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

SECOND CIRCUIT EMPHATICALLY AFFIRMS COVID MANDATES

In a one-page Summary Order issued only one day after oral argument, a unanimous Second Circuit Court of Appeals panel of Judges Walker, Sack and Carney affirmed the decision of District Court Judge Cogan denying the motion of a group of New York City public school teachers seeking a preliminary injunction against the City's must-vaccinate mandate. *Maniscalco v. New York City Dep't of Education*, No. 21-2343 (2d Cir. Oct. 15, 2021).

The teachers sued contending that the City's mandate unconstitutionally infringed on their free exercise and equal protection rights to employment and New York State CPLR Article 78 because other municipal employees could submit to testing rather than vaccination and that the mandate applied even to employees previously infected with COVID. District Court Judge Cogan denied the motion, reasoning that the teacher's stake in public employment need only be weighed against the government's "reasonable relationship" regulatory test, amply met in the current COVID crisis. At oral argument, on Thursday, October 14, the panel agreed that the mandate need not meet strict scrutiny but only reasonableness, adding that the teachers could still be employed outside the New York City public school system. Then on Friday, October 15, the Appeals Court affirmed Judge Cogan "for substantially the reasons stated in the district Court's thoughtful memorandum decision of September 23, 2021" and remanded the case to his steady hand to "proceed as the district court deems necessary or advisable."

Given the prestige and power of the U.S. Court of Appeals for the Second Circuit, this case may well be a bell-weather for any pending or future challenges to mandatory COVID testing in this region.

ALBANY STATE SUPREME COURT UPHOLDS COURT COVID MANDATES

Late Friday, October 15, 2021, New York State Acting Supreme Court Justice Adam W. Silverman, Albany County, rejected the petitions of eight court staff unions led by the Civil Service Employees Association, Inc. Local 1000, AFSCME and the New York State Supreme Court Officers Association ("Unions") to stay the COVID-related order mandating vaccinations for all judicial and non-judicial employees, as promulgated by Chief Judge Janet DiFiore and the NYS Unified Court System ("Order"). *In re Civil Service*

Employees Ass'n, Inc., Local 1000, AFSCME, et al v. New York State Unified Court System No. 908328/21 (Albany Co. Oct. 15, 2021).

Justice Silverman denied the Unions' petition for injunctive relief despite two unusual factors. First, the NYS Public Employment Relations Board ("PERB") had approved and authorized the Unions to make their respective petitions on the grounds that the NYS Unified Court System ("UCS") had violated the NYS Public Employees' Fair Employment Act of 1967 ("Taylor Law"), and its codification of the duty to bargain concerning mandatory subjects of negotiations. PERB determined that the Unions had sufficiently pled that the Order constituted a unilateral implementation of policy without first negotiating the same. Second, New York Supreme Court Justice Christina Ryba of the same court had previously granted temporary restraining orders ("TROs") to the Unions for the reasons initially enunciated by PERB. Justice Silverman navigated between these two obstacles by stressing that neither PERB nor Justice Ryba's TROs controlled the issue before him. On that foundation, Justice Silverman applied the usual standard for injunctive relief, pursuant to CPLR Article 63, and found the Unions' petitions failed to demonstrate irreparable harm, since any adverse employment action taken against unvaccinated members of the Unions could be remedied by money damages. The Court stressed that the Order did not force anyone to be vaccinated but only that unvaccinated staff would face undetermined adverse treatment up to and including discharge. According to the Court, an employee could decline vaccination, but then must accept the consequences, and seek relief in the usual course. The Unions are appealing.

FLASH POINT – FIRST AMENDMENT, FAIR REPRESENTATION AND RULE OF LAW CLASH IN ILLINOIS LAWSUIT

Citing Illinois' version of the NYS Public Employees' Fair Employment Act of 1967, Chicago Mayor Lori Lightfoot has asked the Cook County Circuit Court to enjoin John Catanzara, Jr., President of the Fraternal Order of Police Chicago Lodge #7, from urging Chicago Police Department ("CPD") officers to defy her mandate for reporting COVID-19 vaccination status.

Catanzara had posted on Twitter: "Lori Lightfoot is the only one who has said she will send our dedicated Officers home without pay if they choose to reject her unlawful orders. Hold the line, CPD, like you always do."

According to Lightfoot, "by predicting that 50% or more officers will violate their oaths and not report for duty, Catanzara is encouraging an unlawful strike and work stoppage which carries the potential to undermine public safety and expose our residents to irreparable harm."

While at its early stages, suing to enjoin a union leader from addressing members on an issue of concern dramatically raises the stakes in the ongoing arguments over mandatory vaccination orders. To date, about 36% of CPD personnel have failed to report their vaccination status, compared to 20% citywide. We will watch this case closely.

