Labor & Employment Issues
In Focus

Pitta LLP

For Clients and Friends

October 29, 2019 Edition

IF YOU MISSED THE DEADLINE, THIS MAY BE
YOUR LAST CHANCE BEFORE THE LAWSUIT

The deadline to conduct annual sexual harassment prevention training under the New York State Human Rights Law expired October 9, 2019. There is no extension, but there may be grace, if you act fast.

The amended New York City Human Rights Law sets its own training deadline of December 31, 2019. While this does not extend the State deadline, the State may defer enforcement until after the City deadline passes. "May" is uncertain though. In addition, plaintiffs' attorneys are already suing employers, expressly pleading in their complaints that the targeted employer did not provide the required training. Therefore, the sooner you cure before December 2019, the better your chances to avoid that lawsuit or a judge, jury or agency imposing adverse consequences, including penalties.

If you want to discuss your training options, please do not wait any longer. Please contact Barry Saltzman bsaltzman@pittalaw.com or Jane Lauer Barker jbarker@pittalaw.com of our office, or any of the attorneys with whom you work.

AND DON'T FORGET ELECTION DAY
TUESDAY NOVEMBER 5 NEW LEAVE TIME RULES

As advised in prior In Focus editions, New York State now requires employers to provide three (3) paid hours in which to vote on Election Day, November 5, 2019. Employers may require employees to take the voting time at the beginning or end of their working shift. To be eligible, employees must be registered voters and provide their employer with at least two (2) days advance notice.

Employers must post a notice of the law at least ten (10) working days before the election. The notice is available at:
https://www.elections.ny.gov/NYSBOE/elections/AttentionEmployees.pdf.

If you have any questions, please contact any of the Pitta LLP attorneys with whom you work.

IRS ISSUES FINAL HARDSHIP DISTRIBUTION RULES

On September 23, 2019, the Internal Revenue Service (IRS) issued final regulations amending the rules relating to hardship distributions from Internal Revenue Code (IRC) Section 401(k) plans. The proposed regulations were issued last year. Click the following link to review our December 5, 2018 article on the proposed rule:
http://files.constantcontact.com/cc29d5c8601/b982984e-4fdd-4903-a515-da9127acfd74.pdf.
The IRS advised that "the final regulations are substantially similar to the proposed regulations, and plans that complied with the proposed regulations will satisfy the final regulations."

Plan sponsors will need to amend their plans' hardship distribution provisions to reflect the final regulations, and any such amendment must be effective for distributions beginning no later than January 1, 2020. We suggest that you confer with plan counsel about these changes and the deadline for amending your plans.

SEVENTH CIRCUIT RULING: STATUTE OF LIMITATIONS ON WITHDRAWAL LIABILITY RUNS FROM THE ACCELERATION DATE

On August 13, 2019, the United States Court of Appeals for the Seventh Circuit issued its decision in *Bauwens v. Revcon Technology Group, Inc*, No. 18-3306, holding that when a multiemployer plan accelerates its withdrawal liability, the statute of limitations for the entire liability begins to run on the date of acceleration, as at that time the plan has the right to sue for the entire accelerated amount. The decision is likely to result in Trustees of multiemployer plans being much less likely to agree to payment plans after finding an employer in default. Even if the Trustees subsequently decide to unravel the acceleration of the debt, or decelerate the debt if you will, the statute of limitation will continue to apply as of the acceleration date.

The Multiemployer Pension Plan Amendments Act ("MPPAA") mandates that claims for unpaid withdrawal liability "may not be brought after the later of (1) 6 years after the date on which the cause of action arose, or (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action" 29 U.S.C. § 1451(f).

The facts of *Revcon* are unique, involving multiple cycles of an Employer's default, leading to the Trustees filing a lawsuit, the Employer promising to cure its default, and the Trustees voluntarily dismissing the lawsuit in response only to refile when the cycle started again two (2) years later. The complaint of each lawsuit also referred to the debt acceleration in 2008, making no claim that the acceleration was ever revoked.

