Labor & Employment Issues
In Focus

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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

SOTOMAYOR SHUTS DOWN EMERGENCY APPEAL: NYC DOE IS ALLOWED TO ENFORCE ITS VACCINATION MANDATE

In an attempted Hail-Mary by a group of teachers employed by the New York City Department of Education ("DOE"), the plaintiffs made a last-second appeal to the United States Supreme Court to enjoin the DOE from enforcing the vaccination mandate instituted by the largest school district in the nation. However, Supreme Court Justice Sonia Sotomayor denied the plaintiffs' application, thereby leaving in place the October 4, 2021 deadline for all DOE employees, including teachers, paraprofessionals, trades people, and clericals working in DOE buildings, to present proof of at least one shot of the COVID-19 vaccination. *See Maniscalco v. New York City Dept. of Ed.*, Docket No.: 21-A-50 (October 1, 2021).

The gravamen of the plaintiffs' claim in the instant matter is that the DOE's vaccination mandate violates their substantive due process rights by imposing upon them an unwanted medical procedure/treatment. Insisting that their right to bodily integrity cannot be disregarded by the DOE and that the existence of COVID-19 antibodies from previous infections renders vaccination moot, the plaintiffs have fought this mandate at every judicial step. However, the courts in this case have uniformly rejected this claim and the arguments in support thereof.

This latest opinion from Justice Sotomayor mirrors the decision rendered by Associate Supreme Court Justice Amy Comey Barrett in *Klaassen v. Trustees of Indiana University*, Docket No.: 21-A-15 (August 12, 2021) finding that a challenge to the university's vaccination mandate did not require the Court to enjoin that institution from proceeding with the enforcement thereof. Relatedly, courts throughout the country have consistently found in favor of vaccination mandates, with some limited exceptions, as detailed in last week's edition of In Focus. As these matters play out in the courts, we will continue to provide updated developments.

DISTRICT COUNCIL 37 REACHES A DEAL WITH NEW YORK CITY DOE REGARDING ITS VACCINE MANDATE

On October 4, 2021, the New York City Department of Education ("DOE") and District Council 37 ("DC 37" or "Union") reached an agreement concerning how its unvaccinated members would be treated by the DOE, as it relates to their noncompliance with the DOE's vaccination mandate. DC 37, which represents approximately 20,000 employees who work in DOE settings, agreed to provide its unvaccinated members three options.

First, from October 4, 2021 to October 29, 2021, unvaccinated DC 37 members working in DOE buildings can choose to resign, and in return, they will receive payment for all unused, accrued sick leave, up to 100 days and will have the option to continue health insurance coverage from the DOE until the start of the next school year. Second, unvaccinated DC 37 members working in DOE buildings have until October 5, 2021 to apply for a religious or medical exemption to the DOE's vaccination mandate. Individuals who have applications denied will be given 48 hours to appeal that determination and will be placed on a leave-without-pay status until the appeal is decided. Individuals who have applications granted will remain on payroll and will be allowed to continue their health insurance through the DOE. However, these individuals with approved exemptions are subject to reassignment either to non-DOE buildings or to a different municipal agency that is not subject to a vaccination only mandate. Third, unvaccinated DC 37 members working in DOE buildings, who forego either of these two options, will be placed in a leave-without-pay status until November 30, 2021. During this period of time, individuals may opt to extend this unpaid leave until September 5, 2022, while maintaining his/her health insurance coverage through the DOE.

Additionally, this accord between DOE and DC 37 provides that expectant mothers who are entering their third trimester and have a due date on or before January 1, 2022, will be allowed to utilize unused, accrued leave, such as sick leave, annual leave, and/or compensatory time, beginning on October 1, 2021. After the birth of the child(ren), these individuals will be eligible for New York State Paid Family Leave and/or Family Medical Leave Act time. In the event an expectant mother exhausts her unused, accrued leave prior to the birth of the child(ren), she will be placed in a leave-without-pay status but will be permitted to continue her health insurance coverage through the DOE until at least the birth of the child(ren).

THERE ARE LIMITS TO THIRD CIRCUIT DEFERENCE TO LABOR ARBITRATION

Usually, the U.S. Court of Appeals for the Third Circuit follows the general rule that judicial review of labor arbitration awards is very limited and, so long as the arbitrator is even "arguably" or "colorably" construing the labor agreement, the award must be confirmed. However, in *Verizon Pennsylvania LLC v. Communications Workers of America*, No. 20-1908 (3d Cir. Sept. 8, 2021), the Third Circuit drew a line by vacating an

award it deemed exceeded the parties' submission and reached a result "either punitive or irrational."

Initially, Verizon would have FIOS "set top boxes" delivered and installed by Communication Workers of America ("CWA" or "Union") employees, except when picked up by customers directly. When Verizon added outside carrier shipping options, CWA grieved that Verizon was depriving members of delivery work. An arbitration board agreed with the Union in a "merits" award and later a "remedy" award, but the U.S. District Court for the Eastern District of Pennsylvania found the awards collectively exceeded the parties' submission and improperly awarded punitive damages. CWA appealed to confirm the awards.

