Labor & Employment Issues
In Focus
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SECOND CIRCUIT UPHOLDS ARBITRATOR AWARD REDUCING EMPLOYER WITHDRAWAL LIABILITY ASSESSMENT

In *The National Retirement Fund v. Metz Culinary Management, Inc*., No. 17-1211-cv (2d Cir. Jan. 2, 2020), the United States Court of Appeals for the Second Circuit confirmed an arbitration award barring pension funds from applying new interest rate assumptions retroactively. This ruling, reversing the district court which had vacated the award, provides employers with greater certainty when considering withdrawal from pension funds and suggests that pension funds time their interest rate assumptions with closer care for maximum effect.

Metz Culinary Management Inc. ("Metz") was a contributing employer to The Legacy Plan of the National Retirement Fund (the "Fund"). Metz withdrew from the Fund on May 16, 2014, triggering withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Withdrawal liability requires that an employer who ceases contributing to a plan must pay an actuarially calculated pro rata share of that pension plan's underfunding, and utilizes an assumed interest rate to estimate a plan's assets over time. Generally, the higher the interest rate, the greater the plan's projected assets, and so the lower the employer's withdrawal liability. Conversely, a lower interest rate results in higher withdrawal liability. Critically, MPPAA requires plans to calculate the charge not as of the withdrawal date but as of the last date of the plan year preceding the year of actual withdrawal i.e. the "Measurement Date."

Applying this rule, the Funds' Measurement Date was December 31, 2013, at which time the Fund's interest rate was set at 7.25%, yielding withdrawal liability of $254,644 for Metz's May 16, 2014 withdrawal. However, in June 2014 the Fund reset its interest rate at 3.25% which, applied retroactively to Metz, yielded new assessed liability of $997,734. Metz challenged the retroactive application at arbitration and prevailed. Arbitrator Ira Jaffe held that the Fund's "decision to apply [a] changed assumption [rate] retroactively so as to increase the withdrawal liability assessed to [Metz] and other employers who withdraw from the Fund after December 31, 2013 was violative of MPPAA." The Fund sued to vacate the award. Metz counterclaimed to confirm, and Federal District Court Judge Valerie Caproni agreed with the Fund, holding that MPPAA "does not allow stale assumptions [of interest rate] from the preceding plan year to roll over automatically."

A unanimous panel of the Second Circuit, led by Chief Judge Winter, found "no statutory or case law support for the [District Court's] proposition, and we do not agree with it." Judge Winter framed the question exclusively as one of law, "whether, under the MPPAA, a fund may select an interest rate assumption after the Measurement Date and retroactively apply that assumption …" Answering emphatically in the negative, Judge Winter explained that in the MPPAA context, interest rate assumptions "must have a degree of stability." Moreover, he observed, MPPAA imposes a notice requirement for plan rule changes "designed to protect employers from the retroactive application of rules relating to the calculation of withdrawal liability." Finally, ERISA permits employers "to request and receive notice of their estimated withdrawal liability prior to actually withdrawing from a fund," but "such provisions are of no value

if retroactive changes in interest rate assumptions may be made at any time." Therefore, to avoid "manipulation and bias," the Court concluded that "the assumptions and methods used to calculate the interest rate assumption for purposes of withdrawal liability must be those in effect as of the Measurement Date. Absent a change by a Fund's actuary before the Measurement Date, the existing assumptions and methods remain in effect."

NLRB TO COUNTRYWIDE FINANCIAL: ILLEGAL MANDATORY ARBITRATION AGREEMENTS UNDER *BOEING* STANDARD

In *Countrywide Financial Corp*., 369 NLRB No. 12 (Jan. 24, 2020) the National Labor Relations Board ("NLRB" or "Board") held that the employer, Countrywide Financial Corp. ("Countrywide") violated section 8(a)(1) of the National Labor Relations Act ("NLRA") by maintaining or enforcing a mandatory arbitration agreement in a manner that requires employees to waive the right to maintain class or collective actions in all forums and because maintaining such mandatory arbitration would cause employees to reasonably believe that they are barred or restricted from the right to file charges with the NLRB or have access to the NLRB's processes.

From 2007 through March 2009 Countrywide required job applicants to sign a "mutual agreement to arbitrate claims." The agreement mandated all disputes stemming from an individual's employment go to arbitration. In 2009, a former employee filed a proposed class action alleging that Countrywide violated minimum wage and overtime laws. In 2011 Countrywide filed motions to dismiss in California federal court citing the arbitration agreement signed by the employee and asked the court to stay the case and compel arbitration to resolve the matter. The employees in the proposed class action suit filed unfair labor practice charges against Countrywide alleging violation of section 8(a)(1) of the NLRA. The NLRB's general counsel subsequently filed a complaint.

