Labor & Employment Issues
Client Alert

Pitta LLP
For Clients and Friends
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NYC MAYOR SIGNALS EASED RESTRICTIONS FOR NYC VACCINE PASSPORT BUT NOT EMPLOYEE VAX MANDATE

Mayor Eric Adams announced this week that the City's "Key to NYC" Program (the "Program") will likely be terminated effective March 7, 2022. The Program, which became effective on August 17, 2021 by Emergency Executive Order 225 issued by then-Mayor Bill de Blasio, required individuals over 12 years old to show proof of vaccination in order to enter certain indoor establishments. Businesses included, but were not limited to gyms, restaurants, and commercial event and party venues, and specifically, businesses that provide on-premises catering services. However, at last report, the employee vaccination mandate continues unabated for now. Employers must require all resident employees to be vaccinated or meet the mandate medical or religious accommodation exception.

Mayor Adams announced that he intends to end the Program contingent on COVID-19 indicators continuing to show a low level of risk, and that he will make a final announcement on Friday, March 4, 2022. Regardless of the Adams Administration's decision, the City's private employer vaccine mandate remains in place. Thus, while *patrons* would likely no longer be required to show proof of vaccination in order to enter covered establishments, employees of indoor dining, fitness and entertainment/performance venues must still comply with the City's vaccine mandate to work on site unless covered by an approved medical or religious accommodation, just like employees in other industries. It is "imperative for businesses to continue to create a safe environment for their employees," explained the Mayor.

However, the mandate's asymmetry does foster some illogic, as Brooklyn Nets star Kyrie Irving can attest. Irving, unvaccinated, plays Net away games but not at home where unvaccinated visiting players remain on the court. Nevertheless, based on advice of the City's medical professionals, the employment vaccination mandates will continue for now.

SCOTUS NOMINEE JACKSON BRINGS A RECORD OF RESPECT FOR COLLECTIVE BARGAINING TO THE COURT

On February 25, 2022, President Joe Biden nominated Judge Ketanji Brown Jackson to the United States Supreme Court. In terms of a few of her most publicized workers' rights cases, four cases, in particular, have garnered attention, summarized below. While Judge Jackson issued more than five hundred decisions either as a District or Circuit Court Judge, these are some of her most well-known. Judge Jackson's decisions are detailed and highly technical, and evince a respect for the principles of collective bargaining.

In *Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth.*, 25 F.4th 1 (D.C. Cir. 2022), labor unions separately petitioned for review of an order of the FLRA, 71

F.L.R.A. 968, that adopted a new threshold for when certain federal employers must engage in collective bargaining with their employees' representatives. In a unanimous decision written by Judge Jackson, the Court of Appeals consolidated the petitions and held that a decision by the Federal Labor Relations Authority ("FLRA") to adopt the substantial-impact standard (a test the Trump FLRA adopted that requires bargaining only on topics with a "substantial impact" on working conditions for federal employees) rather than its previous de minimis standard (a test the FLRA had long adopted that required agencies to bargain with unions on policy changes that had "more than a *de minimis* impact" on employees) was arbitrary and capricious in violation of the Administrative Procedure Act ("APA").

In *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Nat'l Lab. Rels. Bd.*, 466 F. Supp. 3d 68, 73 (D.D.C.), *order amended on reconsideration*, 471 F. Supp. 3d 228 (D.D.C. 2020), a labor union brought an action against the National Labor Relations Board ("NLRB") under the National Labor Relations Act ("NLRA") challenging a "rule that prescribe[d] certain procedures that employers, employees, and labor unions ha[d] to implement with respect to the election of employee representatives for collective bargaining purposes." 471 F. Supp. 3d at 73. Judge Jackson held, in part, that the rule did not qualify as an exception to the notice-and-comment rulemaking requirement of the APA. Judge Jackson denied the NLRB's motion to transfer the case to the D.C. Circuit and its motion for summary judgment and granted the union's motion for summary judgment with respect to its claim that notice-and-comment rulemaking was required with respect to certain provisions of the rule. Judge Jackson held that the provisions of the rule that the union challenged were invalid because they did not comply with the APA requirement of notice-and-comment rulemaking and remanded the case to the NLRB for consideration in light of her opinion and order.

