



Labor & Employment Issues In Focus

Pitta LLP
For Clients and Friends
March 9, 2021 Edition

“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

TALE OF TWO FELONS

Rarely does a decision of the U.S. Court of Appeals for the Second Circuit reveal such a stark and searing fracture of judicial mindsets as in *Mandala v. NTT Data, Inc.*, 2d Cir. No. 19-2308-cv (Feb. 23, 2021). In *Mandala*, the Court denied *en banc* reconsideration of a prior appeal upholding dismissal of a lawsuit that alleged an employer’s absolute bar to hiring applicants convicted of a felony disparately impacted African Americans in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”).

George Mandala and Charles Barnett, two black Americans from New York and Kentucky respectively, applied and were hired by national data company NTT Data Inc. (“NTT”), then lost their offers due to NTT’s absolute bar against hiring convicted felons regardless of individual circumstances. They sued alleging that, based on national statistics of higher conviction rates for African Americans, NTT’s policy adversely impacted black Americans disproportionately. The district court dismissed and a panel of Judges Sullivan and Nardini, Chin dissenting, upheld the dismissal.

In denying *en banc* reconsideration, Judges Sullivan and Nardini, joined by Chief Judge Livingston and Judges Cabranes and Park, stood by the original panel’s reasoning, rejecting the national statistics as insufficient to plead a disparate impact case. General population statistics, they explained, “may be used only when there is reason to think that they will reflect the qualified labor pool for the positions in question.” Here, however, they reasoned, the general population statistics offered by plaintiffs failed to nudge the claim over the “plausible” standard because “common sense dictates that highly educated individuals [such as plaintiffs] can be expected to have lower conviction rates than the general population.” As a result, “we have no idea what the difference between African American and white conviction rates will be once we limit our focus to highly educated individuals.” While taking no issue with the significance of Title VII, the majority minimized the impact of their decisions as merely upholding traditional pleading requirements that will not “fundamentally alter the existing Title VII architecture.”

Judge Pooler’s dissent joined by Judges Chin, Katzmann, Lohier, and Carney, blistered in response:

“This case rests on a simple question – whether a blanket policy of excluding individuals with felony convictions from employment at

NTT has a disparate impact on black applicants. To any person with a cursory understanding of America's troubled racial history, the answer is clearly yes".

Judge Pooler argued that plaintiffs' general national statistical evidence sufficed to pass the plausible standard because "racial disparities will continue to exist even after educational levels are considered," just as an amicus brief illustrated. She bitterly criticized the majority's reasoning as showing that "ability to use common sense and judicial experience to draw conclusions is absent once race enters the equation." Hailing Title VII as "this century's most important piece of remedial legislation" and "a body blow to the race-based caste system that defined this country for centuries," Judge Pooler and the dissent deplored the majority shutting the courthouse doors on plaintiffs.

Thomas Jefferson famously called American slavery a "fire bell in the night." *Mandala v. NTT Data*, highlighting the interplay between systematic racism and employment discrimination, proves that race continues to burn fire-bell hot even after "months of protests, violence, and threats to the Nation's most storied institutions and principles, more citizens than ever have questioned how different standards of treatment under law for black and white Americans have persisted from our founding to today." Pooler, J. in dissent.

RIGHT TO WORK LAWS - THE BATTLE CONTINUES IN THE STATES

To erode union integrity and to attack collective bargaining rights of employees, many states passed "Right to Work" laws designed to disincentivize union membership and participation by prohibiting unions from requiring employees to become members and pay dues. However, two recent, failed attempts by anti-union forces in Montana and Colorado to pass this type of legislation may have stalled as a result of a reinvigorated union organizing movement.

In ruby-red Montana, legislators voted down the pending Right to Work law by a vote of 62 to 38, with 29 Republicans joining the legislature's 33 Democrats. The winning argument in defeating this bill was best expressed by Representative Derek Harvey (D-Butte) when he focused on the importance unions played in mining and producing copper in Montana, and how the unions' efforts fueled the industrial revolution, the electrification of the Nation (as copper is the preferred conductor in electrical wiring), and the supply of armaments for various war efforts. With assistance from the AFL-CIO, union members from around Montana convened at the State Capital in Helena to pressure lawmakers to oppose the Right to Work legislation. Those efforts bore fruit because, as Al Eklbad, Executive Secretary of the AFL-CIO stated, collective bargaining rights cut across the political spectrum, since at the end of the day workers believe that they should continue to enjoy their collective bargaining rights.

Additionally, in increasingly-left-leaning Colorado, a similar Right to Work bill did not even make it out of the Colorado House of Representatives' Business Affairs and Labor Committee, defeating the bill by a vote of 8 to 5. According to the chair of this committee, Dylan Roberts (D- 26th Dist.), the vote was swayed by the fact that they were presented with numerous examples of how unions and collective bargaining rights benefit all workers across Colorado from

all different types of professions. In contrast, there was a dearth of evidence presented indicating how unionization is harmful or deleterious to workers and their benefits.

