Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
April 12, 2022 Edition

NYS LAW REQUIRING EMPLOYEE HANDBOOKS TO STATE "REPRODUCTIVE DECISION MAKING" RIGHTS AND REMEDIES VIOLATES 1ST AMENDMENT FREEDOM OF RELIGION

Compasscare, et al v. Cuomo, 19-CV-1409 (TJM) (N.D.N.Y. March 29, 2022) illustrates the tension between "progressive" social legislation and certain religion-based groups' vigorous insistence on First Amendment religious freedoms. In this case, New York State law requiring employers to include notice of employee rights to contraception, abortion, and other instances of "reproductive decision making" bowed to prohibitions against compelled speech protecting religious beliefs.

New York State Labor Law ("NYLL") § 203-e(6) provides that "[a]n employer that provides an employee handbook to its employees must include ... notice of employee rights and remedies" against discrimination or retaliation because of the employee's "reproductive decision making, including, but not limited to, a decision to use or access a particular drug, device, or medical service ..." Compasscare and two other plaintiffs provide counseling to pregnant women to convince them not to have abortions. These plaintiffs sued to strike the entire law prohibiting discrimination or retaliation against the exercise of reproductive rights in 2020 and senior U.S. District Court Judge Thomas J. McAvoy dismissed almost all of the action but enjoined enforcement of the employee notice provision pending final decision. On March 29, 2022, District Judge McAvoy revisited the issue, making the preliminary injunction final and permanent, pending appeal.

First, District Judge McAvoy determined that the "situation requires strict scrutiny," a very high standard. "Requiring that Plaintiffs also include in those handbooks a statement that the law protects employees who engage in behavior contrary to that promoted by the Plaintiffs would compel them to promote a message about conduct contrary their religious perspective," he explained. Applying strict scrutiny to the compelled speech, District Judge McAvoy held that § 203-e of the NYLL was not "narrowly tailored to promote a compelling Government interest." He found a compelling state interest, "since the right to privacy implicated in reproductive health care decisions are constitutional rights," but rejected the State's arguments that the law was sufficiently narrow. For example, information regarding NYLL § 203-e could be and has been disseminated by State advertising and posters without requiring "the Plaintiffs to produce such speech themselves ..." Accordingly: "Plaintiffs must prevail on their First Amendment claim with respect to the notice provision."

Tellingly, while agreeing to strike the handbook notice, District Judge McAvoy repeatedly decried Plaintiffs' attempts in their motion papers to expand their challenge to the protections of NYLL § 203-e in general, "the underlying purpose of Section 203-e, which is to limit employers' ability to make hiring and firing decisions based on

'reproductive health-care choices'." Rejecting a religious pass on anti-discrimination law, District Judge McAvoy understood "that Plaintiffs do not like these limits on hiring and discipline, but the Court has already concluded that those limitations do not violate the Constitution under current standards." He then added: "The Court will wait with the parties to see the results of their appeal." So will we.

THIRD CIRCUIT LIMITS ARBITRABILITY OF POST CONTRACT CLAIMS

On March 30, 2022, the United States Court of Appeals for the Third Circuit ("Third Circuit") issued a decision in *Pittsburgh Mailers Union Local 22 v. PG Publishing Co*., reversing previous circuit precedent that had inferred the survival of an arbitration clause following the expiration of a collective bargaining agreement. *See* Case No.: 21-1249 (3d Cir. March 30, 2022).

