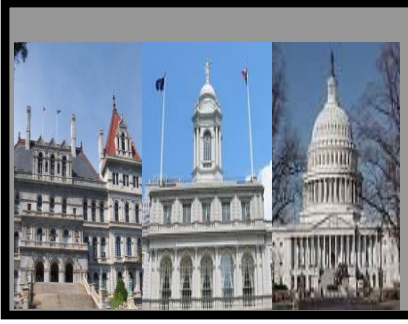

Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
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THE THREE AMICI – NLRB INVITES BRIEFS TO RECONSIDER TRUMP ERA STANDARDS FOR DAMAGES AND ORGANIZING

At year's end, the National Labor Relations Board ("NLRB" or "Board") invited briefing from parties and amici in three pending cases challenging Trump era decisions. The NLRB's invitations highlight the impact of the election of President Biden, with his new Board Member majority appointees demonstrating interest in positive changes of law for workers and labor unions in 2022.

In *Thryv, Inc*., the NLRB General Counsel alleges that Thryv unlawfully laid off six employees without first bargaining to impasse with IBEW Local 1269. 371 NLRB No. 37 (2021). The Board traditionally orders reinstatement and a make-whole remedy for this kind of violation. Additionally, the Board has ordered reasonable search-for-work and interim employment expenses. The full Board unanimously invited briefs to consider whether to establish a practice of awarding "consequential damages," to make employees whole for other economic losses suffered as a direct and foreseeable result of an unfair labor practice. The Board invited interested amici to file briefs by January 10, 2022.

On December 7, 2021, the Board issued another notice inviting briefs in *American Steel Construction*, 371 NLRB No. 41 (2021). In *American Steel*, Ironworkers Local 25 filed a petition seeking to represent a unit of field ironworkers. The employer objected to the unit, contending that unit was inappropriate if not composed of its entire plant. Applying *PCC Structurals, Inc*., 365 NLRB No. 160 (2017) and *Boeing Co.*, 368 NLRB No. 67 (2019), the Regional Director dismissed the petition, finding the community of interest of the field employees not sufficiently distinct from the other plant workers. Chairman McFerran, Member Wilcox, and Member Prouty granted review of the Regional Director's decision and invited briefing on whether the Board should adhere to *PCC Structurals*/*Boeing*. If not, the Board asks what should replace it, including whether to return to the Board's standard from *Specialty Healthcare*, 357 NLRB 934 (2011) (smaller unit appropriate unless larger unit shares an "overwhelming community of interest with those in the petitioned-for unit"). Trump appointed Members Kaplan and Ring dissented. The Board invited interested amici to file briefs by January 21, 2022.

On December 27, 2021, the Board invited briefing in *The Atlanta Opera, Inc.*, 371 NLRB No. 45 (2021). IATSE Local 798 filed a petition to represent a unit of makeup artists and hairstylists. The Atlanta Opera argued that the workers are independent contractors rather than statutory employees. After the Regional Director decided that Atlanta Opera failed to meet its burden to establish the workers as independent contractors, the employer requested review. Chairman McFerran, Member Wilcox, and Member Prouty granted review of the Regional Director's decision and invited briefing on whether the Board should adhere to the independent contractor standard set forth in *SuperShuttle DFW, Inc*., 367 NLRB No. 75 (2019) (considering "entrepreneurial opportunity" a "prism" though which traditional common law factors are

analyzed). If not, the Board asks what should replace it, including whether to return to the Board's standard from *FedEx Home Delivery*, 361 NLRB 610, 611 (2014). Members Kaplan and Ring again dissented. The Board invited interested amici to file briefs by February 10, 2022.

DOL SETTLEMENT WITH AMAZON MAKES IT EASIER FOR UNIONS TO ORGANIZE

On December 23, 2021, the National Labor Relations Board ("NLRB" or "Board") and Amazon.com Inc. ("Amazon") reached a settlement of unfair labor practice charges obligating Amazon to provide workers with notice of their rights to seek collective action and not to retaliate against any workers who exercise their rights. Under the terms of the settlement, Amazon will inform current and former workers of their labor rights to join a labor union through a direct email and post a notice of workers' labor rights at their facilities for 60 days. The settlement could impact more than 1 million workers.

Amazon entered the settlement with the NLRB based upon six complaints (three in Chicago and three in New York) that accused the online company of using unlawful tactics to prevent unions from organizing warehouses. Amazon acknowledged that it had a policy in place that prevented workers from entering common spaces other than during 15-minute periods at either end of their shifts to prevent the workers from speaking to each other about unionization. The company agreed to repeal the policy.

