Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
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"All that serves labor serves the Nation. All that harms labor is treason to America. No line can be drawn between these two. If any man tells you he loves America, yet hates labor, he is a liar. If any man tells you he trusts America, yet fears labor, he is a fool. There is no America without labor, and to fleece the one is to rob the other."

Abraham Lincoln

NLRB ADVISES EMPLOYERS HOW TO AVOID UNIONS UNDER CLOAK OF COVID

On August 31, 2020, the National Labor Relations Board ("NLRB" or "Board") issued *NP Texas LLC d/b/a Texas Station Gambling Hall and Hotel*, dismissing a representation petition as untenable because an employer indefinitely suspended operations as a result of COVID-19. 370 NLRB No. 11 (Aug. 31, 2020). The Board's decision continues its trend of discouraging union representation, including during a crisis that has emphasized the vital function collective bargaining serves.

On May 28, 2020, Local Joint Executive Board of Las Vegas ("Union") filed a petition to represent a unit of employees employed by NP Texas LLC d/b/a Texas Station Gambling Hall and Hotel ("Texas Station"). Texas Station operates a hotel and casino in North Las Vegas, Nevada. However, a few months prior, in or around March 2020, Texas Station temporarily closed due to COVID-19. On May 1, Texas Station laid off the relevant employees, noting that the employment termination was due to temporary closure of the casino. Texas Station subsequently advertised that its closing was temporary on both its marquee and its website. Texas Station made similar representations to shareholders and employees.

Region 28 of the NLRB directed an election in the unit notwithstanding Texas Station's temporary closure. The Regional Director determined that Texas Station failed to meet its burden of demonstrating that the business permanently closed, noting that the Board does not dismiss election petitions based on uncertainty over future operations. Additionally, the Regional Director found that the employees had a reasonable expectancy of employment in the near future. The Regional Director relied on Texas Station's public representations as well as communications to individual employees in concluding that the casino may reopen and employees had a reasonable expectation of return.

The all-Republican 3-Member panel reversed the Regional Director's decision and dismissed the Union's election petition. The Board explained that "voting eligibility of laid-off employees depends on whether objective factors support a reasonable expectancy of recall in the

near future. . . ." The Board held that "in the absence of evidence of past practice regarding layoffs, where an employee is given no estimate as to the duration of the layoff or any specific indication as to when, if at all, the employee will be recalled . . . no reasonable expectancy of recall exists." Vague and hopeful statements, according to the panel, are insufficient to create an expectancy of recall. Based on its findings, the Board concluded that none of the petitioned for workers were eligible to vote and therefore, as a practical matter, the Board could not hold an election.

Accordingly, the NLRB regions will likely dismiss future representation petitions when the covered employees are laid off as a result of COVID-19 and no date for recall has been provided.

BOARD GENERAL COUNSEL DIRECTS REGIONS TO ISSUE COMPLAINTS AGAINST CARD CHECK NEUTRALITY AGREEMENTS AND RELATED ORGANIZING

By Guidance Memorandum GC 20-13 (the "Guidance") dated September 4, 2020, on eve of Labor Day weekend, National Labor Relations Board ("Board" or "NLRB") General Counsel ("GC") Peter B. Robb unleashed a direct assault on union card check neutrality agreements which anti-union advocates long desired. An outline of the Guidance follows.

1. The Rationale – Robb acknowledges that the Board has long applied a "totality of the circumstances" test to evaluate whether employer activity during a union organizing drive impermissibly assists a union in violation of Section 8(a)(1) and (2) of the National Labor Relations Act (the "Act" or NLRA") and a stricter "more than ministerial aid" standard to employer conduct during decertification activity. As a result, alleged employer support during organizing efforts – such as providing employee information and access to a union – would generally not violate the Act because the "totality of the circumstances" did not impair employee free choice, but the same conduct supporting employees seeking to decertify a union would violate the Act because "more than ministerial". Robb argues that the same employer conduct must have a same or similar impact on employee choice under the Act and, therefore, the same standard should apply. The Guidance applies the strict "more than ministerial" standard, which effectively nullifies most card check neutrality conduct and agreements as practiced for decades.

