Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
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BIDEN'S ROBB REMOVAL UPHELD BY COURT OF APPEALS

A panel from the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") has issued a decision in *Exela Enterprise Solutions, Inc. v. NLRB*, which rejected a challenge to President Biden's removal of former General Counsel for the National Labor Relations Board ("NLRB" or "Board"), Peter B. Robb. 21-60426 (5th Cir. April 22, 2022).

Generally, the General Counsel of the Board is appointed by the President, by and with the advice and consent of the Senate, for a term of four years. Peter Robb was appointed by President Donald J. Trump for a term running from November 17, 2017 to November 17, 2021. However, on January 20, 2021, newly-elected President Joseph R. Biden, Jr. terminated Robb's employment after he refused a request to resign his position. No President had ever before terminated an NLRB General Counsel, but Robb was especially disliked by the Board staff and labor for what they perceived as policies and decisions hostile to collective bargaining.

President Biden then designated Peter Sung Ohr as Acting General Counsel. Shortly thereafter, President Biden nominated Jennifer Abruzzo for the opening. Abruzzo was confirmed and began serving as General Counsel on July 22, 2021. While serving as Acting General Counsel, Ohr issued unfair labor practice complaints including one against Exela, which opposed the complaint on the merits, and also ultimately challenged Ohr's authority to issue the complaint, arguing that Robb's termination was unlawful.

The Fifth Circuit panel initially recognized recent Supreme Court precedent affirming the longstanding rule that courts generally presume an officer serves at the President's pleasure when a statute does not limit the President's removal power. The National Labor Relations Act ("NLRA") "clearly and unequivocally" provides removal protections to Board Members, stating that the President can remove them "for neglect of duty or malfeasance in office, but for no other cause." However, the Court found that the NLRA "is silent as to any tenure protections" for the General Counsel. The Court concluded that this distinction was a choice; "Congress knew how to give removal protections to the General Counsel [but] chose not to do so." Indeed, the Court recognized that Congress may have wanted to give greater protection to the quasi-legislative, quasi-judicial Board Members, than the Board's chief prosecutor.

Exela proffered numerous arguments seeking to avoid the clear statutory language, but the Court found none persuasive. The Court rejected Exela's contention that the statutory language creating a four-year term for the General Counsel precluded removal. The Court also rejected Exela's argument that the General Counsel is "tantamount to a member of the Board," recognizing that such a conclusion did not comport with statute, which "creates a stark division of labor" between the positions. The conservative Fifth Circuit lastly explained that while the NLRB was created to be an

independent agency, this did "not license federal courts to read into the statute for-clause limitations that Congress did not expressly include." Without Congressional limitation, the Court upheld the removal power as "essential" to the President's responsibilities and control over the Executive Branch.

With two Busch era Republican-appointed judges on the panel, Exela and other employers will be less likely to succeed in future challenges to Peter Robb's removal. As a result, future presidential administrations may well exercise their newly validated right to terminate lame duck NLRB General Counsels, whether Democratic or Republican.

McDONALD'S SAVES NLRB SETTLEMENT

Last week, fast-food giant McDonald's finally won approval for its settlement with the National Labor Relations Board ("NLRB") over the issue of whether the corporation could be held liable for claims that it conspired with its franchisees in a scheme to fight nationwide worker protests for a higher minimum wage. The United States Court of Appeals for the District of Columbia Circuit rejected claims by Service Employee International Union ("SEIU") and Fight for $15 that the 2019 settlement was inadequate because it did not resolve the overarching question of whether McDonald's could be held liable for unlawful labor practices by its franchisees. *Fast Food Workers Comm. v. NLRB*, D.C. Cir. No 20-1516 (April 22, 2022). The Court held, among other things, that the NLRB has discretion to fashion settlements with which interested parties do not agree.

On appeal, the SEIU and Fight for $15 also argued that NLRB Member William Emanuel, who was involved in the settlement, had a conflict of interest due to his affiliation with one of the law firms representing McDonald's and should have recused himself. The Court did not squarely address that issue because it had not been raised below.

The case arose from nationwide protests, known as the "Fight for $15," which began in 2012, to bring the question of raising the minimum wage to greater attention. As part of the protests, the group Fight for $15 filed complaints with the NLRB alleging that workers at McDonald's franchises were being fired for their concerted activity in support of the issue.

In response, in 2014, the Obama-era NLRB brought cases alleging that McDonald's was a joint employer with its franchisees and therefore liable for the adverse actions against the workers, thus requiring it to bargain with unions which were organizing individual stores and potentially exposing it to liability for labor law violations. McDonald's always denied wrongdoing and claimed that it never exercised sufficient control over franchisees to be considered a joint employer under any of the NLRB's traditional tests.

