Labor & Employment Issues
In Focus
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For Clients and Friends
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THE SECOND CIRCUIT AFFIRMS REDUCTION OF CONTRIBUTION RATES FOR NYS RETIREE HEALTH INSURANCE

On April 27, 2022, the United States Court of Appeals for the Second Circuit ("Second Circuit") upheld New York State's 2011 decision to reduce the percentage rate of contributions to retired employees' New York State health insurance plan ("NYSHIP"). *See Donohue et al. v. Hochul, et al. ("Donohue III")*, __ F.3d __ (2d Cir. 2022). In affirming the judgment of the United States District Court for the Northern District of New York ("NDNY"), *Donohue et al. v. Cuomo, et al. ("Donohue I")*, 347 F. Supp. 3d 110 (N.D.N.Y. 2018), the Second Circuit largely adopted the reasoning of the New York State Court of Appeals ("State Court of Appeals") decision, in *Donohue et al. v. Cuomo, et al. ("Donohue II")*, 38 N.Y.3d 1 (2022). The Second Circuit concluded that the State's rate adjustment neither breached the applicable collective bargaining agreement ("CBA") with the Civil Service Employee Association, Local 1000 ("CSEA"), nor impaired any contractual obligations protected by the U.S. Constitution's Contracts Clause (Article I, Section 10, Clause 1).

As previously documented in an earlier edition of In Focus, this matter stemmed from the Great Recession, where in the context of a $10 billion budget deficit, the State and CSEA agreed to a multi-year CBA under which the State reduced its NYSHIP contribution rate, including, for example, from 90% for individual coverage and 75% for dependent coverage to 88% and 73%, respectively. Thereafter, the State legislature amended New York State Civil Service Law ("CSL") § 167 to authorize the State Civil Service Commission President to extend modified NYSHIP contribution rates for certain employees and retirees. After the State implemented the reduced NYSHIP contribution rates for the affected retirees in October 2011, CSEA and ten other public-sector unions brought lawsuits against the State. As relevant here, CSEA requested the Second Circuit to review the NDNY's decision to grant the State's summary judgment motions in which the NDNY concluded that the CBA unambiguously did not create a vested interest in perpetual and fixed percentage contribution rates for retirees. *See* 347 F. Supp. 3d at 129.

Before addressing the merits of the appeal, the Second Circuit had previously determined it could not proceed because it was unable to predict whether the State Court of Appeals would hold that CSEA could obtain relief under State law for breach of contract. The State Court of Appeals had never before taken a position on whether U.S. Supreme Court decisions outlining a framework for interpreting federal contracts for the existence of lifetime vested retiree benefits applied to agreements governed by State contract law. Those U.S. Supreme Court decisions stand for the propositions that courts interpreting CBAs governed by federal law may not infer lifetime vesting of retiree benefits from silence as to the duration of such benefits, *see M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015), and that such silence does not create ambiguity concerning that

issue. *See CNH Indus. N.V. v. Reese*, 138 S. Ct. 761 (2018). Given the fact that the Appellate Division for the Second and Third Departments took divergent approaches in applying *Tackett* and *Reese* to contracts governed by State law, the Second Circuit certified to the State Court of Appeals: (i) whether an inference of lifetime vesting could be gleaned from the language of the CBA, or, if not, whether said language was sufficiently ambiguous to permit the Second Circuit to consider extrinsic evidence as to whether it created such a vested right; and (ii) if the CBA creates a vested right, does the State's reduction, as per CSL § 167, negate such a vested right?

The State Court of Appeals, in answering the first certified question determined that none of the CBA provisions identified by CSEA, either singly or in combination, establish a vested right to lifetime fixed premium contributions. The State Court of Appeals further ruled that judicial inferences in favor of finding that NYSHIP contributions are vested for life are inconsistent with the State's contract interpretation principles, which are consistent with *Tackett*. Extending this rationale, the Second Circuit similarly concluded that the NYSHIP rate reductions did not violate the U.S. Constitution's Contracts Clause because the CBA failed to unambiguously provide retirees with the vested right to fixed NYSHIP contribution rates for the life of the retiree. The Second Circuit, markedly, did not automatically adopt the State Court of Appeals decision, but performed its own analysis, explaining that State and federal law might not be identical. However, on this issue, the federal court would easily agree with the State Court of Appeals that had, in essence, adopted the federal rule of contract construction.

Finally, the Second Circuit reserved decision on ten related cases because it would need to scrutinize the underlying CBAs negotiated by those other unions to determine if the applicable language creates an inference of lifetime vested benefits in light of the principles applied in *Donohue I, II, and III*.

ORDER UP: NLRB REGIONAL DIRECTOR SERVES COMPLAINT AGAINST STARBUCKS ALLEGING UNFAIR LABOR PRACTICES IN BUFFALO

The National Labor Relations Board ("NLRB" or "Board"), by the Regional Director for Region 3 located in Buffalo ("RD"), recently brought an Unfair Labor Practice ("ULP") complaint against Starbucks Corp. ("Starbucks"), alleging over 200 violations of the National Labor Relations Act of 1935 ("NLRA" or "Act"), all of which arose out of the organizing campaign by Starbucks Workers United ("Union") that occurred in a Starbucks' store located in Buffalo.

