Labor & Employment Issues
In Focus
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For Clients and Friends
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NEW YORK CITY HUMAN RIGHTS COMMISSION ROLLS OUT ONLINE ANTI-SEXUAL HARASSMENT TRAINING

On schedule on April 1, 2019, the New York City Commission on Human Rights ("NYCCHR" or "the Commission") posted its online anti-sexual harassment training video for use in complying with the 2018 amendments to the City's Human Rights Law. Effective April 1, 2019, under City Law, anti-sexual harassment training must be provided annually to every employee by an employer with 15 or more employees, starting with this calendar year.

The Commission states that employers may fulfill the annual training requirement with any program that substantially complies with the City Law. Employers have amassed some experience in this area since New York State released its own harassment prevention video and training in November 2018. Both City and State trainings contain the same core requirements, with the State encouraging employers to meet the minimum core curriculum but also supplement the presentation to take account of the particular industry or employer audience. The City's training, drawing on the City Law, underscores protections for all gender categories, immigrants and independent contractors, and stresses the importance of bystander intervention. Reports to date indicate that in person training is more effective than remote virtual presentations. While in person or online training is not a complete defense to charges of sexual harassment, the fact of highly effective training should weigh positively against liability and/or for reduced damages. Conversely, the absence of training would likely increase the risk of liability and heavier damages, as well as constitute its own independent violation of law.

The interplay of City and State (no minimum employee requirement) training creates a mandatory window for compliance for all New York State employers from now through October 9, 2019. For more information or if you have questions about meeting the City and State training deadlines, please contact our partners Jane Lauer Barker (212) 652-3828/jbarker@pittalaw.com or Barry N. Saltzman (212) 652-3827/bsaltzman@pittalaw.com.

NLRB ISSUES ADDITIONAL ADVICE REGARDING DUTY OF FAIR REPRESENTATION

For the second time since joining the NLRB, General Counsel Robb has issued a guidance memorandum to the agency's regional directors regarding the standard for a determination that a union has breached the duty of fair representation. In Memorandum GC 19-01, as previously reported in *In Focus*, General Counsel Robb identified circumstances in which ordinarily a defense of "mere negligence" would not shield a union from liability for a violation of Section 8(b)(1)(A) of the National Labor Relations Act in duty of fair representation cases. In Memorandum GC 19-05 (March 26, 2019), he explained the circumstances under which "mere negligence" and deference to union decision making may still be viable defenses.

Specifically, Memorandum GC 19-01 identified two types of cases where the "mere negligence" defense would generally not be sufficient: (1) cases "where a union has lost track or forgotten about a grievance;" and (2) cases where a union has failed to "communicate the status of a grievance or respond to inquiries by the charging party." For the "mere negligence" defense to shield the union from liability when a grievance has been forgotten, the union would need to show that there was "a reasonable tracking system" or "reasonable procedures for handling grievances" in place. For the "mere negligence" defense to shield the union from liability when there is an allegation of a failure of communication with the grievant, the union must have "a reasonable explanation." Unless these circumstances are met, the General Counsel's memorandum advises, the union will have engaged in arbitrary conduct in violation of Section 8(b)(1)(A).

Memorandum GC 19-05 states that it is issued in response to questions raised after the issuance of Memorandum GC 19-01. The guidance initially clarifies that when a union asserts the "mere negligence" defense, under the circumstances in which Memorandum GC 19-01 indicates such a defense is viable, there is "no requirement that a union have a specific tracking system or procedures for handling grievances." Rather, "[h]aving *some kind* of tracking system and procedures is a possible defense." (emphasis added) Additionally, the memorandum indicates that the prior guidance "did *not* alter the analysis concerning a union's decision whether or not to pursue a grievance violated the duty of fair representation."

With respect to this latter issue, Memorandum GC 19-05 advises that Memorandum GC 19-01 is consistent with prior treatment of a union's decision of whether to pursue a grievance or not. The union is granted a "wide range of reasonableness" in making that initial decision. Furthermore, a union need not "present a detailed defense of its decision to not pursue a grievance, or its decision to abandon a grievance," if the action is reasonable. Regions are advised that they "need not look behind a union's assertion of a reasonable decision not to pursue a grievances unless there is evidence that those decisions were made in bad faith or involved gross negligence, or where there could be no reasonable basis for the union's decision."

While this latest guidance from the General Counsel on its face seems to limit the scope of his prior memorandum, it remains to be seen how the Regions, and ultimately the Board, will determine when "*some kind*" of grievance tracking protocol is sufficient to support a "mere negligence" defense.

CITY PENSION ACTUARY MISCALCULATES BY MILLIONS, CORRECTIONS SCHEDULED THROUGH 2022

Every year, State Comptroller Tom DiNapoli oversees, along with the Financial Control Board, a fairly routine budget analysis. As part of the review, pension fund estimates for State and City pension funds are checked. This year's review discovered that the City's actuary failed to account for state employees who transferred to city jobs, along with their pension liabilities. As a result, pension liability estimates were off by over $800 million.

