Labor & Employment Issues
In Focus

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For Clients and Friends
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SECOND CIRCUIT RECOGNIZES A "CHURCH OF ONE" EXEMPTION IN NYC COVID VACCINATION CASE

In a unanimous three judge panel merits decision, the United States Court of Appeals for the Second Circuit held that New York City's mandate for school personnel to be vaccinated against COVID-19, subject to religious accommodations, was facially constitutional, but the City's application of the accommodation process under an "Arbitration Award" that recognized only mainstream religions likely failed First Amendment standards. *Kane et al v. DeBlasio*, No. 21-2678 (2d Cir. Nov. 28, 2021) and *Keil et al v. City of New York, Board of Education*, No. 21-2711 (2d Cir. Nov. 28, 2021). The Appeals Court's preliminary injunction order sent the case back to the City and District Court for prescribed improved accommodations consistent with standards set by the United States Equal Employment Opportunity Commission ("EEOC"), State and City Human Rights laws.

Initially, the Court of Appeals held that the City's Vaccine Mandate met First Amendment standards because it was neutral on its face, of general applicability, and rationally related to a legitimate goal. The Mandate requires vaccination of all education employees without regard to religion, notwithstanding certain ill-phrased statements by Mayor de Blasio which the Court deemed irrelevant. Since the Mandate did not on its face discriminate against religion, it need only be "rationally related" to a legitimate goal, which the Vaccine Mandate "plainly satisfies," observed the Court. "Attempting to safely reopen schools amid a pandemic ... in accordance with CDC guidance ... was a reasonable exercise of the State's power to act to protect the public health" and so easily passed rational basis constitutional review.

Not so application of the Vaccine Mandate's religious accommodation process under an "Arbitration Award" accepted by the City and several unions. Here, the Court expressed "grave doubts" against the Arbitration Award's limitations of religious accommodation solely to a "recognized and established religious organization," excluding "where the leader of the religious organization has spoken publicly in favor of the vaccine ..." In this rejection, the Court was adamant: "Denying an individual a religious accommodation based on someone else's publicly expressed religious views-even the leader of her faith-runs afoul of the Supreme Court's teaching that it is not within the judicial ken" to question an individual's particular religious beliefs or practices. Likewise, application of the Arbitration Award by City-union appointed arbitrators failed general applicability because the arbitrators exercised "substitutional discretion," leading to "individualized government assessment" of religion at odds with the First Amendment. Accordingly, application of the religious accommodation process required "strict scrutiny," which the process failed because the Arbitration Award was "not narrowly tailored to serve the government's interest in preventing the spread of COVID-19."

The Court's decision extends a prior interim ruling of the same court by a "motion panel" that ordered the City to revamp the accommodation process along EEOC guidelines, bars discharges pending final requests, reviews, and appeals, and provides for back pay where the accommodation is granted. The decision also establishes several fascinating judicial facts that should guide employees, employers, and practitioners alike. First, combining the two unanimous Appeals Court panels yields six Second Circuit judges, spanning the political and ideological spectrums, including center right and left Judges Livingston and Kearse respectively, all in rare unanimity. Second, the Court repeatedly stressed that Corporation Counsel properly acknowledged the Arbitration Award process as "constitutionally suspect," highlighting that politics and collective bargaining require advance firm legal guidance even in COVID crisis conditions. Finally, the Second Circuit reminded faithful and skeptic alike that while it would willingly give to Caesar that which Caesar be due in state power, the Court will simultaneously protect religion, with as much zeal as the Fifth Circuit or Supreme Court Justice Neil Gorsuch, both of whom the Second Circuit panel quoted approvingly, even in a "Church of One". As COVID law evolves and adapts across the Circuits and nation, Pitta LLP will continue to keep you in the know for every important development, every step of the way.

PRESIDENT BIDEN BOOSTS PAY FOR MORE THAN 327,000 WORKERS TO $15 PER HOUR

On November 22, 2021, the United States Department of Labor ("DOL") issued a final rule that implements Executive Order 14026 signed by President Joe Biden which increases the minimum wage for federal contractors to $15 per hour. The increase will be applied to new or updated contracts starting January 30, 2022. The DOL final rule is expected to apply to more than 327,000 workers across all 50 states, the District of Columbia, and specified United States territories.

