Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
November 23, 2021 Edition

OSHA STRIKES BACK – PETITIONS SIXTH CIRCUIT TO LIFT FIFTH CIRCUIT STAY OF EMERGENCY VACCINATION MANDATE

In a War of the Circuits, the Occupational Safety and Health Administration ("OSHA") is asking the United States Court of Appeals for the Sixth Circuit to lift the stay issued by the federal Court of Appeals for the Fifth Circuit that had enjoined enforcement of OSHA's Emergency Temporary Standard ("ETS") mandating vaccination or mask and test only days earlier. *In re OSHA Rule on COVID-19 Vaccination and Testing*, Case No. 21-4027 (motion filed November 23, 2021)

OSHA's motion attacks the Fifth Circuit's stay on multiple grounds. First, OSHA argues that it acted well within its authority in concluding that the ETS Mandate was necessary to meet the "grave danger" of COVID-19 in the workplace. The Fifth Circuit's objection that the ETS Mandate overbroadly regulates COVID-19 outside the workplace as well finds no support in the statute, agues OSHA, because "Congress charged OSHA with addressing grave dangers in the workplace, without any carve-out for viruses or dangers that also happen to exist outside the workplace." Similarly, the Fifth Circuit's holding that the ETS Mandate is both over and under inclusive by targeting only employers having over 100 employees without regard to the circumstances of employers or employees finds no support "in the statute requiring OSHA to proceed on a more granular" basis, especially in light of "extensive empirical data" for the targeted employers showing the rapid spread of the virus across all employees at all these employers.

OSHA hammers hard on public policy. Directly disputing the Fifth Circuit's effusive embrace of harm to the plaintiff employers, OSHA counters that those "asserted injuries are speculative and depend heavily on minor compliance costs or predictions about how employees may respond that are at odds with empirical evidence..." In contrast, "COVID-19 has killed more than 750,000 people and caused 'serious, long-lasting and potentially permanent health effects' for many more," an acute risk in "workplaces thought the Nation." Employees "are being hospitalized with COVID-19 every day, and many are dying," warns OSHA. Nothing cited in the stay justifies "delaying a Standard that will save thousands of lives and prevent hundreds of thousands of hospitalizations" concludes the motion.

EEOC OFFERS GUIDANCE ON PREVENTING COVID RELATED RETALIATION

As the government at all levels continues to address the work-related fallout of the COVID-19 pandemic, last week, the U.S. Equal Employment Opportunity Commission ("EEOC") offered guidance on a hot-button topic affecting all employers, the question of preventing COVID-19-related workplace retaliation while also providing a safe work environment. The guidance only applies to the laws the EEOC enforces and not all labor and employment laws broadly.

The updates explain and clarify the rights of employees and job applicants who believe they suffered retaliation for protected activities under the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act ("Title VII"), or other employment discrimination laws enforced by the EEOC. The key areas updated include that job applicants and current and former employees are protected from retaliation by employers for asserting their rights under any of the EEOC-enforced anti-discrimination laws; a clarification of the scope of protected activity to include such items as filing a charge of discrimination, complaining to a supervisor about coworker harassment, or requesting accommodation of a disability or a religious belief, practice, or observance. Also, the guidance clarifies that the ADA prohibits not only retaliation for statutorily protected activity, but also "interference" with an individual's exercise of ADA rights.

Some specific examples addressed by the EEOC include that an employee may not be retaliated against for, amongst other things, requesting extended telework as a disability-related accommodation, requesting religious accommodations, such as the use of modified protective gear that can be worn with religious apparel, complaining that a supervisor unlawfully disclosed confidential medical information (such as a COVID-19 diagnosis), or participating in an EEOC complaint process. "Requests for accommodation are protected activity even if the individual is not legally entitled to accommodation, such as where the employee's medical condition is not ultimately deemed a disability under the ADA or where accommodation would pose an undue hardship," the EEOC said.

This guidance, of course, does not prevent an employer from disciplining an employee for legitimate reasons. When considering a retaliation claim, the EEOC, under this guidance, will consider whether an employer's action could deter a reasonable person from engaging in protected activity. The analysis is fact-specific, but retaliatory actions may include denial of a promotion or job benefits, refusal to hire, suspension or dismissal, work-related threats or warnings, negative or lowered evaluations, and transfers to less-desirable work or work locations. Actions outside of work could be considered retaliatory if serious and might deter a reasonable person from exercising their EEO rights.

With regard to COVID-19 vaccination issues, the EEOC has stated that the federal anti-discrimination laws it enforces do not prohibit employers from requiring all employees who physically enter the workplace to be vaccinated against COVID-19. Employers who encourage or require vaccinations, however, must consider reasonable accommodations when employees refuse to get vaccinated for medical reasons, including pregnancy-related reasons, or based on sincerely held religious beliefs, unless an accommodation

would cause undue hardship for the business. Then, similarly to the "Key to NYC" Executive Order covering many New York City businesses, if an employee refuses to get vaccinated against COVID-19 for a protected reason, the employer should engage in an "interactive process" to determine if a reasonable accommodation can be achieved.

