Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
December 8, 2020 Edition

"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

FOR GOD AND COUNTRY-EEOC ISSUES UPDATED COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION

On November 17, 2020, by a prior party line 3:2 vote, the United States Equal Employment Opportunity Commission ("EEOC") proposed an Updated Compliance Manual on Religious Discrimination ("Update") for public comment by December 17, 2020 and White House approval. While not binding or precedential on the public, the timing, manner, and scope of the Update, coupled with recent United States Supreme Court decisions addressing religion, may offer a preview of how a rightward tilting judiciary may view the complicated balance of First Amendment directives, especially in the employment context of harassment and reasonable accommodation.

Spanning over 100 pages, the Update purports to bring current a prior manual issued July 22, 2008 by incorporating subsequent court decisions, including *Bostock v. Clayton County* (extending Title VII to discrimination based on sexual orientation or transgender status, "But how…doctrines protecting religious liberty intersect with Title VII are questions for future cases too."); *Masterpiece Cakeshop Ltd. V. Colo. Civil Rights Commission* (religious based discrimination against gay couple); *Our Lady of Guadalupe School v. Morrissey-Berru* (applying "religious organization" and "ministers" exception to certain federal discrimination prohibitions); and *Burwell v. Hobby Lobby*, (deferring to family owned company's sincerely held religious belief). The Update with numerous examples and best practices, applies only to Title VII of the Civil Rights Act of 1964 ("Title VII"). A prior, similar U.S. Department of Labor rule covering federal contractors will become effective in January 2021. State and local discrimination laws may be informed by or conflict with the Title VII Update.

The Update devotes considerable analysis to harassment and religion, summarizing that "the facts of religious harassment cases may present unique considerations, especially where the alleged harassment is based on another employees' religious practices-a situation that may require an employer to reconcile its dual obligations to take prompt remedial action … and to accommodate certain employee religious expression." In juggling this balance, the EEOC recommends "a well-publicized and consistently applied anti-harassment policy that covers religious harassment." However, since "discussion of religion in the workplace is not illegal,"

employers "should allow religious expression among employees at least to the same extent that they allow other types of personal expression that are not harassing or disruptive."

The EEOC devotes almost half the Update to reasonable accommodation which must be provided to an employee "where sincerely held religious belief … conflicts with a work requirement." A particular accommodation may be excused if it creates an "undue hardship," defined as "more than a *de minimis* cost or burden." The Update's analysis and examples confirm an expansive understanding of "sincerely held religious belief" and a narrow view of the undue hardship exception. For example, employers must take care in questioning the sincerity of even "idiosyncratic" religious beliefs for an accommodation, focusing on the sincerity rather than the logic or popularity of such beliefs, and accepting third party verification not just from church officials, but from "others who are aware of the employee's religious practice or belief." Similarly, while reaffirming that violation of a *bona fide* seniority system or collective bargaining agreement would constitute an undue hardship, voluntary swaps or other measures must be explored and fellow employee jealousy or complaints provide no excuse or defense. Religious objections to unions or their policies must be accommodated by agency fees or dues reductions.

The EEOC Update may soon find more than general application to the usual issues. With COVID-19 rampant and vaccinations rushing through testing to distribution, employers may soon confront employees refusing treatments and restrictions on religious grounds.

SPATE OF LITIGATION ALLEGES NEW CAUSES OF ACTION TO COMBAT UNSAFE WORKING CONDITIONS RELATED TO COVID-19

As the deadly novel coronavirus ("COVID-19") continues to ravage the population of the United States, a number of recent lawsuits throughout the country highlight the dramatic, and often tragic, effects this virus has had on the American workforce. In response, various groups of workers initiated civil actions against some of the most recognized companies in the United States, such as McDonalds, Amazon, Tyson Foods, and Smithfield Foods. Further, just as COVID-19 has caused the population to adapt to the "new normal," the plaintiff-side bar has similarly adapted by advancing, among other things, "public nuisance" claims and "disparate impact" claims against employers who, allegedly, have ignored prudent safety practices and governmental guidance. Additionally, the plaintiff-side bar similarly is advancing several new cases designed to provide increased safety protections to pregnant front-line workers.

