Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
April 20, 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

RIGHT AND WRONG ALONG A BLACK AND BLUE LINE

Quoting Dr. Martin Luther King that, "the time is always right to do right," Justice Dennis E. Ward of N.Y. State Supreme Court, Erie County vacated the termination of Buffalo police officer Cariol Horne for using force against a fellow officer who was applying a chokehold to a black suspect 15 years ago. *Horne v. City of Buffalo*, Index No. 010228-2008 (Erie Co. April 13, 2021).

On November 1, 2006, Officer Horne arrived at the scene of an arrest to see fellow officer Gregory Kwiatkowski "in a rage" using a chokehold on handcuffed suspect Neal Mack who could not breathe. Officer Horne physically pulled Officer Kwiatkowski off of Mack. Following 11 days of hearings, Buffalo terminated Officer Horne, denying her pension just shy of the qualifying date and defending the termination in an ensuing 2008-2010 Article 78 proceeding. Separately, in 2014, Officer Kwiatkowski pled guilty to assaulting four black teenagers in 2009 by slamming their heads against a car. Officer Kwiatkowski served four months in jail and was terminated from the Buffalo Police Department.

Almost 15 years after Officer Horne's intervention, during the current wrenching racial justice accounting, the City of Buffalo enacted "Cariol's Law: The Duty to Intervene," and Officer Horne petitioned to vacate the judgment against her. Justice Ward noted that the "unique factual situation presented here does not fit well into any of the statutory grounds" to vacate. "However," reasoned Justice Ward, "a court also possess the inherent authority and discretion to vacate its own judgment." Applying that inherent authority, Justice Ward found the initial judgment defective on several grounds: It was inconsistent with current norms on police duty; it violated Cariol's Law; and it failed to account for Officer Kwiatkowski's violent racial history. "If the government becomes a lawbreaker," Justice Ward cited Justice Brandeis on police power, "it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." But, he added, "while the Eric Garners and George Floyds of the world" can never have a "do over," the "legal system can at the very least be the mechanism to help justice prevail, even if belatedly," at least here. Accordingly, the Court granted Officer Horne's motion, reinstating her to the required retirement date with backpay and full pension benefits.

SDNY INVALIDATES TRUMP CAMPAIGN NON-DISCLOSURE AND NON-DISPARAGEMENT CONTRACT PROVISIONS

More can be less, and too much can be nothing at all under a holding of U.S. District Court Judge Paul Gardephe. The Court invalidated the non-disclosure and non-disparagement prohibitions of an employment contract between the Donald J. Trump for President campaign organization ("Campaign") and a former employee as overbroad and onerous. *Denson v. Donald J. Trump for President, Inc*., S.D.N.Y. No. 20-CV-4737 (PGG) (March 30, 2021).

Soon after Jessica Denson was promoted to the position of the Campaign's Hispanic Engagement Director, her male supervisor badmouthed, bullied, and harassed her. Denson complained to the Campaign to no avail. When she sued the Campaign alleging sexual harassment and discrimination, the Campaign brought an arbitration proceeding and action to enforce the non-disclosure and non-disparagement provisions of her employment contract. The Campaign prevailed at arbitration, winning damages in excess of $28,000 which was confirmed by the New York State Supreme Court, but vacated by the Appellate Division, First Department. Denson then sued to annul those provisions and Judge Gardephe agreed.

Judge Gardephe found the non-disclosure and non-disparagement provisions "much broader than what the campaign asserts is necessary to protect its legitimate interests," and therefore not enforceable. Reviewing the 35-listed categories of "confidential information" from the contract, Judge Gardephe found them so vague and broad as to effectively prevent Denson from ever saying anything about the Campaign, Trump, his family, or any of the hundreds of legal entities connected to him. Such a gag clause fell for two additional reasons. First, it chills employee speech on matters of public interest. Second, the Campaign used these contract provisions against Denson and at least four others not as a legitimate shield, but as a sword to punish those the Campaign disliked. Criticizing the Campaign for "not operating in good faith," the Court found that the Campaign "has repeatedly sought to enforce the . . . provisions to suppress speech that it finds detrimental to its interests." Accordingly, Judge Gardephe struck those provisions, freeing Denson to pursue her claims, and boosting the likelihood that other former Trump staffers do the same.