The 7th Circuit reasoned as follows: "[a]bsent some contractual or statutory foundation, there is no free-floating general principle of contract law that allows any accelerated debt to be decelerated." According to the 7th Circuit, the statute of limitations for the entire liability began to run on the date of the acceleration, as at that time, the plan had the right to sue for the entire accelerated amount.

Trustees encountering a default situation should consider this decision when contemplating whether to accelerate the debt, especially since subsequent deceleration will not be an option without a separate binding contract or settlement agreement between the defaulting employer and the Plan sponsor.

NLRB SIDESTEPS ITSELF, USING RULEMAKING TO REVERSE CONTROVERSIAL GRADUATE STUDENT RULE

On September 23, 2019, in a highly unusual move, the National Labor Relations Board ("NLRB" or "Board"), issued a notice of proposed rulemaking to settle the question of whether students can be employees for purposes of the National Labor Relations Act ("NLRA" or the "Act"). The issue of unionization of graduate students has been heard and decided by the Board three times over the last two decades, with the answer finally settling on "yes" under the Obama Board, until now.

In an effort to avoid directly reversing the most recent precedent, a case called *Columbia University* from 2016, the Trump Board released a proposed rule that would remove graduate and undergraduate students from the definition of "employee" eligible to unionize under Section 2(3) of the NLRA. Board rules call for a sixty day public comment period. The proposed rule would "overrule extant precedent and return to the state of law as it existed from shortly after the Board first asserted jurisdiction over private colleges and universities in the early 1970s to 2000 and, with brief exceptions, for most of the time since then."

In *Columbia University*, the Board ruled that student teaching assistants and graduate research assistants are statutory employees under the NLRA, reversing the Board's 2004 decision in *Brown University*, which had reversed the Board's decision in *New York Univers*ity in 2000. The cases all turned on whether the students' relationship to the universities was primarily academic or economic. In *Columbia University*, the Board observed: "Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach." Thus, the NLRB said an individual "may be both a student and an employee; a university may be both the student's educator and employer." The proposed rule would overrule this decision.

Once the Trump Administration appointed a majority of Board members, many pending representation petitions for student units were withdrawn in fear of the potential of bad precedent by the Republican-controlled NLRB.

The Board, in an effort to reverse the existing precedent and in the absence of a ripe case has turned to rulemaking to set in stone its position that graduate students are not employees. The proposed rule reads: "Students who perform any services, including, but not limited to, teaching or research assistance, at a private college or university in connection with their undergraduate or graduate studies are not employees within the meaning of Section 2(3) of the Act." The proposed rule seeks comments on whether students should also be excluded because of the "very tenuous secondary interest that these students have in their part-time employment."

In dissent of the Notice, Democratic Board Member Lauren McFerran, who was in the majority in *Columbia University*, urged the Board to adhere to precedent and to the proposition that the Act can afford coverage to student workers who have both an educational and economic relationship with their colleges and universities. She also pointed to the limited instances where private colleges and universities have reached agreements with student worker unions since *Columbia University* and the long history of graduate student unionization at public institutions as support for the proposition that recognizing student workers as employees is consistent with

the Act's goal of promoting collective bargaining. Finally, McFerran wrote that the proposed rule "will raise the specter of renewed unrest on campus" because "[t]he desire of student employees for union representation and for better working conditions will not go away simply because the Board has closed its doors."

On October 17, 2019, the Board extended the time for submitting comments on its proposed rule to permit comments to be filed on or before December 16, 2019, with reply comments due by December 30, 2019. Based on the usual timeline for rulemaking, a final rule is unlikely before the first half of 2020. Moreover, any rulemaking is likely to face legal challenges and congressional review under the Congressional Review Act. The point of all of this, however, is that rulemaking, once finalized, is more difficult to reverse than precedent. Unlike cases, changes to rules can only be accomplished by the passage of another regulation. If the proposed rule is implemented, the next outlet for students may be protest and public relations, and how that turns out is not academic.

