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

DC CIRCUIT BARS TRUMP BOARD ACCESS RULE AS ARBITRARY

On August 31, 2021, the United States Court of Appeals for the District of Columbia issued a decision in *Local 23, American Federation of Musicians v. NLRB*, finding a President Trump-era National Labor Relations Board ("NLRB" or "Board") change of law regarding contractor employee property access to be arbitrary and remanding the case to the now-Democratic Board. 20-1010 (D.C. Cir. Aug. 31, 2021).

In *Bexar Cnty. Performing Arts Ctr. Found. dba Tobin Center*, 368 NLRB No. 46 (Aug. 23, 2019), one of the more controversial rulings of the Trump NLRB, the Board modified the framework under which a contractor's employees can access a property owner's property for labor organizing activity. Since 2011, and with the approval of the federal courts, a property owner was only permitted to prohibit a contractor's employees that were regularly employed on the property when the owner could demonstrate that the employee's organizational activity "significantly interfered with his use of the property or where exclusion is justified by another legitimate business reason." *Bexar* overruled this framework, announcing a new standard whereby a property owner could exclude contractor employees seeking to engage in labor activity "unless (i) those employees work both regularly and exclusively on the property and (ii) the property owner fails to show that they have one or more reasonable nontrespassory alternative means to communicate their message." On its face, *Bexar* made it easier for property owners to prohibit the labor activity of their contractor's employees. AFM Local 23 petitioned for review of the Board's decision, challenging both steps of the new test as conceived and as applied to the Union.

Chief Judge Srinvasan, joined in full by Judge Pillard, granted the Union's petition. With respect to the "regularity" analysis, the Court found the Board's decision, which defined regularity through frequency of appearance, to be internally inconsistent. The Court took issue with the Board's arithmetic when it found the Union employees' 22 weeks per year appearances (i.e., 22/52) to be insufficiently frequent while claiming that an individual working once per week (i.e., 1/7) would meet the regularity standard. The Court also rejected an argument the Board made in briefing - that regularity should be defined based on "constant" or "definite" property access – arguing this would produce awkward

results. Moving on to the *Bexar* exclusivity requirement, the Court concluded that, as defined by the Board, it was an "ill-suited proxy for connection to the property," noting that it results in barring employees who work virtually their entire workweek at a property owner's property but occasionally work at a different site for the same contractor. Finally, the Court rejected the Board's application of the second step of the new test to the Union, recognizing that the property owner never actually had the burden shifted to it to show the Union employees had reasonable alternative means to communicate their message. The Board's second step was new and therefore the parties never presented argument or developed the record on this point. In order to properly shift the burden to the property owner, the Court believed that the Board needed to enable the development of additional evidence, giving the Union an opportunity to show that the burden was unmet. Accordingly, the Court remanded the matter to the Board to either proceed with another version of this framework or to develop a new test altogether. Judge Henderson concurred, but wrote to make clear that she did not find the Board's new test to be arbitrary *per se*.

The D.C. Circuit's decision is a resounding victory for the AFL-CIO, which has challenged Trump Board changes of law very selectively, appearing to prefer reversal from a future Board rather than risk enshrining anti-union law in the circuit courts. On remand, it is very likely that the now-Democratic Board will either reinstate the prior standard or adopt one more favorable to unions, which is almost certainly a priority given the increased presence of contracting relationships, an aspect of what David Weil, President Biden's nominee to head the Department of Labor Wage and Hour Division, termed the "fissured workplace."

THE BOARD'S RX FOR RELIEF IN UNFAIR LABOR PRACTICE CASES MAY SOON GO EXTRA STRENGTH

A lengthy footnote to a decision of the US National Labor Relations Board ("Board" or "NLRB") prescribes novel "consequential damages" in relief for future unfair labor practices where employers unilaterally change terms and conditions of employment with disastrous consequences to their employees. *The Voorhees Care and Rehab. Ctr*., Case 04-CA-219938, 371 NLRB No. 22 (Aug. 25, 2021).

The Voorhees and its iterations ("Voorhees") provided health insurance coverage through CIGNA pursuant to a collective bargaining agreement with District 1199C, AFSCME. Voorhees cancelled its plan midterm in 2017 without notice to the Union or employees, leaving workers without coverage for six months. Following Union unfair labor practice charges, Voorhees substituted inferior plans without bargaining to agreement or impasse with the Union. Consequently, one employee had emergency surgery at a direct cost of over half a million dollars, two employees suffered medical bills going to collection and one a court judgment. Other employees bore bills in the thousands of dollars. Board Chair McFerran (D) and Members Emanuel and Ring, both Trump appointees, unanimously held that Voorhees violated the National Labor Relations Act (the "Act" or "NLRA") by its unilateral actions.

