Labor & Employment Issues
In Focus

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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

TRUMP DEPARTMENT OF LABOR ISSUES FINAL RULE ON INDEPENDENT CONTRACTOR STATUS

Among a flurry of eleventh hour moves by the outgoing Trump Administration, on January 6, 2021, the U.S. Department of Labor ("DOL"), announced a long awaited final rule just cleared by the White House "clarifying" the standards for establishing whether a worker is an employee versus an independent contractor. The rule will be published in the Federal Register on January 7, 2021 and take effect March 8, 2021.

The new rule, which is likely to be stayed or subject to a new proposed rule vacating it by the incoming Biden Administration, "clarifies" the "economic reality" test in the Obama era guidance to determine whether a person is economically dependent on an employer or actually in business for themselves. Under the previous version of the "economic reality" test, the lowest weight was given to the control factor, with more weight given to "dependency," with the result being that fewer workers could be properly treated as independent contractors. Under the new rule, there are two "core factors" which determine the answer. The review looks at the nature and degree of control the individual holds over the work and the worker's opportunity to profit or lose income based on their own work. Moreover, the rule looks at three other points in the determination: (i) the skill level of the work, (ii) the level of permanence in the relationship between the worker and possible employer, and (iii) whether the work is part of an "integrated unit of production."

The importance of the question of independent contractor versus employee rests in whether minimum wage and overtime laws apply. Independent contractors are not subject to such laws and typically receive payment without taxes withheld.

SAG-AFTRA HEALTH PLAN FACING LEGAL CHALLENGES DUE TO "DRACONIAN" BENEFITS CUTS

On December 1, 2020, Edward Asner together with nine other plaintiffs individually and on behalf of other similarly situated members ("Plaintiffs") filed a complaint against the SAG-AFTRA Health Plan ("Plan") and its Trustees ("Trustees") (collectively, "Defendants") alleging that the Plan's "draconian" benefits cuts announced on August 12, 2020, amid the Coronavirus pandemic, wrongfully and illegally discriminate against Plan participants based on age. *Asner v.*

Bd. of Trs. of Screen Actors Guild-Producers Health Plan, C.D. Cal., No. 20-cv-10914 (December 1, 2020).

The complaint, filed in the United States District Court for the Central District of California, alleges that the Trustees: (i) engaged in a prohibited transaction when merging the Plan in 2017; (ii) failed to disclose material information to plan participants regarding the Plan sustainability of benefits; and (iii) breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA") by performing these actions. Specifically, the complaint states that when the SAG-Producers Pension and Health Plan merged with the AFTRA Health Plan in January 2017, the Trustees hastily proceeded with the merger for political purposes without a diligent pre-merger investigation and analysis to assess the impact of the merger on the Plan and its participants' future health benefits under the funding structure of the merged plan. Prior to the merger, the complaint alleges that the Plan unconditionally promised senior coverage to spouses for life as long as the surviving spouse did not remarry. In addition, post-merger, the Trustees knew, for at least two years, that the health benefit structure was not sustainably funded, cuts were looming, and newly negotiated terms of contracts were insufficient to sustain the benefits structure.

Moreover, the Plaintiffs assert that the benefit structure changes, in effect as of January 1, 2021, sought to remove 10% of its participants and nine percent of their dependents from health coverage, effectively causing 8,000 seniors to lose coverage. The benefit structure changes include raising the income threshold of those eligible for healthcare coverage, rendering retired actors over 65 no longer covered unless they met the newly raised income threshold and exclusion of residuals towards the income threshold. In the complaint, the Plaintiffs seek a declaratory judgment that the Plan breached its fiduciary duties under ERISA; an order compelling each fiduciary found to have breached his/her fiduciary duty to restore plan loses; an order requiring disgorgement of profits made by any Defendant; an order appointing an independent fiduciary to administer and manage the Plan assets; an order directing the Plan fiduciaries to provide full accounting of all fees paid; and an order awarding fees and costs and prejudgment and post-judgment interest. As of the date of issuance of this article, an answer to the complaint has yet to be filed.