CONTINUATION OF COBRA SUBSIDIES - EMPLOYERS SCRAMBLE TO APPRISE WORKERS

The American Rescue Plan Act ("ARPA"), which was signed into law by President Biden on March 11, 2021, provided for fully subsidized health insurance coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") for employees who were laid off as a result of the COVID-19 pandemic. This benefit, which also covers employees who were no longer eligible for employer-sponsored health insurance coverage as a result of reduced hours, is designed to protect against individuals losing health insurance during this world health crisis and will cover the time period from April 1, 2021 to September 30, 2021. However, a May 31, 2021 deadline for employers to provide notices of this benefit to dispersed workers has left many employers franticly reaching out to former employees.

This multi-billion dollar benefit enables workers to retain their existing insurance coverage through their former employers, rather than going onto Medicaid, going onto one of the health insurance marketplaces authorized by the Affordable Care Act ("ACA"), or becoming uninsured. Additionally, this benefit will subsidize the high cost typically associated with COBRA coverage, provided individuals did not have access to other group health insurance, such as through a spouse. Notices must be provided to individuals, dating as far back as October 2019, even if those people either did not elect to take COBRA coverage or initially elected to take COBRA coverage and then subsequently dropped said coverage due to the routinely high-price tag associated with it.

In addition to the short time frame for sending out notices, confusion abounds due to the lack of clear and coordinated responses from the federal government. Although the U.S. Department of Labor ("DOL") has issued guidance regarding this benefit in the ARPA, as well as model notices that can be used by employers, the Internal Revenue Service ("IRS") has not yet issued guidance specifically identifying which former employees are eligible for this benefit. Further, the U.S. Department of Health and Human Services ("HHS") must extend a filing deadline for those individuals who were already taking advantage of the pre-existing COBRA subsidy programs under previous federal COVID-19 related legislation to enroll in ACA-authorized health insurance plans more easily. Finally, employers who had been providing free health insurance coverage for workers, must now endeavor to either recoup the monies spent on such costs from the federal government, seek to receive tax credits that would reduce their respective Medicare taxes, or request advance tax credits on the projected estimates associated with said costs.

STOP THE STEAL: DEPARTMENT OF LABOR ISSUES GUIDANCE TO HALT FRAUDULENT UNEMPLOYMENT INSURANCE PAYMENTS

The massive expansion of unemployment insurance ("UI") systems in the individual states resulting from the glut of UI claims due to the COVID-19 pandemic has provided fertile ground for fraud by parties ranging from run-of-the-mill scamsters to "transnational criminal organizations," according to the U.S. Department of Labor ("DOL"). As such, the DOL has recently issued guidance designed to curb the improper payment of UI benefits while, concurrently, ensuring deserving UI applicants continue to receive their appropriate UI benefits.

Under § 303(a)(1) of the Social Security Act of 1935 ("SSA"), states are required to have "methods of administration . . . to be reasonably calculated to insure full payment of unemployment compensation when due." One of these administrative means to ensure proper payment of UI benefits is to correctly determine eligibility verification; and under § 1137(a)(1) of the SSA, this translates into requiring UI applicants to "furnish . . . his Social Security account number." With this statutory backbone, the DOL promulgated guidance to aid states in cracking down on suspicious UI claims, which include but are not limited to i) UI claims being filed under the same Social Security Number ("SSN") in multiple states, ii) UI claims being filed from the same mailing address, and iii) UI claims being filed from the same IP address. However, the DOL cautions states not to automatically flag the second two examples as fraud, in order to account for multiple, appropriate individuals filing UI claims when residing in the same home or using the same

computer. Further, the DOL reiterated that, "once a claim has been established and payments have been issued, there is a presumption of eligibility." Accordingly, the ceasing of payments must only occur when there is "evidence on the record that substantiates a reasonable basis for stopping payments."

In order to deal with this rash of potentially fraudulent UI claims, the DOL has authorized states, when fraud is believed to be at play, to provide written notice with clear instructions for the claimant to provide proof of identity. If the person fails to respond to said notice or fails to provide adequate proof of identity, then the states may, going forward, deny the continued payment of UI benefits. Nevertheless, failure to respond to this notice or failure to provide adequate proof, in and of itself, does not constitute sufficient grounds for the state to recoup previous UI benefit payments.

Finally, any decision by states to halt payments for potentially suspicious UI claims must be made in a timely manner, generally within one or two weeks of detecting possible fraud. According to the DOL: "Timely determinations prevent fraudulent benefit payments while ensuring that qualified and eligible claimants receive benefits as soon as administratively feasible." Moreover, this recent DOL guidance seeks to highlight the problem of identity theft and how this crime has seeped into the UI benefits realm. As such, the DOL is asking states to bolster the methods by which they combat identity theft, such as allowing victims an easily accessible way to report problems and to ensure that victims are not held responsible for overpayments for UI benefits they did not claim.

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