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

SCOTUS DECLINES TO STAY MAINE'S MUST-VACCINATE MANDATE LACKING RELIGIOUS EXEMPTION

A solid majority of the U.S. Supreme Court has declined to stay Maine from enforcing its mandate that most healthcare workers must be vaccinated against COVID-19 without regard to their claims for a religious exemption. *John Does 1-3 v. Mills*, 21A90 (U.S. Oct. 29, 2021).

Maine has long required health care workers and other groups to be vaccinated against infectious diseases. Maine eliminated religious and medical exemptions in 2019 and added COVID-19 to the list in September 2021, effective October 31, 2021. Following the First Circuit Court of Appeals upholding of the mandate, Plaintiffs appealed to the Supreme Court. "Maine added COVID-19 to the rule in order to protect its health-care infrastructure, workers and patients, and vulnerable populations," as a religiously neutral means to that end Maine argued to the Court. Plaintiffs countered that without a religious exemption the State mandate forced them to violate their religious beliefs against the use of cell lines derived from aborted fetal cells.

The Supreme Court declined 6:3 to stay Maine's mandate, in an order approved by Chief Justice Roberts, and Justices Barrett, Breyer, Kagan, Kavanaugh and Sotomayor. The Court's ruling follows similar one-Justice denials of emergency requests by Justices Barrett and Sotomayor. Though the majority rendered its latest decision without explanation, concurring Justices Barrett and Kavanaugh objected separately to the tactic of emergency stays "to force the court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument," objected Justice Barrett. Justices Gorsuch, Thomas, and Alito dissented, leaving no doubt as to their substantive views on the merits. "Health-care workers who have served on the front line of a pandemic for the last 18 months are now being fired and their practices shuttered ... for adhering to their constitutionally protected religious beliefs," lamented Justice Gorsuch. "Their plight is worthy of our attention."

While not clearly defined, there now appears a solid cross-ideological consensus on the country's highest court against staying the growing wave of vaccination mandates. While not uniform nor absolute, the Supreme Court's deference to executive and

legislative initiatives against COVID-19 will likely strengthen the hand of other jurisdictions, like New York, ordering aggressive vaccination mandates, and stiffen the resolve of reviewing courts in their favor.

RED STATES STRIKE BACK, SUE BIDEN ADMINISTRATION OVER VAX MANDATES

With federal COVID vaccination mandates looming or in place, the States of Missouri, Nebraska, Alaska, Arizona, Arkansas, Florida, Georgia, Iowa, Montana, New Hampshire, North and South Dakotas, and Wyoming have filed lawsuits seeking to block the Biden Administration from enforcement of those mandates. *Missouri v. Biden*, E.D. Mo. No. 4:21-cv-1300 (Oct. 29, 2021); *Georgia v. Biden*, S.D. Ga. No. 21-tc-05000 (Oct. 29, 2021).

The crimson counterattack takes aim at the Biden Administration's mandate covering federal contractors, approximately one-fifth of the U.S. workforce, though likely to extend soon to challenge imminent federal mandates from the Occupational Safety and Health Administration and another covering health care workers at facilities funded by Medicare or Medicaid. The contractor Executive Order has a "soft" compliance deadline of December 8, 2021. These mandates are "unconstitutional, unlawful, and unwise," contend the plaintiff states, lacking authority to interfere with state public health orders and violate individuals' privacy rights. The Biden Administration countered: "This is a once in a generation pandemic that has taken the lives of more than 700,000 Americans, and the president is committed to pulling every lever possible to save lives ... Vaccine mandates work …." Administration Guidance issued Monday gives federal contractors significant discretion in implementing the Executive Order as may best fit their business, including deferring to the employer's judgment to approve a religious exemption for the requesting worker.

UNITED'S COVID SKIES UNFRIENDLY TO THE UNVACCINATED

Weighing the wave of private employer mandates for vaccinations against COVID-19 and the narrowness of the religious accommodation exception to such mandates, Judge Regina M. Rodriguez of the U.S. District Court for Colorado denied an employee's request for a preliminary injunction against United Airlines' mandate that put religious objectors on unpaid leave and potential termination. *Barrington v. United Airlines Inc.,* No. 21-CV-2602-RMR-STV (D. Col. Oct. 14, 2021)

In one of the business sectors hardest hit by COVID-19, United Airlines crafted a comeback plan that required all employees to be vaccinated, with employees claiming religious accommodation being placed on unpaid leave and potential replacement. Jaymee Barrington claimed a religious exception and sued United to stay its mandatory vaccination policy and instead accommodate her with testing, masks, change of duties or transfer to a different job.

