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

D.C. CIRCUIT SUBJECTS BOARD UNIT DETERMINATIONS TO STRICT SCRUTINY, INVALIDATING TWO ELECTIONS WON BY UNION

On October 23, 2020, the United States Court of Appeals for the D.C. Circuit issued *Davidson Hotel Co. v. NLRB*, complicating the Board's new standard for determining an appropriate unit. 19-1235 (D.C. Cir. Oct. 23, 2020). The Court's decision burdens the National Labor Relations Board ("NLRB" or "Board") election process and may result in more drawn-out challenges when employers contest the appropriateness of a bargaining unit. It may also portend a shift away from traditional deference for agency decisions.

In 2017, the Board modified its unit determination standard in *PCC Structurals, Inc*., 365 NLRB No. 160. Under the revised standard, when an employer asserts that a petitioned-for-unit must include additional employees, the Board determines "whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit." To make that determination, the Board analyzes and compares the traditional community of interest factors.

In March of 2018, UNITE HERE Local 1 filed a petition to represent a single unit of Davidson Hotel's housekeeping and food and beverage employees at the Chicago Marriott/Medical District. Region 13 Regional Director ("RD") Peter Ohr dismissed the petition, concluding that the petitioned-for-unit was inappropriate without the front desk employees. Decision and Order, 13-RC-215790 (Mar. 29, 2018). The RD explained that while the front desk employees' job functions were distinct from the unit's, the housekeepers and food and beverage employees themselves did not share common job functions. Moving on to working conditions, Ohr determined that all of the employee groups were subject to many of the same conditions of employment. Based on these factors, Ohr concluded that the front desk workers' interests were not sufficiently distinct and therefore they could not be excluded from a combined unit. In a footnote, Ohr noted that the Union could represent separate units of housekeepers and food and beverage.

Local 1 then filed separate petitions to represent housekeeping and food and beverage. Davidson challenged the new units. RD Ohr analyzed the units and concluded that they were

distinctly grouped, had different training, performed distinct work with separate job functions, lacked significant functional integration, never interchanged, and had different lower-level supervision. Decision and Direction of Election, 13-RC-217487 (Apr. 23, 2018). However, RD Ohr again recognized that the groups shared similarities in terms and conditions of employment. After weighing the factors, he concluded that the units were sufficiently distinct to warrant separate unit designations. RD Ohr rejected Davidson's claim that the new petitions were barred by his earlier decision, explaining that they involved different petitioned-for units. Following the RD's decision, the Union won both elections. The Board majority denied Davidson's request for review as raising no substantial issues. Order, 13-RC-217487 (June 5, 2019). Member Emanuel dissented, stating that in his view only a combined unit of all three groups would be appropriate.

On review, a unanimous three member panel of the D.C. Circuit denied enforcement of the Board's decision and remanded the matter back to the Board. The Court observed that the Board is obligated to explain its reasoning when certifying bargaining units. The Court first claimed that neither the RD nor the Board distinguished or otherwise addressed the initial RD decision in the subsequent certification, concluding that the only mention of the prior decision was that it involved a different unit, without explaining the RD's exclusion of front desk workers. The Court demanded that the Board explain why the balance of factors differed the second time around. Moreover, the Court admonished the Board for its failure to distinguish two community-of-interest Board decisions raised by Davidson. The Court recognized that the Board is not obligated to distinguish every case cited by a party, but "when faced with contrary precedent directly on point, the Board must distinguish it."

The Court's decision is concerning for several reasons. First, it does not give sufficient weight to the RD's reasoning. The initial petition obligated a distinct review because of the functional differences between housekeepers and food and beverage workers. The RD's decisions clearly demonstrated that, when the units were isolated, terms and conditions of employment alone could not undermine otherwise appropriate separate units. The Court's analysis elevates form over substance, requiring the RD to explicitly say the same. Secondly, a firm obligation for the Board to distinguish every "contrary precedent directly on point" invites a subjective analysis not well-suited for unit determinations, which are very fact sensitive. Moreover, the Board easily distinguished the two cases in its brief to the Court based on the traditional community of interest factors. Of course, the Board should not have trouble supplementing its decision to underline the points apparent to the RD. But ultimately this harsh review standard may obligate a more thorough analysis at the regional level going forward, which likely elongates the time it takes to complete a representation petition before the Board and frustrates workers' Section 7 right to join a union. Finally, whether this decision portends a consistent shift away from judicial deference for administrative decisions remains to be seen. In the meantime, the message to employers that the courts actively allow certification delay for years on end will not go unnoticed by the employer bar, while the Board and unions must more carefully articulate their reasoning and supportive authority.

NEW JERSEY AND CALIFORNIA TAKE POLAR OPPOSITE PATHS ON GIG ECONOMY LAW

The New Jersey Department of Labor and Workforce Development ("NJ DOLWD") is seeking to penalize Lyft, Inc. for labeling its drivers as independent contractors and failing to pay millions in employment-related taxes including unemployment and disability insurance. On the opposite coast, California passed a referendum exempting Uber and Lyft from a law classifying their drivers as employees.

The NJ DOLWD claims that Lyft owes the state $16 million in unemployment and disability taxes that also include back pay and interest. Last year, Uber received a bill of $650 million for misclassifying workers as independent contractors. While New Jersey limited its determinations to unemployment and disability insurance, it is possible that the NJ DOLWD could force Uber, Lyft and other gig employers to pay workers minimum wage and overtime under New Jersey state law.

While New Jersey continues to require that Uber and Lyft treat its drivers as employees, the state of California passed a ballot initiative on Election Day that will exclude Uber and Lyft from Assembly Bill 5 ("AB 5"). AB 5 codified a California Supreme Court decision that presumes that a worker should be an employee unless an employer can prove that (a) the worker is free from the company's control; (b) the job falls outside the company's "usual course of business" and (c) the worker typically operates a separate business from the company.

Uber and Lyft spent $200 million on opposing Proposition 22, the California ballot measure which keeps drivers from becoming employees eligible for benefits and job protections. The measure passed with 58% support from the ballots cast on Election Day. The passage of Proposition 22 was a defeat for labor unions that pushed for a state law aimed directly at classifying Uber and Lyft drivers as employees. Uber and Lyft had threatened to pull out of California if they lost the vote for Proposition 22. Now, their success in California may serve as a template for them in other states.

The classification of Uber, Lyft and other gig-economy workers will be hotly debated across the country as gig-economy jobs continue to grow in a changing economy.

BRUCE COOPER RETIRING FROM PITTA LLP

To Our Clients and Friends: Our friend, partner and colleague Bruce Cooper will be retiring from Pitta LLP, at the end of the 2020 calendar year. Since our founding, the growth and success of Pitta LLP, has been built on the hard work, professionalism and dedication of our partners, counsels, associates and our non-attorney professional, administrative and support staff. Over the course of the past 13 years, Bruce has been an integral part of our growth and success. His contributions are greatly appreciated and will never be forgotten.

And, while Bruce has earned the opportunity to dial it down a notch, he will continue to maintain his active affordable housing and related real estate transactional practice through his own, yet to be formed, law firm.

From now until the end of 2020, we will be transitioning all of Bruce's responsibilities, with those of our labor, employment and employee benefits clients which he is currently servicing, to other Pitta LLP attorneys. Bruce will of course be available to us for consultation, both during and after the aforesaid transition period.

Please join us in congratulating Bruce on a long and successful career and thanking him for his good and loyal service to Pitta LLP. We extend to him and his family, our very best wishes for long, happy, prosperous and healthy lives.

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.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.