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

NYC REQUIRES INDIVIDUALS TO DISPLAY PROOF OF VACCINATION TO PARTICIPATE IN CERTAIN INDOOR ACTIVITIES

Effective August 16, 2021, New York City food establishments, gyms and fitness centers, and entertainment and recreational settings ("covered entities") will be tasked with verifying that individuals entering their indoor premises for more than a short period of time provide proof of vaccination. Specifically, the "Key to NYC" Program ("the Program"), announced by Mayor Bill DeBlasio previously, requires certain persons entering a "covered premises" to provide proof of at least one dose of the COVID-19 vaccine by providing a physical or digital copy of their official vaccination card. Proof of vaccination can also be achieved by individuals using their digital New York State Excelsior Pass or using the City's similar and soon to be launched "Key to NYC Pass". The City will start enforcement on September 13, 2021. Entities that fail to verify proof of vaccinations will be assessed fines of "not less than $1,000" after that date.

According to **Emergency Executive Order Number 225** ("EO 225") issued by Mayor DeBlasio on August 16, and the Frequently Asked Questions ("FAQs") issued by the City for the Program that day, and since updated, proof of vaccination will be required from employees, patrons, and contractor residents of New York City who enter an indoor covered premises "regardless of the activity" at such location. "Covered premises" include, but are not limited to theaters, music venues, casinos, gardens, commercial event and party venues, museums, zoos, sports arenas, convention centers, exhibition halls, and other recreational game centers. Additionally, covered entities include all food service establishments that are subject to the NYC Department of Health and Mental Hygiene's restaurant grading program that offer indoor dining or beverage service. Grocery stores, and indoor gyms and fitness centers will also have to comply with the terms of EO 225. The FAQs indicate that if a venue has both indoor and outdoor portions, only the indoor portion is covered by the EO 225. Requirements of EO 225 for covered establishments also include a notice posting to employees and patrons about the vaccination requirement.

Exceptions to EO 225 include most schools, childcare programs, senior centers, community centers and locations inside a residential or office building for

which the use is limited to residents, owners, or tenants of that building. The FAQs suggest that individuals may enter covered premises to use a restroom without showing proof of vaccination, provided they comply with other COVID-19 protocols, such as using a face covering and social distancing. The Program requires and discusses exceptions for those who claim a need for reasonable accommodation due to a disability, sincerely held religious belief, pregnancy or victim of domestic violence, stalking or sex offense. There can be no discrimination based on a characteristic protected by the New York City Human Rights Law.

In addition to proof of vaccination, individuals seeking entry must also provide proof of identity matching the vaccination proof. Persons who cannot provide *both* vaccination and identity proof should be denied entry. Ominously, the Program mandates that the Office of Administrative Trials and Hearings post a webinar setting out best practices for conflict resolution when dealing with unruly customers. The webinar can be accessed at: https://www1.nyc.gov/site/oath/conflict-resolution/conflict-resolution.page.

EO 225 was immediately challenged in New York State Supreme Court, Richmond County, *Independent Restaurant Owners Association Rescue (I.R.O.A.R.) et al. v. Bill de Blasio*, (Case Number pending) as allegedly "arbitrary, irrational, unscientific and unlawful."

BOARD GENERAL COUNSEL ISSUES MEMORANDUM DETAILING PRIORITIES INCLUDING A ROADMAP TO UNDO MANY TRUMP ERA CASES

On August 12, 2021, newly approved National Labor Relations Board ("NLRB" or "Board") General Counsel, Jennifer A. Abruzzo released her first Mandatory Submissions to Advice Memorandum which provides an agenda for NLRB Regional Directors, Officers-in-Charge, and Resident Officers on the General Counsel's important priorities. The first section of the memorandum lists 11 Board cases from the Trump era that Abruzzo intends to revisit because she claims the cases dramatically shifted away from previous NLRB precedent. The second section of the memorandum lists additional subject matters that Abruzzo intends to weigh in on such as addressing Weingarten rights, employee status and the employer duty to recognize and bargain with labor unions. Finally, the memorandum includes guidance for handling NLRB cases.

