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

DOL ISSUES COBRA PREMIUM ASSISTANCE MODEL NOTICES

The American Rescue Plan Act of 2021 (ARPA) provides that an eligible employee (and his or her dependents) who loses group health plan coverage due to an involuntary termination of employment or reduction of hours may be eligible to receive a one hundred percent (100%) COBRA premium subsidy for a six-month period (*i.e.*, from April 1, 2021 through September 30, 2021). For additional information and the rules surrounding who is eligible for the COBRA subsidy please reference our ***ARPA Delivers Relief*** Client Alert. Pursuant to ARPA, and consistent with the Department of Labor's (DOL's) guidance, plan administrators must provide individuals who are eligible for the COBRA subsidy with a notice no later than May 31, 2021 informing them of their new opportunity to elect COBRA. Such individuals have sixty (60) days following receipt of the notice to make their COBRA election.

ARPA directs the DOL to issue model COBRA notices to aid plan administrators with their COBRA subsidy administration. The DOL has created a new webpage which includes model notices, as well as FAQs and other resources relating to the COBRA subsidy. Please click the following link to access more information from the DOL regarding the ARPA COBRA subsidy: COBRA Premium Subsidy | U.S. Department of Labor (dol.gov). Also, a link to the various model COBRA notices which may be used for compliance with ARPA can be found below:

- **Model General Notice and COBRA Continuation Coverage Election Notice** (For use by group health plans for qualified beneficiaries who have qualifying events occurring from April 1, 2021 through September 30, 2021.) https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/model-general-and-election-notice.docx

- **Model Notice in Connection with Extended Election Period** (For use by group health plans for qualified beneficiaries currently enrolled in COBRA continuation coverage, due to a reduction in hours or involuntary termination ("Assistance Eligible Individuals"), as well as those who would currently be Assistance Eligible Individuals if they had elected and/or maintained COBRA continuation coverage.) https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/model-extended-election-periods-notice.docx

- **Model Alternative Notice** (For use by insured coverage subject to state continuation requirements between April 1, 2021 and September 30, 2021.) https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/model-alternative-election-notice.docx

- **Model Notice of Expiration of Premium Assistance** (For use by group health plans to Assistance Eligible Individuals fifteen to forty-five (15-45) days before their premium assistance expires.) https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/notice-of-premium-assistance-expiration-premium.docx

Please contact us if you have any questions or require assistance with administering the COBRA subsidy.

JERSEY COURTS STRIKE DOWN STATE STATUTE PROHIBTING EMPLOYMENT DISCRIMINATION CLAIMS GOING TO ARBITRATION

In March 2019, Governor Phil Murphy signed into law N.J Senate Bill S121 which amended the New Jersey Law Against Discrimination ("NJLAD"), to prohibit, *inter alia*, mandatory arbitration and jury waiver clauses in employment contracts. However, two years after the enactment of this law, both the New Jersey Superior Court, Monmouth County, Law Division ("Superior Court") and the U.S. District Court for the District of New Jersey ("DNJ") have now held, independent of each other, that the 2019 change to the NJLAD was unconstitutional.

The amendment to the NJLAD was designed to allow employees who are subjected to discrimination, harassment, and/or retaliation due to protected-class status, greater access to the courts by prohibiting the enforcement of mandatory arbitration provisions in employment contracts that are often signed at the outset of employment. The amendment was also designed to strike a fairer balance of the outsized leverage an employer enjoys over prospective employees. The validity of this amendment to § 12.7 of the NJLAD was immediately challenged by management-side attorneys on the ground that the Federal Arbitration Act ("FAA"), pursuant to the Supremacy Clause in the U.S. Constitution, preempted this change to the NJLAD.

In *Janco v. Bay Ridge Automotive Management Corp.*, MON-L-1967-20 (N.J. Super. Ct. Law. Div. Jan. 22, 2021), the plaintiff initiated a civil action against her former employer for violations of the NJLAD and the defendants moved to dismiss the complaint and compel arbitration. The former employee argued that she did not knowingly assent to arbitrate employment discrimination disputes with her former employer, even though she signed an employment contract that contained a mandatory arbitration provision. In rejecting this argument, Judge Henry Butehorn found that the agreement explained the differences between arbitration and a jury trial, and that such language was in conspicuous, bold-faced type. He also held that the agreement clearly stated that claims under the NJLAD, including discrimination, harassment, and/or retaliation, were covered by the arbitration provision, and that said provision was not "buried among other orientation documents." Finally, Judge Butehorn determined that the recent

amendment to the NJLAD was irreconcilable with the national policy in favor of arbitration, codified in the FAA, and as such, the federal legislation preempts the state law.

Shortly thereafter, in *New Jersey Civil Justice Institute v. Grewal*, 19-CV-17518 (AET) (LHG) (D. N.J. Mar. 25, 2021), the District of New Jersey rendered a similar decision on identical legal grounds. In a preemptive action taken by the plaintiffs to challenge the 2019 amendment to the NJLAD, they sought a declaratory judgment striking down § 12.7 of the NJLAD. According to the Court, § 2 of the FAA forecloses any state legislation that undermines the enforceability of arbitration agreements, and enjoined the State from enforcing § 12.7 of the NJLAD. Further, U.S. District Judge Thompson noted that California and New York rendered similar decisions in instances when those states' laws were viewed as contrary to the overarching, federal policy of deciding legal disputes via arbitration, rather than through litigation. *See Chamber of Commerce of U.S. v. Becerra*, 438 F. Supp.3d 1078, 1099 (E.D. Cal. 2020); *White v. WeWork Cos., Inc.*, 2020 WL 3099969 (S.D.N.Y. June 11, 2020).

