Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
April 1, 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

U.S. DISTRICT COURT RULES HOSPITAL LAWFULLY TERMINATED PREGNANT EMPLOYEE REFUSING FLU SHOT

With a full press for vaccinations and a rush to reopen, employers need to be ready for employee pushback. In *LaBarbera v. NYU Winthrop Hosp.*, E.D.N.Y. No. 2:18-cv-63737 (March 16, 2021), Senior U.S. District Court Judge Denis R. Hurley held that a hospital could lawfully terminate a pregnant radiology employee who refused a flu vaccination in violation of the hospital's policy without violating Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act ("PDA").

NYU Winthrop Hospital ("Hospital") had a policy requiring employees to wear masks or be vaccinated against the flu. In 2017 in response to a severe flu season, the Hospital made vaccination mandatory. Alison LaBarbera worked *per diem* at the Hospital as a radiology technician. When pregnant, LaBarbera requested an exemption to wear the mask without vaccination on the grounds that she feared for her normal pregnancy because of the lack of testing of the vaccine on pregnant women and because of the vaccine label's warning that "pregnant women should only receive [the vaccine] if medically necessary." After some attempts at compromise, LaBarbera persisted in refusing the vaccine and was terminated in December 2017. Following discovery, the Hospital moved for summary judgment, and prevailed.

Judge Hurley found that the Hospital's policy did not violate the PDA or New York State Human Rights Law for several reasons. First, the policy appeared neutral on its face and LaBarbera produced no evidence of anti-pregnancy animus or pretext. Second, applying U.S. Supreme Court precedent, Judge Hurley explained that normal pregnancy itself did not require accommodation or form the basis for a lawsuit. Rather, a plaintiff needed to show that the employer refused accommodating pregnant employees while allowing accommodation to non-pregnant employees for the same inability to work, without legitimate non-pretext justification. LaBarbera failed this standard because, while only one of three pregnant employees had their request for a waiver of vaccination granted, only 42 of all 125 inquiring employees obtained a medical exception from the Hospital. Since LaBarbera could not raise a fact question regarding direct or pretext based intentional discrimination nor disparate impact, Judge Hurley granted the Hospital summary judgment.

LaBarbera did not involve the current COVID-19 pandemic but its lessons should inform employers and employees confronting today's challenges. In addition, as Judge Hurley observed, "Lest it go unsaid, the parties might have been better off pursuing the compromise within their reach from the outset," rather than years of discovery and motions in exhaustive litigation. Lest it go unsaid, sometimes *dicta* really does speak.

SENATE PASSES EXTENSION TO PAYCHECK PROTECTION PROGRAM – DEADLINE NOW MAY 31, 2021

On March 25, 2021, the United States Senate passed legislation moving the Paycheck Protection Program ("PPP") application deadline from March 31 to May 31 by a vote of 92-7. The House of Representatives had passed the legislation on March 17, 2021 by overwhelming support 415-4 and President Joe Biden signed the legislation into law on March 30, 2021.

Patrick Kelly, an associate administrator with U.S. Small Business Administration's ("SBA") Office of Capital Access appeared at a Senate Committee on Small Business and Entrepreneurship advocating for legislation granting an extension for the PPP. Specifically, Mr. Kelly testified that more than 190,000 applications were still held up in the SBA's PPP platform due to unresolved error codes related to validation checks instituted to prevent fraud. The PPP extension legislation does not provide additional funding for the current round of PPP. Earlier in March, President Biden signed the American Rescue Plan of 2021 ("ARPA"), which includes another $7.25 billion in funding for the PPP and lifts some of the Program's earlier restrictions.

The PPP provides forgivable loans that can be used to cover payroll, rent, mortgage interest, utilities, and certain COVID-19 related expenses, such as personal protection equipment. Eligible entities are able to borrow from private financial institutions the lesser of 2.5 times the borrower's monthly payroll costs or $10 million. The PPP loans can be forgiven if at least 60% of the funds are spent on payroll costs over either an 8-week period or 24-week period. Under the ARPA, entities will only qualify for a PPP loan if: (1) the entity does not receive more than 15% of its receipts from lobbying activity; (2) the lobbying activities of the entity do not compromise more than 15% of the total activities of the organization; (3) the cost of lobbying activities for the entity did not exceed $1,000,000 during the most recent tax year prior to February 15, 2020; and (4) the entity does not employ more than 300 employees. Further guidance from the SBA is expected, but all 501(c) organizations are encouraged to apply as soon as possible. This is a link to the SBA's website for guidance: https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources

