Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
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FEDERAL LAW PREEMPTS NEW YORK STATUTE BANNING MANDATORY ARBITRATION OF SEXUAL HARASSMENT CLAIMS

In a recent decision, the Federal District Court for the Southern District of New York ruled that the Federal Arbitration Act ("FAA") preempts the New York state law prohibiting mandatory arbitration of sexual harassment claims. In *Latif v. Morgan Stanley & Co. LLC, et al.,* No. 1:18-cv-11528 (S.D.N.Y. June 26, 2019), Judge Denise Cote ruled that an agreement to arbitrate sexual harassment claims is enforceable pursuant to the Federal Arbitration Act (FAA), rejecting arguments that New York law voids such an agreement.

In recent years, many states have passed such laws, but this is one of the first cases to address what appears to be a conflict between the local laws and the federal policy preference in favor of arbitration. In 2018, New York passed a statute that was described as "sweeping legislation that deals with the scourge of sexual harassment." One provision, Section 7515 of the Civil Practice Law and Rules (CPLR), prohibits contracts which require that "the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment." In addition, the New York legislature passed a bill at the end of its 2019 Legislative Session to expand this prohibition to agreements to arbitrate any discrimination claims.

The plaintiff, Mahmoud Latif, signed an arbitration agreement when he accepted a job with Morgan Stanley. The arbitration agreement provided that it "shall be governed by and interpreted in accordance with" the FAA. Subsequently, Latif claimed that he was subjected to sexual harassment and that he was ultimately terminated for complaining about that harassment. Thereafter, he filed claims under federal and state law and his former employer filed a motion to compel arbitration.

As addressed by the Court, the U.S. Supreme Court has made clear that state laws prohibiting the use of arbitration to resolve particular types of disputes are preempted by the FAA. Thus, Judge Cote held that application of CPLR 7515 "would be inconsistent with the FAA." The court rejected the plaintiff's argument that CPLR 7515 creates a "generally applicable contract defense" that is permitted by the FAA. While the law was passed as part of a package of laws that address sexual harassment, the court explained that the specific provision at issue treats arbitration agreements differently from other contracts and, thus, is preempted by the FAA. The court also rejected the argument that New York's interest in "transparently addressing workplace harassment" allowed the state to create "a ground in equity for the revocation of any contract." Simply put, the court held that CPLR 7515 violates the federal requirement that arbitration agreements be treated equally as any other contract.

Latif confirms that employers covered by the FAA can rely on arbitration to resolve disputes over discrimination, including sexual harassment, notwithstanding the efforts of a state legislature to limit the claims that may be sent to arbitration. However, while the *Latif* decision reinforces the strong presumption in favor of arbitration and the limitations of a state's ability to curtail the use of arbitration agreements for employers covered by the FAA, it is worth noting

that the proposed *Ending Forced Arbitration of Sexual Harassment Act*, which would amend the FAA to prohibit arbitration of sexual harassment claims, is pending in Congress. The Act, which is sponsored by Senators Kirsten Gillibrand (D-N.Y.) and Lindsey Graham (R-S.C.) and has been pending in Congress for approximately one year without substantive progress, would not face the same obstacles as laws enacted at the state level because it would amend the FAA itself. Absent Congressional action, however, states will face significant hurdles in limiting the use of arbitration to resolve claims regarding particular subjects.

NOT ONLY DOES SCABBY THE RAT SYMBOLIZE FREEDOM TO ORGANIZE - JUDGE RULES THAT INFLATING RODENT DURING LABOR PROTEST IS CONSTITUTIONALLY PROTECTED

In a major victory for organized labor, a federal judge in Brooklyn ruled that LIUNA affiliate Construction and General Building Laborers Local 79's use of an inflatable rat to publicize a labor protest is "protected by the First Amendment." *King v. Construction & General Building Laborers' Local 79* ("King Decision"), E.D.N.Y., no. 1:19-cv-03496, at *3 (July 1, 2019). Declining to issue a preliminary injunction that would have forced Local 79 ("Union") members to end their peaceful protest, U.S. District Court Judge Nicholas Garaufis found that the Trump National Labor Relations Board's ("NLRB" or the "Board") attempt to trap Scabby the Rat violated the union workers' free speech rights as well as "applicable law that binds the NLRB."

