Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
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RING OUT THE OLD AS NLRB INVITES MORE BRIEFS TO RECONSIDER TRUMP BOARD DECISIONS

Following three requests for briefing in December 2021, the National Labor Relations Board ("NLRB" or "Board") started 2022 off by requesting even more briefing designed to reconsider and likely reverse Trump Board decisions. All signs point to a busy, controversial 2022 for the Biden Board.

On January 6, 2022, the Board issued a Notice and Invitation to File Briefs in *Stericyle, Inc*., 371 NLRB No. 48. The case is on review following administrative law judge Michael A. Rosas' decision finding that Stericyle violated the National Labor Relations Act ("NLRA") by maintaining unlawful work rules. ALJ Rosas applied the standards established in *Boeing Co*., 365 NLRB No. 154 (2017) and its progeny. In *Boeing*, the Board announced that when a neutral rule, reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board would now evaluate: (1) the nature and extent of the rule's impact on employees' rights; and (2) legitimate justifications associated with the rule. The *Boeing* majority reversed the prior standard, established by *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), finding rules unlawful when employees would reasonably construe the rules' language to prohibit NLRA Section 7 activity. Chairman McFerran, Member Wilcox, and Member Prouty invited briefing on whether the Board should continue to adhere to *Boeing*. Trump-appointed Members Kaplan and Ring dissented. The Board invited interested amici to file briefs by March 7, 2022.

One day later, the NLRB issued notices requesting any party to show cause why the Board should not vacate and re-adjudicate three cases in which Member William Emanuel participated despite violating ethical standards. *ExxonMobil Research and Engineering Company, Inc*., 22-CA-218903; *Marathon Petroleum Co., d/b/a Catlettsburg Refining, LLC*, 09-CA-162710; *CVS Pharmacy*, 13-UC-266228. All three notices stem from former Member Emanuel's failure to disclose ownership of certain mutual funds, which in turn owned shares of the employers in these cases. The NLRB Inspector General concluded that Member Emanuel's participation violated a criminal statute, 18 U.S.C. § 208(a), and its implementing regulations, 5 C.F.R. §2640.201(b)(2)(i). The Board majorities referred to vacatur and re-adjudication as the "presumptively appropriate remedy." The current Members appeared to agree that Member Emanuel should not have participated in these cases and that briefing is appropriate. Member Ring disputed the majority's use of the term "presumptively appropriate remedy." Member Kaplan reserved judgment. *ExxonMobil* may present the most interesting of the three potential re-adjudications since it involved an all Republican-appointed Board panel rejecting a union's unfair labor practice charges in their entirety, including on the basis of the Trump

Board's "contract coverage" standard for unilateral change allegations adopted in *MV Transportation, Inc*., 368 NLRB No. 66 (2019).

DOL KILLS T-1 AT YEAR END FOR 2022, LM-2 REMAINS PRIMARY UNION REPORT

On December 30, 2021, the U.S. Department of Labor ("DOL") officially rescinded the Trump era Form T-1 that required unions with $250,000 or more in annual receipts to submit detailed reports concerning affiliated trusts such as strike funds, labor-management committees, and apprenticeship/training programs, all far beyond the usual information required in LM-2 reports that remain in place under the Labor Management Reporting and Disclosure Act ("LMRDA").

This action by the Biden Administration DOL is no surprise because the DOL had suspended T-1 in March 2021, though it did not officially rescind T-1 then. In formally rescinding T-1 now, the DOL cited its explanations for suspending that rule in March, while amplifying its reasoning. In summary, DOL "no longer views the reporting requirements [beyond Forms LM-2 and 990] … as justified in light of the burden they impose" without any measurable benefit already existing from Forms LM-2 and 990. In addition, and as a separate ground, "as it concerns Taft-Hartley plans, the trust reporting required under the rule is overly broad and thus not necessary to prevent the circumvention and evasion of [LMRDA] Title II reporting requirements" since unions cannot effectively hide their moneys in such heavily regulated trusts under joint union-management control. The DOL noted that in the few comments regarding rescission of T-1, the majority favored rescission and only three, two of which were anonymous and one from a disgruntled union member, opposed rescission in the interest of transparency. DOL rejected these negative comments because they did not show that the additional reporting of T-1 would add more effective disclosures than those available from other DOL reporting forms.

But T-1 may not be completely dead yet. In its rescission, the DOL reviewed the tortuous history of T-1 beginning in 2003, struck down by the D.C. Circuit Court of Appeals in *AFL-CIO v. Chao*, 409 F.3d 377, 389-391 (D.C. Cir. 2005), revived as restated in 2008, rescinded in 2010 and resurrected with revisions under President Trump in 2017-2020. Accordingly, with history as guide, T-1 may again reappear in mutated form under a resurgent Republican president come 2025.

