Labor & Employment Issues **In Focus**

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For Clients and Friends
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CITY ELIMINATES PRIVATE EMPLOYER VACCINE MANDATE

On September 20, 2022, the City announced that it was abandoning the private employer vaccine mandate put in place in the waning days of the de Blasio Administration, effective November 1, 2022. The mandate required that all private sector workers in New York City be vaccinated against COVID-19.

The requirement applied to 184,000 local businesses, but the City acknowledged months ago that it is doing no enforcement. The Adams Administration lifted vaccine requirements for indoor dining and entertainment months ago and created exemptions for athletes and certain entertainers as well. However, employees of the City are still covered by a vaccine mandate despite recent decisions invalidating either the vaccine requirement itself or the manner in which said mandate was implemented by certain City agencies. Relatedly, the vaccine mandate for public school athletics and other extracurricular activities also ended last week.

STATE SUPREME COURT RULES NYPD VACCINE MANDATE INVALID, CITY APPEALS BUT COMPLIES

On September 23, 2022, New York State Supreme Court Justice Lyle E. Frank issued a decision and order ("Order"), in *Police Benevolent Ass'n etc. v. City of New York et al*., Index No. 151531/2022, ruling that the public sector vaccine mandate was invalid as to New York Police Department employees who are members of the Police Benevolent Association of the City of New York, Inc. ("PBA"). The Order directed that all officers who suffered adverse employment consequences as a result of non-compliance, i.e., terminated, removed from the workplace, or placed on Leave Without Pay ("LWOP") must be reinstated to the date of the unlawful action.

The City had argued that the Commissioner of the Department of Health and Mental Hygiene ("DOHMH") was authorized to effectuate said adverse employment decisions. The Court disagreed and found that the City did not establish "a legal basis or lawful authority for DOHMH to exclude employees from the workplace and impose any other adverse employment action," striking down the mandate as it imposed "a new condition of employment" to the members of the PBA without engaging in collective bargaining. The Order came on the heels of the City's September 20, 2022 announcement that the private sector vaccine mandate would expire on November 1, 2022 and Governor Hochul's announcement that the statewide mass transit mask mandate would also be scrapped.

The PBA was predictably celebratory, issuing a statement which said that the decision "confirms what we have said from the start: the vaccine mandate was an improper infringement on our members' right to make personal medical decisions."

Conversely, the City Law Department immediately appealed the Order, claiming it is "at odds with every other court decision upholding the mandate as a condition of employment." Generally, the State's rules of civil practice provide an automatic stay for appeals filed by municipalities. *See* CPLR § 5519(a)(1). So initially, the City maintained that the mandates contained in the Order were stayed pursuant to the CPLR's automatic stay provision. However, the PBA, along with the Detectives' Endowment Association which had a companion case with the instant matter, petitioned the Court, the City Law Department, and City Hall to comply with the Order and to equitably apply the same to all uniformed ranks within the NYPD. On September 27, 2022, the City Law Department indicated that it would be instructing the NYPD to hold in abeyance any forthcoming placements in LWOP status and/or terminations. Additionally, on September 28, 2022, the NYPD circulated guidance amongst all of its uniformed ranks that it would be complying with the City Law Department's instructions, thereby placing a temporary hold on the long-litigated and much-disputed issue of vaccine mandates and their enforceability.

DEPARTMENT OF LABOR REVISES REPORTING RULES FOR EMPLOYERS

On September 13, 2022, the United States Department of Labor ("DOL") issued a proposed revision to the LM-10 reporting form. The revision would require federal contractors who use so-called "persuaders," lawyers, consultants, or lobbyists who inform employees about the perils of unionization, to identify all such engagements. The proposed change to the LM-10 form would add a box that employers would be required to check if they employ "persuaders."

"The public exposure would allow for an open public discussion and debate about the prevalence of persuader activity and the extent to which specific federal agencies might be indirectly supporting such activities by doing business with employers that engage in persuader activities," the DOL stated in its justification for the change. Executive Order No. 13494, issued by the Obama administration, prohibits the government from reimbursing contractors for the cost of persuader or surveillance activity. Employer groups fear that a new rule with these requirements would discourage companies from seeking federal contracts. "Persuader" activity is not *per se* illegal but it is limited.