The import of defeating Right to Work laws, like the ones in Montana and Colorado, is highlighted by a recent analysis of the U.S. Bureau of Labor Statistics (“BLS”) from the historically union-friendly State of Michigan. In 2012, the Michigan State Legislature passed a Right to Work law that had an immediate impact on the number of unionized employees in this State. In 1983, Michigan had the second highest percentage of unionized workers in the private sector out of the 50 States. When the Right to Work law was passed in 2012, Michigan still had the fifth highest rate of unionized employees, driven primarily by the auto industry in Detroit and Flint. However, in less than 10 years, the BLS statistics show that Michigan dropped to the 11th highest rate of unionized employees amongst the 50 States.

Finally, the importance of advancing collective bargaining rights and unions’ roles therein is not lost on President Biden. In a recent speech about union organizing, President Biden reminded everyone that, since 1935 with the passage of the National Labor Relations Act, it is the declared policy of the U.S. to encourage the practice and procedure of collective bargaining. As such, efforts to contravene this policy, like Right to Work laws and obstructions to union organizing campaigns, are not acceptable to this administration.

THE “FIGHT FOR FIFTEEN” RAGES ON: NEW STUDY SHOWS THERE IS NO MONSTER UNDER THE BED

Researchers out of the University of California, Berkeley and Brandeis University have authored a recent study analyzing the overall impact raising the federal minimum wage from \$7.25 an hour to \$15.00 an hour would have on the labor market, the overall wage rates in the workforce, the rate of unemployment, and the supply of available jobs. This study also discusses how non-governmental factors, such as retail giants Amazon, Target, and Walmart raising their respective entry-level wage rates, have on boosting overall marketplace wages without governmental intervention. In utilizing available data from the federal government, as well as information from the popular online job site Glassdoor, this study concludes that raising the minimum wage would not translate into loss of jobs, closures of businesses, or a precipitous rise in the unemployment rate.

Pro-business interests and Republicans in the U.S. Congress have averred that by raising the federal minimum wage rate, the federal government would be letting these boogeymen out of the closet, which in turn would injure the overall health of an economy still struggling to recover from COVID-19. However, the study shows that wage rate fluctuations do not fit neatly into traditional economic models that are hypothesized in a vacuum. More often than not, employees have less information about their worth in the labor force, face greater risks in changing jobs to pursue increased wages, and/or cannot pursue more lucrative positions due to geographic or familial constraints, while employers face none of these barriers. These economic “frictions” are rarely accounted for in the development of models and predictions, but that has not inhibited the proliferation of this inaccurate doomsday scenario revolving around a raise in the minimum wage.

Instead, the study suggests that, by raising the federal minimum wage, non-entry-level workers will also benefit, analogous to the age-old phrase that a rising tide lifts all boats. This effect is created because wages are shaped by traditional market forces, as well as social norms, external pressure, and governmental policies, according to Arindrajit Dube, an economist from the University of Massachusetts. This proposition, that raising the federal minimum wage will increase compensation for low-wage earners as well as all other employees in the labor market, has been endorsed by President Biden's White House Council of Economic Advisers.

Additionally, the study examines the effect that private companies have on wage rates irrespective of governmental action, especially in rural areas, where a significant portion of the population is paid at or near the applicable federal/state minimum wage rate. Not so coincidentally, corporate behemoths Amazon, Target, and Walmart have significant employment presences in these same areas. As such, when these companies began raising their respective entry-level wage rates, employees of other businesses in those areas began to have greater leverage in discussions with their respective employers for better wages and benefits. Since, at the end of the day, if an employer is not willing to match the wage rates being offered by these corporate goliaths, then the employee could simply move on from his/her current position and obtain employment from the likes of Target. Possibly the most important effect of companies like Amazon and Walmart raising their respective entry-level wage rates could be this non-governmental pressure on smaller companies to follow suit in geographic regions like the South and Midwest, which are traditionally resistant to perceived governmental interference in their affairs.

Legal Advice Disclaimer: The materials in this **In Focus** report are provided for informational purposes only and are not intended to be a comprehensive review of legal developments, to create a client–attorney relationship, to provide legal advice, or to render a legal opinion. Readers are cautioned not to attempt to solve specific legal problems on the basis of information contained in this **In Focus**. If legal advice is required, please consult an attorney. The information contained herein, does not necessarily reflect the opinions of Pitta LLP, or any of its attorneys or clients. Neither Pitta LLP, nor its employees make any warranty, expressed or implied, and assume no legal liability with respect to the information in this report, and do not guarantee that the information is accurate, complete, useful or current. Accordingly, Pitta LLP is not responsible for any claimed damages resulting from any alleged error, inaccuracy, or omission. This communication may be considered an advertisement or solicitation.

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.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.