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

AMAZON VS. WONDER WOMAN-PRESSURE MOUNTS IN BATTLE OVER WORKERS' RIGHTS

The world's largest, most profitable company, Amazon, which has seen its fiscal power and profitability grow during the COVID-19 pandemic as a result of the public's reliance on the home retail and delivery service, is facing legal and economic battles on multiple fronts. First, the retail tech giant and the Attorney General for the State of New York, Letitia James/the Office of the Attorney General ("OAG"), have filed competing lawsuits against each other. Second, the Amazon warehouse in Bessemer, Alabama is in the midst of a union election, where approximately 6,000 employees are currently engaged in the democratic process of determining whether they want to be represented by the Retail, Wholesale and Department Store Union ("RWDSU").

On February 12, 2021, Amazon initiated a civil action against the OAG seeking to stop it from using legal action to advance an agenda which is anathema to Amazon's business model. Specifically, Amazon wants to block the OAG from using state laws and regulations to require Amazon to subsidize public service bus service, reduce production speeds and performance requirements, and hire a health and safety consultant. Amazon argues that the OAG does not have the regulatory authority to impose workplace safety measures against it because federal law, namely the Occupational Safety and Health Act ("OSHA"), preempts any authority the State of New York could choose to exercise.

In response, on February 17, 2021, Attorney General James initiated a civil action against Amazon alleging repeated and persistent failure to take adequate measures to protect Amazon's workers in its locations in Staten Island and Queens, the most notable of which is referred to as JFK8. According to this lawsuit, Amazon failed to identify and notify potential contacts of infected workers and to ensure that its disciplinary and productivity policies were applied in a manner that permitted its employees to take necessary hygiene, sanitation, and distancing measures. This action further alleges that Amazon has retaliated against its employees who complained about the tech retail giant's non-compliance with established health and safety protocols, including the termination of one worker from the JFK8 fulfillment center.

These latest legal battles between the online retail behemoth and the State of New York date back to the nascent stages of the COVID-19 pandemic. Back in March 2020, JFK8 was the epicenter of disputes between workers and management with respect to health and safety protocols

Amazon allegedly failed to implement. At the outset, the OAG began exerting pressure on Amazon to address health and safety concerns. However, according to Amazon, the New York City's Sheriff's office conducted an unannounced inspection of JFK8 and concluded that the complaints raised by these employees were without merit. Amazon further alleges that the OAG has ignored the voluminous, voluntary disclosures Amazon has provided. In rebuttal, the OAG called the most recent filing by Amazon "a sad attempt to distract from the facts and shirk accountability for its failures to protect hardworking employees from a deadly virus."

On the election front, the RWDSU is optimistic that the ongoing vote will turn out favorably despite Amazon's staunchly anti-union stance. This optimism is running headlong into documented attempts by Amazon to quell union support by hiring an individual whose sole task would be to monitor worker organizing activities, monitor private and public social media groups of Amazon employees, and posting anti-union messaging in the stalls of the employees' bathrooms. Despite such opposition, the RWDSU enjoys significant public support. Last week, a significant group of investors in Amazon, who hold approximately $20 billion in this company's stock, sent a letter to Amazon demanding that it stop interfering in the RWDSU's organizing campaign. This group includes the Comptroller for the State of New York, the Church of England Pension Board, BMO Global Asset Management, and the Comptroller for the City of New York. Citing to basic human rights principles, this group stated that Amazon should be in favor of allowing workers to seek unionization in order to ensure health, safety, and protection in the workplace.

BLOOMBERG NOT "EMPLOYER" UNDER NYC HUMAN RIGHTS LAW

Michael Bloomberg may be a former three-time mayor of New York City, a candidate for President of the United States, and a "captain of industry," but, as held by the New York State Court of Appeals, he is not personally liable as an "employer" under the New York City Human Rights Law ("NYCHRL") for the alleged sexual harassment of an employee by a supervisor in his company simply because he is also "a co-founder, chief operating officer, president and majority owner" of Bloomberg L.P. *Margaret Doe v. Bloomberg L.P. and Michael Bloomberg*, Court of Appeals, NY No. 8 (Feb. 11, 2021).

Plaintiff, a female employee of Bloomberg L.P., alleged that she had been the victim of discrimination, sexual harassment, and sexual abuse by her direct supervisor, and sought to hold Bloomberg vicariously liable as an "employer" under the NYCHRL. The State Supreme Court had denied Bloomberg's motion to dismiss the complaint as sufficiently pled, but the Appellate Division reversed and dismissed the action because there was no allegation that Bloomberg had "some participation in the specific conduct committed against the plaintiff," which the Appellate Division deemed necessary to hold an individual owner or officer liable as "employer."

The Court of Appeals rejected both views, categorially ruling out liability as an "employer" at all. Instead, Judge Garcia, writing for all except dissenting Judge Rivera, held:

> "Where a plaintiff's employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employers [under the NYCHRL]. Rather, those individuals may

> incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct.

The Court of Appeals justified its holding as aligned with both the NYCHRL, which explicitly creates aiding and abetting and other liability but not expressly for owners or officers, as well as longstanding principles of vicarious and limited liability governing business organizations generally. The Court rejected Judge Rivera's lengthy dissent, that would impose employer liability on owners or employees who do more than carry out the personal decisions of others, as providing too "amorphous" a standard of liability unsupported by NYCHRL text.