NEW YORK CITY COUNCIL CONSIDERING BILL LIMITING HOME HEALTH AIDE HOURS

On August 31, 2022, the New York City Council began serious discussions over a bill making it illegal for home health care aides to be assigned shifts greater than 12 hours ("Bill"). It is common in the industry for aides to work 24-hour shifts where they are only paid for 13 hours, despite regularly engaging in care for a greater period. The paid time stems from a now-overturned State Department of Labor's interpretation of the New York Labor Law ("NYLL") as permitting third-party employers of 24-hour home care attendants to pay their employees for 13 hours of a 24-hour shift, provided the employee is afforded eight hours of sleep, five of which are uninterrupted, and three uninterrupted hours for meals. A similar bill had previously failed in the New York State legislature.

The Bill has been supported by activists for many years but has only recently gained momentum, with 29 co-sponsors on the 51-member Council and backing from the City's Public Advocate. Conversely, Local 1199 SEIU United Healthcare Workers ("Local 1199") is opposing the Bill, despite having the support of many of its members in the health care sector. The opposition stems from the position that the Bill would endanger the neediest clients who could lose care at times due to the hours cap. In addition to capping each shift at 12 hours, the Bill would also prevent employers from assigning home care workers in the five boroughs more than 50 hours per week.

In an open letter to Local 1199 President George Gresham, members wrote "[t]he years of working grueling 24-hour shifts without sleep have taken a toll on our health, inflicting injuries and permanent disabilities in our hands, arms, legs, and backs — and causing most of us to suffer from insomnia."

For its part, Local 1199 said that it "does not support the concept of 24-hour shifts," but opposes the Bill to end them "because it would unfairly restrict workers from the ability to earn the overtime pay (which they rely on to support themselves and their families) by capping the workweek to 50 hours." Local 1199 and other critics said they also worry the Bill will not be paired with the additional home care funding and staffing needed to split each 24-hour shift in two. Moreover, the Bill notes that aides cannot be kept more than two additional hours in a day or 10 in a week, even if the relief aide is late or has an emergency.

The most recent state budget boosted the minimum wage for home care workers by $3 per hour — although that figure fell short of the 50% wage increase advocates were seeking.

BIDEN NAMES NEW REGIONAL DIRECTOR FOR NLRB, REGION 2

On August 30, 2022, the Biden Administration named a permanent Regional Director for the National Labor Relations Board, Region 2, based in Manhattan. John D. Doyle, Jr., is an NLRB veteran, having joined the agency directly out of law school in 1995 as Law Clerk at the Atlanta office, a year later transferring to the Birmingham, Alabama office. He subsequently worked his way through Region 5 (Baltimore, Maryland) to Deputy Assistant General Counsel in the Division of Operations-Management in Washington, DC, back to Atlanta as Regional Director for Region 10 and finally back to Washington for his most recent position as Deputy Associate General Counsel in Operations-Management in 2019. While his government services has taken him around the country, Doyle is a New Yorker, raised in Tarrytown, and a graduate of Regis High School in Manhattan, Colgate, and Fordham Law School.

GUEST ARTICLE*

The following is a contributed piece to IN FOCUS, authored by an industry professional. The thoughts expressed are the perspective of the bylined individual.

An Alert to Union 401(k) Plan Sponsors and Trustees

By Eric S. Smith, J.D., President of Trustee Empowerment & Protection, Inc.[i]

A growing wave of class-action lawsuits against plan sponsors and trustees has hit the corporate world and is beginning to enter the union world. Since most of the reporting on this has been confined to professional journals for lawyers and investment advisors, many plan trustees are likely unaware of what is happening, the nature and risk of the claims, and how they can better protect themselves and their plans from such actions. It's our hope that this alert will help empower readers with knowledge you can use.

What's getting 401(k) plan sponsors and trustees sued? It started with claims focused on excessive costs related to the plans' administrative expenses and investment choices – i.e., that identical or similar services and choices could have been obtained at less cost. However, the focus is now shifting to often dramatically larger damage claims arising from holding chronically poor performing choices within the plan. While the excessive cost claims can typically be in the 15 – 50 bps range, chronic underperformance claims can be in the multiple hundreds of bps, over multiple years. Larger damage claims are now making mid-sized and smaller plans economically viable targets for class-action litigation.