This case began when Local 79 picketed and handbilled at a ShopRite grocery store under construction in Staten Island as well as other stores with common ownership in the area. The Union displayed two inflatable rats and a slightly smaller cockroach to shame the ShopRite owner for using nonunion construction labor without paying prevailing wages. The NLRB's Regional Director of Region 29, as directed by the Board's General Counsel, Peter Robb, sought an injunction in federal court to restrain the Union from using the inflatable protest icon. The Board argued that the Union's use of Scabby unlawfully coerced employees of a secondary and neutral employer, since the Union's dispute was with the construction workers' direct employer, GTL Construction, not ShopRite.

In ruling against the Board, Judge Garaufis cited the same constitutional provision, the free speech clause, which anti-union supporters used against unions in obtaining the recent U.S. Supreme Court *Janus* decision. *Id*., at *23; *see Janus v. AFSCME Council 31*, No. 16-1466, 585 U.S. ___ (2018) (forcing payments for contract negotiations and enforcement violates dissenting workers' "free speech rights"). In denying the injunction, Judge Garaufis found "no evidence" either that the ShopRite employees refused to work because of the Union's protest or that Union representatives "in any way induced or encouraged" ShopRite employees to refuse to work, "let alone that such inducement or encouragement was coercive." King Decision, at *22, 28-29. His decision went one step further: he warned the NLRB General Counsel that appealing his ruling "would raise serious constitutional concerns" because it would be "untenable" for a federal court to enjoin such expressive conduct. *Id*. at *30.

Despite the loss in the courts, once an administrative law judge from Region 29 reviews the instant ULP, the matter can then be brought before the NLRB. This is not the first time, however, that the use of stationary inflatables in connection with a peaceful labor protest has been challenged. In *IBEW Local 98 and Shree Sai Siddhi Spruce LLC d/b/a Fairfield Inn & Suites By Marriott*, case number 04-CC-223346 (May 28, 2019), ALJ Giannasi recently declined to find that the use handbilling or a stationary inflatable rat near the handbilling, "either separately or in combination, constituted picketing or coercion." Another ALJ so held in *Int'l Union of Operating Engineers, Local 150*, 25-cc-228342 (July 15, 2019) ("The General Counsel provides no law showing that a displayed [message] causing embarrassment to a company . . . is equivalent to coercive conduct . . .") Since the IBEW Local 98 and Operating Engineer charges are pending before the NLRB, a new standard for inflatables could be brought about soon. As we have seen many times in the past several months, the Trump-NLRB may likely re-interpret the federal labor laws to provide a more employer-friendly standard for challenging the use of inflatables during certain types of labor protests.

NEW YORK MOVES TO CLOSE THE WAGE GAP

On June 20, 2019, the day after passage of New York's new anti-harassment/anti-discrimination law, the New York State Legislature passed and on July 10, 2019 Governor Cuomo signed laws that will alter the way employers hire and pay their employees. To close race and sex-based pay gaps and end the cycle of low wages following workers from job to job, these laws prohibit employers from soliciting applicants' past salary and wages as well as bar pay differentials for "substantially similar" work for protected classes.

The salary history law states that employers cannot, in any way, inquire about an applicant's salary or wage history when considering employment, promotion, or transfers. The only way employers are privy to that information is if applicants voluntarily, and without prompting, disclose it. This means that employers can no longer rely on wage or salary history to determine what wage or salary to offer someone or use it as a factor for employment.

