Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
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NEW YORK STATE SUPER ALL MASK OR ALL VAX MANDATE BEGINS

In the face of rising COVID-19 cases and hospitalizations and in fear of a winter surge, effective December 13, 2021, New York Governor Kathy Hochul instituted a statewide mask or vaccinate mandate. The mandate requires that all persons over the age of two in all indoor public places must be masked, unless the business or venue requires proof of vaccination for all those 12 years of age or older as a condition for entry. The mandate will be in place until at least January 15, 2022.

This action comes on the heels of New York City Mayor Bill deBlasio’s announcement that as of December 27, 2021, all employees of city private businesses must have received one shot of a COVID-19 vaccine. The Governor’s order applies to all indoor spaces other than private residences, including offices. Masks must be worn except when eating or drinking, or alone in an enclosed room, even among those who are vaccinated.

The Governor’s mandate differs significantly from prior mandates in at least one important way. Businesses cannot “mix and match.” In other words, either everyone is fully vaccinated or everyone must wear a mask, not some vaccinated and some masked as previously permitted. A violation of this mandate may result in a maximum $1,000 fine for each violation. Enforcement is in the hands of local health departments.

U.S. SUPREME COURT WILL NOT HEAR CHALLENGE TO NEW YORK STATE HEALTH CARE WORKER VAX MANDATE

On December 13, 2021, the United States Supreme Court decided in a split 6-3 decision that it would not hear two religious belief-based challenges to New York State’s vaccine mandate for health care workers. The mandate includes exemptions for certain medical conditions, but provides for no religious exemptions. As is its’ custom, the majority ruled without comment. However, Justices Alito and Thomas joined a strong dissent by Justice Gorsuch which argued that the New York law was a clear violation of the petitioners’ constitutional right to the free exercise of religion as their religious beliefs prohibit them from receiving a vaccine whose creation was, in any part, related to the use of fetal tissue.

Justice Gorsuch suggested that Governor Hochul acted out of anti-religious animus. “Thousands of New York healthcare workers face the loss of their jobs and eligibility for unemployment benefits,” he noted. “Twenty of them have filed suit arguing that the State’s conduct violates the First Amendment and asking us to enjoin the enforcement of the mandate” while the Court considers a formal appeal. “Respectfully, I believe they deserve that relief,” concluded Justice Gorsuch for the dissent.

The Court's refusal to hear the case is consistent with its ruling in a similar case from the state of Maine which it considered in October 2021, with the same split of Justices. The refusal is also consistent with Governor Hochul's all mask or all vaccinate mandate effective the same day as the Supreme Court's order. Finally, the Court's majority ruling reflects a consensus supportive of state mandates combatting COVID-19, including the assent of three conservative Justices generally sympathetic to religious rights – Chief Justice Roberts and Justices Kavanaugh and Barrett.

THIRD CIRCUIT CLARIFIES PROCEDURES AND PITFALLS IN ACTION TO VACATE A LABOR ARBITRATION AWARD

A recent decision of the U.S. Court of Appeals for the Third Circuit ("Third Circuit") expressly clarifies that Circuit's standards for both finality and timely filing to vacate a labor arbitration award. The Court held that a January short form award of continuing healthcare contributions and benefits under an expired collective bargaining agreement ("CBA") was final as to the issues on its face, notwithstanding a month later full award, and therefore dismissed the employer's action to vacate brought more than 30 days after the short January award. *PG Publishing Co. v. Newspaper Guild of Pittsburgh*, No. 20-3475 (3d Cir. Nov. 30, 2021).

When the CBA between PG Publishing ("PG") and the Newspaper Guild ("Union") expired in 2017, PG continued contributions at the 2017 level, refusing to pay increases for 2018-2020. The Union filed unfair labor practice charges which the National Labor Relations Board dismissed. The Union also filed for arbitration where it prevailed. On December 30, 2019, Arbitrator Jay Nadelbach issued a short five-paragraph award ("December Award") finding that PG had breached its CBA, must make contribution increases, and must make employees whole. The last paragraph declared: "This Award is final and binding" retaining jurisdiction for any disputes over "implementation of the remedy" and promising "a full Award and Opinion to follow..." A January 21, 2020 Award followed ("January Award"), repeating and explaining the holdings of the December Award.

PG filed an action to vacate the December Award and January Award under Section 301 of the Labor Management Relations Act ("LMRA"), on February 14, 2020, making passing reference to the Federal Arbitration Act ("FAA") but not following the motion procedures of the FAA. The Magistrate and District Court granted the Union's motion to dismiss the action as untimely and the Third Circuit affirmed.

The Court of Appeals first set out the different procedures for actions to vacate labor arbitration awards under the LMRA and FAA. Broadly, an LMRA action proceeds as any civil action with complaint, discovery and motion or trial, whereas an FAA action proceeds by summary motion. Significantly, while the FAA limitations period is 90 days from the final award, the LMRA borrows the most analogous state limitations period, which is 30 days in Pennsylvania. Since PG filed its action more than 30 days after the December Award but within 30 days of the January Award, timeliness turned on whether the LMRA or FAA periods applied and whether the December Award was final, reasoned the Court.

