Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
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GOVERNOR HOCHUL ENDS MASK MANDATE FOR MOST BUSINESSES

Governor Kathy Hochul announced this morning that she will end the indoor mask mandate for businesses and other indoor spaces in New York State starting tomorrow. The state mask mandate required masks to be worn in all indoor public places unless businesses or venues implemented a vaccination requirement. Allowing the mandate to lapse comes as the number of coronavirus cases decreases after the winter surge. The rule was the subject of recent legal challenges in New York.

In explaining the rationale for ending the indoor mask mandate, Governor Hochul cited declining numbers: while 90,000 New Yorkers tested positive one month ago, today, only 6,000 New Yorkers have tested positive. She also noted the significantly lower infection-to-hospitalization ratio among New Yorkers who had contracted the Omicron variant of COVID-19 (3.5%) compared to New Yorkers who had contracted the Delta variant (62%), Governor Hochul stated that overall, cases are down, the positivity rate is down, total hospitalizations are down, cases per 100,000 are down, and new hospital admissions are down, while, at the same time, vaccines and boosters are up and hospital capacity has increased. Calling it a “beautiful picture,” Governor Hochul said she consulted with experts and local leaders to determine the next steps.

Calling the mask mandate an emergency temporary measure put in place two months ago, she stated that now is “the best time” to lift the mandate for indoor businesses and allow counties, cities, and business to choose what they want to do with respect to mask and vaccination requirements. Despite the end of the indoor mask mandate as of February 10, 2022, Governor Hochul underscored that there is still a statewide mask requirement in effect at state-regulated health care settings, state-regulated adult care facilities and nursing homes, correctional facilities, schools and childcare centers, homeless shelters, domestic violence shelters, buses and bus stations, trains and train stations, subways and subway stations, and planes and airports.

While the mandate for businesses was set to expire on February 10, 2022, a separate mask mandate for schools is not scheduled to expire until February 21, 2022. Governor Hochul announced that she will make an assessment in early March after schools’ mid-winter recess regarding whether to continue it.

THE TROUBLE WITH *TIBBLE* - SUPREME COURT VACATES *HUGHES V. NORTHWESTERN UNIV.*, RAISES STANDARD FOR FIDUCIARY PRUDENCE

In a unanimous decision, the United States Supreme Court vacated the U.S. Court of Appeals for the Seventh Circuit's decision in *Hughes v. Northwestern Univ.*, and remanded the case to the lower court to consider whether petitioners plausibly alleged a violation of the fiduciary duty of prudence as articulated in *Tibble v. Edison, Int.'l*, 575 U.S. 523 (2015). *See* 595 U.S. __ (2022).

In this case, respondents were the Administrators of defined-contribution retirement plans and petitioners were current and former employees of Northwestern University and participants in the plans. Petitioners sued respondents alleging a violation of the Employee Retirement Income Security Act of 1974's ("ERISA") duty of prudence by: (1) failing to monitor recordkeeping fees, resulting in unreasonably high costs to plan participants, (2) offering needlessly expensive investment options that carried higher fees than those charged by otherwise identical "institutional" share classes of the same investments, which are available to certain large investors and (3) offering too many investment options—over 400 in total for much of the relevant period—and thereby causing participant confusion and poor investment decisions.

The Seventh Circuit held that petitioners' claims failed as a matter of law and based part of its decision on the lower court's determination that the type of low-cost investments preferred by the petitioners were available as plan options. However, citing its own decision in *Tibble,* the Supreme Court held that the Seventh Circuit's reasoning was "flawed" because it was inconsistent with the "context-specific inquiry that ERISA requires and fail[ed] to take into account respondents' duty to monitor all plan investments and remove any imprudent ones." *Tibble v. Edison, Int.'l*, 575 U.S. 523 (2015)

The Court explained that § 404(a)(1)(B) of ERISA, which outlines the fiduciary duty of prudence, states that plan fiduciaries must discharge their duties "'with the care, skill, prudence, and diligence that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.'" 595 U.S. __ (2022). The Court further held that *Tibble* made it clear that a fiduciary may breach the duty of prudence by "failing to properly monitor investments and remove imprudent ones." As emphasized in *Tibble*, the Court stressed that if fiduciaries fail to remove an imprudent investment option within a reasonable time, they breach their duty. Holding that the Seventh Circuit's focus on investor choice was not only misplaced but also eliminated *Tibble's* guiding principles, the Court remanded the case to the Seventh Circuit to undertake the "context-specific" inquiry in light of the holding in *Tibble*. The appropriate inquiry, the Court instructed, will be context-specific because the content of a fiduciary's duty of prudence "turns on 'the circumstances . . . prevailing' at the time the fiduciary acts."

SCOTUS CANDIDATE JUDGE JACKSON VACATES
TRUMP RULE TO LIMIT FEDERAL WORKER BARGAINING RIGHTS

For 35 years, the Federal Labor Relations Authority ("FLRA") interpreted and applied the Federal Service Labor Management Relations Statute ("Statute") to require collective bargaining with federal public sector unions ("Unions") over any workplace changes that have more than a "de minimis effect" on "conditions of employment". On September 30, 2020, the FLRA abandoned the "more than de minimis" standard as unworkable and required bargaining only if the change has "a substantial impact on a condition of employment." Joined by Judges Tatel and Pillard, Judge Ketanji Brown Jackson of the U.S. Court of Appeals for the District of Columbia vacated the change in FLRA policy as arbitrary and capricious in violation of the Administrative Procedure Act ("APA"). *Am. Fed. Of Government Employees, AFL-CIO v. Federal Labor Relations Authority*, No. 20-1396 (D.C. Cir. Feb. 1, 2022).