The mistake, which will be reimbursed over four years, will cost the City $624 million for the nearly 3,000 employees at issue, with the balance being paid by the State. The city's obligation will be $156 million each year, Mayor Bill de Blasio's spokesperson Freddi Goldstein said.

Compounding the problem, the Mayor's budget did not account for this new liability in its $92.2 billion spending plan because the City was unaware of the problem in February. City Actuary Sherry Chan said that the change "resulted from updating the classification of certain population data." Moreover, she added that "payment of this liability will be complete, through four annual amortized payments of $223 million, by Fiscal Year 2022."

Conversely, City Comptroller Scott Stringer's spokesperson said the error, resulting in "a small increase" to the New York City Employees' Retirement System's ("NYCERS") pension liability, was actually accounted for in his annual financial report last October. It is not clear why the Comptroller was aware of the issue, while the Mayor was not.

Fulfilling the City Council's oversight role, Council Speaker Corey Johnson said he will raise the issue with the city's Office of Management and Budget at a public hearing in May. "It is a significant error," Johnson said. "As we now understand it, the city has missed making contributions to NYCERS for around 3,000 workers — a large number but less than 1 percent of NYCERS' membership." He continued, "there is a lot the city could do with this money…but the real concern is that by delaying the city's contribution, the error cost the city the return it could have earned had the money been contributed in a timely way."

This error and its correction underscore the strength of the State and City Funds, the quality of their administration, and the importance of government systems in place to review other departments' work, checks and balances, and redundancies in the system. On the other hand, despite many departments and government staff presumably having the chance to review the relevant information, but for the routine review from Comptroller DiNapoli's office, the error seemingly would not have been caught. While the error itself is a relative pittance in the light of the size of the funds, the error could have had a negative effect on individuals' pensions.

WHY PLAN DRUG COSTS CAN RISE AS REBATES DO TOO

The interaction between pharmacy benefit managers (PBMs), pharmaceutical manufacturers, and drug plan sponsors has come into the national spotlight in the last few months, discussed by politicians on both sides of the aisle. The federal government's recent decision to not defend the Affordable Care Act indicates that healthcare reform will remain a topic of discussions, and political campaigning, for the foreseeable future. One reason for ever-increasing costs may lie in the selection of a PBM with a focus on achieving the greatest drug rebate rather than overall plan efficiency. These PBMs fill their formularies, or their lists of covered drugs, with high-cost specialty drugs in response to higher promised rebates from drug companies. The selection of PBMs that focus on providing low-cost yet effective drugs and open formularies may offer a solution to rising plan costs.

The role of the PBM is to determine the drugs that each plan will include as treatment options and to select pharmacies that will be included in the plan. Generally, drug plan sponsors select a PBM through a request-for-proposal process that focuses on acquisition discounts and rebates. The result is a focus by the PBMs on drugs that have higher rebates, regardless of the overall cost. It has been suggested that a reason for this focus on rebates is that PBMs receive a portion of the rebate. The portion of the rebate that is returned to the PBM versus the drug plan sponsor is unclear, mostly due to the overall lack of transparency in the PBM market. During a 2016 hearing in the House of Representatives, the CEO of Mylan, Inc., a specialty pharmaceuticals company that manufactures the popular EpiPen, was unable to provide the amount in rebates PBMs or insurance companies received for contracts to purchase EpiPens, which have seen a sharp increase in unit cost over the last decade. PBMs are able to maximize rebates by relaxing their step therapy and prior authorization, delivering a greater volume of purchases to drug companies.

Changes in modern medicine have led to greater profits for drug companies and PBMs, especially in the realm of specialty medications, which are made to treat a narrow range of diseases and are exceedingly more costly than traditional generic or even name-brand drugs. Previously rare and focused on unique diseases, specialty drugs are now being developed for more conditions and are bringing in more profit to drug companies. To balance the increased costs for specialty drugs, drug manufacturers offer increased rebates. These new drugs are placed in the highest tier of the PBM's drug plan and carry the highest copay. When PBMs begin to add specialty drugs to their formularies, overall drug costs can skyrocket along with the rebates. A drug plan sponsor's focus on the greatest rebate may lead to the selection of more specialty drugs, and that focus promotes an increase in the overall cost of the plan rather than its efficiency or effectiveness.

A proposed alternative method for drug plan sponsors in selecting a PBM would be to focus on the efficiency of the PBM in delivering effective drugs at a low cost. Namely, a drug plan sponsor should look at the lowest net cost promised by a PBM and not the highest rebate dollars. This means a focus on generic drugs rather than name brand or specialty drugs. PBMs that do not focus on rebates tend to offer open formularies, making all FDA-approved drugs available and providing a greater breadth of treatment options for patients. In fact, in one case study, a plan sponsor saved 10% of its overall cost based solely on the change of a single patient's drug after the plan sponsor changed to a PBM with an open formulary. Clients utilizing PBMs may wish to explore their options.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

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