With respect to the "public nuisance" doctrine, the workers in those lawsuits have averred that their respective employers have placed the workers in unsafe work environments by having them work in close contact with each other, by ignoring social distancing guidelines, by failing to properly sanitize workstations, and by not performing routine health screenings. This theory claims that the actions or inactions taken by employers have created a threat to public safety, not just for the plaintiffs but also for their families. Additionally, these plaintiffs are frequently foregoing monetary damages, and are instead seeking injunctive relief that would take the form of

compelling the employers to take more aggressive workplace actions to minimize the transmission and spread of COVID-19 amongst the work force. An example of this can be seen in a pending lawsuit filed by workers in an Amazon fulfillment center in Staten Island, which is currently before the United States Court of Appeals for the Second Circuit.

One of the legal hurdles facing these types of cases involve the issue of whether the Courts are the best place for the claims to be decided. The argument against judicial involvement lays the responsibility for adjudicating these issues with the Occupational Safety and Health Administration ("OSHA"). Another significant legal obstacle for advancing cases under the "public nuisance doctrine" is whether the exclusive remedy rule, inherent in workers compensation law, bars employees from seeking redress for potential workplace injuries in an alternative forum.

With respect to the "disparate impact" doctrine, typically used in discrimination lawsuits under Title VII of the Civil Rights Act of 1964 ("Title VII"), the workers in those lawsuits allege that facially neutral employer policies have a disparate impact on workers in protected classes of individuals (e.g. race, color, and/or national origin). Further, the plaintiffs in those cases allege that, due to their overall demographic population, non-white workers are at an increased risk to suffer from the lax implementation and/or enforcement of workplace safety measures. An example of this cause of action can be seen in a pending charge before the Equal Employment Opportunity Commission ("EEOC") involving a group of Miami-Dade County transit workers who are primarily African American.

An unresolved obstacle to successfully pursuing "disparate impact" cases within the context of COVID-19 is whether white workers, also assigned to perform the tasks being complained of therein, receive more favorable treatment than the workers with protected status under Title VII.

With respect to the litigation involving pregnant front-line workers, the cases that have been initiated seek to expand statutory protections embodied in the Americans with Disabilities Act of 1990 ("ADA") and the Pregnancy Discrimination Act of 1978 ("PDA"), which build upon protections set forth in Title VII. As these cases detail, the workers confront a Hobbesian-choice of placing their health, and that of their children, at risk for continued receipt of a steady paycheck and health insurance coverage, or to forego the same in order to avoid exposure to COVID-19. Currently, the patchwork protections provided by these statutes allow for reasonable accommodations to be made by employers in the event that these employees suffer from some type of disabling condition that results from pregnancy. However, the Courts have been resistant to finding that pregnancy, in and of itself, is a qualifying condition under the ADA that would mandate employers engage in the interactive reasonable accommodations process. Further, attempts by Congress to provide more robust protections for pregnant front-line workers have stalled.

These matters, as others advancing similar causes of action, should be watched carefully, as these theories are largely unproven in the context of a public health emergency.

NOELIA E. HURTADO JOINS PITTA LLP

Pitta LLP is delighted to announce that Noelia E. Hurtado, an experienced benefits and ERISA attorney, has joined the Firm as Senior Associate effective December 1, 2020.

Noelia brings a wealth of skills and experience to the job. As an attorney in private practice, Noelia has guided benefit plans through the thicket of ERISA and all aspects of employee benefits law. Noelia rounded out her experience first as in-house counsel for PepsiCo and most recently as counsel to the federal administrative law judges of the Social Security Administration.

Noelia earned her Juris Doctor from the University Of Connecticut School Of Law, Hartford CT and her Bachelor of Arts degree from Fordham University in Political Science and Spanish/Latin American Literature and Linguistics. Throughout her career, Noelia has worked for social justice and equality.

Please join us in welcoming Noelia to our circle of friends and colleagues working together to meet the challenges of a better year ahead.

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.