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

UNION FAILS STANDING IN COVID PROTECTION LITIGATION

Under the pressures of COVID-19, many unions have resorted to court litigation to protect the interests of their members, sometimes to oppose mandates, sometimes to demand greater protections. In *Massone as President and on behalf of the U.S. Security Officers v. Washington et al*., 20-cv-7906 (LJL) (S.D.N.Y. Aug. 30, 2021), federal district court Judge Lewis J. Liman held that the U.S. Security Officers Union ("CSO" or "Union") lacked standing to sue the U.S. Marshals Service and its contractor (jointly "the Service") for inadequate COVID protections in violation of the First Amendment, 42 U.S.C. § 1983, New York State Labor Law § 740 and "public nuisance" common law.

The Union sued under these federal and state laws for monetary damages on behalf of member CSOs, alleging that the service failed to properly sanitize facilities, lacked an adequate PPE program, and systematically retaliated against complaining CSOs. As a result, the Union alleged, the Service "created a substantial and specific danger to the public health and safety" and a COVID "breeding ground" leading to the quarantine, sickness, and the death of many CSOs. The Service moved to dismiss for lack of standing and failure to state a claim.

Judge Liman granted the motion solely on standing. Standing is the threshold issue in a case, absent which the Court lacks any authority to hear the case. Citing Supreme Court and Second Circuit authority, Judge Liman rejected the Union's claims to both "organizational" or "representational" standing. No "organizational" standing existed because the complaint did not allege any direct harm to the Union, only monetary harm to certain members. "For an organization to have standing, it is not enough that the defendant allegedly has engaged in a wrong that affects each union member . . . The organization must suffer some destructive injury to *itself*," explained the Court, "not abstract social interests." The Union also failed "representational" standing, continued the Court, because the Union sought only monetary damages, or "individualized relief" to members, not a declaration, injunction, or some other form of "prospective relief." Monetary claims and relief necessarily required participation of the individual members themselves, not the Union even on their behalf. Accordingly, the Court dismissed the amended complaint with leave to amend again. However, continued Judge Liman, simply adding equitable relief would not suffice if the claim still required individualized proof of participation of members.

This decision illustrates the barriers against union access to general litigation even for its members. However, it does not affect those procedures and relief specifically afforded to unions by federal or state statute, such as the Labor Management Relations Act for arbitration, the National Labor Relations Act for unfair labor practices, and their state equivalents.

THIRD CIRCUIT COURT OF APPEALS UPHOLDS DEFERENCE TO ARBITRATION

On August 26, 2021 the United States Circuit Court of Appeals for the Third Circuit rejected yet another bid from a disappointed employer to overturn the considered judgment of a labor arbitrator. In a case entitled *Independent Laboratory Employees Union Inc. v. ExxonMobil Research and Engineering Co*., (3d Cir. August 26, 2021; 19-2988), a unanimous three judge panel held that the arbitrator did not abuse her discretion when she considered evidence outside the language of the collective bargaining agreement ("CBA"), including prior arbitral awards and statements by company officials. The arbitrator concluded that Exxon Mobil violated its collective bargaining agreement with the Independent Laboratory Employees Union ("Union") at a New Jersey research facility by attempting to replace retired workers with sub-contractors.

The Court held that under United States Supreme Court precedent, arbitrators may consider context when examining the meaning of a CBA. This case stems from the retirement of a union member in 2015. The company replaced the retired union member with an independent contractor and then repeated the practice. In 2018, an arbitrator held that the practice violated the CBA's anti-subcontracting provisions, as well as the Union recognition clause. The arbitrator relied on earlier subcontracting arbitral cases and comments from company management on the issue.

The Court held that since a CBA cannot anticipate every possible scenario, it is appropriate for an arbitrator to rely on outside material for context and that this does not conflict with the "clear and unambiguous" language of the CBA. The Court also relied on the Supreme Court's recognition of the necessity for arbitrators to consider the "common law of the shop."

The Third Circuit decision was unanimous, although Judges Stephanos Bibas and Robert Cowen concurred in the judgment only and disagreed with Judge Theodore McKee's finding that the arbitrator did nothing wrong in reading CBA language limiting Exxon's use of contractors generally. While the Court generally upheld the arbitrator's discretion, it also noted that the arbitrator was on the "outer edge" of the deference arbitrators are granted.

SURCHARGES IN THE TIME OF THE COVID-19

Recently, there has been discussion surrounding employers who maintain group health plans instituting an incentive (*i.e*., a health premium surcharge) on their participating employees who are not vaccinated against COVID-19. By way of example, Delta Airlines is set to impose a $200 monthly health premium surcharge later this year on its employees who participate in its group health plan and have not been vaccinated against COVID-19. This measure may appeal to certain employers as an alternative to mandating the COVID-19 vaccine, however, it may not be as straightforward as it seems.

Employers should beware that the implementation of such incentives may implicate the application of several federal regulations governing wellness programs offered in connection with group health plans, including, Title VII of the Civil Rights Act, the Employee Retirement Income Security Act (ERISA), the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disability Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and the Affordable Care Act (ACA). Employers should proceed with caution when deciding whether to make these types of plan changes because of open questions (*e.g*., which type of wellness program can be offered for this purpose, how much the incentive can be, and whether the incentive will apply to booster shots) and, considering, certain wellness program rules that have not been finalized.

Any employers contemplating establishing a wellness program in response to the COVID-19 or instituting Covid-19--related incentives in their current wellness program may wish to contact counsel for assistance with navigating applicable rules and regulations.

FEDERAL UNEMPLOYMENT BENEFITS EXPIRE FOR 7.5 MILLION AMERICANS

On September 6, 2021 the federal COVID-19 jobless aid that began last March expired for 7.5 million unemployed Americans, including 800,000 New Yorkers.

As part of the $350 billion in the American Rescue Plan signed by President Joe Biden in March, states and local governments were allocated $350 billion in discretionary funding to provide their residents COVID-19 relief. States can extend unemployment benefits but there has been no indication that states will do so, even as the COVID-19 delta variant has caused a surge of cases throughout the country.

The reluctance to extend unemployment benefits even in the most pro-worker states may be attributed to lower unemployment numbers. The most recent United States Department of Labor job reports showed that jobless claims have declined to their lowest level since the pandemic started in March 2020. In addition, many employers argue that they are not able to hire workers because unemployment benefits are too generous leaving many jobs unfilled because workers receive more money collecting unemployment benefits than working. On the federal level, Congressional leaders have

not indicated an interest in extending benefits as they grapple with passage of a national infrastructure bill and social spending bill in the Fall.

REMEMBERING 9/11

This week marks the 20th anniversary of the 9/11 attacks at the World Trade Center and other parts of the United States. We take the time to remember our family, friends, neighbors and fellow Americans who perished that fatefull day and hold them in our hearts. After the attacks, many feared that it marked the end of New York City. Despite the doomsayers, our city overcame many obstacles and today the site of the World Trade Center is filled with visitors from far and wide amid shimmering towers that celebrate freedom, unity and the greatest city in the world.

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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