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

BIDEN'S ACTING GENERAL COUNSEL
OHR BRINGS IMMEDIATE CHANGE TO NLRB

Shortly after being inaugurated, President Biden discharged the staunchly anti-worker and anti-union National Labor Relations Board ("Board" or "NLRB") General Counsel Peter Robb, whose four year term was set to expire in October 2021. Shortly thereafter, President Biden discharged Robb's Deputy General Counsel Alice Stock. The new Administration's goal in these rapid firings was to change the direction of national labor policy, as the General Counsel wields enormous discretion over policy at the Regional level and decides which issues to pursue before the full NLRB. In furtherance of the goal, the President named Peter Sung Ohr, former Regional Director for Region 13 in Chicago, to be acting General Counsel on January 25, 2021. Under the National Labor Relations Act ("NLRA"), Ohr may serve as acting General Counsel only for 40 days or until a nominee is submitted to the Senate for confirmation. Ohr has wasted no time in reversing Trump era NLRB policy choices as described below.

According to Ohr, changes were made because the Trump policy positions did not encourage collective bargaining. First, Ohr reversed ten separate Trump era policy memos which, while not holding the force of law, prioritize categories of cases and emphasize interpretations of the law which are favored by the Administration. Among the covered topics were reversing the approach to negligent conduct by unions from strict under Trump back to deferential, reducing the level of detail required for certain union reporting, and lightening restrictions on the use of recorded evidence. Next, on February 2, 2021, Ohr reversed two additional memos. The first memo reinstated prior policy which encouraged charged parties to cooperate but to not consider whether a charged party cooperates in an investigation. The second reversal returned to Regional Directors the authority to determine who engages in outreach, speaking and recruiting efforts on their behalf.

Additionally, on January 29, 2021, Ohr used one of his key pieces of discretion, the ability to bring or withdraw individual cases, when he decided to withdraw a case before the Board addressing the parameters of neutrality agreements under which an employer in a union election agrees to not actively campaign against a prospective union. In July 2020, previous NLRB General Counsel Robb had brought the action against

UNITE-HERE Local 8 in Seattle over a neutrality agreement it had reached with Embassy Suites during its organizing drive at the Seattle hotel. The Hotel had agreed to recognize the union if it had a majority of the bargaining unit sign cards. *Unite Here! Local 8 v. Gladys Bryant, and Embassy Suites Management LLC v. Gladys Bryant*, 19-CB-227622 and 19-CA-227623. While this was an unremarkable agreement, the Board, under Robb, took the view that such an agreement could amount to an employer actively supporting organizing in violation of the employees' rights.

Many Republican politicians are already protesting Robb's firing as previous Administrations have permitted sitting General Counsels to complete their terms. As such, there is a possibility that any actions taken by Ohr may be challenged as unlawful under the NLRA. In a similar vein, during the Obama Administration, years of NLRB decisions were vacated when the U.S. Supreme Court determined that a Board with three members invalidly appointed during a Senate recess period did not constitute a quorum for decision making, after the Senate had blocked President Obama's Board nominees. Moreover, during President Obama's first term, the actions of Acting General Counsel Lafe Solomon were called into question after he served as Acting General Counsel for over three years.

In addition to specific policy changes, Ohr is expected to return to a more decentralized mode of managing the Board's Regions. Under Robb, power accreted to Washington with many Regional Directors feeling micromanaged from above. The new General Counsel is expected to return the autonomy Regional Directors have historically maintained. Moreover, Ohr has shown a willingness to permit flexibility in the conduct of elections, including mail elections during the pandemic, in the belief that the employees' right to organize should not be limited by an emergency. While Ohr's term is inherently limited, it appears that he will at least begin broad and deep change at the Board.

TRUMP BOARD PANEL PROTECTS WILDCAT STRIKERS THIS TIME, NOTES POSSIBLE CHANGE IN FUTURE CASES

National Labor Relations Board ("NLRB" or "Board") Republican Members Ring and Kaplan overruled fellow Republican Member Emanuel in holding that an employer violated the National Labor Relations Act (the "NLRA" or "Act") by discharging "wildcat" strikers because, under current law, their efforts were protected and not contrary to their union. *Noah's Ark Processor d/b/a WR Reserve*, NLRB Case No. 14-CA-217400 (Jan. 27, 2021)

Employer WR Reserve committed a rash of unfair labor practices, including refusing information to the union, direct dealing, unilateral changes, surveillance, threats and interrogation, and avoiding and stalling proposals on bargaining, all in an effort to drive out incumbent United Food & Commercial Workers Local 293 (the "Union") after contract expiration. A group of 10 employees complained to managers that the company was not observing seniority in its pay scales, refused to work, and were discharged. Applying NLRB precedent in *Silver State Disposal Service*, 326 NLRB 845 (1995),

Members Ring and Kaplan held that WR Reserve violated the Act because the employees were engaged in protected collective action and did not lose protection by refusing to work since their purpose was consistent with the Union's position and they did not try to bargain directly without the Union. Member Emanuel dissented, finding the employees acted solely for themselves rather than for collective purposes.

Lest anyone think the Board was taking an employee protective turn post-election, the Republican Members encouraged employers to challenge *Silver State* in future cases, promising their willingness to reexamine that precedent. Thus, whatever other changes may be occurring in the Office of the General Counsel or elsewhere, the Board majority itself appears still committed to undoing pro-employee precedent for the immediate future.

BIDEN ADMINISTRATION ORDERS BROADER BARGAINING AND PROTECTIONS FOR FEDERAL WORKERS

In yet another reversal from a Trump-era rule, on January 22, 2021, the Biden Administration announced by Executive Order that it was vacating three Trump Executive Orders addressing Federal workers' bargaining rights. Specifically, Trump's Orders had limited issues for collective bargaining, cut "official time," and made it less difficult for agencies to fire workers.

