Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
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THE SECOND CIRCUIT REJECTS CONNECTICUT POLICE UNION'S CHALLENGE TO POLICE TRANSPARENCY LAW

On June 2, 2022, the United States Court of Appeals for the Second Circuit ("Second Circuit") denied an appeal by the Connecticut State Police Union ("CSPU") seeking a preliminary injunction against the enforcement of Connecticut's Freedom of Information Act ("FOIA") in connection with materials in a Connecticut State Troopers' ("Troopers") personnel folder involving "exonerated, unfounded, or not sustained" disciplinary investigations against them. Pursuant to the CSPU's collective bargaining agreement ("CBA"), these types of materials had been contractually excluded from disclosure under FOIA.

In the wake of the murder of George Floyd in the summer of 2020, Connecticut passed Public Act 20-1: An Act Concerning Police Accountability ("Act"), which provided that the provisions of FOIA "prevail in the event of a conflict with a provision in a collective bargaining agreement pertaining to the disclosure of disciplinary matters or alleged misconduct that would prevent the disclosure of documents required under FOIA." *Conn. State Police Union v. Rovella*, Case No.: 20-3530, (2d. Cir. 2022), p. 6-7. Shortly thereafter, the CSPU initiated the instant lawsuit seeking injunctive relief on the grounds that the Act interfered with the contractual obligations set forth in the CBA, in violation of the U.S. Constitution's Contracts Clause (Article I, Section 10, Clause 1) ("Contracts Clause"). In finding against the CSPU, the Second Circuit applied its three-part standard when analyzing alleged Contract Clause violations; specifically: "(1) whether the contractual impairment is substantial, (2) whether the law serves 'a legitimate public purpose such as remedying a general social or economic problem' and (3) whether the means chosen to accomplish that purpose are reasonable and necessary." *Conn. State Police Union*, p. 14.

In focusing primarily on the second and third elements of the above-stated standard, the Second Circuit determined that the repealing of the protections contained in the CBA "served two legitimate public purposes: ensuring transparency and accountability of law enforcement and promoting FOIA's strong legislative policy in favor of the open conduct of government and free public access to government records." *Conn. State Police Union*, p. 16. The Second Circuit then determined that rescission of these contractual, privacy protections in the CBA constituted a reasonable and necessary impairment. In coming to this conclusion, the Second Circuit presumed the Act to be lawful because Connecticut was not "breaching a contract . . . like a private party who reneges to get out of a bad deal," but rather was "governing, which justifies impairing a contract in the public interest." *Conn. State Police Union*, p. 20. Further, since the CSPU could not present any compelling evidence that the Act was unreasonable or unnecessary, the Second Circuit upheld the constitutionality of the Act.

This decision by the Second Circuit largely tracks a February 2021 decision involving police unions of the New York City Police Department by this same court that determined New York State's rescission of similar, privacy protections contained in New York State General Municipal Law § 50-a was lawful given the public need for greater transparency surrounding investigations into alleged police misconduct.

CRYPTO STRIKES BACK-LAWSUIT CHALLENGES DOL CRITICISM OF CRYPTOCURRENCY INVESTMENTS IN 401(K) PLANS

After months of warnings from the U.S. Department of Labor ("DOL") and heightening scrutiny of individual pension plan investments in cryptocurrencies, a leading cryptocurrency company has struck back with a complaint in the U.S. District Court for the District of Columbia ("Complaint") against the DOL and Secretary of Labor Martin J. Walsh. The Complaint by Forusall, Inc. asks for declaratory and injunctive relief on the grounds that the DOL's Compliance Assistance Release No. 2022-01, "401(k) Plan Investments in 'Cryptocurrencies'" ("Release"), critical of such investments, violates the Administrative Procedure Act ("APA") rulemaking requirements and its arbitrary and capricious standards. *Forusall, Inc. v. U.S. Dept. of Labor et al*, Case No. 22-CV-01551 (D.D.C. June 2, 2022).

DOL issued the Release on March 10, 2022. In the Release, DOL expresses "serious concerns about the prudence of a fiduciary's decision to expose a 401(k) plan's participants to direct investments in cryptocurrencies" and the like; "cautions plan fiduciaries to exercise *extreme care* before they consider adding a cryptocurrency option to a 401(k) plan's investment menu . . .;" and warns plan fiduciaries that "they should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks . . ." ("Emphasis added).