The settlement comes on the heels of an NLRB decision that found that Amazon violated labor law after workers at its Bessemer, Alabama warehouse tried to join the Retail, Wholesale and Department Store Union ("RWDSU"). The NLRB ordered a new election because it found credible evidence that Amazon discouraged unionization by illegally holding mandatory meetings on why workers should vote against joining the union, and illegally arranged for the installation of a United States Postal Service box to be installed at the facility's parking lot during the election.

On December 22, 2021, prior to the settlement, the Amazon Labor Union ("ALU"), an independent group which represents workers at the Amazon facility in Staten Island, New York refiled its earlier petition for a union election. The ALU had withdrawn its petition in November but now believes it safe to hold a unionization vote.

In addition to the RWDSU, the International Brotherhood of Teamsters ("Teamsters") pledged to work to organize Amazon workers. Brian Rainville, spokesman for Teamster President-Elect Sean O'Brien said that the settlement is "a good step forward, but labor law should be enforceable everywhere and all the time. It shouldn't take this extraordinary effort." Obviously, the Board's General Counsel agrees as she ramps up her agenda and enforcement at year's end and for 2022.

FINAL RULE ON ELECTRONIC DISCLOSURES SAVES TIME AND MONEY, SAYS DOL

Responding to an Executive Order from the former President instructing the U.S. Department of Labor ("DOL") to improve the effectiveness and ease the costs and regulatory burdens associated with retirement plan disclosures required under the Employee Retirement Income Security Act of 1974 ("ERISA"), the DOL published a final rule that provides a safe harbor for electronic distribution of ERISA-required disclosures by pension plans. The safe harbor provides new options for satisfying ERISA's general standard for furnishing or delivering disclosures to participants and beneficiaries. According to the DOL, the two methods of electronic distribution established in the final rule will reduce plan costs by around $3.2 billion over the course of the next decade.

These methods make it easier for participants to access disclosures, while still retaining the rights of those who prefer paper disclosures. The first method institutes a "notice-and-access" model. Under this method, plan administrators are required to furnish plan participants with an initial paper notice setting forth a default for electronic delivery and a right to opt out of electronic notifications. If a participant elects to receive electronic disclosure(s) after receipt of the initial notice, then the plan would provide the participant with an electronic Notice of Internet Availability ("NOIA") when a required disclosure is provided by the plan. The NOIA should provide information on how to electronically access the disclosure(s) and include hyperlinks that take covered individuals directly to the website address. If a participant elects not to receive electronic disclosure(s), he or she has a right to request paper copies of the relevant disclosure(s). The second method permits plans to deliver disclosure(s) to participants who have elected to receive electronic disclosures after their receipt of the initial paper notice via email. Plan sponsors should include in the email brief information regarding the disclosure(s) being made as well as attach the relevant disclosure(s) in the e-mail. The second method does not require administrators to furnish plan participants with a NOIA.

In addition, a special rule allows plan administrators to deliver to participants who have elected to receive electronic disclosure one annual combined NOIA with respect to a subset of seven covered documents: 1) a summary plan document, 2) a summary of material modifications, 3) a summary annual report, 4) an annual funding notice, 5) an investment-related disclosure, 6) a qualified default investment alternative notice, and 7) a pension benefit statement. The DOL created a special rule for those covered documents because they are considered the most common and recurring disclosures that are made to pension plan participants. The combined NOIA must be delivered at least once each plan year, and, if the combined NOIA was delivered to participants in the prior plan year, no more than 14 months following the prior year's notice. Thus, instead of imposing a strict 12-month requirement on plan administrators regarding the distribution of annual disclosures, the final rule gives plan administrators a two-month grace-period to comply with annual distribution requirements.

Under the final rule, the 2002 safe harbor rule, which permits the use of electronic media to furnish disclosures, if satisfied, remains a viable method for plan administrators

who would like to furnish those ERISA disclosures excluded from the new safe harbor. Accordingly, the new methods adopted by the final rule do not supersede the 2002 safe harbor rule which remains in place as an additional method to distribute disclosure(s).

The final rule, now effective, appears to respond to concerns that plan service providers and employers were working towards economic recovery from COVID-19 and would wish to rely on a cost-effective method for delivering regulatory disclosure(s).

HAPPY NEW YEAR!

As 2022 begins with hopes anew, Pitta LLP wishes all our clients, colleagues, and friends a happy, healthy, and meaningful new year.

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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