

Revisit Union Leave Policies After 7th Circ. Decision

Law360, New York (March 03, 2014, 5:51 PM ET) -- The Seventh Circuit's recent decision in *Titan Tire Corp of Freeport Inc. v. United Steel Workers*, 734 F.3d 708 (7th Cir. 2013) has a number of employers and unions revisiting long-standing practices and contract language covering pay for employees on a union leave of absence. In its Nov. 1, 2013, decision, the Seventh Circuit held that an employer may not lawfully pay the salaries of former employees who are on leaves of absence from the company and working full-time for the union. In its decision, the Seventh Circuit departed from Third Circuit precedent that many viewed as establishing the law in this area for more than 15 years.

The Titan Tire decision means that — at least within the Seventh Circuit — some existing and long-standing employer policies, and sometimes contractual obligations, now are unlawful under Section 302 of the Labor Management Relations Act ("LMRA"). Section 302 broadly prohibits an employer from paying any money or other thing of value to any representative of its employees, subject to certain statutory exceptions. Violations of Section 302 carry both monetary and criminal penalties.

The Titan Tire Decision

The Titan Tire case arose after the company unilaterally discontinued its practice of paying the salaries of two union officials, believing that the payments violated Section 302. The union challenged the company's action and ultimately obtained an arbitration award that required the employer to maintain the practice. Titan Tire filed suit to vacate the award, and the district court upheld the arbitrator's decision. An appeal to the Seventh Circuit followed.

The Seventh Circuit's decision focused on the scope of the Section 302(c) exception for employer payments to union representatives if the payments are "by reason of" the individual's service as an employee of the employer. The court explained that the payments must be "because of" the union officials' prior service to the employer. In other words, the right to receive the payments themselves must "vest" while the individual actually is working for the employer.

The payments Titan Tire had been making, in contrast, were "because of" the union officials' service to the union. Although the union officials had become eligible for the right to the continued wage payments because of their service to the employer, the right to the payments themselves only arose once they began working for the union.

The Seventh Circuit explicitly rejected a contrary rationale articulated by the Third Circuit in *Caterpillar Inc. v. UAW*, 107 F.3d 1052 (3d Cir. 1997). In finding similar payments lawful, the Third Circuit relied heavily on the fact that the payments were provided for in a valid collective bargaining agreement. The Caterpillar majority, over two dissenting opinions, also found no valid distinction between union officials who worked full-time performing union business and union officials who split their time working for the employer and the union and who continued to be paid pursuant to a “no-docking” arrangement. The Seventh Circuit was not persuaded.

Implications for Employers

The Titan Tire decision has obvious, immediate implications for employers within the Seventh Circuit. Those employers need to closely examine existing union leave policies and practices and analyze them under the Titan Tire decision. The analysis is highly fact-specific, so employers should not assume that all paid union leave arrangements are unlawful under the decision. Part-time paid union leave arrangements, often referred to as “no-docking” arrangements, are not impacted by the Titan Tire decision. The Seventh Circuit expressly distinguished those arrangements and carved them out of its holding. Full-time union leave arrangements are squarely within the Seventh Circuit’s holding and may be unlawful depending on how the arrangement is structured.

For employers operating in most other circuits, the need to examine existing policies is a closer question. Outside the Seventh Circuit, the limited precedent is mixed. The Third Circuit, in its *Caterpillar* decision found a full-time paid union leave arrangement similar to the one at issue in Titan Tire lawful. Other circuits, including the Second, Fifth, and Ninth Circuits, have expressed doubts about the *Caterpillar* decision, but did not go as far as the Seventh Circuit in expressly disagreeing with the holding. For that reason, some employers in those circuits are taking the opportunity to reexamine their practices as well.

Addressing Potentially Unlawful Practices

Any changes to existing full-time paid union leave practices will have attending bargaining obligations under the National Labor Relations Act. At a minimum, an employer will be obligated to bargain over the effects of discontinuing an unlawful practice. This could include bargaining over modifications to existing practices and/or replacement policies during the term of the collective bargaining agreement.

Absent union agreement, employers will have to make difficult decisions about whether to: (1) make changes unilaterally and rely on the illegality of the current arrangement under Titan Tire as a defense; or (2) file a declaratory judgment action in federal court, asking the court to declare the prior contract language and/or practices unlawful under Section 302. The viability of either approach will depend on where the employer is located, as well as the existing leave practice.

Regardless, attempting to address long-standing union leave practices could strain labor relations. Paid union leave arrangements often are closely guarded and an important aspect of how a union operates.

Potential Future Developments

Titan Tire was decided on Nov. 1, 2013, which gave the United Steelworkers until late January to appeal to the Supreme Court. Given the circuit split, the (rejected) request by three Seventh Circuit judges to hear Titan Tire en banc, the fact that U.S. Supreme Court Justice Samuel Alito participated in the Caterpillar case while serving on the Third Circuit, the Supreme Court's previous acceptance of the Caterpillar decision (it settled prior to a ruling) and the high court's recent — albeit fleeting — interest in Section 302 cases (the Supreme Court recently accepted certiorari in another Section 302 case before ultimately dismissing the appeal), the Supreme Court might have agreed to resolve the split between the circuits. Ultimately, however, the United Steelworkers declined to petition for certiorari in the case, which leaves companies and practitioners to contend with the uncertainty of a circuit split.

Titan Tire remains good law in the Seventh Circuit and persuasive authority elsewhere. Given the potential criminal penalties associated with Section 302, employers should quickly review their policies and evaluate whether changes are necessary.

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