"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

COVID ORDERS AND COURT TROs IN PLAY AS LEGAL PROCEEDINGS MUTATE

COVID related orders from New York City, New York State and the U.S. Government have resulted in public sector unions or individuals bringing legal proceedings to challenge mandatory vaccination and return to work orders, with mixed results.

In *New York City Municipal Labor Committee v. City of New York,* Sup. N.Y. Co. No. 158368/2021 (Sept. 14, 2021), the New York City Municipal Labor Committee, which is an umbrella organization consisting of all public sector unions with New York City municipal workers ("MLC"), initiated an Article 78 proceeding challenging the City's vaccination only mandate ("Mandate") as it applied to all employees who work in New York City Department of Education ("DOE") buildings, which included teachers, trades-people, clericals, and other support staff. Originally, the Mandate did not account for the possibility of any religious or medical exemptions to receiving the vaccine. As such, the MLC challenged the Mandate on the grounds that: i) it violated the substantive due process rights of these employees, and ii) it failed to allow for medical/religious exemptions, as required by federal and state statutes. The Court, initially, issued a Temporary Restraining Order ("TRO") because the Mandate failed to provide for medical/religious exemptions, but the Court did not weigh in on the substantive due process claim.

Subsequent to the issuance of the TRO, the DOE revised the Mandate to allow for medical/religious exemptions. As such, the Court, on September 22, 2021, decided whether the MLC could succeed on the merits of its claim that the Mandate violated the substantive due process rights of these affected employees working in DOE settings. The Court determined that, since the early 1900s, the courts have consistently found that "a mandatory vaccine requirement does not violate substantive due process rights and properly falls within the State's police powers." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). Further, in citing recent precedent from both federal and state courts, the Court saw no need to upset this holding. *See Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015); *C.F. v. New York City Dept. of Health and Mental Hygiene*, 191 A.D.3d 52 (2d Dept. 2020). The Court also ascertained that Petitioners could not satisfy the other two elements when seeking a preliminary injunction. Namely,

Petitioners did not suffer irreparable harm because the newly added exemptions satisfied medical and religious needs under the law, leaving only monetary issues. Given the importance of vaccinations to the public health, Petitioners also lacked a balance of equities in their favor. Therefore, the Court vacated the earlier TRO.

In contrast, U.S. District Court Judge David Hurd blocked New York State from enforcing Governor Kathy Hochul's mandatory vaccination order against health care workers who claimed it violated their religious beliefs against the use of abortion tissue cells. *See Dr. A v. Hochul*, N.D.N.Y. No. 21-cv-1009 (Sept. 14, 2021). District Judge Hurd set September 28, 2021 for hearing on the issue and possible extension of the stay, but with the recent decision in the MLC matter, the continuance of the stay is in doubt, especially given the courts' continued reliance on established judicial precedent in supporting vaccination mandates.

In related action, on September 15, 2021, District Council 37, representing 80,000 non-essential municipal workers, filed improper practice charges against the City with the Office of Collective Bargaining alleging that the City's return to work order unnecessarily endangers their workers who have performed their duties well from home since March 2020. The charge follows weeks of unsuccessful negotiations with the City centered on the Union's claim that the in-office space is not safe, especially in the shadow of the Delta variant.

And as we go to press, three new legal variants are reported. A group of federal workers and contractors challenged President Biden's executive order on religious grounds just yesterday. *Gregg Costin et al v. Joseph R. Biden*, 1:21-cv-2484 (D.D.C. Sept. 23, 2021). On Wednesday September 22, a group of security guards at state health facilities sued Governor Hochul in federal court, Syracuse, alleging violation of their equal protection and due process rights. Finally, it is reported that the state court system is being sued as well over its vaccination mandate by workers in Albany Supreme Court.

NLRB GENERAL COUNSEL ANNOUNCES INTENT TO SEEK "COMPLETE RELIEF" IN REMEDIES

Last week, in a move signaling the Biden Administration's intent to be a pro-labor administration and to roll back the previous administration's anti-labor approach, the National Labor Relations Board's ("NLRB" or "Board") new General Counsel, Jennifer Abruzzo, issued a memorandum ("Memo") detailing the Board's new approach to seeking relief in unfair labor practice cases. The Memo directs that the Board's Regional offices "request from the Board the full panoply of remedies available to ensure that victims of unlawful conduct are made whole for losses suffered as a result of unfair labor practices," including consequential damages. The Memo further bolsters relief for Unions in organizing and bargaining.

The Memo, issued to all NLRB field offices and intended as guidance for these offices' approach to settling matters, directed that all settlement agreements seek

“complete relief” for charging parties and “victims of unfair labor practices.” The Memo follows an earlier memorandum where the Board’s field offices were directed to seek all available remedies to “fully address violative conduct.” The goal of these two documents is to offer guidance as to what the goal of settlements should be. “A settlement fully effectuates the mission of the National Labor Relations Act when the Agency can deliver timely, effective, and full relief to discriminatees and the public we serve,” said General Counsel Abruzzo. “Regions should skillfully craft settlement agreements that ensure the most full and effective relief is provided to those whose rights have been violated. And, if a settlement fails to materialize, Regions should seek all appropriate remedies from the Board.”

