Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
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PBGC ISSUES FINAL RULE TO RESCUE DISTRESSED MULTIEMPLOYER PENSION PLANS

Prefaced by releases from the U.S. Department of Labor ("DOL"), the Pension Benefit Guarantee Corporation ("PBGC") and the White House, on July 8, 2022 the PBGC formally published a final rule that it claims will allow eligible but currently financially troubled multiemployer pension plans to become solvent and pay full benefits through at least 2051. The rule becomes effective August 8, 2022.

Congress approved $94 billion to support such plans as part of the 2021 American Rescue Plan, alarmed at the increasing rates of withdrawal, over 200 plans projected to become insolvent, and cuts to retiree benefits. The PBGC Final Rule, also known as the Special Financial Assistance ("SFA") Program, creates an application and administrative process to implement that support, after having received numerous comments in response to the PBGC interim rule announced in July 2021. Notable features of the SFA Program include:

- Interest rates to determine the long-term value of SFA assets that more realistically reflect the conservative nature of permitted SFA investments and a different rate for non-SFA assets.

- Plans may invest up to 33% of SFA assets in "return seeking" investments such as publicly traded equities, the remainder in high quality fixed income investments.

- Special interest rates to determine the amount of an employer's Withdrawal Liability for plans receiving SFA money, subject to an additional 30-day public comment period.

Providing assistance valued at $74-91 billion but at a currently uncertain cost, PBGC claims the SFA Program will restore cut benefits to more than 80,000 retirees and prevent cuts for 2-3 million others. Pitta LLP will provide a detailed analysis of the 191 page SFA Program final rule in its upcoming Employee Benefits in Focus edition.

DOL ISSUES STATEMENT PROTECTING WOMEN'S REPRODUCTIVE HEALTH DECISIONS POST DOBBS

On Friday, June 24, 2022, in the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022), the U.S. Department of Labor ("DOL") released a statement in which the U.S. Secretary of Labor Marty Walsh reminded Americans that "[a]ccess to abortion and all other personal reproductive choices

is not only an issue of health and personal liberty, but also squarely an economic issue that determines the welfare of working women and their families." While the DOL's Wage and Hour Division ("WHD"), which enforces the Family and Medical Leave Act ("FMLA"), has not yet issued updated guidance since the Supreme Court overturned *Roe v. Wade*, several laws still govern employers' employment decisions that are impacted by an employee's decision to undergo an abortion.

For example, FMLA generally provides 12 work weeks of unpaid leave each year for eligible employees to treat or recover from their own serious health condition or to care for a spouse, child, or parent because of a serious health condition. Serious health conditions include any "illness, injury, impairment, or physical or mental condition" that involves "inpatient care or continuing treatment by a health care provider." 29 C.F.R. §§ 825.114 and 825.115. Additionally, FMLA implementing regulations ("Regulations") define "continuous treatment" to include any period of incapacity due to "pregnancy or for prenatal care." 29 C.F.R. §§ 825.115(b). Furthermore, the Regulations emphasize that under circumstances where an expectant mother is unable to work due to prenatal care or a condition, an employer may be required to offer FMLA "before the birth of the child." 29 C.F.R. §§ 825.120(a)(4). Indeed, Congress considered as possible serious health conditions "…miscarriages, [and] complications or illness related to pregnancy, such as severe morning sickness ..." S.Rep. No. 3, 103rd Cong., 1st Sess.1993, 1993 U.S.C.C.A.N. at 30-31. Thus, it appears WHD will enforce FMLA against employers who deprive eligible employees of protected leave where an abortion results in an overnight stay, or for continuing physical, emotional, or psychological mental health treatment following such a procedure, regardless of whether the underlying procedure is protected under state law following *Dobbs*.

Additionally, protections are afforded to pregnant employees pursuant to the Pregnancy Discrimination Act ("PDA"), which amended Title VII of the Civil Rights Act of 1964 to prohibit employers from taking adverse employment actions "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). Indeed, in prior frequently asked questions and answers, the U.S. Equal Employment Opportunity Commission ("EEOC") emphatically opined that "an employer cannot discriminate in its employment practices against a woman who *has had or is contemplating having an abortion*." *EEOC Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 34 (1979) (emphasis added). The EEOC reaffirmed its position in its 2015 Enforcement Guidance on Pregnancy Discrimination and Related Issues by stating that "Title VII protects women from being fired for having an abortion or contemplating having an abortion." This agency position is consistent with the PDA's legislative history, in which legislators stated that "no employer may … fire or refuse to hire a woman simply because she has exercised her right to have an abortion." H.R. Conf. Rep. No. 95-1786, at 4 (1978), *as reprinted in* 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766. However, while terminating an employee solely for a making a reproductive health decision would be unlawful under federal law, effectuating an adverse employment action against the same employee for

violating a putative state law prohibiting abortion, *i.e*., being *convicted* of a crime (rather than being charged, which carries its own legislative limitations), might survive scrutiny post-*Dobbs*.

NLRB GENERAL COUNSEL LOOKS TO ELIMINATE CAPTIVE AUDIENCE MEETINGS, RAISES REPUBLICAN IRE

In another example of the Biden National Labor Relations Board's ("NLRB" or "Board") pro-Union bent that has generated growing controversy, the NLRB General Counsel ("GC") issued a memo to NLRB Regional Directors advising of her intent to ask the full NLRB to bar employers from holding so-called "captive audience" meetings. NLRB Memo 22-04 (April 7, 2022). https://www.nlrb.gov/guidance/memos-research/general-counsel-memos (the "Memo"). GC Jennifer Abruzzo said that, notwithstanding seventy-five years of NLRB precedent permitting such meetings under certain circumstances, such meetings are inappropriate under current labor law. Republicans are pushing back, citing precedent.

Captive audience meetings occur when an employer, on working time, calls a mandatory meeting at which bargaining unit members are typically lectured about the disadvantages of unionism and "encouraged" to vote against the Union. Under the terms of the Memo, the GC will seek to bar such meetings unless the employer provides specific assurances that the meetings are completely voluntary. It should be noted that the Memo is not a change in the law, but merely an indication of how the GC will seek to change the law.

Under current law, employers are permitted to hold mandatory meetings and to express their negative views towards Union membership, discuss how elections are run, how collective bargaining works, and its view of how a union affects the relationship between worker and employer. In response to the current status of the law, the GC's Memo notes that while this is the state of the law, it has not always been so and is not in keeping with her view of the Congressional intent underpinning the nation's labor laws. Rather, the GC believes that the law was meant to address the fundamental inequality of power between workers and management. Moreover, she argues that captive audience meetings have routinely become threatening in tone.

Because of this, the GC is looking for a test case in which the new Democratically controlled NLRB can be asked to reconsider current law and find that meetings where workers (1) are forced to convene on paid time or (2) are cornered by management while performing their job duties are inherently coercive and a violation of the employees' Section 7 rights. To partly address these issues, the GC wants the NLRB to adopt a rule that the employer must convey to employees that their attendance is voluntary at these meetings. Any changes in NLRB precedent must be approved by the full NLRB, which can only happen in the context of charges being filed and a decision eventually appealed to the full Board. That opportunity may come as employees of Apple Inc. in Atlanta

recently filed unfair labor practice charges alleging that Apple unlawfully interfered with an NLRB election petition for their unit by holding mandatory anti-union meetings.

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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