Judge Jackson systematically dissected each of the FLRA's reasons for the new policy, rejecting them all as failing fact, logic, and law. First, Judge Jackson noted that the FLRA's contention that the "more than *de minimis*" standard made *all* management decisions subject to bargaining and simultaneously was unpredictable failed logic, since a rule that required bargaining in every situation was unfailingly predictable. In any event, she noted, FLRA decisions over 35 years showed that the "more than *de minimis*" standard did not cover every management decision and the supposedly inconsistent results were not contradictory at all, but merely turned on very different facts. "Put another way," summarized Judge Jackson, "far from demonstrating the *de minimis* standard is unworkable" the FLRA's argument "simply appears to demonstrate how it works." Second, the FLRA failed to explain why the new standard would lead to less confusion or more consistency than the one that had been so long applied. "There is no obvious reason to expect that labor unions and employers will disagree less frequently about whether any given management decision has a "substitutional impact" on conditions of employment than they previously did over . . . a more than *de minimis* effect," she reasoned, and the LMRA supplied none. Third, the LMRA's attack on the "more than *de minimis*" rule's adoption in 1985 misstates the issue—whether the new rule can stand on its own—which the LMRA failed to justify. Finally, the LMRA's reliance on the use of the substantial effect standard in the private sector under the National Labor Relations Act failed because LMRA decisions for 35 years had consistently justified the different standard in public sector bargaining. Since the "cursory policy statement the FLRA issued to justify its choice to abandon thirty-five years of precedent . . . is arbitrary and capricious," the Court of Appeals vacated the Trump era rule.

Judge Jackson's decision attracts attention for a number of reasons. Most obviously, as a leading candidate for President Biden to fulfill his campaign pledge of appointing the country's first black female Justice, the public and professionals are looking for signs as to how Judge Jackson may rule. In that regard, the decision is careful and methodical, free of ideologies or grandstanding. Judge Jackson's respect for precedent and insistence on strong explanation for any departure will counterbalance some on the United States Supreme Court. The outcome here is also consistent with Judge Jackson's record on the D.C. District Court where she ruled against President

Trump in several high-profile cases. However, one point in the decision is particularly intriguing. Toward the end, Judge Jackson acknowledges the need to defer to agencies in the area of their technical expertise, a principle that cuts against her striking down the FLRA's rule change. However, Judge Jackson finds nothing technical in the FLRA rule and confirms that the court is "not bound by the FLRA's conclusory and counterintuitive assertions . . ." Is Judge Jackson adopting the anti-agency skepticism of some conservative jurists, a one-time pushback on a clearly political move by the FLRA or relying on a long-time exception to judicial deference? The answers will develop over time from Judge Jackson sitting on the D.C. Circuit or in a Justice's chair for the highest court in the land.

LEVELING THE COURT SYSTEM'S VACCINE PLAYING FIELD

Early on in the race to prevent the spread of Coronavirus ("COVID-19"), the State of New York Unified Court System ("Court System") was one of the first adopters of a vaccine only mandate. Specifically, the Court System unilaterally implemented a policy requiring all employees to be vaccinated against COVID-19 by September 27, 2021, subject to certain medical and religious exemptions ("Vaccine Policy"). The Vaccine Policy supplemented other Court System policies and orders, such as a mask mandate inside all courthouses ("Masking Policy") and a testing policy for those workers granted a vaccine exemption. The Vaccine Policy was challenged by several unions ("Unions"), who collectively represent tens of thousands of workers who kept the Court System working throughout one of the worst pandemics in this country's history. One of the ongoing challenges involves the unequal treatment between rank-and-file court employees and their jurist counterparts employed by the Court System.

Workers for whom the Court System denied their requests for a workplace accommodation to the COVID-19 vaccine have 10 days to comply before they are forced out of the workplace and terminated with potential loss of health and insurance. In contrast, the Court System has stated that it is without authority to discipline judges who fail to comply with the Vaccine and Masking Policies. It claims that only the New York State Commission on Judicial Conduct is empowered to discipline or remove a state judge for ethical violations; the Court System can only refer a jurist to the Commission for investigation, which can take more than a year while the subject remains on the bench.

However, on January 20, 2022, it was reported that the Court System ordered Poughkeepsie City Court Judge Frank M. Mora to preside over his cases remotely from home after his application for a vaccine exemption was denied. Nevertheless, court employees and users reported that Judge Mora returned to the courthouse unvaccinated on an almost daily basis, donning only a face shield, in violation of the Vaccine and Masking Policies, and continued to preside over arraignments. On February 1, 2022, the Court System *did* remove most criminal court arraignments, trials and evidentiary hearings from Judge Mora's docket, since those proceedings

cannot be held virtually and the jurist may only work from home. The Court System has taken the position that while certain criminal proceedings can be held virtually, arraignments cannot be presided over via video conferencing platform for constitutional and policy reasons.

ONWARD AND UPWARD PITTA LLP

Effective January 1, 2022, Pitta LLP announces several important internal developments. First and foremost, after 35 successful years at the helm of the practice group that now bears his name, Vincent F. Pitta will assume the title of Firm Chairman. Simultaneously, he will begin sharing the position of Managing Partner with Vito R. Pitta. In addition, the Firm is pleased to announce the elevation of Andrew D. Midgen to partnership, Michael Bauman and Stephen Mc Quade both to Senior Counsel, and Joseph M. Bonomo to Senior Associate. Congratulations to all on their achievements and our best wishes and confidence for your future success. Last, Pitta LLP bids a proud farewell to Carlos Beato, formerly a partner in the Firm, now Special Counsel to New York City Council Speaker Adrienne Adams. Congratulations to Carlos on his call to public service. This year begins with our Firm and our City stronger and prouder. Onward and upward to all.

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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