The ULPs, as alleged by the RD, include Starbucks' attempts to quell the growing pro-Union sentiment in this Western New York location. Specifically, the RD contends that Starbucks threatened and intimidated workers by closing down Starbucks locations in the area, by reducing workers' compensation, by discriminatorily enforcing company policies against Union supporters, by surveilling all of its workers in this location, and by terminating certain Union advocates. Starbucks denies the claims and has filed its own charges against the Union.

This ULP petition, the basis of which relies on the Union's over 100 charges filed against Starbucks, comes on the heels of Starbucks conducting a number of "captive audience" meetings with its employees called "partners," where they express anti-union views. Further, Starbucks announced that it would be increasing pay and offer increased training opportunities for its employees, but only for its non-unionized locations. In fact, on a recent earnings call with its investors, current Chief Executive Officer Howard Schultz expressly stated: "The union contract will not even come close to what Starbucks offers."

Remedially, the RD is seeking reinstatement of any terminated employee and training of managers concerning workers' rights. In addition, the RD aims to require Starbucks' executives, including CEO Schultz, who has been notoriously anti-union throughout his various stints helming this company, to hold a meeting with all employees at this location, which would be videotaped and distributed, and have them read a notice of employees' rights at this meeting.

NYS ATTORNEY GENERAL REACHES SETTLEMENT WITH MARRIOT MARQUIS REGARDING SEVERANCE PAY

Last week, New York State Attorney General Letitia James reached a settlement with Marriot International, the corporate parent entity that operates the famed Marriot Marquis Hotel located in Times Square ("Marriot") regarding severance payments due and owed to non-union employees who were terminated in March 2021. According to Ms. James' office, the settlement amount totals $2.9 million, covering over 500 former employees of Marriot who were promised, but did not receive, severance benefits equal to those provided to unionized employees.

The genesis of this dispute arose from Marriot's representation that it would provide the same or better severance benefits awarded to the unionized work force of Marriot at this location, most of whom are represented by the Hotel and Gaming Trades Council ("HTC"). According to the New York State Attorney General, it discovered that Marriot failed to live up to this promise. "Marriott fired hundreds of employees last year due to the pandemic and, to add insult to injury, deprived them of the financial security they needed during that critical time," said Ms. James in an official statement from her office. She added: "No individual should ever feel the hopelessness that these workers felt when Marriott failed to deliver the severance pay they were promised."

The instant settlement of this dispute comes on the heels of the unionization of this Marriot property, which for decades had remained non-union. However, in the face of recent organization, Marriot had promised to provide the same or better severance benefits to its non-unionized work force as those received by its HTC-represented employees.

Spurred on by internal complaints from non-unionized workers exposing this discrepancy in severance benefits, Ms. James' office initiated an investigation into this

issue and determined that HTC-represented workers received more generous severance benefits than the non-union employees. According to its findings, Marriot did not provide 565 of the 728 hourly employees with the same or better benefits as union workers, and therefore Marriot violated New York State Executive Law by failing to live up to its previous promise. According to the New York State Senator who represents the geographic district where the Marriot Marquis is located, Brad Hoylman: "This agreement is a massive win for workers across New York and sends a strong message to corporations who do business in our state: You will be held accountable."

PUT YOUR MONEY WHERE YOUR MOUTH IS: U.S. HOUSE OF REPRESENTATIVES VOTES FOR STAFFERS' RIGHT TO UNIONIZATION

On Tuesday, May 10, the United States House of Representatives ("House") approved measures that would allow congressional staffers to organize in both chambers. This latest effort by Democrats, including the President, furthers their previously-expressed position that they are unabashedly pro-union.

Currently, congressional staffers are not unionized, but have had the opportunity to do so, pursuant to the Congressional Accountability Act of 1995, which requires both the House and the United States Senate ("Senate") to pass resolutions authorizing the same. The impetus for this renewed effort to permit organization of congressional staffers, as led by the Congressional Workers Union ("Union"), stems from an overall effort by workers to unionize throughout the country, as well as a groundswell of support from Democratic campaign staffers, who have become unionized. The Union, as a basis for this effort, points to the low pay and long hours many congressional staffers endure during their respective tenures working for the House and Senate. Additionally, proponents of this measure point to the fact that countless other federal employees, working in various federal governmental agencies and for various Cabinet departments, have been organized for decades.

With the House measure passed, attention now turns to the Senate, which currently bears a 50-50 split between Democrats and Republicans.

REMINDER: NYC EMPLOYER NOTICE TO EMPLOYEES OF ELECTRONIC MONITORING IS IN EFFECT

Please note, as reported in prior issues of In Focus, effective May 7, New York City now requires all New York City based employers, regardless of size, to provide notice to their employees if they monitor employee telephones, emails or internet access. For more information, please do not hesitate to contact the Pitta LLP attorney with whom you work or any of our professionals.

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