IRAS FOR EVERY EMPLOYEE MAY BE A REALITY SOON

On September 9, 2021, the House Ways and Means Committee approved retirement subtitle B, which is included in the $3.5 trillion budget reconciliation bill known as the Build Back Better Act. The approval represents the first step moving forward in the legislative process. Subtitle B is divided into two parts: part one outlines automatic contribution plans and arrangements employers must offer to employees for plan years beginning after December 31, 2022, while part two outlines the "Saver's Match" credit which is an expansion of the retirement savings contribution credit previously known as the Saver's Credit.

Under part one of subtitle B, private-sector employers with five or more employees, not offering a retirement arrangement, will be required to automatically enroll eligible employees in a payroll deduction Individual Retirement Arrangement ("IRA") of their own or their employees' election. The automatic enrollment requirement will not apply to existing plans. Governments and churches will be exempted from the requirement as well. To be an eligible employee for purposes of an automatic enrollment arrangement, an individual must be at least twenty-one (21) years of age and have worked at least five hundred (500) hours in two (2) consecutive twelve (12)-month periods. An eligible employee will automatically be enrolled for payroll deductions of at least six percent (6%) of wages per year in the first year (but not more than ten percent (10%)), with yearly increases of one percent (1%) until reaching the mandatory ten percent (10%) in the fifth year (but not more than fifteen percent (15%) in any year). An eligible employee may choose to contribute a lower percentage or opt-out entirely of the IRA. The IRA limit currently set to $6,000 (or $7,000 for those over age 50) will continue to apply. It is anticipated that Roth IRAs will be the default choice by employers. Employers who fail to comply with this new requirement will be penalized in the amount of $10 per day per employee for up to three months, capped at $500,000 for unintentional violations. In the case of an employer's failure due to reasonable cause, the Secretary of Treasury may waive part, or all of the penalty imposed to the extent that the payment of such penalty would be excessive relative to the failure involved.

The automatic enrollment requirement outlined in part one also provides for an increase in credit limitation – from three (3) taxable years to five (5) taxable years – intended to aid employers with twenty-five (25) or fewer employees with costs associated with compliance of the IRA automatic enrollment requirement. Further, certain small employers who would be required to offer automatic retirement arrangements can take advantage of a new nonrefundable income tax credit equal to five hundred dollars ($500) per year for four years. To be eligible to receive this credit, the employer must either (1) participate in an automatic IRA arrangement, or (2) maintain a deferral-only arrangement. An eligible employer includes one who, on each day of the preceding year, had no more than 100 employees with compensation of $5,000 or more, did not maintain a qualified employer plan during the portion of the calendar year prior to the adoption of the automatic IRA arrangement, and did not maintain a deferral-only arrangement in the two preceding calendar years. The credit is available only during the first four years in

which an eligible employer participates in an automatic IRA arrangement or maintains a deferral-only arrangement.

Part two of subtitle B seeks to modify the Saver's Credit beginning in 2025. Re-named "Saver's Match", the former Saver's Credit, is a tax credit that mid- and low-income taxpayers receive for contributing to a retirement account. The credit is a government matching contribution ranging from $100 to $500 ($1,000 if married and filing jointly) deposited by the U.S. Treasury directly to a Roth IRA or designated Roth account of a taxpayer who made qualified retirement savings contributions for the taxable year and filed a tax return making a claim for such credit for the taxable year. To receive the maximum amount allowed by the Saver's Match credit – 50% of the first $1,000 of qualified retirement savings contributions made by the individual to his or her retirement account – eligible individuals must earn no more than $25,000 per year and families must earn no more than $50,000 per year. For married taxpayers filing jointly for income between $50,000 and $70,000, the 50% credit rate will phase out, with phaseout rates of 75% of those amounts for head of household returns and 50% for single returns.

The budget estimate for the proposal is $47 billion and it is evenly split between parts one and two of retirement subtitle B. Proponents of the legislation claim the proposal will help reduce poverty in old age and help sustain the economy given that older retirees usually spend their distributions on local products and goods. In addition, it is suggested that the proposed automatic IRA and the Saver's Match have the potential – over a 10-year period – to add up to $7.3 trillion in additional retirement savings and create over 63 million new retirement savers.

NEW YORK STATE ISSUES RECREATIONAL CANNABIS GUIDANCE – EMPLOYERS CANNOT TEST WORKERS

The New York State Department of Labor ("DOL") issued new guidance for employers across the state for recreational cannabis use. Employers are precluded from testing their employees for marijuana use unless the worker is visibly under the influence of cannabis while performing their duties at work.

According to the guidance "observable signs of use that do not indicate impairment on their own cannot be cited as an articulable symptom of impairment." The mere smell of cannabis will not provide the employer with the grounds to test the worker for cannabis use if the worker does not show that they are impaired. The guidance states that employers are within their rights to ban the possession of cannabis products at the place of employment.

New Yorkers employed by the federal government are still subject to tests for cannabis because federal law still outlaws the practice. New York has more than 115,000 federal workers. This is a link to the DOL guidance:https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf.

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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