Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
January 19, 2022 Edition

THIRD CIRCUIT LIMITS RICO ANTI-UNION THREAT

The Racketeer Influenced and Corrupt Organizations Act ("RICO") has long loomed as the "neutron bomb" of anti-union litigation, carrying with it the penalty of treble damages and criminal liability that could destroy any union. When a nursing home operator woke up one morning, on the eve of a strike, to find scores of patient medical records seriously vandalized and equipment sabotaged, he pulled the RICO trigger. In a heated decision by a bitterly split United States Court of Appeals for the Third Circuit, the union won an "iron dome" type defense, as the Appeals Court sustained summary judgement for the union dismissing the lawsuit on grounds unique to RICO. *Care One Mgmt., LLC v. United Healthcare Workers East*, No. 19-3693 (3d Cir. Dec. 17, 2021).

Care One operates nursing homes throughout the northeast, several in Connecticut where many of the workers are represented by 1199 SEIU United Healthcare Workers East ("1199 SEIU" or "Union") in a hostile labor management relationship. Following failed negotiations for a new labor contract and several unfair labor practice charges pending before the National Labor Relations Board, Union leaders called for workers to "become angry about their working conditions," and to be "more militant" because "the law takes too long." The Union also launched an aggressive campaign raising questions about Care One patient care, medical care, billing, and labor practices, including seeking the intervention of United States Senator Richard Blumenthal into Care One's billing practices, and picketing a lecture by Care One Chief Executive Officer at New York University School of Law's Institute for the Advanced Study of Law and Justice. On the night before the 1199 SEIU called strike at Care One Connecticut facilities, the facilities were vandalized and sabotaged – patient information necessary for treatment was mixed up, medical records were altered, and medical equipment was damaged or hidden. Care One sued under RICO, alleging that the Union had engaged in a pattern of unlawful racketeering activity designed to unlawfully coerce Care One to succumb to 1199 SEIU contract bargaining demands.

The District Court granted the Union summary judgement on the RICO claims and Care One appealed. United States Circuit Court of Appeals Judges McKee and Rendell joined to affirm the District Court decision in a powerful defense of union economic pressure, despite RICO, denouncing the biting dissent of their "colleague" Judge Jordan, as the three judges battled in a decision less like a dispassionate legal analysis and more like a bar room brawl swirling with fisticuffs, knives and broken hard whiskey bottles.

First, Judges McKee and Rendell rejected Care One's claim of extortion for economic advantage under state law and under the federal Hobbs Act, both traditional

grounds for RICO predicate acts, by applying a “claim of right” defense as a “carve out” from Hobbs Act prohibitions. Analyzing the definition of “extortion” under state law and the Hobbs Act as substantially the same, over the indignant objection of Judge Jordan whose points the majority dismissed as inapplicable “linguistic parsing,” the Court cited statute and United States Supreme Court authority that the Hobbs Act applied only where “the alleged extortionist has no lawful claim to that property,” as well as legislative history that the Hobbs Act would not “interfere in any way with any legitimate labor objectives or activity.” In this light, the Union’s exhortations and campaign conduct could not constitute extortion because they were made in pursuit of a lawful claim for better contract terms, notwithstanding the dissent’s “bizarre” attempts to limit the carve-out. Rejecting general Hobbs Act cases in favor of the narrow labor carve-out, the Third Circuit explained: “Labor is simply different. The underlying purpose of a strike—the ultimate tool of labor—is, after all, inflicting harm on an employer's business to exert such economic loss (or threat of loss) upon that business that the employer agrees to labor's demands. *Accordingly, as long as unions pursue legitimate labor objectives, their coercive tactics are simply not subject to liability under the Hobbs Act*.”(Emphasis added).