In *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018), *rev'd and vacated*, 929 F.3d 748 (D.C. Cir. 2019), four different unions brought suit against President Trump and other federal government officials challenging three Executive Orders ("EOs") issued by the President as conflicting with the Federal Service Labor-Management Relations Statute ("FSLMRS") and the Constitution. Judge Jackson held that a number of the provisions of the EOs were invalid because they "curtail[ed] the scope of bargaining" between federal agencies and unions in violation of the FSLMRS. The defendants appealed to the United States Court of Appeals for the District of Columbia Circuit where the D.C. Circuit vacated the District Court's judgment on the ground that the District Court lacked subject matter jurisdiction. The D.C. Circuit further held that the unions must pursue their claims through the statutory scheme established by the FSLMRS which calls for administrative review by the Federal Labor Relations Authority ("FLRA") followed by judicial review in the Court of Appeals.

In *Unite Here Loc. 23 v. I.L. Creations of Maryland Inc.*, 148 F. Supp. 3d 12 (D.D.C. 2015), a labor union filed suit against a food service employer under the Labor Management Relations Act ("LMRA") and moved to confirm an arbitration award and for attorney fees while the employer moved to vacate the award. Judge Jackson confirmed the award, holding that the district court would defer to the decision that the arbitrator made because it was based on an interpretation and application of the parties' collective

bargaining agreement after an arbitration proceeding in which the employer "fully participated." *Unite Here Loc. 23*, 148 F. Supp. 3d at 21.

In 2021, Judge Jackson was confirmed to the United States Court of Appeals for the D.C. Circuit. Before that, she served for eight and a half years on the United States District Court for the District of Columbia. Prior to serving as a federal judge, Judge Jackson worked on the U.S. Sentencing Commission and with the District of Columbia's Federal Defender Service. If confirmed, Judge Jackson will replace retiring Justice Stephen Breyer for whom she had clerked.

WOMEN TALLY A DECISIVE VICTORY IN THEIR BID TO BRING PAY EQUITY TO SOCCER

In the highly publicized case involving the United States Women's National Soccer Team ("USWNT"), which has been one of the most successful national teams in soccer, irrespective of gender, the team secured a tentative settlement agreement with the United States Soccer Federation ("USSF") stemming from the team's pay equity lawsuit initiated in 2019 by such USWNT stalwarts as Carli Llyod, Alex Morgan, and Megan Rapinoe.

The instant action stemmed from the pay disparity between the men's and women's World Cup Championships in 2018 and 2019, respectively. When France secured a 4-2 victory over Croatia in the 2018 Men's World Cup Final in Russia, the men's champion pocketed $38 million from FIFA, soccer's international governing body; in contrast, when the USWNT beat the Netherlands 2-0 in the 2019 World Cup Final in France the next year, it took home a paltry, by comparison, $4 million from FIFA. As such, the USWNT filed a collective action against the USSF alleging violations of the Equal Pay Act of 1963 ("EPA") and of Title VII of the Civil Rights Act of 1964 ("Title VII"). As alleged by the plaintiffs, the gross disparity in pay between the USWNT in comparison to the male counterparts of the United States Men's National Soccer Team ("USMNT"), who unquestionably did not enjoy the same success in domestic and international competitions, was the direct result of gender-biased policies contained in the contract terms the USSF had with the USMNT and USWNT.

Initially, on May 1, 2020, the United States District Court for the Central District of California granted the defendants' partial summary judgment motion dismissing the plaintiffs' claims under the EPA and a portion of the claims brought under Title VII. However, this decision prompted the parties to enter into a settlement agreement regarding the claims that survived. Furthermore, the persistence of the plaintiffs to achieve class certification and for judicial approval of the settlement, resulted in the instant matter proceeding to the United States Court of Appeals for the Ninth Circuit on April 14, 2021. Nearly one year later, the two sides were able to reach this global resolution.

