Labor & Employment Issues
Client Alert

Pitta LLP
For Clients and Friends
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NO LOVE IN THE AIR FOR MUNICIPAL WORKERS TERMINATED ON VALENTINE'S DAY

On February 14, 2022, Mayor Eric Adams fired more than 1,400 City workers who refused to get vaccinated or lost their bids for exemptions from the City's COVID-19 vaccination requirements by the February 11 deadline. According to Mayor Adams, his "goal was always to vaccinate, not terminate." Indeed, in the ten days leading up to Friday's compliance deadline and continuing through this past weekend, of the approximately 4,000 City workers on the chopping block, all but 1,430, or less than 1 percent of the Big Apple's approximately 400,000 civil servants, were fired for failing to submit proof of getting at least one shot. Included in the terminations are approximately 36 workers from the New York City Police Department, 25 from the Fire Department, 75 from the Department of Corrections, 40 from the Sanitation Department and 914 from the Department of Education ("DOE"). The terminations follow a decision by a New York State Supreme Court Justice declining to issue a temporary restraining order enjoining the City from separating the municipal workers who were non-compliant with the City's COVID-19 vaccine mandate. *MLC et al., v. City of New York et al.*, Index No. 151169/2022 (Feb. 10, 2022).

Over two dozen unions which comprise the Municipal Labor Committee ("MLC"), including the United Federation of Teachers, Uniformed Fire Officers Association, and the Police Benevolent Association, alleged in their complaint that the City's decision to "summarily" terminate the non-compliant City employees violated their right to due process. The MLC further contended that terminating these workers, who have already been subjected to months of leave without pay, and now lose health insurance for themselves and their families in the midst of a continuing pandemic, would run counter to the City's goal of ensuring the safety and health of the citizenry. Central to the lawsuit was the argument that if the City could deprive workers of their due process and civil service rights and protections, and summarily terminate them for non-compliance with a unilaterally implemented policy, then the City could circumvent due process rights and civil service protections in the future without accountability. According to the City, however, it defended the City Health Commissioner's vaccine order as a condition of employment, rather than discipline. As such, the City asserted that employees who chose to remain unvaccinated or who were denied an exemption were not entitled to a pre-termination due process disciplinary hearing. In a short form decision issued on February 10, 2022, the New York State Supreme Court agreed. Issuing the interim order for the court, and without entertaining oral argument, Manhattan State Supreme Court Justice Judy H. Kim found that the MLC "failed to demonstrate a sufficient likelihood of success on the merits, a reasonable risk of irreparable harm, or that the equities balance in their favor to justify such relief." 151169/2022, NYSCEF Doc. No. 52. Consequently, the City was free to effectuate the country's largest mass firing of municipal employees in connection with a vaccine mandate.

Additionally, one day after Judge Kim declined to grant the MLC's request for injunctive relief, the U.S. Supreme Court rejected an emergency application filed by several New York City DOE employees who sought to enjoin the City from terminating them following an allegedly unlawful religious exemption review process. *Keil, et al., v. City of New York, et al.*, 21A398. Justice Sonia Sotomayer rejected the request by the approximately 15 plaintiffs without issuing a written opinion or asking all the other Justices to participate in the decision. This denial is consistent with similar denials of emergency COVID applications from state or city employees by other Justices, such as Justice Amy Coney Barnett.

CONGRESS PASSES LANDMARK "ME-TOO" LEGISLATION

In a sign that bipartisanship is possible, the Senate last week passed a landmark piece of "me-too" legislation under the sponsorship of odd couple Senators Kirsten Gillibrand (D-New York) and Lindsay Graham (R-South Carolina). The legislation, previously passed by the House by a 335-97 vote and openly approved by the White House, was so widely popular in the Senate that it passed by a voice vote.

Most prominently, the new law, known as the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, calls for a wide ban on forced arbitration in sexual harassment and assault claims. The law bans employment contracts from containing mandatory arbitration language of such claims. Importantly, the law applies to "any dispute or claim that arises or occurs on or after . . . enactment," serving to nullify language in current contracts. Senator Gillibrand, long a champion of women's' rights in the workplace generally and for banning mandatory arbitration, said "no longer will survivors of sexual assault or harassment in the workplace come forward and be told that they are legally forbidden to sue their employer."

Business groups broadly opposed the law, as they believe that the arbitration process is faster and cheaper than courtroom resolution.

BIDEN ADMINISTRATION REQUIRES HEALTHCARE PROTECTIONS FOR LGBTQI+ COMMUNITY

On December 28, 2021, the Centers for Medicare and Medicaid Services ("CMS") and the Department of Health and Human Services ("HHS") issued the Notice of Benefit and Payment Parameters 2023 Proposed Rule which includes topics such as advancing standardized plan options, implementing network adequacy reviews, strengthening access to essential community providers and prohibiting discriminatory practices. With a public comment period which ended January 27, 2022, the proposed rule seeks, in part, to amend the nondiscrimination protections of the Patient Protection and Affordable Care Act ("ACA") to include discrimination based on "sexual orientation" and "gender identity." The proposed rule follows President Biden's Executive Order ("EO") issued in early 2021 and is consistent with previously released HHS guidance announcing HHS's intention to interpret and enforce Section 1557 of the ACA and Title IX's prohibition on discrimination on the basis of sex to include discrimination on the basis of sexual orientation and gender

identity as held in the 2020 Supreme Court's decision in *Bostock v. Clayton County, GA,* 140 S. Ct. 1731 (2020).