This decision of New York State's highest court clearly closes the door on discrimination liability under NYCHRL against owners and officers based on holding them to be "employers." However, it also clearly leaves intact aiding and abetting liability for Bloomberg allegedly fostering an environment that accepted and encouraged "sexist and sexually charged behavior." Aiding and abetting liability is therefore likely to be further developed in this and other cases by plaintiffs suing officers, owners, and employees individually.

THE DEMOCRATICALLY-CONTROLLED CONGRESS ADVANCES PRESIDENT BIDEN'S PRO-WORKER LEGISLATION

Less than one month into the new administration and the return of the U.S. Congress to the Democrats, President Biden has begun to implement a more union-friendly agenda. Earlier this month, the Protect the Right to Organize Act ("PRO Act"), a keystone of this agenda, was reintroduced into the House of Representatives and the U.S. Senate.

The PRO Act, which had been approved by the House of Representatives last year but which stalled in the previously Republican-controlled Senate, seeks to overhaul private sector labor law after decades of decay at the hands of management-friendly interests. The PRO Act seeks to codify a number of initiatives that would make it easier for employees to organize and to discourage union-busting. Specifically, the PRO Act would facilitate the process by which newly formed unions could secure their first collective bargaining agreement, would bolster workers' rights related to strikes and boycotts, and would strengthen protections for workers who are improperly terminated during organizational campaigns. The PRO Act also would create monetary penalties against employers who engage in illegal union-busting tactics, would override anti-union right to work laws that currently exist in over half the United States, and would make it more difficult for companies in "gig-industries" like Uber, Lyft, and Doordash, to avoid unionization through the use of "independent contractors."

The reintroduction of the PRO Act has been universally lauded by labor leaders and Democratic politicians. The President of the AFL-CIO, Richard Trumka, stated: "Today, working people are one step closer to freely exercising our most fundamental rights on the job. The PRO Act will strengthen workers' ability to come together and demand a fair share of the wealth we create – boosting wages, securing better health care and rooting out discrimination." The

Chairman of the House's Labor Committee, Representative Bobby Scott (D-VA), arguing for the PRO Act explained: "The decades-long assault on workers' rights - led by special interests in state legislatures, courts, and employers across the country – has suppressed union membership and eroded America's middle class. The [PRO Act] is a major step toward ensuring that workers can exercise their basic right to form a union and collectively bargain for higher pay, safer working conditions, and decent benefits - including paid leave, quality health care, and a secure retirement."

Despite strong support for the PRO Act, including from Vice-President Harris who co-sponsored the PRO Act in the previous Congress, this piece of legislation is going to require support from at least 10 Republican Senators, as it is subject to the filibuster and cannot be passed through the budgetary maneuver of reconciliation. In order to accomplish this goal, Mr. Trumka stated: "We will take our case in every state and every congressional district, to elected leaders across the political spectrum. . . . If you stand on the side of America's workers, you won't just vote for the PRO Act – you'll sponsor it, you'll whip for it and you won't rest until it's signed into law."

BREAKING NEWS-BIDEN NOMINATES ABRUZZO AS NLRB GENERAL COUNSEL, BUT BEWARE ROBB'S REVENGE

Following up on its labor friendly initiatives, President Joe Biden today nominated Jennifer Abruzzo, an attorney for the Communications Workers of America, to serve as General Counsel of the U. S National Labor Relations Board ("NLRB" or "Board"). Abruzzo previously served as Deputy General Counsel to General Counsel Dick Griffin under the Obama Administration. But the Administration's firing of her predecessor, anti-union Peter Robb during his term, clouds Abruzzo's and the Board's future, providing fuel for Republican opposition in the Senate and spawning legal challenges in Board proceedings that all actions by the NLRB General Counsel after Robb's discharge are illegitimate and void.

ROLL BACK OF TRUMP-ERA RELIGIOUS EXEMPTION RULE ON THE HORIZON

In two cases currently pending in the federal courts, *State of New York v. Dept. of Labor*, Docket No.: 21-CV-0536 (S.D.N.Y.) and *Oregon Tradeswomen, Inc. v. Dept. of Labor*, Docket No.: 21-CV-0089 (D. Or.), the U.S. Department of Labor ("DOL") has requested a temporary stay of the proceedings, which are challenges to the Trump Administration's rule that expanded the religious exemption applicable to federal contractors, because such matters would be rendered moot by the Biden Administration's roll back of said rule.

Under the Trump Administration's rule instituted in January 2021, just prior to President Biden's inauguration, employment decisions made by "religion-motivated organizations" were exempted from scrutiny under, *inter alia*, Title VII of the Civil Rights Act of 1964 ("Title VII"). Essentially, this Trump-era rule allowed federal contractors that were "closely held" corporations, purportedly embodying closely held religious beliefs, to skirt the obligations under federal law not to discriminate against employees (or prospective employees) on the basis of race, gender, national

origin, and sexual orientation. The DOL's Office of Federal Contract Compliance ("OFCCP") advised the courts that it intends on proposing a rescission of the Trump-era rule in the near future and that a stay of the respective proceedings should be granted to allow for the DOL to propose a new rule that would require time to satisfy the notice and comment requirements inherent in federal rulemaking. This new stance taken by the DOL is designed to limit the scope of entities able to hide behind the concept of religious protection when making employment decisions, such as hiring and firing, where the religious beliefs of the employer are used as justification to engage in actions that would normally run afoul of Title VII. This recent position taken by the DOL mirrors the concerns which were previously expressed by civil rights groups that feared the over expansion of the religious exemption rule and an end run around anti-discrimination statutes such as Title VII.

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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