The Memo notes that monetary remedies of backpay and lost benefits do not necessarily make the victim whole. Rather, the NLRB Regions were directed to seek compensation for “any and all damages, direct and consequential, attributable to the unfair labor practice at issue.” For example, “costs associated with health insurance coverage; medical, legal or moving expenses; detrimental effects to credit ratings; liquidating a bank account to cover living expenses; and training or coursework required to obtain or renew a security clearance, certification, or license.”

The NLRB General Counsel also advises that its field offices should never seek less than 100% of backpay and benefits as well as all consequential damages where the employee waives reinstatement. Moreover, settlements should require the violating employer to assist in obtaining any required work authorizations. Additionally, the Memo calls on the Board’s Regions to use admissions language where a violator is a repeat offender.

The Memo includes specific remedies to be sought in given scenarios. For example, in unfair labor practices committed during organizing drives, the Board should require an employer to provide employee contact information, equal time to respond to “captive audience” meetings, “reasonable” access to bulletin boards, reimbursement of organizing costs, posting, and reading of Notices in the presence of management, publication of notices in newspapers and social media, and training of employees on worker rights. When violations are committed during bargaining, the Board should require bargaining schedules, submission to the Board of bargaining progress reports, and a 12-month period during which the Union’s representative status cannot be challenged.

The new General Counsel’s willingness to get into such granular detail in protecting worker organizing and Union bargaining rights is meant to prove the current Administration’s commitment to those rights. The actual impact of the changes, of course, remains to be seen.

The link to the Memo can be found here: https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-seeking-all-available

EVADE OR AVOID WITHDRAWAL LIABILITY NEED ONLY BE ONE PRINCIPAL PURPOSE IN A TRANSACTION TO VOID IT SAYS THIRD CIRCUIT

On August 26, 2021, the U.S. Court of Appeals for the Third Circuit affirmed the judgment of the lower court holding that, *inter alia*, defendant The Renco Group, Inc. ("Renco") had failed to show any basis for avoiding its obligation to make withdrawal liability payments to the Steelworkers Pension Trust. *Steelworkers Pension Trust v. The Renco Group*, No. 19-3499 (3rd. Cir Aug. 26, 2021). The Court specifically held that a transaction which transferred part ownership for substantial payment could also have a prohibited principal purpose of evading withdrawal liability and so be disregarded in assessing withdrawal liability against the employer.

In early 2011, Renco acquired a unionized steel business, RG Steel Holding LLC ("RG Steel"), a wholly owned subsidiary and thereby becoming part of RG Steel's controlled group. RG Steel subsequently bought various steel mills, some of which were contributing employers to the Steelworkers Pension Trust ("SPT"). In late 2011, RG Steel was in financial distress pressing Renco to seek financial assistance from Cerberus Capital Management in exchange for a 24.5% ownership stake in RG Steel ("Cerberus Transaction"). Despite the Cerberus Transaction, RG Steel filed for bankruptcy relief and withdrew from the SPT. The SPT filed proofs of claim in the RG Steel bankruptcy and assessed withdrawal liability in the approximate amount of $86 million against Renco as a controlled group member. Renco did not make any payments towards the withdrawal liability assessed, ignored the demand letters from the SPT, and requested arbitration. The SPT, in turn, filed an action in the U.S. District Court for the Western District of Pennsylvania ("WDPA") arguing that Renco's arbitration request was untimely and seeking to set aside the Cerberus Transaction because the principal purpose of the transaction was to evade or avoid withdrawal liability. The District Court dismissed the action and ordered the parties to arbitration.

The arbitrator ruled that Renco was required to make interim withdrawal liability payments to the SPT commencing 60 days after the initial withdrawal liability assessment. Renco failed to make any payments and the SPT filed a new action in WDPA where it was granted interim withdrawal liability payments, interest, double interest, liquidated damages, and attorneys' fees. Renco appealed arguing that the primary purpose of the Cerberus Transaction was to infuse capital to RG Steel and not to evade or avoid paying pension contributions. Renco further argued in its appeal that, because it owned less than 80% of RG Steel stock by virtue of the Cerberus Transaction, it was no longer part of the controlled group and therefore not liable for RG Steel's withdrawal liability.

The Third Circuit disagreed with Renco's arguments. Applying Section 4212(c) of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which provides that "if a principal purpose of any transaction is to evade or avoid liability . . . ([the] liability should be determined and collected) without regard to such transaction," the Third Circuit held that a transaction can have more than one principal purpose. This court further held that, in this case, Renco had two principal purposes, namely infusing capital in RG Steel and evading or avoiding withdrawal liability obligations. Accordingly, the Third Circuit found that, because one of Renco's principal purposes was to evade or avoid withdrawal liability, then the Cerberus Transaction had to be set aside in accordance with Section 4212(c) of MPPAA.

The Third Circuit's decision in *Renco* reminds us that in the context of withdrawal liability, a company cannot attempt to exit a controlled group by virtue of transferring more than 20% of its ownership, as any transfer of ownership in the shadow of a withdrawal liability assessment will be scrutinized by an arbitrator and a reviewing court.

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