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

HOLDING THE LINE: U.S. SUPREME COURTS REJECTS CHALLENGES TO QUALIFIED IMMUNITY

In two recent *per curiam* decisions, the U.S. Supreme Court ("Court") rejected attempts to either erase or significantly dilute the concept of qualified immunity. *See Rivas-Villegas v. Cortesluna*, Sup. Ct. Case No.: 20-1539 (October 18, 2021); *City of Tahlequah v. Bond*, Sup. Ct. Case No.: 20-1668 (October 18, 2021). In the context described herein, the Fourth Amendment of the U.S. Constitution ("4th Amendment") proscribes the use of excessive force against citizens by the government (i.e. the police). However, individual actors of the government are protected from civil liability if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly*, 137 S.Ct. 548 (2017). In both *Rivas-Villegas* and *Bond*, the Supreme Court found that the factual circumstances that gave rise to these cases warranted the application of the qualified immunity defense because there was no clearly established violation of the law.

In *Rivas-Villegas*, the police officer in question responded to a 911 call from a frightened girl hiding in her closet from her mother's abusive, alcoholic boyfriend, who was physically threatening all of the occupants of their house. With this knowledge and upon viewing the suspect with a knife in his pocket, the officer, along with his partner, apprehended the individual. However, during the securing process, the officer placed his knee on the suspect's back for eight seconds. Due to this physical contact, the suspect initiated a civil action against the officer alleging that he used excessive force in apprehending him. Although the U.S. Court of Appeals for the Ninth Circuit reversed the court below and denied the summary judgment motion by the officer finding that qualified immunity did not protect him from civil liability, the Supreme Court reversed the appellate court. The Supreme Court determined that qualified immunity protected the officer because, given the circumstances presented to him upon arriving at the scene and from the initial 911 call, no "reasonable official would have understood that what he [was] doing violate[d the Fourth Amendment rights of the suspect]." *Id.*

In *Bond*, the police officer in question responded to a 911 call originating from a woman whose ex-husband arrived at her house intoxicated and combative. When the officer, along with his partner engaged the ex-husband, the suspect reached for a

hammer. Although the ex-husband was instructed to put down the weapon and comply with the lawful commands of the police, the ex-husband approached the officers on scene in an aggressive manner demonstrating an intent to strike them with said weapon. As a result thereof, the officer discharged his firearm and killed the ex-husband. The estate of the suspect brought a civil action against the officer for violating the ex-husband's 4th Amendment rights. The initial motion for summary judgment was granted, but the U.S. Court of Appeals for the Tenth Circuit reversed the court below finding that qualified immunity for the officer did not apply. However, the Supreme Court determined that qualified immunity provided a consequential defense, being that it is designed to protect "'all but the plainly incompetent or those who knowingly violate the law." *Id.* Moreover, the Court cautioned other adjudicatory bodies that, when determining the applicability of qualified immunity, the specific factual circumstances confronted by the police in a given situation must be contemplated. *Id.*

EEOC UPDATES COVID-19 TECHNICAL ASSISTANCE IN LIGHT OF INCREASED EMPLOYER VACCINATION MANDATES

On October 25, 2021, the U.S. Equal Employment Opportunity Commission ("EEOC") updated its prior COVID-19 Technical Assistance ("Update") in response to increased employer vaccination mandates. The Update addresses employer rights and duties under Title VII of the 1964 Civil Rights Act ("Title VII"), the Pregnancy Discrimination Act ("PDA"), the Americans With Disabilities Act ("ADA"), the Rehabilitation Act and the Genetic Information Nondiscrimination Act ("GINA"), when employers require or encourage vaccinations against COVID as a condition of employment. The Update may be found at www.eeoc.gov/coronavirus,Sections K and L.

Section K of the Update reasserts that an employer may require COVID-19 vaccinations for all employees entering the workplace. In so doing, employers may inquire about or request documentary or other certification of vaccination, but must keep such information confidential. GINA's restrictions on using or requesting genetic information from employees applies to the employer or its agents, but not to vaccinations required by the employer that are administered by a health care provider unaffiliated with the employer, such as a private physician or pharmacy. Similarly, there are no limits on incentives an employer may offer employees for vaccinations administered by unaffiliated providers, but incentives may not be so substantial as to be coercive if administered by the employer or its agents.

Section L of the Update contains guidance on the hot-button issue roiling the courts – religious objections to COVID-19 vaccine mandates. Generally, an employer must make accommodation to employees declining vaccination due to sincerely held religious beliefs. Employees seeking a religious accommodation must affirmatively advise their employers, but since there is no particular method or magic words, employers should provide employees and applicants with information about whom to contact and how to make the requests.

Although an employer should generally accept the legitimacy of the request, an employer having an objective basis for questioning either the religious nature or sincerity may make a limited factual inquiry, with which the employee must cooperate, proceeding with care. As section L.2 of the Update cautions:

> an individual's beliefs – or degree of adherence – may change over time and, therefore, an employee's newly adopted or inconsistently observed practices may nevertheless be sincerely held ... No one factor or consideration is determinative, and employers should evaluate religious objections on an individual basis.

The Update notes that an employer need not make a religious accommodation if it causes "undue hardship," defined as a more than a "de minimus" burden encompassing not only monetary costs, but also loss of efficiencies and risks to the health of other employees or the public. The burden of proving an objective rather than speculative undue hardship rests squarely on the employer. Because the analysis depends on numerous facts and circumstances pertaining to the individual employees and the particular workplace, a grant or denial of an accommodation does not preclude a different result for other employees who may be different, or even for a subsequent modification or retraction for the same employee whose circumstances have changed, following a good faith review and discussion with the employees.