Reversing Course on Trump Era Cases

Abruzzo listed 11 Trump era cases that she will examine that she says marked significant doctrinal shifts from prior Board precedent. Among the cases is the applicability of *The Boeing Co.,* 365 NLRB No. 154 (2017) which deals with the framework for determining the legality of workplace/employee handbook rules. The NLRB under the presidency of Donald J. Trump changed previous Board General Counsel's interpretations of workplace/employee handbook rules to a pro-employer perspective on issues concerning confidentiality rules, non-disparagement rules, social media rules, media communication rules, civility rules, respectful and professional rules, in a manner

that pro-worker groups believe violates Section 7 of the National Labor Relations Act ("NLRA").

Abruzzo will also examine Trump era decisions that involve: confidentiality provisions/separation agreements and instructions, what constitutes protected concerted activity, *Wright Line/*General Counsel's burden of proof, Board remedial issues such as backpay and employee reinstatement, union access for Section 7 activity, union dues, employee status, NLRB jurisdiction over religious institutions, cases examining employer duty to recognize and bargain in good faith and cases involving the deferral to arbitration.

New Priorities for the General Counsel

The memorandum marks examining other pressing issues as well, such as employee status and misclassification. The Trump era NLRB was criticized for refusing to find a violation when employers intentionally misclassified their workers as independent contractors to subvert labor rights. Abruzzo expressed an interest in re-examining *Weingarten* rights and whether workers have a right to pre-disciplinary interview information, including the questions to be asked in a discipline interview. Abruzzo likewise intends to reexamine the applicability of *Weingarten* rights in non-union settings as described in *IBM Corp.,* 341 NLRB 1288 (2004).

In addition, memorandum expresses an intention to examine cases relating to the National Mediation Board's jurisdiction, employer duty to recognize and bargain with unions, employees Section 7 right to strike and picket, the extent of the Board's ability to issue remedies for NLRA violations and failure to comply with Board rulings.

Guidance for Handling Board Cases

Abruzzo ends the memorandum by discussing issues that the Board intends to review that are traditionally submitted for Board advice. These issues include cases involving the validity of partial lockouts and cases where the NLRB invites the parties to file position statements following a remand from the Court of Appeals or on the Board's own motion. The goal appears to try and streamline NLRB procedures to expedite the adjudication process.

The tone and tenor of Abruzzo's memorandum is a significant pro-labor departure from her predecessor, Peter Robb who was terminated on President Joe Biden's first day of office. This is a link to the NLRB Advice Memorandum: https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.

IRS ISSUES SUPPLEMENTAL GUIDANCE ON COBRA PREMIUM ASSISTANCE

Recently, the Internal Revenue Service ("IRS") issued further guidance in connection with the COBRA premium subsidy made available pursuant to the American Rescue Plan Act of 2021 ("ARPA"). ARPA provides that certain individuals (*i.e*., assistance eligible individuals) may be eligible to receive a one hundred percent (100%)

COBRA premium subsidy for the six (6)-month period from April 1, 2021 through September 30, 2021. For more detailed information regarding the COBRA premium subsidy eligibility rules, please refer to our previous article entitled "ARPA Delivers Relief".

On May 18, 2021, the IRS issued guidance on the application of ARPA relating to the temporary premium assistance for COBRA continuation coverage. Most notably, the IRS made clear that the entity entitled to the COBRA premium assistance credit is (1) the multiemployer plan, in the case of a group health plan that is a multiemployer plan; (2) the employer, in the case of a group health plan, other than a multiemployer plan, that is (a) subject to Federal COBRA, or (b) under which some or all of the coverage is not provided by insurance (that is, a plan that is self-funded, in whole or in part); or (3) the insurer providing the coverage, in the case of any other group health plan not described in (1) or (2) above.[1] In its most recent guidance issued in July 2021, the IRS clarifies eligibility for (i) the ARPA subsidy during extended coverage periods, (ii) state continuation COBRA and (iii) claiming the tax credit.