STATE JUDGE FREEZES ALASKA'S ATTEMPT TO EXTEND JANUS, FOR NOW

Following the Supreme Court's decision last June in *Janus v. AFSCME Council 31*, many States' Attorneys General responded by issuing memoranda clarifying the limits of the holding and indicating that existing membership cards and other agreements should be honored. The State of Alaska, and its current Governor Michael Dunleavy, however, believe that the *Janus* decision extends further, obligating the State to impose *Miranda*-like procedure to ensure the "protection" of state employees' speech rights. Alaska's actions, and any success in implementation of the same, will likely serve as a bellwether for other states seeking to curb public sector unions.

After *Janus*, the Alaska State Employees Association, AFSCME Local 52 ("ASEA" or "Union"), ceased collection of agency fees and changed its dues authorization card to require employees to sign a statement that they "voluntarily" agree to have dues deducted and that the authorization is revocable for a ten day period each year. On September 7, 2018, Alaska's former Attorney General issued a Memorandum stating that the Union was in full compliance with *Janus*. In January of 2019, Governor Dunleavy was seated. Several months later, the Union and the State negotiated a new collective bargaining agreement ("CBA"), which was signed on August 8, 2019. ASEA's new dues authorization form continued to be used through the negotiation of the new CBA. A few weeks later, new Attorney General Kevin Clarkson issued his own opinion letter stating that *Janus* requires the State to implement a process "for ensuring that an employee's consent to payroll deductions for union dues and fees is knowing, intelligent, and voluntary." Clarkson argued that *Janus* demands "periodic inquiry" into employee wishes by the State because permitting a union-directed process is "no longer tenable." Instead, Clarkson argued that the State must require employees to provide consent directly to it through forms it unilaterally designs. Moreover, he argued that the State should notify employees of their rights and determine how frequently an employee should be required to reaffirm their choice.

On September 26, 2019, Governor Dunleavy issued an Administrative Order ("Order") implementing Clarkson's Opinion. The Order contained mandated (and gratuitous) language for a dues authorization form permitting withdrawal at any time and provided that all pre-existing

authorizations will be deemed void. The Order also provided that the State will work with unions to determine the frequency of "opt-in" authorizations for employees.

Alaska initiated a lawsuit in state court prior to issuance of the Order, requesting a declaratory judgment as to whether Clarkson correctly interpreted *Janus*. ASEA filed a third party complaint thereafter and sought a temporary restraining order ("TRO") and preliminary injunction to maintain the status quo. ASEA argued that Clarkson's Opinion went far beyond *Janus* and violated both Alaska's state labor law and the parties' CBA.

On October 3, Superior Court Judge Gregory Miller issued a decision granting the Union a TRO. *State of Alaska v. Alaska State Employees Association*, No. 3AN-19-09971CI (D. Alaska Oct. 3, 2019). Judge Miller explained that while the *Janus* decision was long, its holding was "quite succinct" – "neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages . . . unless the employee affirmatively consents to pay." He noted that the facts at issue in *Janus* were not whether the State could control the union dues collection process. The Judge also relied on the Supreme Court's footnote stating that, "States can keep their labor-relations systems exactly as they are-only they cannot force nonmembers to subsidize public-sector unions." Judge Miller then rejected Alaska's contention that State employees have a constitutional right to resign membership at any time, explaining that the cases upon which the State relied were distinguishable. Moreover, Judge Miller rejected the State's attempt to insert criminal *Miranda* rights procedure into union dues practices, explaining that *Miranda* was derived from the Fifth Amendment, inapplicable here. Reviewing the Union's dues authorization form under *Janus'* actual holding, the Court concluded it was not confusing, ambiguous, or coercive. On the contrary, Judge Miller found the State's process to be "not neutral" and to at least bypass the State labor law. Based on the Union's likelihood of success and irreparable harm, Judge Miller issued an immediate TRO. These proceedings, however, remain ongoing. We will keep you posted.

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