Next, the majority disposed of the argument that the Union had engaged in sabotage as a RICO predicate act. Initially, the Court established as the standard of proof Section 6 of the Norris-LaGuardia Act requiring “clear, unequivocal, and convincing proof" rather than "a bare preponderance” of actual authorization or ratification of the unlawful acts of Union members or even officers. Under this heightened standard of proof, decried by the dissent as a see-no-evil, “nothing here, move along,” get-out of jail free card, the Court majority saw no sufficient evidence of authorization or ratification. “It simply does not follow that the Unions were authorizing acts of vandalism and sabotage by complaining about delays in the legal process” or encouraging militancy, especially since Union representatives publicly condemned the sabotage and vandalism. Similarly, proof of mail or wire fraud or reckless disregard could not suffice to establish the Union’s liability where the statements were believed to be true by the Union after vigorous fact checking and review by senior officers and counsel. Finally, questions implying Care One misconduct were only opinion and “the law does not hold either party to a labor dispute to a given level of objectivity,” concluded the Court majority.

The *Care One* decision carries an important message for labor practitioners. On its face, the decision offers an instruction manual for aggressive but lawful union campaigns. On a deeper level, the decision showcases the increasingly pitched battles between jurists applying pro-labor New Deal legislation and conservative appointees bent on rolling back or reinterpreting those laws to undermine labor. And those battles are not confined to the Third Circuit. The judges reviewing labor cases in sister circuits, including the Second Circuit Court of Appeals, will be reading *Care One* carefully, majority and dissent opinions, so both employers and unions should do so as well.

NYS INDOOR MASKING POLICY
EXTENDED THROUGH FEBRUARY 1, 2022

On December 10, 2021, Governor Kathy Hochul announced that masks must be worn in all indoor places unless businesses or venues implement a vaccine requirement. The new requirement went into effect on December 13, 2021 and was set to expire on January 15, 2022; however, the requirement has been extended from January 13, 2022 through February 1, 2022, at which time, according to the New York State Department of Health's ("DOH's") website, "the State will reevaluate next steps."

The requirement is meant to address the winter surge and is in alignment with the Centers for Disease and Control Prevention's ("CDC's") recommendations. Solidifying the requirement, on January 13, 2022, the Acting Commissioner for the Department of Health ("DOH") issued a determination letter regarding indoor masking pursuant to 10 NYCRR 2.60. That rule requires, among other things, that businesses, at their expense, must provide face-coverings for their employees. The statute also outlines penalties: a maximum fine of $1,000 for each violation where each day that an entity operates in a manner inconsistent with the statute shall constitute a separate violation.

Pursuant to 10 NYCRR 2.60 , the Commissioner issued a determination letter that included findings of necessity to support face masking/covering requirements for various settings, including: 1) healthcare settings, 2) adult care facilities regulated by the Department, 3) P-12 school settings, 4) correctional facilities and detention centers, 5) homeless shelters (including overnight emergency shelters, day shelters, and meal service providers), 6) public transportation conveyances and at transportation hubs, and 7) all indoor places not otherwise covered by the determination letter. For the last setting mentioned – number seven – the Commissioner provides that all persons "over age two and able to medically tolerate a face covering/mask, regardless of vaccination status, shall wear an appropriate face covering/mask while in any indoor public place." Significantly, according to the determination letter, the requirement does not apply to "any indoor public area that requires proof of vaccination as a condition of entry." Further, "indoor public place" means "any indoor space that is not a private residence." The requirement will remain in effect until February 1, 2022. The full text of the determination letter can be found at: https://coronavirus.health.ny.gov/system/files/documents/2022/01/2.60_Determination_011322.pdf.

Updated CDC guidance regarding appropriate types of masks and respirators can be found at: https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/types-of-masks.html.

WHITE HOUSE LAUNCHES NEW WEBSITE WHERE AMERICANS CAN REQUEST FREE COVID-19 TESTS BEGINNING JANUARY 19, 2022

A newly launched White House website will allow Americans to request free COVID-19 tests beginning January 19, 2022. According to the website, "[e]very home in the U.S. can soon order 4 free at-home COVID-19 tests. The tests will be completely

free—there are no shipping costs and you don't need to enter a credit card number." Tests will be mailed to homes within 7-12 days through the U.S. Postal Service.