RENOWNED HOTEL COMPELLED TO PROCEED TO ARBITRATION REGARDING FUND CONTRIBUTION DISPUTE

In a recently decided decision from the United States District Court for the Southern District of Florida, the Court granted a motion to dismiss filed by the South Florida Hotel and Culinary Employees Welfare Fund ("Fund") and UNITE HERE, Local 355 ("Union") in connection with an action initiated by the world famous Fountainebleau Florida Hotel, LLC ("Fountainebleau") seeking to free the hotel from Fund contributions. The case is docketed *Fountainebleau Florida Hotel, LLC v. South Florida Hotel and Culinary Employees Welfare Fund and UNITE HERE, Local 355*, Case No.: 20-CV-22667 (RNS) (S.D. Fla. December 16, 2020).

This dispute arose when the Union initiated a grievance against the Fountainebleau for failing to timely remit contributions to the Fund for "all eligible employees," including those recently laid off, pursuant to the collective bargaining agreement by and between the Fountainebleau and Union. Immediately prior to proceeding to arbitration, the Fountainebleau filed a complaint with the Court seeking a declaratory judgement on the grounds that the instant dispute should be resolved in the federal courts, under the Employee Retirement Income Security Act ("ERISA") or the Labor Management Relations Act ("LMRA"), and not by an arbitrator.

In dismissing the Fountainebleau's causes of action under ERISA, the Court held that the § 4301 of ERISA, 29 U.S.C. § 1451, which was relied upon by the Fountainebleau, is inapplicable to the Fund because said provision governs retirement plans, whereas the Fund administered the Union membership's health care plans. Further, the Court found that the Fountainebleau lacked standing to bring a civil action against the Union/Fund under §§ 502(a)(3) and 515 of ERISA, 29 U.S.C. §§ 1132 and 1145, because these provisions do not expressly authorize employers to seek redress through litigation. *See also Gulf Life Ins. v. Arnold*, 809 F.2d 1520, 1524 (11th Cir. 1987) (holding that ERISA's standing provisions must be narrowly construed).

In dismissing the Fountainebleau's causes of action under the LMRA, the Court held that the Union did not violate the parties' collective bargaining agreement by initiating a contractual grievance for the unpaid contributions that are mandated by the terms thereof. In rejecting the Fountainebleau's argument that the Union/Fund are compelled to seek redress for unpaid contributions through judicial litigation, the Court held that the express language of the agreement does not mandate that the Union/Fund proceed to the Court to collect such arrearages. Rather, the Court applied the long standing precedents favoring arbitration of disputes arising out of alleged violations of collective bargaining agreements that "there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted disputes." Given that the contract between the Fountainebleau and Union contained a "broadly worded" arbitration provision, the Court sided with the Union/Fund by compelling the underlying dispute be decided by an arbitrator, and not the Court.

CHANGE AND INDEPENDENT MONITOR COME TO THE UAW

The U.S. Department of Justice ("DOJ") announced, on December 14, 2020, that an agreement has been reached with the United Auto Workers Union ("UAW" or "Union") bringing resolution to a years-long, criminal probe that involved misuse of UAW funds, improper gifts, and bribes. There are three major components to the deal: (i) an independent monitor, (ii) internal election reforms, and (iii) payment of $1.5 million to the Internal Revenue Service ("IRS").

With respect to the first component of this arrangement, the independent monitor will be installed for a period of six years to oversee the financial and internal disciplinary processes of the Union focusing on investigating internal corruption and eliminating financial improprieties. The term of the independent monitor can be shortened or lengthened depending on the findings of said individual and on the UAW's compliance with the same. Regarding the second aspect of this deal, the UAW will present to its membership a secret ballot referendum, overseen by the independent monitor and the U.S. Department of Labor ("DOL") that is aimed at eliminating the previous electoral processes used by the Union to elect its leadership. Under the prior procedure, the UAW's leadership was elected via a delegate system. Under the new, proposed procedure, the leadership of the Union would be elected based upon popular vote, which is being referred to as the "one member, one vote" system. Concerning the third component of the deal reached between the DOJ and UAW, the Union will pay the IRS $1.5 million in administrative fees in order to correct the improper diverting of funds from Detroit's Big Three Automakers that were supposed to be used in connection with joint training centers that were administered by the Union. This sum is in addition to the $15 million the UAW had to repay regarding this scheme.

These above measures were integral to resolving a wide-spread, illicit endeavor that ensnared two former UAW Presidents, a UAW Vice-President, several UAW Board Members and other high ranking individuals, and other local Union officials. Further, the investigation into this matter also criminally implicated executives, accountants, and legal counsel for Fiat Chrysler. In total, more than eleven individuals were either convicted or pled to various criminal offenses resulting in prison terms ranging from 60 days to five years.

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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