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

U.S. DISTRICT JUDGE BROADLY ANSWERS HOW BROAD CAN LABOR ARBITRATION GO?

On February 18, 2021, United States District Judge John G. Koeltl ruled that union sponsored arbitration under a collective bargaining agreement ("CBA") can go very broadly indeed, encompassing questions of arbitrability and blocking out dissident bargaining unit employees as the Court confirmed an award in favor of 1199 SEIU United Healthcare Workers East ("Local 1199") against a number of employer groups and over objections by dissenting workers. *1199 SEIU United Healthcare Workers East v. PSC Community Services*, SDNY No. 20-cv-3611 (JGK) (Feb. 18, 2021).

Local 1199 has been party to CBAs containing comprehensive arbitration provisions allowing for arbitration of statutory claims, such as wage-hour obligations, and incorporating American Arbitration Association rules that "[t]he arbitrator shall have the power to rule on his own jurisdiction, including ...the existence, scope or validity of the arbitration agreement." Local 1199 submitted disputes regarding wages due over 100,000 employees at several home care agencies to arbitration while flocks of workers and their private attorneys flew to state court. When Local 1199 moved to confirm an award in its favor, the litigating workers opposed confirmation as beyond the CBA and moved to intervene claiming the awards did not go far enough. Judge Koeltl came down squarely for the union on all counts.

First, the Court denied the workers' motion to intervene. At the outset, the workers lacked standing, he ruled, because workers can "attack an arbitration award" only upon "a showing that the union breached its duty of fair representation," which the employees did not allege and, in fact, Local 1199 had "acted with diligence" in pursuing the workers' claims. Moreover, the workers also failed federal intervention standards because their "argument that confirmation of the Award may impair their ability to assert their claims in state court is too contingent or remote to be cognizable ..."

Next, Judge Koeltl confirmed the award on the merits. In doing so, the Court considered and rejected substantive arguments by the workers that the award could not cover employees who had been terminated prior to inclusion of the broad statutory arbitration clause in the CBA. He explained:

> "The Proposed Intervenors' arguments confuse the question of consent to arbitration ... with the question of arbitrability (namely, whether the dispute at issue is within the scope of the arbitration agreement".) The searching review ... is not appropriate because the parties to the CBA ... plainly agreed to arbitrate grievances and to delegate such questions of arbitrability to the Arbitrator."

Finally, on the question of upholding the arbitrator's determination of jurisdiction and arbitrability, Judge Koeltl cited voluminous and longstanding federal cases extolling labor arbitration and narrowly circumscribing judicial review. Approving both incorporation of the AAA rules by reference and referral of arbitrability itself to the arbitrators if the parties "clearly and unmistakably" provide, as here, Judge Koeltl ruled that the award's finding that pre-CBA employees were covered neither failed to draw its essence from the CBA nor fell outside the scope of the arbitrator's authority.

Accordingly, the Court confirmed the award in a decision likely to be cited early and often by unions to confirm awards under broad arbitration provisions.

UNITED STATES SUPREME COURT REJECTS AMAZON DRIVER'S LAST MILE ARBITRATION DISPUTE

The United States Supreme Court declined to consider whether Amazon "final mile" delivery drivers are transportation workers engaged in interstate commerce and thereby exempt from the Federal Arbitration Act ("FAA") despite a split among different Circuit Courts of Appeals. *Amazon.com, Inc. v. Rittman*, No. 20-622 (cert. denied 2/22/21).

A group of as many as 10,000 Amazon delivery drivers filed a putative class-action lawsuit, under the Fair Labor Standards Act ("FLSA") claiming that the retail giant misclassified them as independent contractors and are in fact employees entitled to minimum wages and overtime under the FLSA. Amazon moved to resolve the disputes by individual arbitration pursuant to the collective action waiver and binding arbitration agreement that each driver signed prior to working with Amazon. The Amazon drivers argued that they fall under the FAA's transportation exemption which excludes transportation workers from arbitration agreements.

The Ninth Circuit Court of Appeals held that the Amazon drivers qualify for the FAA exemption because they complete the final leg of deliveries that cross state lines. In a similar case, the Seventh Court of Appeals held that Grubhub Inc. drivers delivering food to customers in the same state did not engage in interstate commerce. The Ninth Circuit has another case in its docket that examines a similar issue involving Lyft Inc. and Uber Inc. drivers.

