



# 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*

## **COVID-19 VACCINE WORKER MANDATES ACROSS ALL LEVELS OF GOVERNMENT CAUSE RUSH TO LITIGATION**

As all levels of government work to contain the delta variant and end the COVID-19 pandemic, governmental agencies have started to mandate COVID-19 vaccines for unvaccinated workers, however, these mandates have been met with legal challenges. Below are mandates from New York City, New York State and the federal government and the respective status of the legal challenges at the time of publication.

## **SECOND CIRCUIT COURT VACATES INJUNCTION AGAINST COVID-19 VACCINE MANDATE – NEW YORK CITY DEPARTMENT OF EDUCATION MANDATE GOES INTO EFFECT ON OCTOBER 1, 2021**

On September 27, 2021, a three-judge panel from the United States Court of Appeals for the Second Circuit vacated a temporary injunction against a COVID-19 vaccine mandate from the New York City Department of Education (“DOE”). *Maniscalco et al v. New York City, etc.*, No. 21-2343 (2dCir.) The mandate was scheduled to go into effect on September 27, 2021, however a group of teachers brought a lawsuit in federal court challenging the mandate. The Second Circuit initially issued a temporary injunction on September 25, 2021, but reversed course days later.

Under the DOE’s mandate all educators, along with other school personnel such as custodians, school lunch helpers, school safety officers and DOE contractors must receive at least one dose of the COVID-19 vaccine to continue working at DOE buildings. Workers who refuse the COVID-19 vaccine will be put on unpaid leave. The DOE vaccine mandate is the first mandate without a test-out option for New York City workers. Following, the most recent decision from the Second Circuit, the mandate will go into effect on October 4, 2021. New York City unions that represent workers at DOE buildings, including District Council 37, United Federation of Teachers, and the Council of School Supervisors & Administrators called on Mayor de Blasio to delay implementation of the COVID-19 vaccine because of staffing shortages that this mandate would create. The de Blasio administration stated that it had contingency plans to make up for any potential staff shortages caused by the absences of any unvaccinated workers. The Second

Circuit's decision could set a precedent providing the Mayor the legal justification to mandate COVID-19 vaccines for other New York City workers and contractors.

### **STATE SUPREME COURT POSTPONES COVID-19 VACCINE MANDATE FOR COURT WORKERS**

On September 25, 2021, New York State Supreme Court, Albany County ("Court") issued a decision that "enjoined and restrained" the Unified Court System from implementing a COVID-19 vaccine on non-judicial employees of the Unified Court System ("UCS"), which sought to impose a mandatory COVID-19 vaccination requirement on court workers starting on September 27, 2021. The Civil Service Employees Association ("CSEA") sued challenging the legal grounds for the mandate. Specifically, CSEA contended that the UCS violated the Civil Service Law § 209-a(1)(d) by refusing to negotiate over mandatory subjects of negotiations that involved the institution and logistical implementation of this vaccination only mandate. Previously, the New York State Public Employment Board ("PERB") found reasonable cause to believe that UCS's "unilateral implementation of the mandatory vaccination requirement was an improper practice, and that immediate and irreparable injury would occur absent an injunction."

Justice Ryba held that there is "reasonable cause to believe that unilateral imposition of the mandatory vaccination requirement is an improper practice that violates Civil Service Law." She also stated that the Civil Service Law "potentially implicates a variety of terms and conditions of employment requiring mandatory negotiation, including but not necessarily limited to possible discipline and termination for noncompliance." Justice Ryba ordered a hearing for October 1, 2021 to examine the matter.

In one related matter, the New York State Supreme Court Officers Association ("SCOA") filed a similar action first with PERB and then with the Court; and on September 27, 2021, the SCOA received similar relief as CSEA. In another related matter, the New York State Court Clerks Association ("NYSCCA") filed a similar action with PERB and is awaiting a determination from PERB to permit the NYSCCA to seek injunctive relief from the Court, as well.