A three-member panel of the Third Circuit agreed with the District Court decision not to confirm the awards and remanded the case to the arbitrators. According to the Third Circuit, Verizon and the Union submitted only the question of whether Verizon's use of outside carriers to deliver FIOS "set top boxes" to existing customers violated their labor agreement. The arbitration board first ruled in a "merits award" that such deliveries to existing customers, rather than delivery through Union workers, violated the labor agreement. Months later, in a "remedy award" ostensibly fashioning relief for the improper deliveries to existing customers, the arbitration board awarded damages for deliveries not only to existing customers but expressly to new customers and for self-installation as well. In so doing, stated the Third Circuit, the arbitration Board exceeded the parties' submission, rendering the remedy award unenforceable. According to the Third Circuit, the issues of deliveries to new customers and installation were not submitted by the parties and not within the "outerbounds" of the merit award, the relief award could not expand the coverage. Moreover, continued this court, the award of damages for deliveries to new customers and for installations was either punitive, which was prohibited by the labor agreement, or irrational, since there was no evidence that any Union technicians lost pay for work to which they were entitled. Accordingly, the Third Circuit remanded the awards to the arbitration panel solely to determine what compensatory damages, if any, were due for outside carrier deliveries of boxes to existing Verizon customers.

Verizon may be most significant, however, for clearly stating that the general commercial arbitration principal of *functus officio* is alive and well in the Third Circuit even in labor cases. *Functus officio* means that once an arbitrator rules in a case he cannot go back and revisit his ruling except in very limited circumstances. Courts, including in the Second Circuit, have questioned whether that doctrine applies in the labor arbitration context. Here, in ruling that the "remedy award" improperly expanded the scope of the prior "merits award," the Third Circuit affirmatively held that *functus officio* not only applied but determined a labor arbitration case. Employers, Unions, and practitioners in the courts of the Third Circuit should take note and be guided accordingly.

THE NLRB SIGNALS IT MAY REVISIT THE
EMPLOYEE STATUS ISSUE FOR COLLEGE ATHLETES

On September 29, 2021, the General Counsel of the National Labor Relations Board ("NLRB" or "Board") issued a memorandum to the Board's field offices stating that all athletes at private academic institutions should be considered employees under the National Labor Relations Act ("Act") and be afforded all rights thereunder. Most notably, Section 7 of the Act guarantees employees the right to self-organize, to form, join, or assist labor organizations, to bargain collectively, and to engage in other concerted activities, as well as to refrain from any such actions.

In several high-profile, recently decided cases, the issue of whether college athletes are employees has been placed in the national spotlight because the massive economic engine created by top-tier college football and basketball disparately benefits coaches, universities, conferences, and the NCAA, while relegating the actual participants to second-class status, who gain little financially from the billions of dollars generated by these sports. *See College Athletes Players Association v. Northwestern University*, 13-RC-121359 (NLRB August 17, 2015) (rejecting the players petition to be recognized as employees under Section 2(3) of the Act); *In contrast, NCAA v. Alston*, Docket No.: 20-512 (June 21, 2021) (holding that the NCAA's limits on certain educational benefits violated antitrust principles). In the September 29, 2021 memorandum from Jennifer Abruzzo, the Board's General Counsel, is indicating that if a dispute raises similar to the one first raised by the Northwestern football players, the NLRB should decide it differently.

However, this change in direction by the Board is comes with a litany of unintended consequences that would, in the short-term, empower athletes in the revenue-generating sports of football and basketball, but in the long-term, could disenfranchise a legion of athletes who practice, train, and play in non-revenue-generating sports, like track, lacrosse, hockey, fencing, and softball. The private academic institutions subject to this new Board initiative would be placed in an unenviable situation of deciding whether to pay its football and basketball players or to fund these other athletic endeavors, who's economic life-blood is the money received from the power-two sports. Further complicating this issue is the fact that the potential sacrifice of these non-revenue-generating sports would disproportionately injure female college athletics, such as lacrosse, basketball, and softball, which are popular but are not self-sustained economic endeavors. Additionally, the Act only applies to private sector employers and employees, while most of the college football powerhouse currently sitting atop of the rankings are public educational institutions, thereby creating a divisive dichotomy. The Universities of Alabama, Georgia, Oklahoma, Oregon, and Florida, all of which are public universities, would not be subject to this new Board initiative, while it would handicap such private institutions as Stanford, Notre Dame, and Southern California.

Further complicating the matter, both sides of this debate may involve the U.S. Congress to bring clarity to the ever-changing landscape of bigtime college athletics. The Commissioner of the Southeastern Conference Greg Sankey stated: "Considering the

resulting uncertainty and to address the many other challenges facing college athletics, we hope that Congress will step in and provide clear and uniform legal standards consistent with recent court decisions." On the other side, U.S. Senator Chris Coons (D-Conn) has stated that the treatment of college athletes is a civil rights issue and has introduced legislation that would grant all college athletes, irrespective of their academic institution, the ability to bargain over their pay and working conditions. In support of his position, he stated: "Executives, who are mostly white, have long profited off the labor and talents of college athletes, who are mostly Black. It's time to end the charade of amateurism and finally ensure all athletes the rights and benefits they have long deserved."