The Order read, in part, "Career civil servants are the backbone of the federal workforce, providing the expertise and experience necessary for the critical functioning of the federal government. It is the policy of the United States to protect, empower and rebuild the career federal workforce. It is also the policy of the United States to encourage union organizing and collective bargaining. The federal government should serve as a model employer."

The Order directs agencies to freeze and review any pending proposed rules which run counter to the Order. The Order expanded bargaining areas by directing agencies to bargain over previously "permissible" as opposed to mandatory subjects of bargaining. Finally, the Order eliminates Trump's changes to so-called Schedule F. This was a new classification of federal employee Trump created to change previously policy making civil service employees into political appointees, making it much easier to hire and fire them.

POST-COVID-19 EMERGING ISSUES: NEW PROPOSED CHANGES TO WORKPLACE PRIVACY LAWS

On January 6, 2021, the New York State Legislature introduced the New York Biometric Privacy Act ("BPA") (AB 27), which, if enacted, would impose significant compliance requirements on companies that receive biometric data from their employees and customers.

The BPA is closely aligned to Illinois' Biometric Privacy Act of 2008 ("BIPA") 740 ILCS 14/5(g), which was the first biometric privacy statute of its kind because of its private

right of action and high statutory damages. As a result, BIPA has been a boon to the Illinois class action plaintiffs' bar in protecting employees' privacy interests from future data breaches and hacks that are becoming more commonplace. In Illinois, there are hundreds of class action cases across an array of industries in the pipeline and against major companies such as Microsoft, Amazon, and Google. This seems to be the start of a national trend as other states, such as Texas, Washington, Oregon, California, and Arkansas have passed similar privacy laws, and others, such as Massachusetts, Hawaii and Arizona, have similar pending legislation. If passed in New York, BPA would go into effect on the 90th day after passage.

The legislation defines biometric information as an individual's measurable biological or behavioral characteristics – such as fingerprints, voiceprints, retinal scans, and facial photography – that are used primarily for identification and authentication purposes. BPA, which was originally introduced in 2017, would require private entities that collect this data to enact privacy policies for the retention and destruction of biometric data, notice and consent forms, data security requirements and the legislation would prohibit entities from selling or profiting from biometric data. Violations of the Big Apple's BPA are subject to a private cause of action whereby any "aggrieved" individual could recover $1,000 for each negligent violation, $5,000 for each intentional or reckless violation, injunctive relief, and attorneys and expert witness fees. To demonstrate the far-reaching effect of such a bill, one need not look further than social media giant Facebook, who last year settled a BIPA lawsuit involving its allegedly improper use of facial recognition technology as part of its photo-tagging feature for $650 million.

As businesses adjust to operations in a post-COVID-19 world, they must be cognizant of the implications for enacting policies and procedures that, while intended to protect consumer and employee safety, involve the collection and/or storage of biometric data. For example, contactless and touchless payment systems sometimes use facial recognition software and, if unconsented, would likely violate biometric privacy laws. The same would hold true for biometric timeclocks, which, pursuant to New York Labor Law must also be truly voluntary. Additionally, COVID-19 screenings that include contactless infrared facial scanning to gauge a consumer or employee's temperature would likely violate BPA, if unconsented. The legislation prohibits the unconsented collection of "biometric identifiers," which includes a "scan of hand or face geometry." As such, entities would need to notify employees and customers and obtain their consent beforehand.

There are currently several legal challenges to the application of privacy laws to employees covered by federal labor laws. Most notably, in 2019 the Seventh Circuit Court of Appeals dismissed a lawsuit brought by airline workers covered by the Railway Labor Act because it found that the workers' claims required an interpretation of their collective bargaining agreement. *Miller, et al. v. Southwest Airlines Co.*, 926 F.3d 898 (7th Cir. 2019). As such, the workers were required to arbitrate their BIPA claims before the Railway Labor Adjustment Board. Additionally, at least one federal court has extended the *Miller* analysis and held BIPA claims are preempted by collective bargaining agreements under Section 301 of the Labor Management Relations Act. *Gail v. University*

of Chicago Medical Center, Inc., No. 19-CV-04229, 2020 WL 1445608 (N.D. Ill. Mar. 25, 2020) (granting motion to dismiss).

If BPA is enacted, there are several best practices that New York companies should consider implementing to minimize the risk of becoming embroiled in litigation stemming from the use of biometric data. Companies must first ensure that recipients are provided written notice and written consent is obtained. This should be done for all customers and employees – regardless of residency in the Empire State. Indeed, BPA requires that companies enact publicly available policies that encompass written notice and consent for biometric data, the current and reasonably foreseeable purposes utilizing the data, a description of the protective measures used to prevent data breaches, and the company's retention and destruction policies. Finally, entities must ensure that neither they nor any person with access to the biometric information sells or discloses the data.

LONG TIME AFL-CIO HEAD JOHN SWEENEY DEAD AT 86

Bronx-born and bred John J. Sweeney, the AFL-CIO's President for four terms and fourteen years though the 1990s and 2000's, has died at 86. After rising through the ranks of first the ILGWU and then the SEIU, Sweeney ascended to leadership at a time of transition for the labor movement. As President, Sweeney pushed for the labor federation to organize industries with a more minority and female based workforce than previous leadership and to aggressively organize new immigrants. Moreover, he forged coalitions with civil rights groups in an attempt to respond to changing demographics and aligned the movement more closely with Democratic politics. While his efforts implemented lasting and important change in the labor movement, he was unable to stem the decline of union density. In 2010, President Obama awarded him the Presidential Medal of Freedom, the nation's highest civilian honor, in part for his emphasis on union organizing as integral to social justice.

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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