DEPARTMENT OF LABOR PRESENTS NEW RULE FOR TIPPED WAGES AFTER CALLING PAUSE ON TRUMP ERA PROPOSED RULE

The United States Department of Labor ("DOL") under President Joe Biden is proposing revisions to the regulations that cover tipped wages. This comes after the Biden DOL paused a Trump era late-term rule for which the restaurant industry had lobbied.

During the waning days of the Trump Administration, the Trump-led DOL proposed a tip-pooling rule that effectively eased regulations for the time spent on side work that does not generate gratuities. The Trump rule would have allowed employers to pay tipped employees the lower tipped minimum wage of $2.13 per hour for all hours worked, regardless of the amount of time they spent on non-tipped duties, such as cleaning workstations and setting up tables, where full minimum wage of $7.25 per hour would normally be due.

Upon taking office, the Biden administration paused the proposed rule in an effort to examine its impact on workers. This month, the Biden DOL's Wage and Hour Division unveiled two rules for tipped employees. Jessica Looman, DOL's Wage and Hour Division Deputy Administrator, said that "tipped workers are among those hardest hit amid the pandemic, and the Wage and Hour Division has made protecting these essential frontline workers a priority."

First, the DOL has proposed taking additional time to consider the withdrawal of the Trump-era rule. The DOL will consider the Trump rule for the lower minimum wage until December 31, 2021. The DOL will accept public comments until April 14, 2021.

Second, the DOL proposed a new rule that withdraws and revises the Trump-era rule of when employers are liable for civil monetary penalties for willfully engaging in such practices as an unlawful tip-sharing arrangement and which kind of managers and supervisors are ineligible to participate in a tip pool. Generally, a tip-pool arrangement involves what are deemed front-of-house workers, such as servers and bartenders that share gratuities with back-of-house workers, such as cooks and dishwashers. One of the purposes of this reproposed rule is to clarify when tipped employees can have their tips pooled when they are performing non-tipped related duties that are contemporaneous with or performed a reasonable time before or after tipped duties. The previous iteration of this rule blurred the lines "when an employer can take a tip credit for a tipped employee who performs non-tipped related duties." The DOL will accept public comments on this proposal until May 24, 2021.

To submit a public comment on these proposed rules, use the following website: www.regulations.gov.

GARDEN STATE GUIDANCE – NEW JERSEY ISSUES VACCINATION RULES

On March 25, 2021, the State of New Jersey issued new guidance on the steps employers may use to ensure their workforce is protected from COVID-19. In a new FAQ posted to the state's COVID-19 internet hub, New Jersey largely permitted private employers to require employees to receive one of the three-approved vaccinations (Moderna, Pfizer, or Johnson & Johnson) in order to return to onsite work. However, mirroring the directives issued by the Center for Disease Control and Prevention that were distributed at the end of 2020, employers in the Garden State are prevented from unilaterally imposing vaccinations in a few limited instances.

Most notably, employers cannot require employees to be vaccinated if they have a viable medical reason or if they hold a sincere religious belief. Further, under this latest guidance, expectant mothers, as well as mothers who are currently breastfeeding their newborns, are exempted from an employer-mandated vaccination policy, provided they submit documentation from their treating medical professional recommending that they not receive inoculation. In ascertaining the applicability of the disability exemption, an employer may "generally request" medical documentation to confirm a medical disability, but such paperwork must be maintained in an employee's "confidential medical record." In applying the religious exemption, employers "generally may not question the sincerity" of a person's religious beliefs or practices, but may do so, provided the employer has "an objective basis" for doing so.

In the event one of these exemptions applies, an employer is required to provide an employee with a reasonable accommodation, unless doing so "places an undue burden" on the employer. Examples of such accommodations include allowing an employee to work remotely or outfitting him/her with personal protective gear that "sufficiently mitigates any danger of virus transmission or exposure." Even then, an employer "may not automatically" terminate an employee who refuses to be vaccinated, but instead can unilaterally bar an unvaccinated employee from showing up at the jobsite.

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.