2. Application to Pre-Recognition Organizing – the Guidance provides a laundry list of employer-union activity that may or may not be part of a card check neutrality agreement, usually lawful under the "totality" test but unlawful using the "more than ministerial" standard:

(a) -(b) Allowing non-employee union organizers access to employer facilities during breaks or meal time or informing employees that organizers are present.
(c) Providing a union with employee contact information such as a list of names or identifying information.
(d) Any communication, such as a notice announcing the neutrality agreement, which may suggest employer's preference for a union.

3. All Neutrality Agreements Come Under Strict Scrutiny - According to GC Robb: "…where a minority union and an employer enter a neutrality agreement that sets *or otherwise deals with* terms and conditions of employment," they clearly violate Sections 8(b)(1)(A) and 8(a)(2) of the Act. "This bright-line test should be applied to all neutrality agreements that set *or deal with* terms and conditions of employment." (*Emphasis added).* As to all other neutrality agreements, "Regions are instructed" to submit such cases "to the Division of Advice". The Guidance specifically emphasizes the breadth of "deal with" by examples which, to GC Robb, provide the union with a "deceptive cloak of authority" in aid of organizing "and [are] therefore unlawful":

(a) Agreements which suggest a range of wages
(b) Interest arbitration provisions
(c) No strike/no lockout provisions can restrict the union but cannot waive employees' right to strike.
(d) Access to company facilities
(e) Determination of an appropriate unit by the union and employer, generally a pre-requisite to card count, because it "ousts the Board of its authority to determine the unit while at the same time giving the union" a prohibited "cloak of authority" that interferes with employee free choice.
(f) Provisions that restrain employee access to the Board for elections because "NLRB-supervised elections provide the more reliable basis for determining whether employees desire representation."

FEDERAL COURT EXCISES PARTS OF TRUMP'S PROPOSED CHANGES TO JOINT EMPLOYER RULE

In a lawsuit brought by the Attorneys General of 17 states, including New York, and the District of Columbia against the Trump administration, on September 8, 2020, Judge Gregory Woods of the United States District Court for the Southern District of New York issued a 62 page opinion voiding sections of the United States Department of Labor's ("DOL") proposed changes to the "joint employer rule" under which a related entity may be held liable for the acts of the primary entity.

Judge Woods ruled that the proposed rulemaking was done in an "arbitrary and capricious" fashion because the DOL failed to offer any justification for it or consider the costs to workers and that the DOL's interpretation of who counts as a joint employer conflicted with the Fair Labor Standards Act. The issuance of the proposed rule was covered here in March.

Judge Woods wrote, "if the Department's interpretation were 'clear' (or even permissible), some court would have probably adopted its rationale. But the Department has found not a one. Over eighty years later, this dog has yet to bark."

The joint employment standard determines when more than one employer is responsible under the FLSA because both exert sufficient influence over a worker's employment. The rule which became effective in March contained a four-factor "balancing test" meant to help determine FLSA joint employer status. The test considered whether the potential joint employer had the power to: hire or fire the employee; supervise and control the employee's work schedule

or conditions of employment to a substantial degree; determine the employee's rate and method of payment; and maintain the employee's employment records. Judge Woods ruled that the test is "impermissibly narrow," finding that "the conclusion that an employer satisfies 'one or more of the control factors' is a necessary condition for an entity to qualify as a joint employer. That conflicts with the FLSA."

Dramatically changing the parameters of joint employer has been a goal of franchise based businesses like McDonald's, Amazon.com, FedEx and hotel operators for many years. The rule would set aside Obama administration guidance that the employment relationship hinges on "economic realities," such as the work being performed and companies' influence over the workplace environment.

The case is *New York et al v Scalia et al*, Southern District of New York, No. 20-01689.

COVID PROVIDES NO PAUSE OF NYS OCTOBER 9 SEXUAL HARASSMENT TRAINING DEADLINE

As you know, New York State requires annual training in sexual harassment prevention, and New York City imposes similar requirements. The State training deadline for 2020 is this October 9th, fast approaching. There is no indication from New York State that the COVID pandemic pauses this deadline. For most employers recovering from the COVID Spring shutdown, that deadline is fast approaching unfulfilled. If you fall into this large category, it is time to discuss options with counsel now.

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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TO ALL OUR FRIENDS AND CLIENTS, OUR THOUGHTS, MEMORIES, AND SUPPORT ARE WITH YOU AS WE ALL REMEMBER THE EVENTS OF SEPTEMBER 11.