AFTER CYBERSECURITY, DOL FOCUSES ON CROSS-SELLING

Starting in 2020, the U.S. Department of Labor ("DOL") broadened its information and document requests to include requests for information on benefit plans' cybersecurity and participant data protections. While the DOL formally manifested its focus on cybersecurity in April 2021[1] by issuing a three-part guidance addressing plan sponsors, service providers, and participants, its focus on participant data protections appears emergent. In fact, the newly added inquiries related to participant data protections suggest that the DOL is concerned not only with the theft of plan data but also with the misuse of confidential participant data. The foregoing is evident by the DOL's current requests that plan sponsors under audit produce evidence of cybersecurity insurance coverage and plan procedures regarding the protection of participant data, as well as information about the plan's implementation of these procedures.

The DOL's focus on participant data protections appears to coincide with several recent unsuccessful legal challenges against service providers' cross-selling practices, which is the use of participant data by plan sponsors and/or service providers to sell non-plan related products or services to participants. Generally arguing that plan assets include plan data such as participant identifying information, these challenges have been largely unsuccessful, at least, in part, due to the courts' reluctance to support such an argument. In contrast to the courts' refusal to classify participant identifying information as a plan asset, some recent settlement agreements involving 403(b) plans have circumvented the issue by including a provision in the settlement agreements prohibiting plan sponsors from permitting plan service providers to cross-sell.

While the current legal landscape regarding cross-selling practices appears uncertain, plan sponsors should be prepared to answer questions from the DOL about their service providers' cross-selling practices as well as their own. Specifically, plan sponsors should focus on whether the plan sponsor or the service providers use plan participant data for non-plan purposes. Furthermore, until either formal DOL guidance is issued, or the courts opine in favor of cross-selling, plan sponsors should ensure that their service agreements do not give implicit approval of use of participant data for purposes other than what is explicit in the agreement.

[1] For more information regarding this guidance, please click on the following link: https://www.dol.gov/newsroom/releases/ebsa/ebsa20210414 .

NEW YORK STATE PASSES AUTOMATIC IRA LAW

In an effort to encourage retirement savings and ultimately make for easier retirements for New Yorkers, on October 21, 2021, New York joined other states in requiring that certain qualified employers either offer a retirement plan or join a state-facilitated retirement savings program. In 2018, New York instituted a law creating a voluntary version of the same plan which has now become mandatory in many instances. Enrollment of employees must begin by December 31, 2021.

The Secure Choice Savings Plan applies to all for profit or not for profit entities with at least ten employees, thath have been in business for at least two years, and do not offer a qualified retirement program, like an IRA, 401(k), or 403(b). To be mandated for the program, the employer must meet all criteria and, for example, have had at least 10 employees for the entire previous year.

An employer who comes under the law's requirements must have an arrangement for direct payroll deposit of retirement savings, automatically enroll all employees who do not opt out, withhold and remit the contributions, and distribute all informational materials about the program to all employees. Importantly, this program will not be considered an employer sponsored program covered by the Employee Retirement Income Security Act ("ERISA").

In addition to a deadline of December 31, 2021 to begin deductions, participating employers must set up their payroll deposit arrangements within 9 months of the program opening for enrollment. That said, the legislation contains no penalty for non-compliance. This is likely to change. The law also creates a seven member New York Secure Choice Savings Program Board, which will be responsible for supervising the program. This Board has a fiduciary duty and is being asked to design and operate the program. The law, however, offers little guidance for the Board, leaving it with broad discretion in its choices in setting up the program's logistics, investment options and the like. Employers will not be considered fiduciaries of the program.

The default election for an employee who does not make an election will be 3% of wages. The retirement accounts created under this law will be Roth IRAs, thus they are after tax contributions with a current federal annual contribution limit of $6,000 and catch-up contribution rules for employees 50 years old and older. The state will pick up administrative costs until the program has sufficient assets to cover these costs itself.

It is worth noting that earlier this year, New York City enacted a mandatory auto-IRA law. The NYC legislation, however, provides that if the state enacts a retirement savings program that "requires a substantial portion of employers who would otherwise be covered employers to offer to their employees the opportunity to contribute to accounts through payroll deduction" the NYC program will be discontinued. Thus, it is as yet unclear whether the state program will displace the City program.

THANKSGIVING MESSAGE

As the Thanksgiving Holiday begins, we at Pitta LLP would like to extend our sincere thanks and gratitude to all of our clients and friends for their confidence and friendship throughout this year and always. May you all celebrate a healthy, peaceful, and happy Thanksgiving, and may you enjoy this Thanksgiving and the coming year with all good things in abundance.

WE WISH YOU AND YOUR FAMILIES
A HAPPY AND HEALTHY THANKSGIVING!

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.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.