In addition to boosting the rate of pay for federal contractors on new or updated contracts to $15 per hour, the final rule also indexes the federal contract minimum wage in future years to inflation, eliminates the tipped minimum wage for contract employees by 2024, guarantees a $15 minimum wage for workers with disabilities performing work on or in connection with covered contracts and restores minimum wage protections to outfitters and guides operating on federal lands.

The final rule provides an update to an Obama-era rule that required a federal minimum wage of $10.95 for employees of federal contractors. In addition to a higher wage of $15 per hour, the Biden DOL mandates that when federal agencies exercise an option on an existing contract for additional services or supplies, the contractor must update the terms of the contract that includes the $15 minimum wage. The Obama-era rule only applied a higher minimum wage to new or renewed awards, not options on federal contracts.

Commenting on the workers impacted by the DOL's final rule, United States Secretary of Labor Marty Walsh said it "improves the economic security of these workers and their families, many of whom are women and people of color." DOL Wage and Hour

Division Acting Administrator Jessica Looman said "the final rule adds value for taxpayers by boosting worker productivity and reducing employee turnover and absenteeism. It also allows federal contractors to retain top talent and reduce recruiting and training costs."

IRS ISSUES NEW FAQS REGARDING REHIRING RETIREES AND IN-SERVICE DISTRIBUTIONS

On October 22, 2021, the Internal Revenue Service ("IRS") issued guidance directed at private employers addressing the rehiring of retirees and the retention of employees who have reached retirement age. The IRS added two new questions and answers to their Frequently Asked Questions ("FAQ") entitled "Coronavirus-related relief for retirement plans and individual retirement accounts questions and answers."

In its first additional FAQ, the IRS instructs that in the absence of plan terms detailing the conditions under which a retirement will be considered bona fide, such determination should be based on the facts and circumstances surrounding the employee's retirement. For example, the rehire of a retired individual will not affect whether the retirement was bona fide assuming the rehire is due to unforeseen circumstances related to COVID-19 and there was no prearrangement to rehire the individual. Accordingly, an employer may choose to remedy unforeseen hiring needs by rehiring former employees even if those employees have retired and have begun receiving pension benefit payments. Further, if permitted under the plan's terms, the rehired retiree may continue to receive his or her benefits uninterrupted.

In its second additional FAQ, the IRS addresses whether a qualified pension plan should permit individuals who are working to commence in-service distributions. Under the Code, a qualified pension plan *may* permit individuals to commence in-service distributions if the individuals have attained either the age of 59½ or the plan's normal retirement age. The IRS suggests that plans that permit in-service distributions to commence at age 59½ or at the plan's normal retirement age, may help employers retain employees eligible for retirement. The IRS underscores, however, that a qualified pension plan may not permit individuals younger than age 59½ to commence in-service distributions without being subject to a 10% additional tax under Internal Revenue Code § 72(t) "unless the distributions fit within an exception to that tax." Examples of exceptions include coronavirus-related distributions, which were distributions allowed between January 1, 2020 and December 30, 2020 for reasons related to COVID-19, and distributions to individuals affected by federal disasters declared between January 1, 2020 and February 25, 2021.

The IRS' update reflects the Biden Administration's sensitivity to the ongoing effects of the pandemic on employers and employees alike.

NLRB ORDERS SECOND UNION ELECTION FOR AMAZON WAREHOUSE WORKERS IN ALABAMA

On November 29, 2021, the National Labor Relations Board ("NLRB") authorized a second union election for Amazon warehouse workers in Alabama after the Retail, Wholesale and Department Store Union ("RWDSU") appealed the outcome of a union election in April 2021. In that election, workers at the Bessemer, Alabama warehouse voted overwhelmingly against joining the RWDSU and becoming the first organized Amazon shop in the country.

The RWDSU appealed the election results by arguing that Amazon engaged in illegal intimidation tactics against joining the union, such as pressuring their workers to cast votes in a mailbox that Amazon installed at the plant in view of security cameras, and forcing workers to display anti-union paraphernalia that Amazon managers handed out.

NLRB Region 10 Director Lisa Y. Henderson found RWDSU's allegations credible. In her decision authorizing a second union election, Henderson said that Amazon "improperly polled employees when it presented small groups of employees with the open and observable choice to pick up or not pick up 'Vote No' paraphernalia in front of managers." She also noted the impropriety of the installation of a mailbox at the warehouse for workers to use for their ballots.

RWDSU President Stuart Appelbaum said, "today's decision confirms what we were saying all along – that Amazon's intimidation and interference prevented workers from having a fair say in whether they wanted a union in their workplace."

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