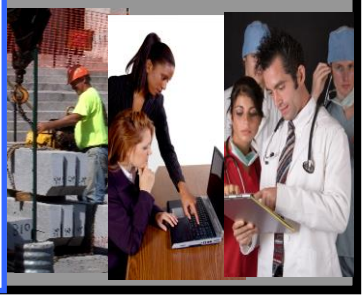
Labor & Employment Issues
In Focus

Pitta LLP

For Client

August 20, 2020 Edition



LAW ENFORCEMENT UNIONS FILE LAWSUIT CHALLENGING NYC "DIAPHRAGM LAW"

The Mayor of the City of New York, Bill de Blasio recently approved City Council legislation relating to actions taken in the course of making an arrest. Modeled after the New York State "Eric Garner" law, which bans choke holds during an arrest, the City law further bans the compression of a person's diaphragm during the arrest process. Violation of the City law, which requires no intent nor injury, is a misdemeanor subject to a one year jail sentence.

Five New York Police Department unions took the first step in a challenge to overturn the New York City "diaphragm compression" law. The five police unions include the Police Benevolent Association, Sergeants Benevolent Association, Detectives' Endowment Association, Lieutenants Benevolent Association and Captains' Endowment Association. Joining as Plaintiffs are various other law enforcement unions including the MTA and PANYNJ PBAs, and New York State Court Officers among others.

The lawsuit in NYS Supreme Court in New York County, challenges the law as: 1). preempted by State law; and 2). so vague and ambiguous as to be unconstitutional. The next step in the litigation is seeking an injunction against enforcement of the law. During the litigation, unless an injunction is ordered, the law remains on the books and enforceable.

CALIFORNIA COURT ORDERS UBER AND LYFT TO RECLASSIFY DRIVERS AS EMPLOYEES

In a landmark decision, San Francisco Superior Court Judge Ethan Schulman ordered Uber and Lyft to reclassify their drivers in California as employees.

This past June, California Attorney General Xavier Becerra and a coalition of city attorneys from California filed for a preliminary injunction to force Uber and Lyft to comply with California Assembly Bill 5 ("AB 5"). AB 5 is a California state statute that expands upon a Supreme Court of California case *Dynamex Operations West, Inc. v. Superior Court* which held that most workers are employees and should be classified as such and that the hiring entity assumed the burden of proof for classifying individuals as independent contractors. AB 5 went into effect in January.

The California Attorney General and the coalition of city attorneys accused Uber and Lyft of depriving workers of basic labor protections, including a minimum wage, overtime, paid sick leave and unemployment insurance that would be available to employees. In addition, California's Labor Commissioner's Office filed lawsuits against Uber and Lyft for allegedly committing wage theft by intentionally misclassifying drivers as independent contractors instead of employees.

This decision comes at a time when Uber and Lyft ridership is low as the country continues to cope with the COVID-19 pandemic. In his opinion, Judge Schulman said that "now, when Defendant's ridership is at an all-time low, may be the best time (or the least worst time) for Defendants to change their business practices to conform to California law without causing widespread adverse effects on their drivers." The judicial order would have gone into effect on August 20, 2020 but Uber and Lyft appealed Judge Schulman's ruling and obtained a stay pending appeal.

Uber's Chief Executive Officer, Dara Khosrowshahi said that Uber may have to shut down its ride-hailing application in California for several months if a court does not overturn Judge Schulman's ruling. He said "it's hard to believe we'll be able to switch our model to full-time employment quickly."

Uber, Lyft and other large technology companies such as DoorDash and Instacart have started to collaborate together to fund a ballot initiative that if passed, would exempt them from AB 5 law but would offer drivers some benefits.

ALLEGEDLY FUNNY, FRIGHTENED AND STAR-STRUCK ARBITRATOR NOT EVIDENTLY PARTIAL IN FAVOR OF UBER

A recent decision by Judge Jed Rakoff tightly construes the limited basis for a court to vacate an arbitration award on the grounds of "evident partiality' by an arbitrator in favor of the prevailing party. *Meyer v. Travis Kalarack and Uber Technologies, Inc.,* S.D.N.Y. No. 15-Civ-9796 (JSR) (Aug. 3, 2020). While not a labor or employment case, the decision provides valuable support to all attorneys defending arbitration awards.

On behalf of a class, Plaintiff Spencer Meyer sued Defendants Uber and its founder Travis Kalanick for a declaratory judgment prohibiting Defendants from using Uber's surge pricing algorithms. Judge Rakoff remanded the case to arbitration under the Federal Arbitration Act ("FAA").

At arbitration hearings Arbitrator Les Weinstein allegedly first photographed Kalanick and later stated: "I must say I act out of fear" that "if I ruled Uber illegal, I would need security … People would be after me." After receiving an adverse award in favor of Uber, Plaintiff sued to vacate the award on a ground specified in the FAA, that Weinstein exhibited "evident partiality" in favor of Uber by his conduct at hearings.

Judge Rakoff disagreed and denied Plaintiff's motion. First, he held that Plaintiff had "forfeited" the evident partiality argument by not objecting before the award issued. Citing Second Circuit precedent he explained; "The settled law of this circuit precludes attacks on the qualifications of arbitrators on grounds previously known but not raised until after an award has been rendered." Judge Rakoff rejected Plaintiff's argument that objections to an "openly partial award" are not waivable given the court's obligation to review awards for compliance with law. While parties may not contract out of judicial review, they can, and here did, fail to invoke judicial review in a timely manner.

Second, Judge Rakoff rejected the evident partiality claim on the merits as laughable. Reviewing the record which contained other jokes by the arbitrator, some funny, he characterized

the arbitrator's reference to fear as "perhaps inappropriate" but consistent with "impartiality once their patently jestful intent is recognized." Moreover, the alleged photographing, if it occurred, would not "rise to the level of bias … necessary to vacate an arbitration award," concluding, "Plaintiff's speculation is just that – speculation – which is insufficient to justify vacatur."

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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