In remedy, the Board ordered Voorhees to "restore the status quo ante and make the unit employees whole for any loss of earnings and benefits and for other costs attributable to its unlawful conduct," including "payment of all outstanding medical costs . . . and any court judgments . . ." Some employees will be reimbursed while Voorhees must pay other bills directly because in "the circumstances here, it is unreasonable to expect the affected employees to pay those bills out of pocket . . ." Then, in footnote 14, Chair McFerran, joined tentatively by former Chair Ring, proposed stronger medicine.

In McFerran's view, "this case should prompt the Board to seek public input about whether to add a new make whole remedy . . . consequential damages . . . for economic losses (apart from loss of pay or benefits) suffered as a direct and foreseeable result of an employer's unfair labor practice." In addition to the unpaid bills and judgments of this case, such consequential damages would go beyond actual medical costs to include interest and late fees, penalties on early withdrawals, transport or child care costs, and even loss of car or home. According to McFerran: "it is time for the Board to consider addressing the issue of consequential damages in an appropriate case, and to consider any other appropriate ways to ensure that employees victimized by unfair labor practices are made completely whole."

As noted in the decision in *Voorhees*, the Acting General Counsel did not ask for consequential damages, "presumably because the Board has never authorized such damages and has rebuffed the General Counsel before . . ." However, with a new General Counsel and two new labor friendly Board Members joining Chair McFerran and Member Ring, the presumption may soon change.

CHICAGO AFL-CIO OPPOSES VACCINE MANDATES

In a break with the AFL-CIO national organization, the Chicago branch of the union umbrella group has come out against vaccine mandates. In late July, in one of his last official acts before his death at age 72, long time AFL-CIO President Richard Trumka led the organization in coming out in favor of vaccine mandates. Trumka viewed the decision as protecting working people. "If you are coming back into the workplace, you have to know what's around you." He continued, "everybody" in the workplace would be jeopardized if a worker is not vaccinated. He also indicated that it is difficult to make proper accommodations if a business doesn't know if an employee has been vaccinated.

More recently, vaccine mandates have spread across the country, from large companies to government agencies, states and municipalities. For example, the Federal Department of Veterans Affairs became the first federal agency to mandate vaccines for its health care workers. In addition, President Biden has said that a vaccine mandate for federal employees is "under consideration." On a local level, New York City Mayor Bill de Blasio has ordered that all public school employees would have to be vaccinated, as well as mandating vaccines for a host of indoor activities. These mandates are currently facing legal challenges.

In the face of this momentum, the Chicago Federation of Labor is opposing the City of Chicago's new vaccine mandate. As of October 15, 2021, all Chicago city employees and volunteers must be fully vaccinated, with certain medical and religious exemptions to be reviewed case by case. The mandate came in conjunction with the United Stated Food and Drug Administration granting full approval to the Pfizer vaccine. This approval took away one of the few science based legal obstacles to vaccine mandates, as several cases have been brought claiming that an "experimental "vaccine cannot be forced on employees. The full stamp of approval from the FDA renders at least the Pfizer vaccine indubitably not "experimental."

The Chicago Federation of Labor opposes the mandate, contradicting late President Trumka and the national AFL-CIO, on the ground that punitive measures will not increase vaccine usage. "We believe in the benefits of vaccination to help protect workers and residents, but we do not believe punitive mandates are the right path to significantly increase vaccine uptake," the group's president, Bob Reiter, said in a statement Wednesday. "In fact, we believe this announcement may harden opposition to the vaccine instead of protecting the workers who have sacrificed so much over the past 18 months." Ironically, the Chicago Federation earlier this year set up a union-run vaccine clinic, however, the group insists that the City would be better served by maintaining a testing option for the vaccine hesitant. The group represents 500,000 workers belonging to 300 member unions.

The City of Chicago predictably disagrees. "As cases of COVID-19 continue to rise, we must take every step necessary and at our disposal to keep everyone in our city safe and healthy," Mayor Lori Lightfoot said. "Getting vaccinated has been proven to be the best way to achieve that and make it possible to recover from this devastating pandemic. And so, we have decided to join other municipalities and government agencies across the nation, including the U.S. military, who are making this decision to protect the people who are keeping our cities and country moving. We have also been in close communication with our partners in the labor movement to create a vaccination policy that is workable, fair and effective."

The Chicago move follows vaccine mandates for Cook County employees as well as Illinois state congregant care employees. Whether this opposition is a harbinger for New York remains to be seen, as proposed mandates have not taken full effect yet, are still subject to legal challenge and not every Union opposes mandates. In any event, there is a strong argument to be made that such mandates are terms and conditions of employment and should be subject to bargaining.

TO ALL OUR FRIENDS AND CLIENTS
HOPE YOU HAVE A WONDERFUL LABOR DAY!!

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