The revisited precedent is a 1994 Third Circuit decision in *Luden's Inc. v. Local Union No. 6 of Bakery, Confectionary, and Tobacco Workers' International Union of America*. In *Luden's*, following expiration of a collective bargaining agreement, the parties negotiated and thought they had reached agreement on a successor contract. Luden's attempted to memorialize the agreement in writing, but the union objected to the drafting of the wage scales. The union filed for arbitration but Luden's protested, arguing that the parties' arbitration agreement had expired. The Third Circuit determined that Luden's was bound to arbitrate, concluding that, in the labor context, parties will generally not want to abandon arbitration. The Court held that an arbitration agreement can survive expiration of a collective bargaining agreement unless: (1) both parties, in fact, intended the term not to survive, or (2) under the totality of the circumstances, either party objectively manifested intent to disavow or repudiate arbitration. Observing that neither party had expressed discontent with the arbitration provision during negotiations, the Court found an implied agreement to arbitrate. Notably, future Supreme Court Justice Samuel Alito dissented.

In the present case, PG Publishing and the Mailers Union were parties to labor agreements that expired in March 2017. Shortly before the contracts expired, PG Publishing informed the Mailers Union that, following expiration, it would continue to observe established terms and conditions of employment required by law but would decide whether to arbitrate grievances on a case-by-case basis. In 2019, during negotiations, the Mailers Union claimed that PG Publishing violated the expired contracts by failing to provide certain health insurance benefits. PG Publishing refused to arbitrate. The Mailers Union brought this action, contending PG Publishing was bound to arbitrate under *Luden's*.

A unanimous Third Circuit panel concluded that *Luden's* rationale was undermined by subsequent United States Supreme Court ("Supreme Court") decisions and therefore must be overturned. The Third Circuit compared the dispute to a pair of Supreme Court decisions involving retiree health benefits. In both cases, the Supreme Court found that such benefits did not survive expiration of collective bargaining agreements because the contracts were insufficiently clear as to whether those retiree benefits were intended to

survive. In *CNH Industrial N.V. v. Reese*, 138 S.Ct. 761 (2018), the Supreme Court noted that the retiree benefits clause itself did not have durational language, and therefore the Supreme Court concluded that the contract's general durational clause should govern. Applying that logic here, the Third Circuit found that the PG Publishing/Mailers Union arbitration clause lacked durational language and therefore the clause expired with the remainder of the contract.

The overturning of ***Luden's*** closes a route to arbitration that was unique to the Third Circuit. Interestingly, the decision appears to cut against the general trend in favor of arbitration. Going forward in the Third Circuit, parties desiring labor arbitration of potential issues occurring after contract expiration will need to affirmatively state as much in their agreements.

FEDERAL APPELLATE COURT REJECTS CHALLENGE TO FEDERAL EMPLOYEE VACCINE MANDATE

On April 7, 2022, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") issued a decision in *Feds for Medical Freedom, et al. v. Biden, et al.*, Case No.: 22-40043 (5th Cir. April 7, 2022) vacating the temporary restraining order issued by the United States District Court for the Southern District of Texas with respect to President Joseph R. Biden Jr.'s Executive Order mandating COVID-19 vaccinations for executive branch employees ("Appellate Opinion"). This decision determined that the lower court, in *Feds for Medical Freedom v. Biden*, No. 21-CV-0356 (S.D. Tex. January 21, 2022) lacked the necessary subject matter jurisdiction to issue such preliminary relief because the plaintiffs failed to exhaust the administrative procedures set forth in the Civil Service Reform Act of 1978 ("CSRA").

According to the Appellate Opinion, the CSRA provides federal, public sector employees with a panoply of administrative processes when facing some type of adverse employment action, be it counseling, demotion, suspension, or termination. These types of actions must first be challenged in front of the Merit Systems Protection Board ("MSPB"), and if an employee is dissatisfied with the determination from the MSPB, then he/she "is entitled to judicial review in the United States Court of Appeals for the Federal Circuit," as per § 7703 of the CSRA. According to the Appellate Opinion, the CSRA provides an elaborate remedial scheme "establishing in great detail the protections and remedies applicable to adverse personnel actions against federal employees, including the availability of administrative and judicial review." *Id.* at 7 (internal quotations omitted).

