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

FEDERAL COURT REJECTS NLRB BID TO STRIKE DOWN OREGON ANTI-CAPTIVE AUDIENCE LAW

On October 9, 2020, the National Labor Relations Board ("NLRB" or "Board") suffered a defeat in federal district court, where the agency sought to invalidate an Oregon law prohibiting the discipline of workers for refusing to attend employer captive audience meetings. *NLRB v. State of Oregon*, 20-cv-203 (MK) (D. Or. Oct. 9, 2020). The rejection on procedural grounds could make it more difficult for the Board to enforce National Labor Relation Act ("NLRA") preemption in the future.

In 2009, Oregon enacted a law providing that an "employer . . . may not discharge, discipline or otherwise penalize or threaten to discharge, discipline or otherwise penalize or take any adverse employment action against an employee: (a) Because the employee declines to attend or participate in an employer-sponsored meeting . . . if the primary purpose of the meeting or communication is to communicate the opinion of the employer about religious or political matters." ORS § 659.785(1). At the time the law was enacted, the Chamber of Commerce alleged that the law was unconstitutional and preempted by the NLRA. *Assoc. Oregon Indus. v. Avakian*, 09-cv-1494 (D. Or. May 6, 2010). However, the court then dismissed the Chamber's claims as not yet ripe for adjudication because it was unable to show that its members faced real and imminent threat of prosecution.

The Republican-led NLRB took up the mantle for the Chamber this year, alleging that the Oregon statute is preempted by the NLRA because it conflicts with the NLRB's regulation of employer conduct during an election campaign and its ability to regulate unfair labor practices.

Magistrate Judge Kasubhai, however, determined that the Board failed to establish its standing to pursue its lawsuit. To establish standing: (1) a plaintiff must suffer an injury in fact; (2) there must be a causal connection between the injury and the offending conduct; and (3) it must be likely that the injury would be redressed by a favorable decision from the court. The court concluded that the injury alleged by the Board – a disruption of the regulation of labor elections – is a speculative harm to third parties not before the court. Moreover, the court found that because the statute is privately enforceable, the Board could not demonstrate how any action by the State of Oregon caused the alleged injury. Accordingly, the court granted Oregon's motion to dismiss.

While the result obviously benefits unions and workers in the short-term, such a restrictive view of the NLRB's federal court standing may produce complications for a future Democratic Board seeking to enforce NLRA preemption against laws it finds troubling. This case also serves as a stark reminder of the potential consequences of the current articulation of NLRA preemption. As used in many federal laws like the Fair Labor Standards Act, floor preemption, where the federal government sets minimum requirements that states can exceed, may prove a more effective method of securing collective bargaining rights under the NLRA.

TRUMP THREATENS CONTRACTORS ON ANTI-BIAS TRAINING – OFCCP SEEKS SUPPORT BY DEC. 1, 2020 – BUSINESS AND NONPROFITS PUSH BACK

In a remarkable series of pre-election strikes and counters, President Donald J. Trump issued an Executive Order in late September threatening federal contractors who conduct anti-bias training, the Office of Federal Contract Compliance Programs ("OFCCP") solicited comments on implementation, and leading businesses urged the Administration to recall its order while themselves doubling down for diversity. As discussed below, the stakes are high.

President Trump's Executive Order 13950 (Sept. 22, 2020) barred federal contractors from conducting "offensive and anti-American" training, such as suggesting that workers could be "inherently racist, sexist, or oppressive, whether consciously or unconsciously." On October 21, the OFCCP issued a request for information and comments from the public by December 1, 2020 to implement and enforce the Order. OFCCP Director Craig Leen compared E.O. 13950 to the 1965 Civil Rights Executive Order, encouraged worker complaints on a dedicated hotline and email address, and promised, "If we do get a complaint ... we will act on it now." According to sources, over 100 employee complaints have been received to date.

Business and non-profit opposition came broadly and emphatically. A joint public letter dated October 15, 2020 signed by over 150 businesses and non-profits and their associations, from virtually every state coast to coast including the U.S. Chamber of Commerce, urged the President "to withdraw the Executive Order and work with the business and non-profit communities on an approach that would support appropriate workplace training programs" and "create inclusive workplaces." The letter notes that the ambiguity and subjectivity of the Executive Order language, such as the phrase "anti-American," encourages meritless lawsuits, endangers contracts and chills or discourages needed training. Even more dramatically, many companies, including Microsoft, Wells Fargo, LinkedIn and Starbucks, publicly ramped up their diversity efforts, sometimes in the face of Labor Department "inquiries" against them.