AS THE CLOCK STRUCK MIDNIGHT: THREE UNIFORMED CITY UNIONS MAKE DEALS WITH THE OUTGOING ADMINISTRATION

At the proverbial eleventh hour, three unions representing several uniformed memberships within the City of New York ("City") reached successor collective bargaining agreements with the outgoing De Blasio Administration. In separate negotiations, the Detectives' Endowment Association ("DEA"), the Sergeants Benevolent Association ("SBA"), and the Uniformed Firefighters Association ("UFA") all reached agreements with the City on the terms of their next contracts for the latest round of bargaining.

Covering the 2019-2022 round of bargaining, these three unions achieved base wage increases of 2.25%, 2.5%, and 3.0% over 36 months, which was commensurate with the uniformed pattern established by the Uniformed Officers Coalition ("UOC") in December 2019. Additionally, these three unions were able to secure a 2.25% "service differential" for their applicable, respective memberships, which was originally secured by the Patrolmen's Benevolent Association ("PBA") in the previous round of negotiations, through attrition bargaining.

The frenetic pace of negotiations, spurred by the mutual desire to secure these agreements before the Adams Administration came into office on January 1, 2022, resulted in the SBA deal being signed on December 17, 2021, the UFA deal being signed on December 22, 2021, and the DEA deal being signed on December 28, 2021. All three of these deals need to be ratified by the respective memberships of the DEA, SBA, and UFA. Moreover, the City's renewed desire to finalize these agreements with three out of the four remaining uniformed unions that had not participated in the UOC was in stark contrast from the previously-taken position of the City to allow the contracts for these three unions to remain in *status quo*, while it dealt with the fiscal ramifications from the COVID-19 pandemic and the litigation resulting from the unilateral institution of various vaccine mandates.

As such, the only remaining uniformed union yet to reach an agreement with the City for the 2019-2022 round of bargaining is the PBA, which is currently embroiled in Interest Arbitration for the first two years of the three-year deals reached by the DEA, SBA, and UFA.

TAG TEAM ACTION: FEDERAL AGENCIES JOIN FORCES TO ENFORCE WORKERS' RIGHTS

On January 6, 2022, the Wage and Hour Division for the U.S. Department of Labor ("WHD") and the National Labor Relations Board ("NLRB") reached an agreement to coordinate their respective efforts in combatting the illegal tactics used by some employers of misclassifying employees as independent contractors and then retaliating against them when they speak out against such abuses. This agreement memorializes an arrangement between these two federal agencies to collaborate on investigations and to share information on potential violations that target workers who suffer from being

denied their statutory entitlement to minimum wage and overtime under the Fair Labor Standard Act of 1937 ("FLSA") and their statutory right to engage in collective, protective activity under the National Labor Relations Act of 1937 ("NLRA").

As set forth in the Memorandum of Understanding between the WHD and NLRB ("MOU"), a new referral process will be created in order to make it easier for the federal government to pursue employers who have violated both the FLSA and NLRA. As explained by the WHD's Acting Administrator Jessica Looman, this effort will create a system by which these two federal agencies can share information in an effort to maximize and improve enforcement of these two laws. Further, the reason for the MOU is to ensure that bad actors are held accountable to all applicable federal laws, where in the past, the lack of cohesion between the WHD and NLRB allowed these same bad actors to escape liability from one or the other statutes, due to the lack of coordination. Further, the MOU is designed to relieve ordinary workers from the burden of navigating the federal procedural process, which often times can be confusing, so that they can maximize the enforcement of all applicable laws.

Under this new system, the WHD and NLRB can request information from each other, thereby systemizing the free flow of information between the two in connection with the identification and investigation of complex and fissured employment structures. In furtherance thereof, the WHD and NLRB will coordinate and participate in joint training to address employee complaints, investigation cooperation, and collective agency action.

This latest mandate from the pro-worker Biden Administration is best summed up by NLRB General Counsel Jennifer Abruzzo, when she stated: "These issues frequently cut across multiple workers protection agencies, which is why it is so important to work collaboratively to prevent and address them."

CELEBRATING THE LIFE AND LEGACY OF REV. DR. MARTIN LUTHER KING, JR.

This Monday, we celebrate the birthday of Rev. Dr. Martin Luther King, Jr., an American icon remembered for leading the fight for civil and voter rights across the United States. Dr. King also actively worked with labor unions to fight for fair contracts. He was honored for his work by our client, Local 6, long before our government did. Dr. King was murdered while supporting sanitation workers on strike in Memphis, Tennessee. His thoughts on organized labor shine true today, burnishing his legacy:

> "The labor movement did not diminish the strength of the nation but enlarged it. By raising the living standards of millions, labor miraculously … lifted the whole nation."

Pitta LLP wishes all Americans a meaningful and healthy MLK Day.

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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