After several years of litigation and a record-setting 150-day trial, the Trump-era NLRB settled the matter in 2019. The settlement required more than two dozen McDonald's franchisees to pay about $170,000 to individual workers but did not address McDonald's joint employer liability, nor did it require McDonald's itself to pay any damages. The settlement came over the vociferous objections of Fight for $15, SEIU,

and the Administrative Law Judge who presided over the trial. ALJ Lauren Esposito called the settlement "incomprehensible" and a response to McDonalds' "purposeful delay." As such, the ALJ rejected the settlement. However, the full NLRB reversed that decision, a finding which the Court of Appeals affirmed.

NYC AMENDS (AND DELAYS EFFECTIVE DATE OF) SALARY DISCLOSURE LAW FOR JOB, PROMOTION, AND TRANSFER ADVERTISEMENTS

Late last year, the New York City Council passed Int. No. 1208-B, now Local Law 32 of 2022, which amended the City Human Rights Law ("HRL") to require City employers with four or more employees to include in job postings – including those for promotion or transfer opportunities – the minimum and maximum salary offered for any position located within New York City ("Law"). Failure to comply with the pay transparency requirements would constitute an unlawful discriminatory practice under the HRL. As enacted, the Law was scheduled to take effect on May 15, 2022, but that, and other provisions, have just been amended. Yesterday, the City Council's Committee on Civil and Human Rights passed Int. No. 134-A, which implements several significant amendments to the Law, and this afternoon the City Council passed the same ("Amendments").

Specifically, the Amendments:

- Extend the effective date of the Law to November 1, 2022;
- Clarify that the Law extends to both hourly and salary employees;
- Supplement the Law to reiterate that it does not apply to positions that "can not or will not be performed" in the City;
- Restrict job applicants, rather than current employees, from suing covered employers; and
- Bar penalties for first-time violations if an employer corrects the problem within 30 days.

The Amendments seek to balance the Law's main purpose of helping to prevent pay discrimination against women and minorities, while answering some of the business community's most urgent concerns. If you have any questions in navigating this delicate balance, please feel free to contact the Pitta LLP attorney with whom you work, or any of our other dedicated attorneys.

APPEALS COURT FLAGS CONTRACTOR FOR FAILING TO PAY SAFETY LABORERS PREVAILING WAGE AND BENEFIT RATES

After more than a decade long fight for prevailing wages, on April 14, 2022, the New York State Supreme Court, Appellate Division, First Department, upheld a trial court ruling that a class of construction flaggers, who worked on construction sites since April 26, 2011, are covered by the prevailing wage schedules for public works projects within New York. *Herman et al., v. Judlau Contracting, Inc.*, Index No. 652249/2017 (Sup. Ct., N.Y. Co. (Borrok, J.) May 11, 2021), ***aff'd*** Case No. 2021-03871 (N.Y. App. Div. 1st Dept. April 14, 2022). The Appellate Court's decision has significant implications for flaggers

state-wide who have generally been treated by construction industry employers as ineligible for the union wage and benefit rates, and often paid close to minimum wage.

Judlau Contracting Inc., a subsidiary of multi-billion-dollar infrastructure contractor OHL Group, employed the flaggers in New York City and the Capital Region on a variety of public works projects involving street excavation, and water main and sewer maintenance and repair projects. Rather than treating the flaggers as construction workers covered by the prevailing wage schedules for the specific jurisdiction, Judlau classified them as pedestrian crossing guards. This classification allowed Judlau to pay them at rates far below its other workers employed on their New York public works construction sites, notwithstanding the fact that the flaggers often assisted and worked alongside their higher paid colleagues and were subject to significant dangers while protecting the public and jobsite workers.

Eligibility for prevailing wage rates on local projects is determined by guidance issued by the New York State and City Comptrollers. Additionally, wage and benefit rates vary by county, are typically updated once or twice per year, and the worker classifications may change over time. Previous guidance from the New York State Department of Labor ("NYSDOL") has distinguished between "traffic control" personnel, for example, qualifying lineman, laborers, and painters who work on or near construction sites and primarily focus on ensuring safety, and "pedestrian flaggers," those who work at a distance from construction sites and primarily direct traffic.

In 2017, the flaggers filed a class action lawsuit challenging their crossing guard classification. Judlau claimed that, unlike workers in well-established trades such as electricians, plumbers, bricklayers, and roofers, the NYSDOL had not issued a separate prevailing wage classification for flaggers on New York public works projects. The Trial Court found that despite Judlau's characterization of the plaintiffs' work on its job sites, *i.e*., crossing guards, the evidence revealed that the workers performed flagging to ensure public safety within close proximity to construction sites, and often at construction zone barriers. The Appellate Court looked beyond both the title listed in the prevailing wage guidance and the defendant's characterization of plaintiffs as crossing guards and focused instead on the pivotal question of whether the specific nature of the work they actually performed required payment of prevailing wages. Distinguishing a prior case where flaggers' work involved pedestrian control and was performed away from construction sites, here, Judlau's employees' work was consistent with the type of qualifying work identified by the City Comptroller as entitled to prevailing wages – namely, work involving a protection of public safety and construction crews on or near a construction site. The respective courts agreed that the evidence was so clear that no trial was needed to evaluate the relevant facts. As such, these decisions represent a major step forward for all public worksite flaggers.

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