# 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*

## NEW YORK'S ELECTION DAY RULES

With the early voting period beginning in New York on October 24, 2020 and Election Day on November 3, 2020, it is worth reminding our readers that all employers are mandated by New York State Election law to provide workers time to vote. The law, passed in 2019, originally required that employees be given up to three (3) hours of paid time off to vote. A 2020 amendment changed the law to permit employers to specify when during the work day the employee may take the "voting" time and clarified that the time may not be charged against the employee's benefits time.

Specifically, New York State has undone the changes that were made in 2019. Under the new "old" law, employers in New York State are required to provide employees who are registered voters with up to two (2) hours of paid time to vote on Election Day, if the employee does not have "sufficient time to vote." An employee is considered to have "sufficient time to vote" if he or she has four (4) consecutive non-working hours in which to vote, either from the opening of the polls until the start of the employee's shift, or from the end of the employee's shift to the close of the polls. Employees who do not have sufficient time to vote are permitted to take off time that will, when added to his or her voting time outside his or her working hours, enable him or her to vote.

Specifically, an employee who takes off time to vote must take time at the beginning or end of the employee's work shift, as designated by the employer, unless the employer and employee mutually agree to another time. An employee who needs time off to vote must notify his or her employer not more than ten (10) and not less than two (2) working days before the day of the election that he or she requires time off to vote.

In addition, employers must post notice of their employees' right to voting leave. The poster must go up not fewer than ten (10) business days before Election Day. For employers whose business days are Monday through Friday, the posting date this year is October 20, 2020. The notice must be posted where it can be seen as employees come or go to their place of work and must be kept posted until the close of the polls on Election Day.

If an employee has four consecutive hours either between the opening of the polls and the beginning of his or her working shift, or between the end of his or her working shift and the closing of the polls, the employee is deemed to have sufficient time outside his or her working hours within which to vote. On the other hand, if the employee has less than four consecutive hours, then he or

she may take off so much working time as will, when added to his or her voting time outside his or her working hours enable him or her to vote, but not more than two hours of which shall be without loss of pay.

With the increase in telecommuting, it is wise for employers to post any notices through employee e-mail, as telecommuting employees are entitled to this paid time off. Further, the time off applies to all elections, whether general, primary, run-off, town and village, but not school boards. The law is silent over whether employees must somehow prove that they voted.

https://www.elections.ny.gov/NYSBOE/elections/TimeOffToVoteNotice.pdf

## NLRB CONTINUES TO HALT VOTE BY MAIL ELECTIONS

In an update to a recent *In Focus* article, the National Labor Relations Board ("NLRB" or "Board") has halted more vote by mail union elections despite a national spike of COVID-19 infections, issuing orders that indefinitely delay votes that have already been scheduled. The Board's trend graphically hit New York City in *Housing Works Inc. and Retail, Wholesale and Department Store Union, UFCW*, 29-RC-256430 (Oct. 15, 2020).

In *UFCW*, the Regional Director for Brooklyn, N.Y. rejected the attempt of non-profit Housing Works Inc. to withdraw from an agreement for a mail election which had been delayed due to COVID. NLRB Chair Ring and Members Kaplan and Emanuel, all Trump appointees, reversed the Regional Director, citing "unusual circumstances," providing explanation. Among the factors cited by Housing Works and approved by the Board, the employer had closed covered and opened several excluded facilities, as well as laying off one-third of the covered union employees while hiring an even greater number of excluded employees, all allegedly due to COVID. While noting that its decision is limited to the facts presented, the unusual reversal of the Regional Director provides yet another Board roadmap to avoid collective bargaining under the cloak of COVID.

In the early days of the COVID-19 pandemic, the NLRB appeared willing to permit vote by mail union elections. However, since the NLRB's General Counsel Peter Robb issued a July 6 memorandum to regional offices detailing protocols for safe manual elections, the NLRB has made it more difficult to conduct mail elections. Since late August, the NLRB has stopped five vote by mail union elections and has only allowed four to proceed. For the elections that have been canceled, the NLRB has yet to determine how the suspended elections will proceed. In all of these cases, the NLRB's majority has stated that the employer's request to oppose vote by mail elections "raises substantial issues warranting review," without further explanation.

## NLRB POLICES WORKPLACE ETIQUETTE

Earlier this year, the U.S. National Labor Relations Board ("NLRB" or "Board") replaced its rule protecting employee speech to management with one more protective of management. The shift played out dramatically in *Wismettac Asian Food, Inc.*, 21-CA-207463 (Oct. 14, 2020) as

Chair Ring and Members Kaplan and Emanuel, all Trump appointees, ordered an administrative law judge ("ALJ") to reopen argument and record, reversing her finding that the employer unlawfully disciplined an employee for his "angry and hostile tone" when raising safety concerns at a safety meeting.

ALJ Eleanor Laws found in 2019 that Wismettac vigorously opposed a Teamsters organizing drive by serial meetings and widespread discipline and discharge of union supporters in violation of the National Labor Relations Act (the "Act") including counseling of driver Rolando Lopez. Applying *Atlantic Steel Co.*, 245 NRLB 814 (1979), the ALJ found that Lopez engaged in protected activity by raising the issue of overweight trucks at a safety meeting of drivers called by management and that his behavior fell far short of being "so opprobrious" as to forfeit the Act's protections. Lopez merely raised his voice, rolled his eyes and smacked his lips when interrupting a manager, then stopped when so directed.

Retroactively applying its recent decision in *General Motors, LLC*, 369 NLRB No. 127 (2020), the Board vacated the ALJ's decision on Lopez in one paragraph, remanding to reopen argument and record on whether Wismettac would have disciplined Lopez even in the absence of protected activity under the *Wright Line* dual motive test. While not unexpected, the circumstances of the case – Lopez's mild behavior in context of a safety meeting, the imposition of an already weakened *Wright Line*, and Wismettac's claim that its manager subjectively felt threatened – illustrate just how unprotected vital employee concerns have become under the current employer advocating Board.

## PBGC PREMIUM INCREASE FOR MULTIEMPLOYER PLANS

Historically, the Pension Benefit Guaranty Corporation ("PBGC") per participant insurance premium for multiemployer benefit plans is adjusted for inflation. In light of the low inflation environment of the last several years, the PBGC has been increasing the premiums at a rate of $1 per year. Once again, the PBGC has increased the premium beginning January 1, 2021 from $30 per member to $31 per member.

https://www.pbgc.gov/prac/prem/premium-rates

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**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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