Based upon this precedent, the Fifth Circuit determined that the plaintiffs' attempt to overturn President Biden's Executive Order requiring COVID-19 vaccinations for all executive branch employees should have been initially challenged before the MSPB because the CSRA provides for exclusive, initial jurisdiction over the adjudication of disputes involving "working conditions." Thereafter, the MSPB is authorized to consider and remedy statutory or constitutional claims, "any of which might fully dispose of the case, if the employee receives a favorable decision from the MSPB." *Id.* at 14. Additionally, the Fifth Circuit acknowledged that its own jurisprudence recognizes "that

the CSRA precludes district court adjudication of federal and constitutional claims." *Id.* at 8. Moreover, in countering the argument averred by the plaintiffs that proceeding under the CSRA would deny them adequate access to have their complaints fairly adjudicated, the Fifth Circuit additionally highlighted that the Office of the Special Counsel ("OSC") has independent jurisdiction over, *inter alia*, "a prohibited personnel practice affecting a significant change in duties, responsibilities, or working conditions." *Id.* at 12 (internal quotations omitted).

It is likely that the plaintiffs will seek to appeal the Appellate Opinion either for an *en banc* review by the entire Fifth Circuit or seek certiorari to the United States Supreme Court.

RECENT RISE IN UNION-RELATED ACTIVITY WITH THE NLRB WHILE BUDGETARY RESOURCES REMAIN STAGNANT

According to the National Labor Relations Board ("NLRB" or "Board"), the first six months of Fiscal Year 2022 has seen a significant upswing in representation petitions being filed with the NLRB. During the first six months of Fiscal Year 2021, there had only been 748 union representation petitions filed with the Board; in contrast, this year, that number has risen to 1,174, which is a 57% increase. Similarly, the number of unfair labor practices filed with the NLRB during the first six months of Fiscal Year 2022 have increased by 14%. During this time frame in Fiscal Year 2021, there had been 7,255 unfair labor practice charges, as opposed to 8,254 for Fiscal Year 2022.

In the general theme of "doing more with less," the NLRB's budget has not seen an increase in nine years. Since 2013, the Board's operating budget has remained at $274.2 million, which, when accounting for inflation, translates into the current budgetary equivalent of $205.6 million. As a result of this lack of necessary funding, overall staffing at the Board has dropped by 39% and field office staffing has decreased by 50%. However, help may be on the way. According to the recent budget proposal disseminated by President Joseph R. Biden, Jr., he is calling for the NLRB's operational budget to be increased to $319.4 million, which is a 16% increase from the existing funding afforded to the Board.

According to the NLRB's General Counsel, Jennifer Abruzzo, the Agency urgently needs more staff and resources to effectively comply with its Congressional mandate because "there has been a surge in labor activity nationwide, with workers organizing and filing petitions for more union elections." The lack of appropriate funding has "caused a significant increase in the NLRB's caseload." We shall see how the budgetary wrangling plays out.

ANDREW TO THE RESCUE – TAPPED TO BE STAFF COUNSEL, NLRB

It is with mixed emotions that we announce that our partner Andrew Midgen will be leaving the firm to follow his professional dream to work for the National Labor Relations Board ("NLRB"). Andrew has been hired as staff counsel to recently appointed NLRB Member Gwynne A. Wilcox. Member Wilcox was nominated by President Joseph R. Biden, Jr. on May 27, 2021, confirmed by the U.S. Senate on July 28, 2021, and sworn in on August 4, 2021. Andrew will commence employment with the NLRB on May 9, 2022. Please join us in congratulating Andrew as he embarks upon a new, challenging and hopefully successful, stage in his professional career which, just as our law firm, has been dedicated to protect and advance the rights of workers. We will miss Andrew and we hope that one day he will return to work with all of us once again. Good luck Andrew and Godspeed.

HAPPY EASTER, HAPPY PASSOVER

Easter and Passover both mark rescue and renewal. Pitta LLP wishes all our friends and clients reflection and celebration this holiday season.

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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