Judge Rodriguez denied the motion on multiple grounds. First, Barrington lacked a likelihood of success on the merits because United offered an accommodation even if not satisfactory to plaintiff. Moreover, Barrington's requested attendance accommodations posed an undue hardship to United involving additional costs, upending United's recovery plan, and exposing other employees and customers to risk of COVID infection. Second, plaintiff would suffer no irreparable harm because she could be made whole by backpay and other economic relief if she ultimately prevailed. Finally, the balance of equities and public policy weighed against an injunction. "[E]very person, including the parties in this case, can agree that ending the COVID-19 pandemic is in our collective best interest – and in the public's best interest as well," reasoned Judge Rodriguez. "The Court simply cannot find that enforcement of a policy that protects other employees and conforms to the guidance of the CDC is not in the public interest," she ruled.

NEWLY EMBOLDENED WORKERS TURN OCTOBER INTO #STRIKETOBER

This past October, tens of thousands of workers went on strike throughout the United States which prompted labor leaders and labor economists to dub the month "Striketober." This surge of labor activism may be a result of economic factors such as a high demand for labor across many industries in the country such as restaurants and tourism, along with the belief among many workers that they deserve to be rewarded for keeping the economy afloat during the COVID-19 pandemic.

Among the workers who engaged in strikes in October are nurses, factory workers and bus drivers. Some labor leaders believe that the pandemic has caused many workers to reevaluate their standing in the workplace and push for safer working conditions and higher compensation, especially as many companies have reaped record profits during the pandemic.

Recently, more than 10,000 workers went on strike at 14 John Deere factories in Iowa, Illinois and Kansas demanding higher wages and a better retirement plan. John Deere agreed to terms with the United Auto Workers by increasing wages by 10% in the first year with additional increases and bonuses over six years, and continuing its pension program for new hires. Workers at 12 plants voted down that tentative agreement 55-45%, demanding further improvements in work rules and wages, and citing the company's growing profits. More than 30,000 nurses in California and Oregon voted to authorize a strike to prevent Kaiser Permanent from imposing a two-tier wage and benefits system for new employees that is significantly less than what existing employees receive.

AFL-CIO President Liz Shuler proclaimed that "across industries, workers are standing in solidarity to demand dignity and decency. Some observers see these strikes as one more sign of chaos against the backdrop of an endangered democracy, a persistent pandemic and increasingly unequal economy. But this is not chaos. It's the opposite," Shuler insisted. "Strikes are leading indicators that our country is heading in the right direction – a healthy response to imbalances of powers created by employers who believe they should be able to squeeze more and more out of the workers who make their companies profitable."

SECOND CIRCUIT CLEARS PATH FOR BIDEN TO UNDO TRUMP JOINT EMPLOYER REGULATIONS

In another of a continuing series of moves to undo Trump-era labor policy, on October 29, 2021, the United States Court of Appeals for the Second Circuit granted the United States Department of Labor's ("DOL") motion to dismiss the DOL's own appeal of the District Court's decision vacating the Trump Administration's joint employer rule. According to the Biden DOL and the Court, that appeal had been rendered moot by the Biden administrative rule which reversed the Trump Administration's joint employer definition. *New York v. Walsh*, 2d Cir., No. 20-03815, order 10/29/21. The Biden Administration has not yet indicated whether it will issue new rulemaking or simply allow this area of law to revert to its prior status under the Obama Administration.

On July 29, 2021, the DOL issued a final rule rescinding the Trump-era "Joint Employer Status Under the Fair Labor Standards Act" rule (29 CFR part 791), which went into effect on March 16, 2020. The Trump rule reflected that Administration's pro-employer biases by establishing two standards for determining whether employers constituted a "joint employer" under the Fair Labor Standards Act and, by extension, other federal labor laws. The Trump rule also reversed the Obama Administration's approach, which focused on an "economic realities" analysis.

The two approaches were broadly defined as Vertical Joint Employment Standard and a Horizontal Joint Employment Standard. The Vertical Standard applied a four-factor test to determine whether a purported joint employer was acting directly or indirectly in the interests of the employee's recognized employer. Focusing primarily on the level of control exercised over the worker, the four-part test assessed the extent to which the employer has the authority to: (1) hire or fire employees, (2) control their schedules or conditions of employment to a substantial degree, (3) determine workers' pay rates and the methods by which they are paid, and (4) whether it maintains workers' employment records. The Vertical Standard's focus on actual control significantly narrowed the circumstances giving rise to a joint employer relationship under the previous rule.

The Horizontal Standard, conversely, reviewed whether purported joint employers were acting independently of each other, or were "sufficiently associated" with each other with respect to the employment of the employee. In the July 29, 2021, recission of the Vertical Standard, the DOL ruled that the Vertical Standard had never been applied by the DOL's Wage and Hour Division, it was inconsistent with the joint employer analyses applied by courts and, thus far, it had not been widely adopted by courts. Moreover, the DOL reasoned that the Horizontal Standard was "intertwined" with the Vertical Standard and, even though the Horizontal Standard was largely consistent with prior DOL guidance, rescinded it too.

The DOL's rescission of the rule means that there is currently very little clear guidance from the DOL with respect to joint employment standards. Therefore, until the

Biden Administration acts, interested parties are left to a patchwork of court decisions for guidance as to the existence of joint employment status.

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