As this battle continues to be fought on the gridiron, the hardwood, the halls of Congress, and the courts, one thing is certain, change is coming. The resulting outcome of this debate is far less certain.

ENFORCING MENTAL HEALTH PARITY LAW: A NEW FOCUS ON THE DOL

In a sharp break with the past and a signal of future enforcement actions to come, the Department of Labor ("DOL") filed an unprecedented lawsuit against health insurers, United Healthcare Insurance Co. and United Behavioral Health, alleging violations of certain provisions of the Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA").

The DOL action stemmed from its investigation of two class action lawsuits previously brought by private litigants seeking benefits and injunctive relief for violations of the MHPAEA. *See Jane Doe v. United Health Group Inc., et. al,* No. 1:17 cv 4160 (E.D.N.Y. November 15, 2018) and *Jane Smith v. UnitedHealthcare Insurance Co., et al.*, No. 1:21 cv 02791 (E.D.N.Y. May 18, 2021). Titled *Walsh v. United Behavioral Health et al.,* No. 1:21-cv-04519 (E.D.N.Y. August 11, 2021), the DOL action was simultaneously filed with an action brought by the New York Attorney General against the same health insurers as well as against Oxford Health Insurance ("NYAG action"). *See James v. UnitedHealth Group Incorporated et al.,* No. 21 cv 4533 (E.D.N.Y. August 11, 2021).

The DOL's action asserted violations of the MHPAEA and sought injunctive relief and penalties under Section 502(a)(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"). The complaint specifically alleged that defendants violated the MHPAEA and breached their fiduciary duties to members of ERISA-covered plans by using an outlier management program for psychotherapy called Algorithms for Effective Reporting and Treatment ("ALERT"). The ALERT program allegedly automatically denied coverage for psychotherapy services. The NYAG's action alleged that defendant violated the MHPAEA and New York law by reducing reimbursement claims for out-of-network psychotherapy services provided by non-physician therapists such as psychologists and social workers and by utilizing the ALERT program. Both the DOL action and the NYAG action were consolidated with the two class actions brought by private individuals for

settlement purposes. The private litigants, the DOL and the NYAG were parties to the first settlement, while the DOL and the NYAG alone were parties to the second settlement.

Under the settlement agreements, UnitedHealth Group Inc., and its affiliated companies ("United") will pay $2.5 million to settle the DOL's claims, $1.1 million to settle the NYAG's claims, approximately $2 million in penalties, and $10 million to settle the private litigants' claims. In addition to financial payments, United was directed to disclose the settlements on its websites as well as its affiliated companies' websites and enhance its disclosures of relevant non-quantitative treatment limitations ("NQTLs") comparative analyses. The additional requirement to enhance disclosure of relevant NQTL analyses is reminiscent of the new requirements set forth in the Consolidated Appropriations Act, 2021 ("CAA").

The DOL action is particularly significant because it involves conduct that occurred before the passage of the CAA. Relevant provisions of the CAA amended the MHPAEA to require group health plans and issuers to perform and document a comparative analysis of the Plan's design and application of NQTLs. Additional requirements included in the CAA for group health plans or issuers are that enrollees be notified of a finding of non-compliance against the plan or issuer within seven days of such finding by the DOL and that all plans and issuers found to be noncompliant be identified by name in an annual report to Congress submitted by the Secretaries of the Departments of Labor, Health and Human Services and the Treasury.

The DOL action marks the first time the DOL has used litigation to enforce MHPAEA violations against a claim administrator or fiduciary of a health plan. Thus, if the terms of the settlement, taken together with the new CAA requirements and contemplated civil penalties are any indication of future enforcement actions, going forward, the DOL appears at the forefront of enforcement.

LABOR COMMUNITY MOURNS THE PASSING OF HISPANIC LABOR LEADER ED VARGAS

On October 1, 2021, Heriberto "Ed" Vargas succumbed to his battle with cancer leaving a hole in the collective labor community, as well as representing the loss of an integral Hispanic labor advocate. Mr. Vargas grew up in the Fort Greene Projects in Brooklyn and later served in the United States Air Force. He started his professional career as a union organizer for the International Ladies Garment Workers Union ("ILGWU"), Local 23-25, and proceeded to serve in various positions within this organization, as well as the ILGWU's successor organizations. Further, he was a zealous advocate for Latino labor efforts, which included coordinating the annual ceremonies that honored the victims of the Triangle Shirtwaist Factory Fire of 1911. Most recently, Mr. Vargas served as the Director of Labor Relations at the New York State Department of Labor. A loving husband, father, grandfather, colleague, and confidant, his passing is an immeasurable loss to all who had the honor and privilege to have known him. Descansa en paz.

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