The NLRB's three current members held that Countrywide (which is now owned by Bank of America) violated the NLRA by maintaining an arbitration agreement for over two years that employees frequently interpreted as restricting their ability to file and pursue unfair labor practice charges before the NLRB. The Board stated "in sum, the language of the arbitration agreement, when reasonably interpreted under Boeing, [368 NLRB No. 10], makes arbitration the exclusive forum for resolution of claims arising under the [NLRA], and the exclusion clause language is legally insufficient." The NLRB also stated that the "agreement restricts employee access to the board, and such restriction of Section 7 rights cannot be supported by any legitimate business justification. Therefore, the agreement is a Boeing Category 3 policy, and we find that the respondents violated the NLRA by maintaining it."

Arbitration agreements that explicitly prohibit the filing of claims with the NLRB or with administrative agencies are unlawful because such an agreement constitutes an explicit prohibition on the exercise of employee rights under the NLRA. Where an arbitration agreement does not contain an express prohibition, but rather language that is facially neutral, the NLRB applies the test from *Boeing*. *Boeing* sets forth three categories that employers' workplace rules fall into. Category 1 includes rules that are legal in all cases because they cannot be reasonably interpreted to interfere with workers' rights or because any interference is outweighed by business interests. Category 2 consists of rules that are legal in some cases depending on their application. Category 3 consists of rules that are always illegal because they interfere with workers' rights in a manner that is not outweighed by business interests.

Under this legal standard, the Board concluded that where provisions in an arbitration agreement make arbitration the exclusive forum for the resolution of employment-related claims, including claims for violations of federal statues such as minimum wage and overtime pay, then such provisions are unlawful and fall within the third category of *Boeing*. The NLRB found that no "legitimate justification outweighs, or could outweigh, the adverse impact of such provision on employee rights and the administration of the act." The Board also concluded that a clause contained within Countrywide's arbitration policy which created an exception to blanket arbitration "if an agreement to arbitrate such claim is prohibited by law" was too vague for an employee to reasonably understand that they had other legal avenues to pursue redress from violations of labor law.

GOVERNOR CUOMO PROPOSES LEGISLATION FURTHER PROTECTING TRANSIT WORKERS FROM HARASSMENT AND ASSAULT

As part of the Fiscal Year 2021 budget proposal, Governor Andrew M. Cuomo has proposed expanding protections for transportation workers. Specifically, the proposed legislation would cover more categories of workers and increase the potential penalties for harassment or assault of the transportation workers.

The proposal expands the list of protected transportation workers to also include customer assistance personnel, signal system repairers, track cleaners and others, joining train and bus operators, signal persons and terminal cleaners. The legislation both clarifies the existing law and extends it. If passed, any form of forceful or violent physical contact against a worker on duty, including spitting on them, constitutes a Class A misdemeanor punishable by up to one year in prison.

The legislation is an extension of the Governor's 2020 agenda, which included the general goal of making public transit systems safer by, among other things, banning repeat and high-risk sexual offenders as well as repeat assailants of Metropolitan Transportation Authority (MTA) employees from even accessing the subway, bus and rail systems. Specifically, the new legislation authorizes a three year ban for anyone who commits repeated sex-related violations of the MTA code of conduct, or who is a high-risk sex offender. This proposal is in response to several recent MTA incidents involving repeat sex offenders.

In 2019, transit workers led by their union, Transport Workers Union Local 100, called for more security following the stabbing of an MTA conductor in the Bronx and a union study which showed an increase in violent incidents of 40% from the previous year. Local 100 said the statistics were taken from MTA data and among other things showed 83 assaults between Jan. 1 and the end of August 2019 — an increase from 61 over the same time period in 2018.

"New York transit workers literally keep this state moving and the attacks against them are repugnant," Gov. Cuomo said. Local 100 President Tony Utano agreed: "The way that some people treat transit workers is a disgrace to this city and state. Can you imagine going to work every day knowing that you or one of you co-workers is likely to get spit at, punched or abused in some other manner?" The Governor concluded: "No transit worker should ever be subjected to assault of any kind, and I am proposing new measures to enhance protections for them and ensure more workers across the transit system get the respect they deserve."

NEW YORK STATE BUDGET PROPOSAL INCLUDES PROVISION TO PROVIDE UNIONS ACCESS TO ORIENTATIONS FOR NEW EMPLOYEES

Fresh from his vow at the 2020 New York State of the State to provide further protections to unions in the wake of the 2018 Supreme Court *Janus* decision, Governor Andrew Cuomo's 2021 executive budget includes a proposal that requires public employers to provide unions access to new employee orientations. This is the latest pro-union measure from Governor Cuomo to protect unions from the effects of *Janus*.

Last year, the legislature passed a law that bans government employers from disclosing workers' personal contact information to outside parties that may try to sway them to opt-out of paying union dues. New York State has about 1,800 unionized public employers. New York State AFL-CIO President Mario Cilento approved of Governor Cuomo's budget proposal and stated that it demonstrates the Governor's "unwavering commitment to stand for all working men and women."

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