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

NATIONAL LABOR RELATIONS BOARD DEFERS PRESIDENT BIDEN'S GENERAL COUNSEL APPOINTMENT TO THE COURTS

On Friday, April 30, 2021 the National Labor Relations Board ("NLRB" or "Board") ruled that it did not have jurisdiction to decide the legality of President Joe Biden's appointment of the NLRB General Counsel. The Board noted that even if there were jurisdiction to decide this issue, the only remedy would be to shut down the agency partially or completely, which would be in direct violation of their duty to faithfully administer the National Labor Relations Act ("NLRA"). The Board ruled that this issue was best left to the court system.

The underlying issue in *National Association of Broadcast Employees & Technicians,* 370 NLRB No. 114 (2021) is based on a dispute between an ABC television network cameraman and a union for camera operators, the National Association of Broadcast Employees and Technicians. In 2020, an administrative law judge issued a decision in the case, and Trump-era NLRB General Counsel Peter Robb filed exceptions.

Among President Joe Biden's first actions as President was the termination of Robb, who was serving a statutory four-year term originally set to end on November 15, 2021, along with Robb's top deputy. Following this, President Biden appointed Peter Sung Ohr as acting general counsel. Shortly thereafter, NLRB Acting General Counsel Ohr withdrew Robb's exceptions to the decision in this case. The National Right to Work Legal Defense Foundation, representing the cameraman in the dispute, filed legal challenges against President Biden's appointment of Ohr to acting general counsel.

The statute in dispute is Section 3(d) of the NLRA. The NLRA states that there shall be a general counsel of the Board, serving for a term of four years, after being appointed by the President of the United States and receiving advice and consent by the United States Senate. While the NLRA allows for an appointment process when there is a vacancy of the Board's general counsel, it is silent as to whether the President can dismiss a general counsel prior to the end of their statutory four-year term. The parties challenging Ohr's appointment cite this and the violation of the Appointments Clause of the United States Constitution, while Ohr asserts that the general counsel works at the pleasure of the President.

The Board acknowledged the importance of this issue, noting that there were at least nine other cases before them revolving around the same issue. It sets up a legal battle at the United States Supreme Court, which previously found that Lafe Solomon, who served as acting General Counsel under President Barack Obama, improperly served in that role from January 2011 through 2013. The Supreme Court reasoned that the Obama administration violated the Federal Vacancies Reform Act and held that a person who is nominated to serve in an acting office could not serve as the permanent nominee.

BIDEN ADMINISTRATION CANCELS TRUMP ERA GIG-WORKER RULE

On May 5, 2021, the Biden administration announced that it was canceling a Trump-era rule designed to make it easier for businesses to classify workers as independent contractors. The misclassification of workers as independent contractors has become controversial as the economy transitions to include more "gig-workers."

In announcing the rollback on the Trump rule, the United States Department of Labor ("DOL") said the change was necessary to achieve President Joe Biden's commitment to broadly extend wage protections and crack down on intentional worker misclassification.

Jessica Looman, Principal Deputy Administrator for the Wage and Hour Division at the DOL said that the DOL will again rely on the multi-factor test established by judicial precedent to determine if a worker is an independent contractor. She cited DOL guidance from 2008 that outlined a seven-factor "economic realities" test which includes the examination of whether the work performed is an integral part of the business and the worker's "degree of independent business organization and operation."

TEAMSTERS PREVAIL IN LAWSUIT CHALLENGING CALIFORNIA'S ABC CLASSIFICATION LAW FOR INDEPENDENT CONTRACTORS

The International Brotherhood of Teamsters and other worker advocates prevailed in a federal lawsuit in the United States Court of Appeals for the Ninth Circuit challenging California's Assembly Bill 5 ("AB 5"). *Trucking Ass'n v. Bonta*, 9th Cir., No. 20-55106 (4/28/21). In this case, several California Trucking companies sued in federal court arguing that the Federal Aviation Administration Authorization Act ("FAAAA") preempts AB 5. A divided panel in the Ninth Circuit ruled that Assembly Bill 5 is not preempted by the FAAAA.

AB 5 codified the so-called ABC test for independent contractors. The ABC test as defined in *Dynamex Operations West, Inc. v. Superior Court* includes a guide for employers to determine whether a worker is considered an independent contractor or an employee. The ABC test requires that an employer prove the following three factors to classify a worker as an independent contractor (a)the worker is free from the control and direction of the hiring entity in connection with the work's performance; (b)the work is outside the usual course of the hiring entity's business; and (c) the worker is engaged in an independently established role. The ABC test and other metrics to determine whether a worker is an independent contractor have become a hot button issue as the

government seeks to regulate the "gig" economy and gig workers seek benefits and other protections.

In *Bonta*, the California Truckers Association sued to block the enforcement of the ABC test arguing that it will harm the industry and require motor carriers to significantly restructure their operations to avoid fines and criminal liability. The Truckers Associations argued that the FAAAA preempts AB 5 because the restrictions and onerous regulations would destroy the trucking industry in California thereby violating the FAAAA. A majority was not persuaded because it is "generally applicable labor law that affects a motor carrier's relationship with its workforce and does not bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers."

The Ninth Circuit's ruling furthers a split among different federal appeals courts. The First Circuit held that the FAAAA preempts Massachusetts' independent contractor law while the Third and Seventh Circuits held that the FAAAA did not preempt similar independent contractor laws in New Jersey and Illinois.

The Teamsters hailed the Ninth Circuit's decision because they believe that for too long California truckers have "faced exploitation and misclassification at the hands of the trucking companies that place corporate profit ahead of drivers' safety and well-being." The California Truckers Association is contemplating appealing the case to the United States Supreme Court to resolve the splits among the different courts of appeals.

NEW POT LAW IN NEW YORK CREATES LEGAL AMBIGUITIES FOR WORKERS

The state of New York recently legalized recreational marijuana following other states across the country that have sought to cash in on the lucrative cannabis industry. New York's Marijuana Regulation and Taxation Act ("MRTA") includes a provision that prevents employers from disciplining or discriminating against their workers for using cannabis products on their personal time off. However, these labor provisions may not be absolute for all workers within New York State.

These labor provisions may not apply to the almost 140,000 federal workers in the state of New York and it is unclear whether federal laws may prevent other non-federal employees from using cannabis products, such as employees working under a federal contract. Federal contracts require a drug-free workplace and schools.

The federal Controlled Substances Act still lists marijuana as a Schedule I drug. The United States Drug Enforcement Agency defined Schedule I drugs as "drugs with no currently accepted medical use and a high potential for abuse." Currently, criminal justice reform groups are lobbying the Biden Administration to remove marijuana as a Schedule I drug.

Other states that have legalized recreational marijuana have faced criticism for penalizing workers such as teachers for using cannabis outside of work hours. Teachers have been disciplined

in Florida, Connecticut, and Texas for out-of-office cannabis use. The discipline of workers for out-of-office cannabis will likely soon come up in New York as an issue as the MRTA goes fully into effect on April 1, 2022.

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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