Labor & Employment Issues
In Focus

Pitta LLP For Clients and Friends

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LAME DUCK TRUMP ADMINISTRATION RUSHES RULES, RULINGS, AND RETRIBUTION IN ELEVENTH HOUR

Just when you thought it was safe to relax for the holidays, the outgoing Trump Administration rushed to issue volleys of new rules advancing its agenda. Freed from any need to curry voter favor, these new rules reduce employees' wages in hospitality and construction, extend a freer hand to businesses to avoid joint employer liability, and try to stifle discussion of diversity in an increasingly complex America.

Reduce Wages

On December 22, 2020, the U.S. Department of Labor ("DOL") published its final rule allowing employers to pay employees the tipped minimum wage of $2.13 an hour even if they perform as little as 20% "tip" work. Thus, employees currently being paid $7.25 an hour who perform 80% non-tip work can be reduced to the tip level of $2.13 an hour though unlikely to actually be tipped. Employers who continue the full minimum wage can require tip pool sharing with back of the house staff. The DOL Inspector General targeted this rule as improperly promoted by the Department of Justice ("DOJ"). According to the DOL Inspector General, DOJ pressured DOL to suppress an internal analysis that this rule would divert $640 million from workers to management.

Also, buried in a December 14, 2020 internal memo interpretation long promoted and well known to construction industry employers, the DOL now eases the ability of federal contractors to pay the single lowest available residential rate on all projects and work where some residential work exists. In addition to reducing the rate of pay generally, the rule makes bidding for federal contracts more difficult for unionized employers whose labor agreements generally require higher wages. Building trades unions thus now face increased pressure for concessions or will suffer lost jobs.

Both rules will likely be rolled back by a pro-labor Biden Administration, but that may take time.

Limit Liability

Company liability as joint employer has generated controversy for all of 2020 and will continue unabated in 2021 as the White House reviews the DOL's final rule on joint employer status. The new rule replaces the Obama Administration's broad economic reality test with the more limited right of control standard. The change will not become effective until February 2021, presenting an early target for the Obama staffed Biden Administration to freeze and repeal.

Shut Up "Divisive" Diversity Speech

In September 2020, a combination of Executive Orders and Administration guidance ("Order") established a ban on federal contractors and grant recipients against any "divisive un-American propaganda training sessions" that "teaches or implies that an individual, by virtue of his/her race, sex and/or national origin is racist, sexist, oppressive or biased, whether consciously or unconsciously." The Trump Administration posted dedicated phone and email lines to report violators. Soon thereafter, the United States Chamber of Commerce and other business and non-profit groups asked the President to rescind the Order, to no avail. The Order's chilling effect was immediate as companies cancelled training sessions in fear of losing government contracts. Opposing litigation swiftly followed.

NO WAY YOU STAY FREE SPEECH – U.S. DISTRICT COURT ENJOINS ANTI-DIVERSITY ORDER

In *Santa Cruz Lesbian and Gay Community Center v. Donald J. Trump*, N.D.CA. No. 20-cv-07741-BLF, Plaintiff, backed by amicus briefs from "8 Institutions of Higher Education: (Boston University, Brandeis, Brown, Dartmouth College, Harvard, Stanford, Tufts and the University of Michigan), The City of Seattle and 20 Cities and Counties" and the New Teacher Center, charged that the Trump Administration Order banning diversity training ("Order") violated their First Amendment Right to free speech as overbroad and content based and their Fifth Amendment Due Process protections as unconstitutionally vague. On December 22, 2020, U.S. District Court Judge Beth Labson Freeman agreed in substantial part.

Judge Freeman granted a nationwide preliminary injunction barring the federal government from enforcing the Order against private contractors and grant recipients as to their programs unrelated to government contracts. Judge Freeman held Plaintiffs established a clear likelihood of success on their constitutional claims, since the Oder broadly prohibited free speech "unrelated to the use of federal funds" based on disfavored content, used hopelessly vague terminology, inflicted irreparable harm on speech generally and on Plaintiffs core mission specifically, and the public policy/balance of equities tipped decisively against such sweeping content based prohibitions. Acknowledging the Government's authority over its own workforce, the Court left untouched the Order with respect to training directed at federal workers. However, Judge Freeman added a stinging rebuke: "The Court agrees with Plaintiffs that the Government's argument is a gross mischaracterization of the speech Plaintiffs want to express and an insult to their work of addressing discrimination and injustice…That this Government dislikes this speech is irrelevant to the analysis but permeates their briefing."

The Trump Administration may appeal the District Court decision, as is its past practice, but time is running out, along with 2020 and the current President's term of office.

January is often depicted in ancient literature with two faces staring in opposite directions – one arising from the past, the other looking to the future. The content of 2021, and our country's evolving story, is yet to be written. Pitta LLP wishes all our clients, colleagues and friends a happy, healthy and meaningful new year.

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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