The equal pay law safeguards members in a protected class from receiving less pay than others for doing the same or "substantially similar" work. Previously, the law bared pay differentials because of "sex" for "equal work". The new protected class not only includes sex but also includes age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, disability, and domestic violence victim status. This new amendment lowers the standard and allows for a greater amount of people to bring an equal pay claim under New York Labor Law. However, the exceptions that permit pay differentials will remain the same. These exceptions are based on seniority, merit systems, quantity or quality of work, and a bona fide factor.

These changes in the salary history and amended equal pay law will take effect 180 days and 90 days respectively after the Governor signed them.

So what does this mean for employers? Employers will need to update their paperwork and interview processes along with taking steps to ensure they are in compliance with respect to their current employees. Application, transfer, and promotion paperwork should be revised and eliminate questions about wage/salary history. Interviews and other related processes involving questioning about wage/salary history should also be removed. In addition, employers may want to consider doing a review of their job descriptions and compensation procedure. This will ensure that employees are receiving equal pay for "substantially similar" work, and if not, whether their pay differential falls under one of the exceptions or requires adjustment.

NEW YORK EMPLOYEES MAY SOON BE ABLE TO "LIEN" ON THEIR EMPLOYER'S PROPERTY FOR WAGE AND HOUR VIOLATIONS

As the Empire State continues to expand worker protections, the New York State Legislature passed Senate Bill S2844B (Assembly Version: A486) that would allow employees making certain claims for unpaid wages, benefits and wage supplements to obtain a lien against their employers' property for the value of the wage claim, inclusive of liquidated damages ("Legislation"). If signed by Governor Cuomo, the Legislation would be effective 30 days later, including section 36 of the bill which specifically permits retroactive application for claims that arose prior to its effective date. S2844B, § 36.

The Legislation grants an employee with a wage claim the right to file an "employee's lien" against the real and personal property of the owners, top 10 investors, and managers of a business. S2844B, § 1. The Legislation defines a "wage claim" as those brought under either the Fair Labor Standards Act and the New York Labor Law (and associated wage orders), including, but not limited to recovering overtime, unlawful deductions from wages, withheld gratuities, minimum wage, spread of hours, call-in pay, uniform maintenance pay, unpaid commissions, improperly taken meal and tip credits, as well as unpaid compensation pursuant to an employment contract. S2844B, §§ 1 and 28. An employer's deposit accounts maintained with a bank and other "goods," as defined by in Section 9-102 (29) and (44) of the Uniform Commercial Code are explicitly carved out from attachment. The Department of Labor and the State Attorney General are also empowered to seek a lien on the employee's behalf.

In addition to the new lien rights for wage claims, the Legislation provides wage and hour plaintiffs the right to:

- Access and make copies of the minutes of shareholder meetings and records of shareholders and limited liability company (LLC) members, as well as certain contact information and membership stakes of said stakeholders, related to their claims (S2844B, at §§ 32, 35);

- Hold personally liable the 10 largest shareholders and members of non-public New York corporations and LLCs for liquidated damages, penalties, interest, attorney's fees and costs, all of whom are currently only liable for the amount of unpaid wages (S2844B, at §§ 33 & 34); and

- Seek pursuant to Section 6210 of the New York CPLR an order of prejudgment attachment on an employer's assets and require courts to hold an emergency hearing following an employer's opposition (S2844B, at § 29).

If the Governor signs the Legislation into law, employers should review their payroll practices to ensure strict compliance with federal and state wage and hour laws. Besides the hefty penalties imposed for wage and hour violations, employees may soon be able to attach an employer's real and personal property pending adjudication of the claim.

In Memoriam
Héctor Figueroa 1962-2019

The labor community mourns the loss of Héctor J. Figueroa, president of 32BJ of the Service Employees International Union, President of 32BJ since 2012. Héctor died suddenly of a heart attack on the evening of Thursday, July 11.

A celebration of Héctor's life will be held on Wednesday, July 24th, at the Riverside Church, 490 Riverside Drive, New York at 1 p.m.

Pitta LLP extends its heartfelt condolences to Hector's family and to the proud, grateful members of Local 32BJ whom he faithfully led for so many years.

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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