The recent change of course precedes a somewhat contradictory history, starting with HHS's May 2016 publication of a final rule broadening Section 1557 to include nondiscrimination protections based on two new categories, namely "termination of pregnancy" and "gender identity" ("2016 Final Rule"). The 2016 Final Rule required medical providers to perform and insurance providers to insure abortions as well as gender-transition procedures or otherwise face penalties for unlawful discrimination based on the new categories. However, in June 2020, HHS issued a new final rule eliminating the new categories it enacted in the 2016 Final Rule ("2020 Final Rule").

Subsequently, the Supreme Court held in *Bostock* that discrimination based on sex under Title VII of the Civil Rights Act of 1964 includes discrimination on the basis of "sexual orientation" and "gender identity." The Supreme Court further held that "[a]n employer who fires an individual merely for being gay or transgender defies the law." *Bostock*, 140 S. Ct. at 1754. President Biden's EO response to *Bostock* was to mandate that sex discrimination laws, including Title IX of the Education Amendments of 1972, as amended, should include a prohibition against discrimination on the basis of sexual orientation and gender identity. The EO directed agency heads, including the Secretary of HHS, to review all existing regulations and determine whether changes to the regulations were necessary to comport with the EO. Accordingly, on May 10, 2021, HHS declared that the meaning of "sex" in the ACA's antidiscrimination protections would include discrimination based on gender identity and sexual orientation. The Notice of Benefit and Payment Parameters 2023 Proposed Rule follows the EO directive and reflects HHS' May 2021 Notice tenets prohibiting qualified health insurance plans offered on the state and federal exchanges from discriminating against gay and transgender individuals.

Despite the several challenges to both the 2016 Final Rule and the 2020 Final Rule, based on the EO, there is a strong indication that the final rule, which is anticipated to be released in April 2022 by CMS and HHS, will follow the pre-2020 nondiscrimination protections prohibiting healthcare providers and health programs that receive federal funding from discriminating on the basis of sexual orientation or gender identity pursuant to Section 1557 of the ACA.

SEXUAL HARASSMENT VS. ALCOHOLISM – THE THIRD CIRCUIT SAYS HR GOT IT RIGHT

A recent decision from the U.S. Court of Appeals for the Third Court illustrates how a Human Resources Department can protect an employer from being burned in the clash of competing claims of sexual harassment and disability discrimination. In this case, the Appeals Court upheld summary judgment for the employer accused by a male employee of using his sexual harassment misconduct as a pretext to discharge him because of his alcoholism. *Yoho v. The Bank of NY Mellon Corp*., No. 21-1071 (3d Cir. Feb. 1, 2022).

Keith Yoho was a rising star in Bank of NY Mellon ("BNYM") until two sales conferences in Chicago and San Diego leading to complaints, made in accordance with BNYM's sexual harassment policies, that he commented about the "ass" and other attributes of several female co-workers, inviting one to his hotel room. BNYM's investigation was led by Thomas Galante, who is blind. On September 2, BNYM tentatively decided to discharge Yoho for violating its sexual harassment policy; on September 3, Yoho accessed BNYM's Employee Assistance Program regarding his alcoholism; on September 6, Yoho told his friend Tim McCormick about his call to the Program, who then told Yoho's direct supervisor; and on September 7, BNYM discharged Yoho. Yoho immediately sued alleging discrimination due to his alcoholism, spoilation of evidence (Galante lost recordings) and defamation when BNYM was contacted by a prospective employer.

On appeal of summary judgment for BNYM, the Third Circuit found no error and affirmed. First, Yoho's sexual harassment was undisputed and the Court saw no evidence of BNYM using Yoho's sexual misconduct as a pretext to fire him for his alcoholism, noting that the information and decision was tentatively made prior to Yoho reporting his alcoholism. Next, the Court rejected the claim of spoilation, characterizing the loss of recordings as "sloppy" at worst and inconsequential since nothing indicated the recordings contradicted Galante's testimony. Finally, the defamation claim failed because McCormick merely told the prospective employer that Yoho "ran a red light" which was true, and "just cause" is not alone defamatory. Accordingly, the district court correctly granted BNYM summary judgment and the Court of Appeals affirmed.

Please note that the City and State requirements for annual sexual harassment prevention training are not tolled by COVID. With employees heading back to the office, now is the time to ensure compliance. Please feel free to contact the Pitta LLP attorney with whom you work or any of our other attorneys in this regard.

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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