Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
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EEOC UPDATES GUIDANCE ON EMPLOYER RESPONSES TO COVID-19

As COVID-19 variants spike and Americans return to the physical workplace, the U.S. Equal Employment Opportunity Commission ("EEOC") updated its Technical Assistance Questions and Answers on July 12, 2022 (the "Q & A"), captioned "What You Should Know About COVID-19 and the ADA, The Rehabilitation Act, and Other EEO Laws." Notably, the Qs & As advise that employers may require testing if testing is a "business necessity," notwithstanding prior guidance and myriad court decisions that "do not affect any statements made in this publication ..." *Id.* at A. 6.

Q & A A.6 states that a COVID-19 test "is a medical examination within the meaning of the ADA" (Americans with Disabilities Act). Therefore, any mandatory testing of employees must be "job related and consistent with business necessity." The EEOC advises that employers' testing "will meet the 'business necessity' standard when it is consistent with guidance from Center for Disease Control and Prevention ("CDC"), Food and Drug Administration ("FDA"), and/or state/local public health authorities that is current at the time of testing." Other "possible considerations" in determining "business necessity" include the level of community transmission, the vaccination status of employees, the presence and degree of any "breakthrough" infections and the ease of transmission and severity of illness caused by the current COVID-19 variant.

Q & A C1 adds that employers may screen job applicants for symptoms of COVID-19 after making a conditional job offer or pre-offer if required of everyone entering the workplace. An employer may withdraw an offer if "(1) the job requires an immediate start date, (2) CDC guidance recommends the person not be in proximity to others, and (3) the job requires such proximity to others ..." Concern "for an applicants' well-being" because the person is older, pregnant or has an underlying health condition, does not justify delay or withdrawal of employment. Qs & As C4 and 5. Similarly, an employer who knows an employee has a medical condition that would make the employee more likely to become severely ill if contracting COVID-19 may not limit that person's employment unless the employee requests an accommodation or poses a direct threat to health and safety that cannot be sufficiently reduced by reasonable accommodation absent undue hardship. G-4,5.

The EEOC also updated its Qs & As on "Title VII Religious Objections to COVID-19 Vaccine Requirements," (L1-6) but broke no new ground on the principle that employers must attempt to accommodate an employee's or applicant's sincerely held religious belief or practice absent undue hardship. An employer may make a limited factual inquiry into the sincerity or religious nature if it has an objective basis for the inquiry. Religion remains broadly defined and sincerity remains "largely a matter of individual credibility." Factors undermining sincerity include inconsistency (though an

employee's beliefs need not be entirely consistent and may change over time); timing (employee finds religion after a prior non-religious denial); or whether the accommodation is also desirable for non-religious reasons. Employers may deny a religious accommodation if it objectively causes "undue hardship," defined as even a "*de minimus*" cost. However, given recent U.S. Supreme Court sensitivity to religious interests, that standard may soon rise to the same higher level as a disability accommodation. Finally, the EEOC reminds employers that an accommodation may be modified or revoked over time depending on evolving circumstances, provided "an employer should discuss with the employee any concerns it has about continuing a religious accommodation before revoking it."

Please feel free to contact the Pitta LLP attorney with whom you work if you have any questions concerning this highly sensitive, evolving area of compliance. The Q & A may be found here: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission (eeoc.gov)

THIRD CIRCUIT COURT OF APPEALS UPHOLDS UNIONS' RIGHT TO KEEP DUES PAID PRE-*JANUS*

In 2018, the United States Supreme Court ruled in *Janus v. American Federation of State, County and Municipal Employees, Council 31* that mandatory "fair share" fees for public employees represented by unions, but who were not members and did not want such representation, were unconstitutional, overruling forty years of precedent. Since *Janus*, the anti-union groups behind that case have brought a series of actions in the federal courts around the country seeking to expand that ruling to find that such employees could recoup the fees they had paid prior to the decision. In each case, the courts have ruled in favor of the unions. On July 20, 2022, the United States Circuit Court of Appeals for the Third Circuit, based in Philadelphia, joined its brethren and ruled in favor of the American Federation of State, County, and Municipal Employees Council 13 ("Council 13" or "Union") in finding that Pennsylvania public employees represented by the Union are not entitled to a retroactive refund of such fees. *David Schaszberger et al. v. American Federation of State, County and Municipal Employees Council 13,* case number 21-2172 (July 20, 2022).

Council 13, which represents over 65,000 local and commonwealth workers, was following the law as it existed prior to *Janus* and therefore did not have to refund the fees, said the Court in a decision written by Circuit Judge Patty Shwartz. The case had come from a United States District Court in Scranton, where the District Judge had dismissed a proposed class action finding that the Union had a "good-faith" defense in that it was following the laws in place at the time. The Court specifically noted that it was joining the Second, Sixth and Seventh Circuit Courts of Appeals in upholding the Union's good faith reliance on then existing law. The Court also distinguished a prior Third Circuit decision on this issue as not controlling because the three-member panel had decided the case 2:1 with three different rationales.

UNION PETITIONS RISE DRAMATICALLY

Perhaps stimulated by highly publicized union campaigns at Starbucks and Amazon, among other large national businesses, the rate of union petition filings at the National Labor Relations Board ("NLRB") has increased at a rate of 58% over the period October 2021 through June 2022 as opposed to the same period in the previous year. Petitions received through May 25 of Fiscal Year 2022 exceeded those received for all of Fiscal Year 2021. Indeed, the number of petitions filed in the first three quarters of the year surpassed the total number filed in any of the past five years in total. The Department of Labor runs on an October 1 through September 30 Fiscal year.

The regions with the highest level of election activity during the first three quarters of FY 2022 included Region 05 (Baltimore), Region 13 (Chicago), Region 18 (Minneapolis), Region 19 (Seattle), and Region 21 (Los Angeles). Moreover, the number of unfair labor practice charges filed at the NLRB also increased for this period by 16%.

This increase in activity comes at a time when the NLRB has suffered large staffing and funding decreases. While union membership has dipped to 10.3% by the end of 2021, with a 33.9% rate in the public sector and 6.1% in the private, these recent surges in filings may suggest a change coming on the membership front. Whether this is the direct or partial result of President Biden's avowedly pro-union Administration also remains to be seen.

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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