Labor & Employment Issues
**In Focus**
Pitta LLP
For Client
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## NEW YORK FEDERAL COURT VOIDS RESTRICTIONS ON PAID LEAVE FOR WORKERS AFFECTED BY COVID-19

On August 3, 2020, United States District Judge J. Paul Oetken voided parts of a Trump administration rule which restricted paid sick leave and emergency family leave for potentially millions of workers affected by COVID-19. The State of New York had filed a lawsuit against the United States Department of Labor ("DOL") protesting the promulgation of rules to implement the Emergency Paid Sick Leave ("EPSL") and Emergency Family and Medical Leave ("EFML") provisions of the Families First Coronavirus Response Act ("FFCRA"). New York challenged the DOL's authority to issue certain aspects of its rules, which were finalized on April 6, 2020. The case is *New York v U.S. Department of Labor*, U.S. District Court, Southern District of New York, No. 20-03020.

In sum, the Court ruled that a provision in the DOL rule permitting some employers to deny paid sick leave if the economic downturn resulted in their having no work available for affected employees violated the law. The Court also invalidated the rule's "vastly overbroad" definition of "health care provider," which the government conceded could keep people like English professors, librarians and cafeteria managers from obtaining benefits. Finally, Judge Oetken also voided provisions requiring that workers obtain employer consent for intermittent leave and document their reasons for sick leave in advance. The balance of the rules were allowed to stand.

Specifically, the DOL regulations define health care provider very broadly to include among other things "anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity; and any individual employed by an entity that contracts with any of these institutions, employers, or entities to provide services or to maintain the operation of the facility." The Court ruled that the determination of a health care provider must be based on the nature of the employee's work, and not the nature of the employer. As such, any health care provider, such as a hospital or doctor's office, attempting to preclude its employees from taking otherwise available leave should carefully consider whether the individual asking for leave actually qualifies as a health care provider.

As to the so-called "but-for" rule, the DOL's regulations and FAQ guidance provide that an individual is only entitled to emergency leave if he/she would be working but for the need to take leave. The Court determined that this is too broad a reading of the statute and hence, it is vacated. Thus, employers should not condition eligibility for leave on the availability of work.

With regard to regulations allowing the use of intermittent leave, the Court took issue with the requirement that employers approve the employee's request to take leave on an intermittent or reduced scheduled leave. The Court held that an employer may request such documentation, but it must request documentation after commencement of the leave.

## NEW OSHA GUIDANCE: MASKS WON'T HURT YOU

Perhaps responding to increasing number of state and local governments and private employers who have recently mandated the wearing of masks covering the mouth and nose to avoid the airborne spread of the coronavirus, the U.S. Occupational Safety and Health Administration ("OSHA") has issued guidance to advise the public that neither medical masks, including surgical masks, nor cloth face coverings reduce oxygen levels or result in a build-up of carbon dioxide. The guidance was issued in an update to COVID-19 FAQs on OSHA's website. https://www.osha.gov/SLTC/covid-19/covid-19-faq.html. OSHA has so far resisted calls by the labor movement and lawsuits seeking to force OSHA to issue mandatory workplace standards to prevent the spread of the COVID-19 by and among employees returning to work when states and cities reopen.

The guidance states that medical masks and cloth face coverings can be breathed through but do protect against the spread of respiratory droplets that are typically larger than tiny carbon dioxide particles. Consequently, according to OSHA, "most carbon dioxide particles will either go through the mask or escape along the mask's loose-fitting perimeter," and further while "[s]ome carbon dioxide might collect between the mask and the wearer's face, but not at unsafe levels."

The guidance also seeks to dispel misinformation that has circulated against the use of masks and notes that "[s]ome people have mistakenly claimed that OSHA standards…apply to the carbon dioxide levels resulting from the use of medical masks or cloth face coverings in work settings with normal ambient air." OSHA states that those standards apply only to work settings where there are known or suspect sources of chemicals or workers are required to enter a potentially dangerous location.

## SENATE CONFIRMS LAUREN MCFERRAN AS SOLE DEMOCRAT ON THE NLRB

National Labor Relations Board nominee Lauren McFerran, who previously sat on the NLRB for five years, will rejoin the labor board as its only Democrat, after the U.S. Senate on Wednesday July 29, 2020, confirmed her and current Republican board member Marvin Kaplan for new terms.

Traditionally, three board seats are held by members of the president's political party, while two seats are reserved for members of the minority party. McFerran will occupy one of two open Democratic seats on the five-member labor board. She left the NLRB in December and was renominated by President Trump a short time later. The Senate voted 53-42 to return her to the labor board. Kaplan's term was due to expire in August before he was confirmed for a fresh five-year stint by a party-line vote of 52-46. He was first nominated by Trump to serve on the labor board in 2017.

The board's two other Republican seats are currently held by NLRB chairman John Ring and member Bill Emanuel; the second Democratic seat is vacant with no nominee pending. Each member's term is five years. Ring's will end December 16, 2022, and Emanuel's runs out August 27, 2021. By re-confirming Kaplan, the Senate ensured GOP dominance of the labor board for at least another year regardless of who wins the presidential election in November.

McFerran, who was confirmed to her previous term in December 2014 after being nominated by former President Barack Obama, held several roles with the Senate Health, Education, Labor and Pensions committee prior to joining the NLRB, including chief labor counsel.

McFerran's restoration to the board means there will be a dissenting voice on significant case decisions and rulemakings, assuming the Republican majority continues its pattern under the Trump administration of restoring pro-employer policies and giving businesses an edge over unions. In the last year-plus of her previous term, McFerran wrote opinions dissenting from a number of the more controversial decisions and regulatory initiatives made by the board's Republican majority, including the board's legal frameworks for assessing joint employment and worker misclassification.

Opinions of dissenting NLRB members often lay groundwork for future appointees to rely upon when the partisan majority on the leadership panel shifts and new members reconsider policies to regulate private sector union organizing and labor practices.

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