The Complaint seeks to vacate the Release and enjoin DOL from "taking any action" in furtherance of the Release which Forusall alleges was issued without compliance with the APA's notice and comment requirements for rulemaking, is arbitrary and capricious, and exceeds DOL's statutory jurisdiction, authority, or limitations. In support of its challenge, the Complaint alleges that the Release does not mention the many benefits of cryptocurrency, owned by "about 46 million Americans" or "17% of the adult population" in Bitcoin alone, and comprises "a small portion" of the portfolios of Harvard, Yale, and Brown Universities. and University of Michigan. Moreover, the Complaint unfavorably contrasts the Release with President Biden's March 9, 2022 "Executive Order on Ensuring Responsible Development of Digital Assets" which Forusall sees as taking an affirmatively positive approach to development of cryptocurrency investments globally. In contrast, the Complaint alleges that DOL created a new stricter standard of care, "extreme care" instead of "prudence," and solely for cryptocurrency. Critically, the Complaint characterizes the Release as a *de facto* "rule" and alleges that DOL arbitrarily and capriciously avoided the APA's rule notice and comment requirements based on bias and political expediency, in order to evade months of input from stakeholders, all in violation of DOL's authority under the APA. Finally, the Complaint

alleges harm from the chilling effect on the cryptocurrency industry of the DOL's alleged "threat" of investigation.

DOL will soon answer or move to dismiss, but the Release and the Complaint may have broader consequences. Paragraph 63(d) of the Complaint asks the Court to declare, "that the DOL's investigative authority is limited to investigating violations of Title I of ERISA, and may not be used for any other purposes, including but not limited to, harassing or intimidating individuals, imposing costs on individuals for taking lawful action, or otherwise using its investigatory authority to seek adherence to substantive rules that it has not set forth in regulatory guidance." As the Complaint warns: "While this lawsuit arises in the context of cryptocurrency, unless the principles at stake here are addressed to require DOL to operate strictly within the limits of its legal authority and to follow the law in undertaking agency actions, tomorrow unlawful federal agency action could just as easily extend to any other type of investment or investment strategy that senior officials at DOL (in this or any future administration) do not find to be entirely to their liking. Indeed, DOL is currently in the process of reversing course on a prior rule it issued (in that instance, through notice and comment rulemaking), characterizing the prior rule as having improperly singled out environmental, social and governance (ESG) investments. Defined contribution plans governed by ERISA hold approximately $10 trillion in assets – and where those assets may be invested should not be subject to the arbitrary whims of an agency that has no such authority."

ELECTRONIC POSTING REQUIRED BY NLRB DUE TO COVID-19 RELATED CLOSURES

Last week, the National Labor Relations Board ("NLRB" or "Board"), in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), provided a more expansive notice-posting requirement for an employer covered by the National Labor Relations Act ("Act" or "NLRA") when it commits an unfair labor practice ("ULP"). It is the general rule that notice-postings must be done within 14 days after an employer learns from the Board that there is such a requirement stemming from an ULP and must be done physically on the premises of the employer and via email, concurrently. However, due to COVID-19 related restrictions and closures of some workplaces, the Board has had to tackle this new wrinkle to an old issue.

Prior to this decision, the previous rule regarding electronic postings was set forth in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020) and provided that the 14-day window period for posting of violation notices need only commence when the physical location of the employer reopened and a substantial compliment of the work force had returned to the office. As such, any electronic transmission of the notice posting would not begin until 14 days after the two previously-stated circumstances had occurred.

However, in *Paragon Systems, Inc.*, the Board stated that this employer was required to post notices of violations by electronic means within 14 days after receipt of its decision because its facilities were closed and/or only partially occupied due to COVID-19 related restrictions. The Board stated, in addressing concerns raised in a dissenting

opinion from its Republican-appointed members: "We find that the remedial benefit of notifying employees of unfair labor practices committed against them, and the steps that will be taken to remedy those violations, outweigh our colleagues' concern that the combined notice-posting period will extend beyond 60 days." Nevertheless, this decision did not expressly overturn *Danbury Ambulance Service, Inc.*

NEW YORK CITY COMPTROLLER PROMULGATES PRELIMINARY PREVAILING WAGE RATE SCHEDULES FOR 2022-2023

Workers in New York City employed by a contractor or subcontractor performing certain types of work on a New York City public works projects, such as a public school, City street, City park, or subway station, or for City agencies, are entitled to prevailing wages and benefits under New York State Labor Law ("Labor Law") Articles Eight and Nine. The wage and benefit rates are set annually by the New York City Comptroller for each trade or occupation associated with work performed on said government-funded work sites.

The Comptroller's Bureau of Labor Law recently updated its website and posted preliminary schedules for prevailing and living wages for public comment as are listed below:

- Construction Worker & Apprentice Prevailing Wage Schedules (covered by Article 8 of the Labor Law and formerly known as 220);
- Building Service Employee Prevailing Wage Schedule (covered by Article 9 of the Labor Law and formerly known as 230); and
- NYC Service Contractors Prevailing Wage and Living Wage (covered by New York City Administrative Code § 6-109).

Please note that the final schedules will be published on July 1, 2022 and have an effective period from July 1, 2022 to June 30, 2023. Please also note the lists of employers and buildings in above-stated schedules and on the Comptroller's website are for informational purposes only.