In the words of the old labor union song, which side are you on boys, which side are you on?

Vote on or before November 3.

SCOTUS SIGNALS INTEREST IN HEARING ERISA CASE

Last week the United States Supreme Court signaled interest in hearing arguments in a class action lawsuit brought by PricewaterhouseCoopers LLP ("PwC") retirees that are seeking higher pension benefits. The Supreme Court asked the United States solicitor general to file a brief with its opinion on how a federal court of appeals should handle Employee Retirement Income Securities Act ("ERISA") remedies.

PwC asked the Supreme Court to reverse a 2019 decision from the Second Circuit Court of Appeals (see *Laurent v. PricewaterhouseCoopers LLP*, Docket No. 18-487 (2019)) which held for the first time that ERISA authorizes plan participants to seek an order rewriting plan terms to remedy a violation of the statute, even when there is no indication that the ERISA violation stemmed from fraud or misconduct. PwC objected that the decision in *Laurent* possibly creates a $2 billion windfall for PwC retirees.

For the past decade, PWC retirees have been in court challenging various provisions of their pension plan, including how the plan defined a worker's normal retirement age. Prior decisions established that PwC's retirement plan's retirement age violated ERISA, however a trial court judge ruled that ERISA did not provide retirees an avenue for remedying the violation. The Second Circuit disagreed, holding that ERISA authorizes courts to rewrite the plan terms to remedy statutory violations that are not rooted in fraud. The Third, Fourth and Eighth Circuits have rejected this legal proposition. If the Supreme Court agrees to consider this case, it will settle the split among the different circuit courts, limiting or expanding plan exposure as the Supreme Court may decide.

OSHA DEBUNKS N95 MISINFORMATION AND DECLARES THE MASKS VERY EFFECTIVE AGAINST COVID-19

The Occupational Safety and Health Administration ("OSHA") confirmed that N95 respirator masks are effective in protecting the wearer from COVID-19, thereby debunking rumors that COVID-19 is too small to be trapped by the N95's filters.

OSHA said it "is aware of incorrect claims stating that N95 respirators' filter does not capture particles as small as the virus that causes the coronavirus." OSHA unveiled new guidelines to set the record straight on the effectiveness of N95 masks which doctors, nurses and other healthcare professionals use when treating patients with COVID-19. OSHA stated that the N95 masks are "very effective at protecting people from the virus causing COVID-19."

The misinformation about the effectiveness of N95 masks stems from the mistaken belief that COVID-19 can't be filtered out by the N95 because the particle is around 0.1 microns and too small for the N95 respirator to filter out. OSHA stated that proponents of this belief fail to understand how respirators work. According to OSHA "the virus rarely travels alone, as it often moves through the air with companions that are much larger. When an infected person expels the virus into the air – by coughing, talking, or sneezing – the particles that are airborne consist of

more than just" COVID-19, as they also contain water or mucus. OSHA said, "these larger particles are easily trapped and filtered out by N95 respirators because they are too big to pass through the filter."

OSHA was careful to note that N95 alone will not single-handily stop the spread of COVID-19 and reminded employers that they must be "used as part of a comprehensive, written respiratory protection program that meets the requirement of OSHA's Respiratory Protection Standard."

Since mid-July OSHA has fined employers more than $1.2 million for failing to implement a written respiratory protection program that includes a respirator fit test, training, and a report that includes injuries or illnesses. This is a link to OSHA's Respiratory Protection Standard: https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.134.

SENATE MAJORITY CONFIRMS JUSTICE BARRETT TO SCOTUS

On October 26, 2020 the United States Senate confirmed Justice Amy Coney Barrett to the Supreme Court. Justice Barrett replaces Justice Ruth Bader Ginsburg who died on September 18, 2020. Justice Barrett is the third Supreme Court justice confirmed during the Trump administration.

The Senate voted 52-48 to approve the nomination. Every Democrat voted against Justice Barrett's confirmation in protest against Senate Majority Leader Mitch McConnell's decision to confirm Justice Barrett a week before Election Day after refusing to consider President Barack Obama's nomination of Judge Merrick Garland to the Supreme Court in 2016.

Justice Barrett was born in New Orleans, Louisiana. She graduated from Rhodes College where she was inducted into Phi Beta Kappa. Justice Barrett attended Notre Dame Law School where she graduated first in her class and served as an executive editor of the Notre Dame Law Review. Justice Barrett worked in the private sector and academia before being nominated to the Seventh Circuit Court of Appeals by President Donald Trump in 2017. Justice Barrett is the fifth woman to serve on the Supreme Court.

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