NLRB APPOINTS FIVE REGIONAL DIRECTORS

On October 15, 2021, the National Labor Relations Board ("NLRB") appointed five regional directors: Laura A. Sacks in Region 1 (Boston), Elizabeth Kerwin in Region 7 (Detroit), Iva Y. Choe in Region 8 (Cleveland), Andrea J. Wilkes in Region 14 (St. Louis) and Suzanne Sullivan in Region 22 (Newark). All five new regional directors are longtime NLRB employees.

The new regional directors will improve the NLRB's ability to investigate labor law violations. Under President Joe Biden, the NLRB has focused on meeting its staffing needs to fulfill its mission. From 2010 to 2019, the NLRB's field staff fell by one third and about half of senior-level positions across the 26 regional offices were vacant. The staff shortages at the NLRB swelled under former NLRB General Counsel Peter Robb, who tried to unsuccessfully reorganize field operations for investigations to weaken the agency. With the appointments of the new regional directors, the NLRB is signally its commitment to proper staffing.

We wish the new regional directors the best of luck in their new roles at the NLRB. *Laura A. Sacks in Region 1 (Boston)* - Ms. Sacks began her career at the NLRB as a Field Attorney in Region 2 – Manhattan, New York and transferred to Region 1 – Boston, Massachusetts in 1993. She was promoted to Supervisory Attorney in 2000 and to her prior position as Regional Attorney in 2018. She served as Acting Director of Region 1 from July 2021 through August 2021. *Elizabeth Kerwin in Region 7 (Detroit)* - Ms. Kerwin began her career with the NLRB as a Student Assistant Field Examiner Co-op in Region

29-Brooklyn, New York before being hired as a Field Examiner in Region 7 in 2003. She was promoted to Supervisory Examiner in 2014 and to her prior position as Assistant to the Regional Director in 2016. *Iva Y. Choe in Region 8 (Cleveland)* - Ms. Choe began her career with the NLRB in 1995 as a Field Attorney in Region 8. She was promoted to supervisory attorney in 2012 and regional attorney in 2014. She served as Acting Regional Director from May 20119 to August 2020, and as Acting Deputy General Counsel from February 2021 through July 2021. *Andrea Y. Wilkes in Region 14 (St. Louis)* - Ms. Wilkes began her career at the NLRB as a Field Attorney in Region 15 (New Orleans) in 1992. She was promoted to Deputy Regional Attorney in Region 15 first in 2000 and again in 2010 after a hiatus for the birth of her children. *Suzanne Sullivan in Region 22 (Newark)* - Ms. Sullivan began her career with the NLRB as a Field Attorney in Region 2-Manhattan in 1989. She was promoted to Supervisory Attorney in 2012 and has served as Regional Attorney since 2019.

DEPARTMENT OF LABOR PROPOSAL AMENDS INVESTMENT DUTIES REGULATION UNDER ERISA

On October 13, 2021, the Department of Labor ("DOL") published a proposed regulation, titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" ("Proposed Rule"). The Proposed Rule seeks to modify the two Final Rules ("2020 Rules") published by the DOL in late 2020 amending the Investment Duties regulation under the Employee Retirement Income Security Act of 1974, as amended. The 2020 Rules outlined plan fiduciaries' duties when exercising shareholder rights in connection with plan investments in shares of stock or when voting proxies. The 2020 Rules also required plan fiduciaries to pick investments and investment courses of action based only on considering pecuniary factors, which were defined as "financial considerations that have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and funding policy." Soon after, the DOL faced a chorus of criticisms, including that the Final Rules had a chilling effect on integrating climate change and other environmental, social, and governance ("ESG") factors in investment decisions. In March 2021, the DOL announced that it would not enforce the 2020 Rules and the publication of the Proposed Rule followed.

Divided into four parts, the Proposed Rule generally provides that when making investment decisions and when exercising shareholders rights, including voting on shareholder resolutions and board nominations, fiduciaries may consider ESG factors. The first part of the Proposed Rule clarifies that when analyzing projected returns on an investment or an investment course of action, a fiduciary's duty of prudence may require a consideration of the economic effects of climate change, governance factors, and workplace practices, which depending on the facts may be instrumental to the risk-return analysis. The second part of the Proposed Rule requires that, when choosing a qualified default investment alternative, a fiduciary examine material risk-return factors and not make the interests of participants and beneficiaries come second to objectives that do not relate to the provision of benefits under the plan.

The third part of the Proposed Rule clarifies the application of the "tie-breaker" standard whereby a fiduciary is required to decide prudently that over a certain period, competing investment, or competing investment courses of action, are equally beneficial to the financial interests of the plan. In certain cases, a fiduciary may select the investment or investment course of action after considering economic or non-economic benefits other than investment returns. The Proposed Rule eliminates the special documentation requirements previously required for tie-breakers. However, if the plan applies the tie-breaker standard, the plan is required to disclose to plan's participants the collateral considerations that were considered as tie-breakers in the investment decisions.

The last part of the proposed Rule eliminates the requirement that when determining whether to exercise shareholder rights and when exercising shareholder rights, a fiduciary must keep records of proxy voting activities. Concluding that exercising shareholder rights is a fiduciary function, the Proposed Rule offers guidance on investment policy statements, including proxy voting. The Proposed Rule also eliminates two safe harbor examples for permissible proxy voting policies included in the 2020 Final Rules.

The Proposed Rule's comment period runs for 60 days after publication in the Federal Register which means that interested stakeholders should consider submitting comments to the Proposed Rule by the Monday, December 13, 2021 deadline.