In a Q&A format, some of the open questions addressed by the IRS in its July 26, 2021 guidance include:

- If an assistance eligible individual has not timely notified the plan or insurer of the individual's intent to elect extended COBRA continuation coverage due to a disability determination, a second qualifying event, or an extension under State mini-COBRA, the assistance eligible individual may still be eligible for COBRA premium assistance as long as the individual's extended period of COBRA coverage falls between April 1, 2021 and September 30, 2021.
- If an assistance eligible individual who elected COBRA premium assistance for dental or vision-only coverage becomes eligible to enroll in a group health plan or Medicare, the individual loses eligibility for the COBRA premium assistance even if the group health plan or Medicare coverage excludes vision or dental coverage.
- A State law that provides a continuation of coverage program only for employees of a State or local government unit may be comparable coverage that qualifies an assistance eligible individual for COBRA premium assistance.
- Generally, a common law employer maintaining a group health plan is the current common law employer entitled to claim the COBRA premium assistance credit, subject to certain exceptions.
- If a State agency is obligated to make COBRA continuation coverage available to employees of various agencies of the State and local governments within the State and the assistance eligible individuals would have been required to remit COBRA premium payments directly to the State agency were it not for the COBRA premium assistance, then such State

[1] Click the following link for additional information on the IRS's May 18, 2021 COBRA premium assistance guidance: https://www.irs.gov/pub/irs-drop/n-21-31.pdf.

agency is the premium payee entitled to claim the COBRA premium assistance credit.

For additional information, the IRS's July 26, 2021 COBRA premium assistance guidance can be found here: https://www.irs.gov/pub/irs-drop/n-21-46.pdf.

Please contact us if you have any questions or require assistance with administering ARPA's COBRA premium subsidy.

WHILE YOU WERE LOOKING ELSEWHERE, SCOTUS MAY HAVE JUST UPHELD MANDATORY VACCINATIONS

On August 12, 2021, United States Supreme Court Justice Amy Coney Barrett denied a request for an emergency injunction against the University of Indiana's mandatory vaccination policy. To anti-vaccination groups hoping the conservative leaning Supreme Court would stem the tide of mandates, the one-page-no explanation ruling by a Trump appointed conservative Justice comes as a firm setback.

The University policy requires all students, faculty and staff to be vaccinated by the Fall semester unless they obtain a medical or religious exemption and then both wear masks and be tested twice weekly. Eight students, six of whom had obtained religious exemptions, challenged the policy as unconstitutional, even with the exemptions because they objected to masks and testing as well. The Court of Appeals rejected the challenge, relying on a 1905 Supreme Court ruling upholding mandatory small pox vaccinations. Justice Barrett rejected the request on her own, without referring the question to the full nine justices, without asking the University to respond, and without explanatory opinion.

Sometimes, silence speaks volumes. As cities, states and private employers increasingly turn to mandatory vacation policies like the University's here, we count SCOTUS in.

MAYOR DE BLASIO SIGNS LABOR PEACE AGREEMENT LEGISLATION FOR HUMAN SERVICES CONTRACTORS

On August 18, 2021, New York City Mayor Bill de Blasio signed Intro. 2252 which requires city human services contractors to enter into labor peace agreements within 90 days of receiving or amending a city contract. This legislation will provide workers under a contract with the City the ability to organize without the interference of their employers.

District Council 37, AFSCME played a key role in drafting this legislation and obtaining the support of the City Council that passed Intro 2252 with overwhelming support this past July. To date, District Council 37 represents 20,000 non-profit workers who provide New York City services such as home health care, early childhood education and homeless outreach services.

Henry Garrido, Executive Director, District Council 37, AFSCME observed "Workers in the non-profit social and human services sectors have been in crisis. They face dangerous working conditions, rising health care costs, low pay and extremely high turnover. They have been asking for the ability to organize without fear, and it has finally been granted."

OSHA ISSUES NEW COVID-19 GUIDANCE

On August 13, 2021, the Occupational Safety and Health Administration ("OSHA") revised its COVID-19 guidance to incorporate the United States Centers for Disease Control and Prevention ("CDC") guidance from July 17, 2021 which advises fully vaccinated Americans to resume wearing masks indoors in areas experiencing a "substantial or high risk of transmission."

The CDC changed its guidance because the COVID-19 Delta variant has caused a surge of infections throughout the country, ravaging areas with low vaccination rates including Florida, Texas, Arkansas, and Alabama. The CDC concluded that the Delta variant is more transmissible than earlier strains of COVID-19, giving rise to the need to reverse previous guidance for fully vaccinated Americans.

OSHA's new guidance does not mandate vaccinations for workers but suggests that employers "consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing in addition to mask wearing and physical distancing-if they remain unvaccinated." This is a link to OSHA's updated COVID-19 guidance: https://www.osha.gov/coronavirus/safework.

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.