### **WHITE HOUSE RELEASES COVID-19 VACCINE GUIDANCE FOR FEDERAL CONTRACTORS – WORKERS MUST BE VACCINATED BY DECEMBER 8**

On September 25, 2021, the Biden Administration released guidance for federal contractor employees following its September 9, 2021 executive order that mandates the COVID-19 vaccine for federal contractors. According to the guidance, all workers under a federal contract must be fully vaccinated against COVID-19 by December 8, 2021, unless they receive a legal accommodation. The American Federation of Government Employees opposes the mandate and insists that "changes like this should be

negotiated.” Republican leaders signaled a legal challenge based upon the constitutionality of the mandate.

According to the United States Department of Labor, federal contract workers constitute one-quarter of the United States workforce. This mandate has the potential to compel millions of unvaccinated workers to receive the COVID-19 vaccine and is the latest action taken by the Biden Administration to reverse stagnating vaccination rates while the delta variant surges across the country.

The guidance is silent on penalties for non-compliance of the COVID-19 vaccine mandate for federal contractors. The Safer Federal Workforce Task Force which drafted the guidance is expected to issue further guidance on or before the December 8, 2021 deadline. This is a link to the current guidance:

[https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc\\_20210922.pdf](https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf)

### **BIDEN DOL ISSUES FINAL TIP THEFT RULE THAT EXPANDS THE POWER TO FINE BUSINESSES**

The United States Department of Labor (“DOL”) under President Joe Biden published a final rule for tipped workers which expands the circumstances under which businesses can be fined for wage-theft. The DOL will now have the authority to penalize restaurants and other employers for up to \$1,100 per violation, plus back wages owed if it concludes that wage theft has occurred. This rule expands upon a Trump-era DOL rule that allowed fines to be levied for “repeated and willful” violations of wage theft. The Trump-era rule never went into effect.

The penalty provisions will apply when employers, including supervisors and managers, withhold tips from workers. The rule attempts to clarify when supervisors and managers are permitted to hold onto tips when they receive the tip directly from customers. The final rule states that the supervisors and managers can keep tips solely when they provide a service to the customers, not when they are assisting workers who rely on tips for compensation.

The final rule will go into effect on November 23, 2021. This is a link to the DOL’s final rule: <https://www.federalregister.gov/documents/2021/09/24/2021-19795/tip-regulations-under-the-fair-labor-standards-act-flsa-partial-withdrawal>.

### **MENTAL HEALTH PARITY LAW VIOLATIONS MAY FINALLY CARRY CIVIL PENALTIES**

A little publicized proposal in the Build Back Better Act would amend the Mental Health Parity and Addiction Equity Act of 2008 (“MHPAEA”) to enable the Department of Labor (“DOL”) to impose civil penalties on employers who disregard their obligations

under the MHPAEA. Officially titled “to amend the Employee Retirement Income Security Act of 1974 to strengthen parity in mental health and substance use disorder benefits, and for other purposes,” the proposed amendment was introduced in the House Education and Labor Committee as the Parity Enforcement Act of 2021 ( “Act”).

As expected, the Act, designed to strengthen the MHPAEA’s requirements prohibiting large group health plans from imposing less favorable benefit limitations on mental health benefits than on medical and/or surgical benefits, has encountered strong opposition by health plan sponsors. On the other hand, mental health proponents, who have long critiqued the MHPAEA for lacking enforcement power since its inception, frequently calling for civil penalties to strengthen the MHPAEA, may finally get the robust response they expected.

Once enacted, the Act would supplement the newly created MHPAEA requirements included in the Consolidated Appropriations Act, 2021 (“CAA”) which, in turn, was enacted on December 27, 2020. Under the CAA, group health plans and insurers are charged with performing, documenting, and disclosing comparative analyses of the design and application of non-quantitative treatment limitations for mental health and substance use disorder benefits in their plans.

Details on what specific MHPAEA compliance violations would trigger civil penalties are unknown at this time. However, it is suspected that the civil penalties contemplated under the Act will be like those attached to the Genetic Information Nondiscrimination Act violations. If this is the case, then penalties would range from \$2,500 to \$15,000 depending on the specific type of violation. Accordingly, health plan sponsors and administrators should ensure that their plans are in full compliance with all the requirements of the MHPAEA or else run the risk of facing hefty monetary penalties.