As per the publicized terms of this agreement, the USSF will pay $22 million to the players of the USWNT who are part of this civil action, as well as an additional $2 million dollars into a fund designed to advance post-career goals and charitable efforts

related to women's and girls' soccer. Although the overall price tag falls short of the $67 million sought by the plaintiffs, this result has been widely applauded. This tentative agreement is contingent upon the USSF settling collective bargaining agreements with both USMNT and USWNT, as well as judicial approval.

RESTAURANT ADVOCACY ORGANIZATION FAILS IN ATTEMPTS TO "TIP" OVER U.S. DOL FINAL RULE FOR HOSPITALITY EMPLOYEES

The United States Department of Labor Wage and Hour Division ("DOL") released its final rule regarding proposed revisions to the tip regulations under the Fair Labor Standards Act of 1938 (FLSA) effective December 28, 2021. The final rule withdrew one portion of the Trump era FLSA tip regulations and revised the standard for determining when a tipped employee is employed in dual jobs under the FLSA ("Dual Jobs Rule") so that more employees will receive at least minimum wage. On February 22, 2022, the final rule survived a restaurant industry group's attempt to enjoin implementation as a federal district court held it merely reinstates the pre-Trump standard and effects no irreparable harm.

By way of background, the FLSA permits an employer to credit a designated portion of an employee's tips toward the employer's obligation to pay minimum wage so long as the employee performs certain tip generating work. However, if the combined direct wage and total tips received by an employee are less than the full minimum wage for all hours worked in a workweek, the employer must make up the difference. The Dual Jobs Rule clarifies that an employer may only avail itself of a tip credit when its tipped employees perform work that produces tips as well as work that directly supports tip-producing work, provided the directly supporting work is not performed for a substantial amount of time. The Dual Jobs Rule also established certain limits on the amount of time tipped employees can spend performing work that is not "tip-producing" and still be paid at the reduced cash wage applicable to employer's availing themselves of the FLSA tip credit provisions.

Previously, the DOL enforced the so-called "80/20," or "20%," Rule, which limited the amount of time (*i.e.*, no more than 20%) tipped employees could spend performing tasks related to their allegedly tip-generating duties, while still allowing their employer to claim a tip credit. However, during the Trump Administration, and specifically in December 2020, the DOL took the position that the 80/20 Rule was "unwise," "difficult to administer," and failed to "adequately consider the practical difficulties" of comply once. Now, the Biden DOL seeks not only to reinstate the 80/20 Rule but also to add on the new "30-Minute" Rule. This new addition would eliminate the availability of the tip credit when a tipped employee spends more than thirty continuous minutes performing work that is not considered tip-producing work. The classic restaurant examples of tip-related tasks include preparing items for tables so that the servers can more easily access them when serving customers or cleaning the tables, such as rolling silverware and napkins, and for bartenders, slicing and pitting fruit for drinks so that the garnishes are more readily available as drinks are mixed and prepared, *i.e.*, most preparatory tasks that do not involve customer interaction.

In December 2021, the Restaurant Law Center ("RLC"), an advocacy organization affiliated with the internationally recognized National Restaurant Association, filed suit seeking to have the Dual Jobs Rule invalidated as it allegedly conflicts with the language of the FLSA and the DOL purportedly exceeded its authority in promulgating it. In early February 2022, the RLC filed a motion for preliminary injunction to prevent the DOL's enforcement of the Rule. In denying the RLC's attempt to obtain injunctive relief, District Judge Robert Pitman concluded that the new Dual Jobs Rule is not substantially different than the decades old position the DOL has taken concerning the 80/20 Rule, and further noted that several federal courts of appeal have upheld the validity of the DOL's previous guidance. *Restaurant Law Center et al v. United States Department of Labor et al*, 1:2021cv01106, (W.D. Tex. Feb. 22, 2022). Finally, the court also held that the RLC failed to adequately establish irreparable harm to be suffered by employers as a result of the implementation and enforcement of the Dual Jobs Rule. Thus, at least for the time being, the Dual Jobs Final Rule remains in effect.

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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