the applicable Treasury Department regulations in a manner that we believe is inconsistent with both the intent and language of [tax code] Section 411(d)(6) and the applicable regulations and if allowed to stand will result in a very substantial reduction in [the retiree's] pension benefits that was never envisioned by the Treasury Department in carving out exceptions to the anti-cutback provisions," he said.

The employer's attorney said that the court's decision is a "sign of encouragement" for plan sponsors that rely on Treasury regulations when adopting and amending their pension plans. He said if plan sponsors are unable to rely on these regulations and face an increased volume in lawsuits that try to impose unintended pension costs on sponsors, the easy answer for plan sponsors will be to stop offering pension plans altogether.

This case discussion illustrates the handling of a problem in employee relations. It is based on an actual court ruling, although the names and dialogue are fictitious.

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