In December, President Joe Biden announced that the U.S. would purchase 500 million COVID-19 tests for the program and on January 13th, the President announced the U.S. would purchase an additional 500 million COVID-19 tests, bringing the total to one billion.

President Biden's efforts come amid a nationwide shortage of tests. The website can be found at: https://www.covidtests.gov/. The kits can be ordered by clicking https://special.usps.com/testkits.

EBSA PUBLISHES NEW RULES ON POOLED EMPLOYER PLANS AND ANNUAL REPORTING REQUIREMENTS

On December 17, 2021, the U.S. Department of Labor ("DOL") Employee Benefits Security Administration ("EBSA") published a set of "Final Revisions" amending annual reporting requirements for some multiple-employer plans, including new pooled employer plans delineated in the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act"). The Final Revisions document that the SECURE Act amended the Employee Retirement Income Security Act of 1974, as amended ("ERISA") to permit a new type of multiple employer pension plan ("MEP"), namely a newly designed pooled employer plan.

The newly designed pooled employer plan, a MEP and defined contribution pension plan, is to be operated by a pooled plan provider. In contrast to its predecessors, the new pooled employer plan allows several unrelated employers to participate in a plan without requiring a common nexus (such as industry or location) among the participating employers except for having adopted the plan, it also permits the participating employers to submit one single Form 5500 Annual Return/Report or Form 5500-SF as applicable. Prior to the SECURE Act, if a plan included unrelated participating employers without a common nexus (often called an "open MEP"), the DOL required each participating employer to maintain its own plan and file its own Form 5500 or Form 5500-SF. Furthermore, if multiple, unrelated employers shared a common nexus, the arrangement was considered a single plan (often called a "closed MEP") and required the filing of a single Form 5500 or Form 5500-SF.

In addition, pursuant to the Final Revisions, pooled employer plans must include in their annual reports two new additional pieces of information: "(1) the aggregate account balances attributable to each employer in the plan (determined as the sum of the account balances of the employees of such employer and the beneficiaries of such employees)," and (2) identifying information for the pooled plan provider.

The Final Revisions further explain- that the ERISA amendments included two new obligations of pooled plan providers requiring them to (1) register with the DOL and (2)

file a registration statement with the Secretary of the Treasury, prior to beginning operations. Following the issuance of the Final Revisions, the Treasury Department and the Internal Revenue Service ("IRS") advised that filing the Form PR, used to report information by a person or entity that intends to serve as a pooled plan provider, with the DOL, satisfies the requirement of registration with the Secretary of the Treasury. Therefore, the revised instructions of Forms 5500 and 5500-SF require that pooled employer plans confirm in their Form 5500 that the plan's pooled plan provider had initially filed a Form PR. Further, the pooled employer plan must provide the AckID number for the pooled plan provider's Form PR filing. It is worth noting that the Form PR instructions advise the filer to use the same identifying information used to file the Form PR in their Form 5500 filing, specifically: name, EIN for the pooled plan provider, and "any identified affiliates providing services; trustees; and plan name and number for each pooled employer plan."

The Final Revisions document also notes that "[w]hile there is no explicit civil penalty for failing to file a Form PR, there is a civil penalty for failing to file a complete and accurate Form 5500." Furthermore, the DOL, the IRS, and the Pension Benefit Guaranty Corporation will address additional changes to the Form 5500 in one or more separate Notices of Adoption of Final Forms Revisions and Notices of Final Rulemaking soon.

ONWARD AND UPWARD CARLOS BEATO

This issue may be the last for which Pitta LLP and Pitta Bishop *et al*. partner Carlos Beato serves as editor. After years of work at both firms, Carlos has now been tapped by New York City Council Speaker Adrienne Adams as Special Counsel. Congratulations to Carlos. Your work and friendship have long made your colleagues proud; now it's your City's turn. With our best wishes, onward and upward Carlos.

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.

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