PLAY BALL - SDNY THROWS OUT UMPIRE CLAIMING TITLE VII FOUL

Holding that a Hispanic umpire working for Major League Baseball ("MLB") missed the bag on race, ethnicity and national origin claims, U.S. District Court Judge J. Paul Oetken highlighted the policies and proofs necessary for any plaintiff to bring to trial claims under Title VII of the Civil Rights Act of 1964 ("Title VII") and the New York State Human Rights Law ("NYSHRL"). In granting MLB summary judgment, the Court reviewed World Series experience, iconic New York sports hero Joe Torre, and "built in headwinds that can freeze out protected groups from job opportunities and advancement." *Hernandez v. The Office of the Commissioner of Baseball*, S.D.N.Y. No. 1:18-CV-0035 (March 31, 2021).

Ignoring the fact that MLB players routinely voted him one of the worst umpires, Cuban born Angel Hernandez sued MLB alleging that the Commissioner Rob Manfred, MLB's Chief Baseball Officer Joe Torre and others passed over him for promotions to crew leader and for plum World Series assignments in violation of Title VII and the NYSHRL because of his race, ethnicity and national origin. MLB countered that Hernandez was just a passable umpire and a worse leader. Hernandez cried pretext, citing nearly 30 years' experience and positive reviews. Judge Oetken held that "no reasonable juror could find that MLB's explanation is a pretext for discriminatory motive," and sent Hernandez to the showers.

Judge Oetken took his first swing at Hernandez's claim that MLB long maintained a discriminatory policy of "overly subjective" evaluations blocking minority umpires from advancement by noting that subjective criteria can be permissible. Second, the Court observed that Hernandez could not offer alternative means for MLB to eliminate any discriminatory disparities. Finally, the Judge reviewed Torre's record as subjective decision maker, which included assigning two other Latino umpires to World Series games and promoting junior umpires over senior ones, both evidence countering any discriminatory intent. Rather, opined the Court, the stats on Hernandez showed numerous bad calls and failures to rise to leadership under stress that supported Torres. "The court is mindful of the reality of unconscious bias" but an honest judgment "even though partially subjective" cannot be the basis for a Title VII trial, explained the

Court, absent actual disparate treatment or disparate impact. Since Hernandez's evidence supported neither disparate treatment nor impact, Judge Oetken granted MLB summary judgment and closed the case.

COURT GRANTS AMAZON EMPLOYEE'S REQUEST TO ADD A NEW WAGE AND HOUR CLAIM FOR PRE-SHIFT COVID-19 RELATED SCREENINGS

On March 17, 2021, Magistrate Judge Tonianne J. Bongiovanni, of the United States District Court for the District of New Jersey ("DNJ"), granted an Amazon fulfillment center employee's motion to amend her wage and hour lawsuit against the company to include a claim for time spent undergoing pre-shift COVID-19 temperature checks and answering health questions ("screenings"). The issue turns on whether the screenings primarily benefit the company, or whether they primarily protect the health of the employees themselves and the general public. A link to a copy of the decision and order in *Vaccaro v. Amazon.Com, DEDC, LLC*, 3:18-cv-11852 (D. N.J. Mar. 17, 2021)("*Vaccaro II*"), can be found here.

This decision follows a prior June 29, 2020 ruling by District of New Jersey Chief Judge Freda L. Wolfson that time spent undergoing *post*-shift mandatory security screenings is compensable under New Jersey's wage and hour law ("NJWHL"). N.J.S.A. 34:11-56a *et seq*. A link to a copy of Chief Judge Wolfson's decision and order can be found here ("*Vaccaro I*"). In Plaintiff's initial complaint, she alleged that Amazon required warehouse employees to undergo metal detector screenings, place personal items on a conveyer belt to be scanned via X-ray, and sometimes undergo a secondary screening involving a physical search of the person.

Vaccaro argued that the screenings in the second case primarily benefit Amazon's operations because the vetting will reduce absenteeism related to COVID-19 disease and/or quarantines as well as potential outbreaks in the fulfillment center, which could result in forced closure and interruption of delivery services. According to Amazon, however, the screenings primarily benefit their workers because they are based upon required guidance of the U.S. Centers for Disease Control and Prevention, and doing so protects the public at large from this highly contagious virus.

Magistrate Judge Bongiovanni ruled that the putative class could file an amended complaint claiming Amazon should also pay workers for time spent undergoing temperature checks and answering a COVID-19 questionnaire prior to their shifts as this may constitute compensable time. Additionally, the court held that the requested amendment was not futile because time spent undergoing screenings conceivably benefits Amazon and therefore discovery on this issue was warranted.

Consistent with our prior suggestions, since no court has yet opined on the issue of pre-shift COVID-19 screenings, employers wishing to avoid wage and hour liability exposure should proceed carefully with advice of counsel.

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