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

COVID-19 VACCINATIONS-STAYING HEALTHY, AND IMMUNE FROM DISCRIMINATION LAW LIABILITY

With the rapid approval by the U.S. Food and Drug Administration ("FDA") of "Emergency Use Authorization" for vaccines developed and produced by Pfizer Inc. and Moderna, Inc. against the novel coronavirus ("COVID-19"), can an employer mandate its workforce be vaccinated and, if yes, how? Guidance issued by the Equal Employment Opportunity Commission ("EEOC") on December 16, 2020 ("Guidance"), must be considered. Key elements of the EEOC Guidance are summarized below and a link to the EEOC for the full Guidance, including Section K, can be found here: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

Yes You Can

Generally, an employer can require all of its employees to be vaccinated prior to returning to work at its office, shop, plant, and/or department. But "can" does not mean "must" or even "should". To date, an employer is under no clear obligation to vaccinate the workforce. Therefore, an employer should weigh the benefits against alternative steps such as encouragement or incentives which may mitigate or avoid the legal risks discussed below.

There are no statutory prohibitions that would *per se* shield an employee from refusing vaccination, unless he/she falls into one of two specific exemptions discussed below. However, the employer still needs to be mindful of other statutory considerations when mandating vaccinations for its workforce, such as pre-screening questionnaires for vaccinations that may be limited by the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). Pre-screening questionnaires for vaccinations can be considered "disability-related inquiries" and therefore should be tailored to "job related" questions that are consistent with business necessity. Furthermore, employers must maintain all medical information, including any documents related to COVID-19 vaccinations, confidential and separate from an employee's respective personnel file. Accordingly, employers mandating vaccinations may prefer to refer employees to sources the employer does not control, such as the employee's medical practitioner or pharmacy.

But There Are Exceptions

One of the exemptions to an employer-mandated COVID-19 vaccination policy arises if an employee has a disability under the ADA, which is defined as a physical or mental impairment that substantially limits one or more major life functions of such individual. The disability may prelude vaccination but the employee may still pose a "direct threat" to self or others, thereby allowing the employer to bar the employee from premises. However, the employer is still required to engage in an interactive process with said employee to ascertain if there is a reasonable accommodation that would not impose an "undue hardship" on the operation of the employer. Although the courts and the EEOC have not dealt with the application of the ADA to COVID-19 vaccines, they have previously determined that reasonable accommodations can be made for employees as they relate to vaccines for TDAP, rubella, and the flu.

The other exemption to an employer-mandated COVID-19 vaccination policy arises if an employee states a sincerely held religious belief that would be anathema to receiving such a vaccine. Under Title VII of the Civil Rights Act of 1964 ("Title VII"), an employer cannot discriminate against an employee on the basis of religion or force an employee to receive a COVID-19 vaccination if it would run afoul of his/her religion. Much like the exemption under the ADA, if an employee invokes Title VII protection in this context, the employer is obligated to pursue a reasonable accommodation with said employee subject to "undue hardship." Though defined as a burden "more than *de minimis*" here, the courts and EEOC have recently shown special sensitivity to alleged infringements on religious freedoms and employers are limited in contesting whether such a religious belief is sincerely held. As with the ADA, the courts have previously applied this religious exemption under Title VII with respect to the flu vaccine.

And That's Not All

In the event that an employee falls into one of the protected classes discussed above and a reasonable accommodation cannot be achieved, then, according to the EEOC's Guidance, the employer could exclude said employee from the workplace. However, the Guidance does not allow the termination of said employee. Rather the EEOC indicates that the employer should look to other applicable employment laws if any other protections exist and whether said employee may be eligible to take leave under the Families First Coronavirus Response Act, the Family Medical Leave Act, or under the employer's own internal policies. In setting its policies and implementing them, an employer may rely on the Centers for Disease Control ("CDC") for the latest expert standards and information.

In this vein, there will also be other federal, state, and local laws that could exempt employees from having a COVID-19 vaccine being imposed upon them by their employer. For example, the National Labor Relations Act ("NLRA") may prevent the unilateral imposition of such vaccination policies without bargaining first as a mandatory subject of bargaining that cannot be unilaterally instituted. Even independent of the ADA, a 2009 letter from the Occupational Safety and Health Administration ("OSHA") suggests that employees who refuse vaccination

because of a reasonable belief that they have a medical condition which might trigger a serious reaction, such as an allergy, are protected, a position likely to arise with respect to COVID-19 vaccines as well. Moreover, New York State and City Human Rights laws expand definitions and obligations beyond Title VII or the ADA. In the public sector, the New York City Collective Bargaining Law ("NYCCBL") may preclude New York City municipal employers from requiring employees to receive a COVID-19 vaccination because such unilateral imposition may have a practical impact on the safety of the employees, in contravention of NYCCBL § 12-307(b).

Finally, the advice and recommendations of the Guidance cover both technically and substantively difficult territory with serious legal, health, and safety implications. In meeting the continuing challenges of COVID-19, please feel free to contact Pitta partners Jane Lauer Barker or Barry N. Saltzman or any of the Pitta LLP attorneys with whom you have worked.

SECOND CIRCUIT CABINS FIDUCIARY LIABILITY FOR SERVICE PROVIDERS ACTING UNDER CONTRACT

On December 7, 2020, the Court of Appeals for the Second Circuit issued a summary order denying a proposed class action suit under the Employee Retirement Income Security Act ("ERISA") and affirming the lower court's decision finding that setting prices for prescription drugs pursuant to the terms of a contract is not an exercise of fiduciary authority and thus not actionable under ERISA's fiduciary liability rules, *In re Express Scripts/Anthem*, Case No. 18-346 (2d. Cir. 2020).

