Labor & Employment Issues
**In Focus**
Pitta LLP
For Client
March 13, 2020 Edition

## MANAGING THE CORONAVIRUS FOR NEW YORK STATE EMPLOYERS/EMPLOYEES

The Coronavirus (COVID-19), originally detected in Wuhan, China in January 2020 has rapidly spread respiratory illnesses around multiple continents. The virus challenges New York State employers to balance an obligation to responsibly contain the spread of the virus with an employee's right to work free of discrimination. The following will focus on the primary legal considerations for New York State employers and employees.

In order to foster a safe and healthy workplace, employers should regularly update employees on the relative risk of outbreak in the employer's area, provide hand-sanitizers and other cleaning materials to encourage positive hygienic behavior, and encourage sick employees to stay home and seek medical care. Employers should educate employees as to the Center for Disease Control and Prevention (CDC) guidelines regarding COVID-19 (https://www.cdc.gov/coronavirus/2019-ncov/index.html) and its symptoms, particularly individuals who have recently traveled to China.

Dealing with Affected Employees:

If an employer has a *reasonable* belief that an employee has been exposed to, or has contracted Coronavirus, then the employer may send that person home to protect the rest of the workforce. Currently, the CDC has recognized the Coronavirus incubation period to be 14 days. However, discrimination claims can arise if an employee is singled out based on a protected characteristic for example, national origin. Therefore, employers should be mindful to treat all employees with potential exposure the same, regardless of national origin or any other protected class characteristics.

If an employee has been diagnosed with COVID-19, the federal, state, and/or local public health agencies will take responsibility for informing anyone who may be at risk. Employers should keep information about the employee's health confidential, as required by the Americans with Disabilities Act ("ADA"). This includes a general prohibition against sharing an employee's health condition with managers, supervisors, and other employees. If an employee is on a Coronavirus-related leave of absence, however, employers may inform managers, supervisors, and others that an employee is on a leave of absence for non-disciplinary purposes.

Communications with Employees:

It may be necessary to share information with employees who may have had contact with an employee with a confirmed case of Coronavirus. Employers should not inform the potentially affected employees of the identity of the Coronavirus-stricken employee, but may inform the potentially affected employees that an employee of the company has tested positive for Coronavirus and that the company believes that the potentially affected employees may have come into contact with the infected employee. The company may suggest to such potentially

affected employees that they may wish to seek medical attention or otherwise monitor their possible development of symptoms.

Employee Rights Under ADA, FMLA, and Wage and Hour Concerns:

Under the ADA, an employee with Coronavirus, or even an employee "regarded as" being exposed to the virus (for example, based on location of recent travel), could fall within the definition of a "qualified individual with a disability" and be protected by the ADA (and state/local disability laws).

According to the ADA, an employer cannot make medical inquiries of employees unless the inquiry is *voluntary* or *job-related and consistent with business necessity*. If an employer does make such inquiries, the employer must (a) require confidential maintenance of medical information, which should be kept separate and apart from the employee's personnel file, and (b) limit the distribution of such information to individuals with a legitimate need to know. Nonetheless, if an employee poses a *direct threat* to the health or safety of himself/herself or others, then an employer can require the employee to disclose health information. A positive test for Coronavirus would almost certainly fall within this category. Similarly, an employer will likely be permitted to require an employee to undergo medical testing if the employer *reasonably believes*, based on an individualized assessment, that an employee may have been exposed to Coronavirus, and demonstrates symptoms of Coronavirus.

An employee diagnosed with Coronavirus may also constitute a serious health condition under the Family and Medical Leave Act ("FMLA"). If so, once diagnosed, the employee would be entitled to FMLA leave as certified by the employee's health care provider.

If an employer requires an employee to perform work from home due to a reasonable belief that the employee has been exposed to, or has contracted, Coronavirus, the employee must be paid. If the employee is an exempt employee, he or she must be paid for the entire week during which he or she performs more than a *de minimis* amount of work. If the employee is non-exempt, he or she must be paid for the time that he or she works.

As the situation evolves, our clients should not hesitate to reach out to the Pitta LLP attorneys who serve them for guidance on specific questions.

## RETIREMENT PLAN REFORM: THE SECURE ACT

On December 20, 2019, President Trump signed into law the Setting Every Community Up for Retirement Enhancement (SECURE) Act (the "Act"), included as part of the Further Consolidated Appropriations Act, 2020. The Act provides for significant changes that will impact various retirement plans. Below is a brief listing of some of the changes made by the Act and their effective dates.

- Upon enactment (December 20, 2019), the Act provides that:
    - Defined contribution plan loans cannot be made through credit cards or similar arrangements, and if done, will be treated as a deemed distribution.
    - Defined contribution plan fiduciaries have the option to use new safe harbor measures when selecting a lifetime income provider.

