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

AMERICA MOURNS THE DEATH OF JUSTICE RUTH BADER GINSBURG

"[She] embodied for me the possibility and the courage and the strength of trying to shoot for the stars as an attorney, substantively and with impact, but also to have a life, to be a kind person and to be a mother." Chief Legal Officer, Fortune 500 Company. As Chief Justice John Roberts eulogized: "Our nation has lost a jurist of historic stature … a tireless and resolute champion of justice."

Justice Ruth Bader Ginsburg, born in Brooklyn in 1933, graduated at the top of her class from Columbia University Law School in 1959. After 13 years on the District of Columbia Circuit Court of Appeals, Justice Ginsburg became the second woman to serve on the U.S. Supreme Court in August 1993.

A/k/a "The Notorious RBG," Justice Ginsburg won fame as a steadfast advocate for human rights while working at the American Civil Liberties Union and whether writing for the majority or in one of her powerful dissents on the U.S. Supreme Court. The New York bar knew Justice Ginsburg as its Circuit Justice for the Second Circuit. America knew her as an embodiment of feminism and its cause.

The final quote is therefore hers: "Women belong in all places where decisions are being made." Justice Ginsburg is there now. May her memory be a blessing.

NEW YORK STATE SICK LEAVE LAW CHANGES TO GO INTO EFFECT SEPTEMBER 30, 2020

Beginning September 30, 2020, New York will have two tracks of sick leave laws: one specific to COVID-19, and one that is general. Unlike the COVID-19 Sick Leave Law, which is expected to expire at the end of the pandemic, the New York Sick Leave Law is expected to be permanent. Employees will begin accruing time toward New York Sick Leave on September 30, 2020, but the sick leave may not be used until January 1, 2021.

The amount of sick leave, and whether it is paid or unpaid, varies by employer size and net income as follows:

- Employers with 4 or fewer employees and a net income of less than $1 million must provide at least 40 hours of unpaid sick leave each calendar year.
- Employers with 4 or fewer employees and a net income of more than $1million must provide at least 40 hours of paid sick leave each calendar year.
- Employers with between 5 and 99 employees must provide at least 40 hours of paid sick leave each calendar year regardless of net income.
- Employers with 100 or more employees must provide at least 56 hours of paid sick leave each calendar year regardless of income.

In addition, New York Sick Leave may be used for the following reasons:

- For the diagnosis, care, or treatment of an employee or an employee's family member's mental or physical illness, injury, or health condition;
- For preventive care for an employee or an employee's family member; and/or
- When an employee or an employee's family member has been the victim of domestic violence, a family offense, sexual offense, stalking, or human trafficking, and needs leave to meet with social services, meet with an attorney, file a complaint, and other enumerated reasons related to the offense.

New York Sick Leave has two methods for employers to provide the leave: (1) accrual or (2) lump sum. Under the accrual method, employees accrue sick leave at a rate of 1 hour for every 30 hours worked. Under the lump sum method, employers may grant the full amount of sick leave (40 or 56 hours depending on size of employer) at the beginning of each year. Accrued, unused sick leave carries over to the next year. If an employer is subject to both New York Sick Leave and either Westchester County Sick Leave or New York City Sick Leave, the more generous benefit will apply.

It should also be noted that employers with collective bargaining agreements may be treated differently. Collective bargaining agreements ("CBAs") entered into on or after the effective date of the law must provide paid sick leave benefits that are at least "comparable" to those provided for under the Law. Such benefits may be in the form of paid time off, or other leave, compensation, or benefits. Further, the CBA must "specifically acknowledge" the provisions of the Law. Parties operating under a CBA may negotiate terms and conditions of sick leave different from the provisions of this section provided that the CBA specifically acknowledges the sick leave law. Employers with policies that meet or exceed the requirements of the sick leave law are not required to provide employees with additional leave.

The new New York Sick Leave provisions can be found here: https://www.nysenate.gov/legislation/laws/LAB/196-B

SO YOU THOUGHT YOUR DISCUSSIONS WITH COUNSEL WERE PRIVILEGED? THINK AGAIN

Retailer Barnes & Noble thought its discussions with counsel for legal advice on compliance with the wage-hour requirements of the Federal Fair Labor Standards Act ("FLSA") were privileged, but both federal district court magistrate and judge disagreed. *Kelly Brown v. Barnes & Noble, Inc*., SDNY 1:16-cv-07333 (Aug. 26, 2020).

Faced with a potential class action, Barnes & Noble asserted "good faith" for allegedly misclassifying "managers" as exempt. That, explained the Court, put counsel's discussions with the employer squarely at issue, thereby waiving the privilege. To emphasize the point, the Court awarded $25,000 in attorneys' fees to plaintiffs against Barnes & Noble for litigating the issue. Clearly, clients and counsel should be sure that they document the compliance aspects of their discussions, and take care to weigh the pros and cons before asserting a "good faith" defense.

NJ FEDERAL COURT CASE MAY IMPACT WHETHER MANDATORY COVID-19 HEALTH SCREENINGS ARE COMPENSABLE UNDER WAGE AND HOUR LAWS

As the economy continues to open up and more employees reenter the workplace, the question of whether mandatory COVID-19 health screenings are compensable becomes critical. A United States District Court of New Jersey decision may impact arguments that the time used for mandatory COVID-19 health screenings should or should not be compensable.

In *Vaccaro v. Amazon.Com, DEDC, LLC*, 3:18-cv-11852 (June 29, 2020) the Court ruled that time spent undergoing post-shift mandatory security screenings is compensable under New Jersey's wage and hour law ("NJWHL"). N.J.S.A. 34:11-56a *et seq*. A link to a copy of the decision and order can be found here. In *Vaccaro*, the plaintiff alleged that she along with hundreds of other warehouse workers were not compensated for time spent waiting to pass through security screenings after their shifts ended. Employees were required to walk through a metal detector, place personal items on a conveyer belt to be scanned via X-ray, and sometimes undergo a "secondary" screening involving a physical search of the person.

Plaintiff Vaccaro also alleged that because Amazon required workers to go through the same security screenings before leaving and after returning from meal breaks, their actual time spent on lunch was reduced and undercompensated. The Fair Labor Standard Act ("FLSA") requires that employees be paid for all hours worked, except those activities that are "preliminary" and "postliminary" to the employee's primary activity.

Relying, in part, on New Jersey's wage and hour regulations, which defined "hours worked" as all the time the employee is required "to be at his or her place of work," Chief Judge Freda L. Wolfson predicted that the State judiciary would conclude that time spent undergoing mandatory security screenings at the end of the workday is compensable as "hours worked." NJAC 12:56-5.2(a). "Place of work" is any place where an activity is performed that is

controlled or required by the employer and such activity serves to primarily benefit the employer. As Chief Judge Wolfson noted, Plaintiff Vaccaro and her colleagues were not only compelled, but the screenings benefitted only Amazon, and such a finding was consistent with FLSA precedent.

Please note that, in addition to whether the time is compensable, any mandatory COVID-19 screenings must also comply with federal, state and local anti-discrimination laws, such as the Americans with Disabilities Act.

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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