On December 1, 2009, Anthem and Express Scripts, Inc. entered into a 10-year pharmacy benefit management contract ("PBM contract") allowing Express Scripts to provide exclusive pharmacy benefits and set prescription prices for Anthem plan participants. The signing of the PBM contract was a condition precedent to the sale of three Anthem-owned prescription benefits manager companies to Express Scripts. Pursuant to the PBM contract, Express Scripts would pay $4.675 billion for the companies but charge higher prices for prescriptions during the length of the PBM contract. Plaintiffs alleged that Anthem and Express Scripts, Inc. had violated their fiduciary obligations under ERISA in contracting to set excessive prescription drug prices as well as other violations under the Racketeer Influenced and Corrupt Organizations Act, the Affordable Care Act and state law torts. On January 5, 2018, the United States District Court for the Southern District of New York sided with Express Scripts, Inc. and Anthem in dismissing the Plaintiff's action for failure to state a claim upon which relief could be granted.

On appeal the Plaintiffs argued that by entering into the PBM contract, Anthem exercised its discretion to manage Plaintiff's prescription benefit, discretion that flowed from its role as an ERISA fiduciary.

In holding that Express Scripts and Anthem were not exercising authority under the plan and therefore not acting as fiduciaries, the Second Circuit, cited *Blatt v. Marshall & Lassman*, 812 F.2d 810, 812 (2d. Cir. 1987). That case employed a functional approach to determine which individuals and entities are ERISA fiduciaries "'by focusing on the function performed, rather than

the title held.'" The Second Circuit also cited its precedent establishing that general fiduciary duties under ERISA are not triggered when the decision at issue, at its core, is a corporate business decision, and not one of a plan administrator. *Am. Psychiatric Assoc. v. Anthem Health Plans, Inc.*, 821 F3d 352, 357 n.2 (2d Cir. 2016). Thus, the Second Circuit agreed with the lower court that a decision to sell a corporate asset is not a fiduciary decision even if the sale affects an ERISA plan because Express Scripts did not exercise discretion in setting prices when prices were set by contract terms and it did not control its own compensation.

SECOND CIRCUIT REAFFIRMS DEFERENCE TO LABOR ARBITRATION

On December 16, 2020, the United States Court of Appeals for the Second Circuit unanimously reaffirmed the traditional deference for labor arbitration awards and warned employer counsel against bad faith gamesmanship. In a case entitled *A&A Maintenance Enterprise, Inc. v. Ramnarain, as President of Local 1102, RWDSU, UFCW*, 20-459 (2d. Cir. Dec. 16, 2020), a *Per Curiam* Court made clear that absent unusual, clearly defined circumstances, it would not upset an arbitrator's award.

Under Article V of the parties' collective bargaining agreement ("CBA"), A&A was permitted to hire "substitute employees," defined as workers hired to replace employees who are out on disability, workers compensation, or other, approved extended leaves. Substitute employees were subject to the union security clause in the CBA. In late 2017 and early 2018, the Union noticed that A&A had hired more "substitute employees" than the number currently out on leave.

The Union grieved the issue, asking the arbitrator to decide whether A&A had hired an excessive number of "temporary" employees, as opposed to the term used in the CBA "substitute." The arbitrator ruled that A&A had violated the CBA by its use of "non-union substitute/temporary and/or probationary employees to perform bargaining unit work." The arbitrator found that A&A had hired the non-union employees, discharged them within the ninety day probationary period and then rehired them in order to keep them in permanent probationary status and avoid many of the obligations under the CBA. The arbitrator held this conduct to be in bad faith, as it circumvented the terms of the CBA and was a concept expressly rejected during negotiations, and held that A&A owed damages in the amount of $1,702,263.81 to the Union, its affiliated benefit funds, and the affected members.

The Second Circuit reviewed Judge Bricetti's confirmation using the *de novo* standard of reviewing for legal error and the clear error standard for factual questions. Moreover, the Second Circuit considered the confirmation in light of the common approach that a federal court's review of a labor arbitration award is highly deferential. To vacate, the arbitrator must have issued an award which falls within one of a small number of exceptions, for example, the ruling violates public policy or, as alleged here, the arbitrator exceeded his authority.

At the Circuit, A&A argued that the arbitrator exceeded his authority by considering issues not before him and changing the CBA's terms by considering "temporary" as opposed to

"substitute" employees. The Court found that this argument was simply placing form over substance, as "[t]he real substance of the union's initial grievance was the contention that non-union workers were improperly performing bargaining unit work," a dispute which "clearly concerns A&A's use of temporary employees." The Court also rejected the argument that the arbitrator exceeded the scope of his authority by deciding an issue to which A&A did not consent, noting that the CBA has no requirement that the issue be consented to and, in any event, that "the instant dispute concerns 'the interpretation, application or claimed violation of the stated terms or provisions of [the CBA],' precisely the type of dispute that the parties had previously agreed to submit to arbitration if not resolved through the grievance process."

While not breaking any new ground, the Second Circuit's opinion is a further reminder of the power of the labor arbitrator's award and the attention all parties should pay to the grievance and arbitration process.

MACHINISTS NAME NEW GENERAL COUNSEL

Long-time International Association of Machinists and Aerospace Workers ("IAM") General Counsel Mark Schneider is retiring at the end of this year. Schneider enjoyed a long career as a Union lawyer, working at the IAM as well as the Service Employees International Union. The new General Counsel for the IAM will be Carla Siegel, the current Deputy General Counsel.

MERRY CHRISTMAS!

As we approach the end of the year, Pitta LLP wishes our clients, colleagues, and friends Happy Holidays and better times to come in the New Year!

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