  - Special nondiscrimination rules can be used to test certain closed defined benefit plans.
- For plan years (or distributions made) after December 31, 2019, the Act:
  - Increases the tax credit available for qualified startup costs of an eligible small employer who adopts a new qualified retirement plan, SIMPLE IRA plan, or SEP, provided certain requirements are met.
  - Makes available to small employers a new automatic enrollment general business tax credit, provided certain retirements are satisfied.
  - Provides for the penalty-free withdrawal of up to $5,000 from a defined contribution or 403(b) plan for a qualified birth or adoption.
  - Increases the limit on the default contribution rate for qualified automatic contribution arrangements from 10% to 15%.
  - Delays the age for required minimum distributions from age 70½ to age 72.
  - Reduces the earliest age that an employee can receive in-service retirement benefits from a pension plan from age 62 to age 59½.
  - With certain exceptions, provides that the entire interest in a defined contribution plan must be distributed to a designated beneficiary within 10 years after the death of an employee.
  - Increases penalty for failure to file an income tax return from $330 to $435.
  - Provides for a ten-fold increase in penalties for the failure to file Form 8955-SSA and a plan's annual report, as well as, the failure to provide notice of the right to elect out of withholding.
- For plan years beginning after December 31, 2020, the Act:
  - Permits unrelated employers to establish ''open MEPs'' that are administered by pooled service providers and, generally, eliminates the "one bad apple" rule.
  - Permits long-term, part-time workers who work for at least 500 hours in each of the immediately preceding three consecutive 12-month periods to become eligible to participate in the employer's 401(k) plan.
- For plan years after December 31, 2021, the Act:
  - Mandates the Secretaries of Labor and Treasury to revise annual returns to permit certain defined contribution plans (*i.e.*, plans with the *same* trustee, named fiduciaries, administrator, and plan years beginning on the same date) to file a single aggregated Form 5500.
- Further, the Act:
  - Mandates the Secretary of Treasury to issue guidance not later than six months after the date of enactment providing for a process pursuant to which 403(b) plan terminations may proceed even though certain assets that cannot otherwise be distributed remain in a tax-favored vehicle.
  - Pension benefit statements must include disclosures regarding lifetime income effective for pension benefit statements furnished more than 12 months *after* certain actions are fulfilled by the Secretary of Labor.

We suggest that you work closely with counsel to review your plan(s) and determine which SECURE Act changes are applicable to you. The Act provides for a remedial amendment period for amending your plan(s) until the last day of the first plan year beginning on or after

January 1, 2022 (for certain governmental or collectively bargained plans, substitute January 1, 2024, for January 1, 2022).

## EIGHTEEN ATTORNEYS GENERAL SUE TO BLOCK LONG AWAITNED JOINT EMPLOYER RULE

On February 26, 2020, nearly immediately after the U.S. Department of Labor issued its long awaited "joint employer" rule, a group of eighteen Democratic attorneys general from seventeen states and the District of Columbia sued in United States District Court for the Southern District of New York to block it. *New York v. Scalia*, S.D.N.Y., No. 20-01689.

The rule, set to take effect March 16, 2020, was developed over a lengthy rule making comment period and would roll back Obama era rules to make it more difficult to prove that companies are "joint employers" of franchise and contract workers. The lawsuit alleges that the rule ignores the broad purpose of the Fair Labor Standards Act (FLSA) and will lead to increased wage theft particularly for temporary and contract workers.

Conversely, the final joint-employer rule, announced last month, was a top priority for the White House and the business community, and was praised by conservative politicians for correcting uncertainty they say was caused by the Obama administration's expansive, worker-friendly approach.

The new rule would limit the circumstances in which multiple businesses can be liable under the FLSA for failing to pay minimum wage and overtime. Franchise focused businesses like fast food restaurants have faced questions over joint-employment liability in recent years. Previously, the DOL applied an "economic realities" test where companies were considered joint employers when they hired and fired workers and set wages with a focus on a worker's level of "economic dependence."

The linchpin of the final rule is DOL's adoption of a four-part test for assessing whether one company is a joint employer of another company's workers. The test, which considers all factors collectively, explores whether the potential joint employer hires or fires an employee; supervises or controls work schedules; sets pay rates; and maintains employment records.

However, the lawsuit argues, the new test contravenes Congress's intent, in the FLSA, to establish a broad interpretation of what constitutes an employer. The suit points to long standing U.S. Supreme Court precedent which holds that employment should be interpreted based on the entire circumstances which was the approach taken by the Obama era rule rather than "isolated factors" allegedly used in the Trump rule. The Complaint argues that the new rule "makes workers even more vulnerable to underpayment and wage theft … (and) provides an incentive for businesses best placed to monitor FLSA compliance to offload their employment responsibilities to smaller, less-sophisticated companies with fewer resources to track hours, keep payroll records, and train managers."

Advocates for the rule argue that the risk of class actions alleging a corporation is jointly liable for paying employees' wages owed for off-the-clock work prevented some companies from providing support management services to their franchisees.

However, before the coalition of state attorneys general can persuade a federal court to set aside the rule, they may first have to address whether they have legal standing to sue. The attorneys general remain confident. New York Attorney General Letitia James said, "The new rule, which would result in lower wages and additional wage theft targeting lower- and middle-income workers, demonstrates that the Trump Administration does not care about the hardworking individuals that help this country run. My office will continue to fight to ensure workers across New York, and across the country get the wages they deserve."

---



**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.

**To Our Clients and Friends:** To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.