The Third Circuit found that the LMRA limitations period applied in this case because the complaint followed full civil action procedure without sufficient reference to the FAA or motion practice. "Even if PG had intended to move to vacate the Award under the FAA, the substance of its Complaint and its manner of litigating this dispute were insufficient to put the Union and the District Court on notice that PG was proceeding via FAA Motion." Further, the Court held the December Award final and so counted the LMRA 30-day limitations period from that December Award rather than the later January Award. Finality of the December Award appeared clear on its face, explained the Court, because the December Award resolved all issues before the Arbitrator both as to liability and remedy, and stated that it was final and binding, without any need for "extrinsic evidence regarding an arbitrator's intent." The subsequent January "full Award and Opinion" did not alter the finality of the earlier December Award nor restart the limitations period, ruled the Third Circuit. Accordingly, since the final December Award started the LMRA 30-day limitations period running, and PG filed its action by complaint in February, the Third Circuit affirmed dismissal of the action to vacate as untimely and confirmed these Awards.

IN A FIRST, A STARBUCKS SHOP VOTES TO UNIONIZE

After fifty years of avoiding unions in the United States, employees at a Starbucks shop in Buffalo last week voted to unionize. The National Labor Relations Board ("NLRB") certified the vote as 19-8 in favor of the Union, Workers United, an affiliate of the Service Employees International Union ("SEIU"). A second store in Buffalo rejected the Union in a vote of 12-8, though that result was within the range of the number of objected to ballots, so the Union was considering challenging the results. A vote at a third Buffalo store remained undecided due to both sides challenging seven separate votes. Prior to the elections, the company argued to the NLRB that the election should involve all 20 of its local stores, a request the NLRB rejected, ruling that a store-by-store vote was more appropriate.

In response to the election results, in a letter to Starbucks' U.S. employees last week, Starbucks President and CEO Kevin Johnson reminded them of the company's benefits, including paid parental and sick leave and free college tuition through Arizona State University. Late last month, the company also announced pay increases, saying all its U.S. workers will earn at least $15 — and up to $23 — per hour by next summer.

Under NLRB rules, the parties have five business days after the results are certified to file objections. If filed, the objections would be subject to hearings and appeals within the NLRB. Employees at an additional Starbucks store in Buffalo and one in Mesa, Arizona have filed petitions for a Union election and await the scheduling of the elections.

While one election has been won, union supporters say Starbucks can do more. "If Starbucks can find the money to pay their CEO nearly $15 million in compensation, I think maybe they can afford to pay their workers a decent wage with decent benefits," said Senator Bernie Sanders, a Vermont independent, in a recent Twitter post. Sanders held a virtual town hall with Buffalo Starbucks workers earlier this week. Union representatives in Buffalo have noted that Starbucks has had chronic management problems, including understaffing and faulty equipment. There are about 8,000 company owned Starbucks stores in the United States, so this successful organizing drive is the very tip of the iceberg of further organizing.

NEW YORK CITY COUNCIL PASSES LEGISLATION SEEKING TO PREVENT BIAS IN AUTOMATED EMPLOYMENT DECISION TOOLS

Going far beyond the laws in any other municipality, the New York City Council has joined Illinois and Maryland in passing legislation which seeks to prevent hiring bias by conducting "bias audits" on automated employment decision tools. Many employers use such artificial intelligence to cull job applications and make the hiring function more manageable for their Human Resources departments. The Council passed the legislation on November 10, and it "lapsed" into law due to Mayor deBlasio's failure to either sign it or veto it. The Mayor has said he supports the law, and it takes effect Jan. 2, 2023.

The law will require employers to advise all employees and candidates if a tool was used. A $500 fine comes with a first violation and $1,500 for further violations. The impetus of the legislation is a recent increase in filings in Federal and state agencies alleging that the widespread use of such tools has a discriminatory impact on job applicants.

The Bill defines "automated employment decision tool" as "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence," which scores, classifies, or otherwise makes a recommendation, which is used to substantially assist or replace the decision-making process from that of an individual. The Bill exempts automated tools that do not "materially impact" applicants, like a junk email filter, firewall, calculator, spreadsheet, database, data set, or other compilation of data. The Bill defines an acceptable "bias audit" as an impartial evaluation by an independent auditor that includes the testing of the tool to assess its disparate impact on persons of any federal EEO-1 "component 1 category," i.e., whether the tool would have a disparate impact based on race, ethnicity, or sex.

The Bill applies only to decisions to screen candidates for employment or employees for promotion within New York City and does not apply to other employment-related decisions. The Bill prohibits employers or employment agencies from using the automated decision tools to screen candidates or employees for hiring or promotion decisions unless:

(1) the tool has undergone the independent bias audit no more than one year prior to its use; and

(2) a summary of the results from the audit as well as the distribution date of the tool to which the audit applies has been made publicly available on the employer's website.

New York City employers using automated employment decision tools must notify each employee or candidate who resides in New York City of the following:

- at least ten business days before such use, that the tool will be used in assessing or evaluating the individual and allow a candidate to request an alternative process or accommodation;
- at least ten business days before such use, the job qualifications and characteristics that the tool will use in assessing or evaluating the individual; and
- if not posted on the employer's website, and within thirty days of a written request by a candidate or employee, information about the type of data collected for the tool and the source of such data.

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.