By declining Amazon's petition, the Supreme Court effectively permits the Amazon drivers to proceed with their class action lawsuit seeking minimum wage and overtime payment. The class action lawsuit comes at the time when Amazon workers in Alabama are voting in a historic union election that may mark the first time that the online retail giant is unionized.

BIDEN DEPARTMENT OF LABOR RENEWS FOCUS ON WAGE ENFORCEMENT FOR GOVERNMENT CONTRACTORS

Building trades and service unions have expressed support for the Biden administration's focus on enforcing the Davis-Bacon Act, which covers public construction projects and the McNamara-O'Hara Service Contract Act, which applies to government service contracts which include food, security and janitorial work. Boston Mayor Marty Walsh, who is waiting for a final Senate vote on his nomination to be the United States Labor Secretary promised, "I will do everything I can to make sure that Davis-Bacon's enforced."

The Biden Department of Labor ("DOL") has already started to focus on enforcement of prevailing wage. Acting wage and hour administrator, Jessica Looman is the former executive director of the Minnesota Building and Trades Council with experience advocating for wage enforcement for construction workers. This effort reverses the trend from the Trump era when the DOL gutted its Wage and Hour Division ("WHD") and placed limits on regional offices' ability to enforce government contract law. The overall headcount for investigators at the end of January 2021 was 794 investigators, down from more than 1,000 field enforcers during the Obama presidency. The Trump DOL often ignored violations of prevailing wage and benefits consistent with what similar workers in the same geographic area receive.

The enforcement of prevailing wage is a major focus for organized labor as they prepare for a potential federal infrastructure bill. Eric Dean, the general president of the Iron Workers International Union who attended a meeting with President Joe Biden on February 17 said, "we just need a level of fairness on behalf of workers, and the Department of Labor using its enforcement mechanisms to enforce the existing standards is a welcomed sign."

BIDEN LABOR DEPARTMENT EXTENDS JOBLESS BENEFITS TO WORKERS REFUSING UNSAFE WORK

On February 25, 2021 the Department of Labor ("DOL") issued a program letter to state unemployment agencies that ensures Pandemic Unemployment Assistance ("PUA") to workers who decline work that jeopardizes their health. The DOL guidance comes after President Joe Biden delivered a speech in January promising to protect the health of workers who are not able to return to work because of COVID-19 safety concerns. PUA was created last year by the CARES Act to cover self-employed people, independent contractors and other workers who are not traditionally covered by state-managed unemployment insurance programs.

The DOL program letter says that a worker may be eligible for jobless benefits when refusing to return to work when the job site is "not in compliance with local, state, or national health and safety standards directly related to COVID-19." Non-compliance includes but is not limited to failure to wear facial masks, abiding by physical distance measures "or the provision of personal protection equipment consistent with public health guidelines." Workers seeking the benefits will have to attest to the unsafe conditions under penalty of perjury.

Suzi LeVine, principal deputy assistant secretary of labor at the DOL's Employment and Training Administration, observed: "The workers and families who give so much to make this nation prosper during boom times, they deserve to be safe and economically secure in this time of dire need."

The program letter is available at https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Change_5.pdf.

BIDEN ELIMINATES TRUMP ERA APPRENTICESHIP PROGRAM

The Biden administration has abandoned another Trump era rule, eliminating former President Trump's executive order which created so-called IRAPs, industry recognized apprenticeship programs. Under this concept, the government's traditional role in supervising and approving apprenticeship programs, particularly in the trades, would be replaced by training programs in the private sector controlled and supervised by individual companies. While the IRAP approach was announced in 2017, final rulemaking was not completed until March 2020 and the first program was not approved until Raytheon was selected as a pilot participant in October 2020.

Trump's idea had been roundly criticized by Democrats and pro-union interests as watering down government's ability to monitor the efficacy of the training, as well as suppressing wages, and undermining training. President Biden's executive order seeks to reinstitute the previous approach by asking the Department of Labor ("DOL") to engage in rulemaking with input from relevant parties. The goal would be to revive the National Advisory Committee on Apprenticeships to assist in oversight of Apprenticeship programs.

President Biden also supports the National Apprenticeship Act, which passed the House with bipartisan support earlier this month and would spend billions in the DOL's registered apprenticeship system. That bill would expand registered apprenticeship, youth apprenticeship and pre-apprenticeship programs. Supporters of the bill say it will create nearly 1 million new job training opportunities and generate billions of dollars in economic benefits.

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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