Just how serious is this "risk?" Are plan sponsors losing these cases? Not all are, but many have or have settled to avoid potentially higher damage verdicts. Two of these cases have gone all the way to the U.S. Supreme Court. Both resulted in unanimous decisions against the plan sponsors and trustees. In the first, *Tibble v. Edison*, the Court ruled that as long as the harm continued and could have been remedied (but wasn't) the 6-year ERISA statute of limitations would not run to bar the claims. In the second, *Hughes v. Northwestern University*, the Court held that just because the plan had good investment choices, the trustees still had an affirmative fiduciary duty to remove bad ones.

But more concerning for sponsors and trustees is the fact that the U.S. District Court, in *Tibble*, summarily brushed aside the defense the Edison trustees offered – a defense that virtually every other 401(k) plan trustee would almost certainly assert – the "**we relied on the advice of our investment consultant**" defense. If you are a plan trustee, isn't that the truthful answer you'd give if you were to be asked "how did these investment choices come to be in your plan?" In rejecting that defense, the Court ruled that:

> **". . . securing independent advice from . . . [their investment consultant] . . . is not a complete defense to a charge of imprudence. At the very least, the Plan fiduciaries must 'make certain that reliance on the expert's advice is reasonably justified.'"** (page 56 of the District Court Opinion, emphasis added, citations omitted . . . this ruling was not appealed).

But how can trustees make certain that their reliance on their consultant's advice is reasonably justified if they just have one, and virtually all just have one. As is often the case, the Court didn't explain. So, here are some hopefully useful protective suggestions and some lessons from these cases:

- **You may wish to secure an independent, protective review of the investment choices within your plan and the administrative expenses you're paying**. A protective "second opinion" would seem to satisfy the "must make certain that the reliance on (your investment consultant's) advice is reasonably justified" requirement. Identifying and removing chronically underperforming choices would also almost certainly improve the investment results and retirement security of the plan's participants, certainly an additional worthy result.

- **Don't count on your fiduciary liability insurance to adequately protect you . . . it may not.** Chronic underperformance claims can be extraordinarily large and could exceed your policy's limits. Moreover, fiduciary liability insurance premiums are dramatically increasing, total coverage levels are dropping, and the deductible amounts you will have to pay (the "retention") are going up as well. It's important to review and understand the coverage and limits of your policy.

- **Don't assume that picking low-cost, "big name" investment choices will make you "safe."** Because early cases focused almost exclusively on excessive cost-related claims, some trustees and their advisors apparently began to believe that these were "safe" choices and would better protect them from fiduciary imprudence claims. But this is proving not to be the case. A recent wave of cases against large plans, such as Citigroup, are now alleging that selecting and holding low-cost and underperforming BlackRock target date funds was fiduciarily imprudent.

- **Even if you believe you and your plan would ultimately win, you should ideally do all you reasonably can to avoid getting sued.** There is one effect of such suits that is seldom (if ever) mentioned in any of the articles and for which there is no insurance coverage. It's the reputational damage to plan sponsors and individual trustees that results from being publicly accused of violating your fiduciary duty to your plan's participants (your fellow union members). Possibly worse is the effect it could have on you and your family within your community and social circles.

Class-action litigation firms have been and still are focusing on the largest plans. So, if your plan is north of $1 billion, or in the high hundreds of millions, you and your plan may be at risk and the possibility of that risk should be evaluated and remedied if vulnerabilities to fiduciary imprudence claims are found to exist. However, because class-action litigation decisions involve weighing economic risk (the costs involved to bring the case) vs. potential economic reward, the smaller the plan, the less that potential reward and likely the lower the risk that you and your plan will be sued. However, as noted above, the new focus on the much larger chronic underperformance claims are now making smaller cases more viable.

So, be alert to this. At the very least, pay more attention to the administrative expenses your plan is paying and to investment selection and performance monitoring processes – 15 to 30 minutes in a quarterly meeting may no longer be sufficient.

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[i] Eric Smith, a graduate of Harvard College and the University of Kentucky College of Law, co-founded and serves as Chairman and President of Trustee Empowerment & Protection, Inc.

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