Labor & Employment Issues
In Focus
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NYC OFFICE OF COLLECTIVE BARGAINING FINDS CITY VIOLATED LABOR LAW BY FAILING TO NEGOTIATE THE POLICIES AND PROCEDURES THAT IMPLEMENTED THE VACCINE MANDATE

On October 6, 2022, the NYC Office of Collective Bargaining ("Board") issued a decision and order ("Decision") finding that the City of New York ("City") violated several provisions of the New York City Collective Bargaining Law ("NYCCBL") when it unilaterally adopted certain policies and procedures to implement then Mayor De Blasio's order that all City employees be vaccinated against COVID-19 by October 29, 2021 ("Mandate"). *MLC*, 15 OCB2d 34 (BCB 2022). Consequently, while the Board did not order the City to restore the *status quo ante*, it directed the City to return to the bargaining table and negotiate with the New York City Municipal Labor Committee and certain constituent members thereof (collectively, "Petitioners") over any remaining "issues" concerning terms and conditions of employment.

By way of background, on October 22, 2021, the City issued guidance for agencies to adopt policies to implement the Mandate including procedures for placing non-compliant employees in Leave Without Pay ("LWOP") status, penalties for employees who fail to comply, the process for requesting a reasonable accommodation exemption ("Exemption"), and appealing denials of the same. Petitioners demanded pre-implementation bargaining with the City over the impact of said policies on the employees' terms and conditions of employment. Petitioners also filed an improper practice petition ("Charge") with the Board claiming that the City violated the NYCCBL by refusing to meet at reasonable times and conferring in good faith when it, among others, set an arbitrary deadline for implementing the Mandate. The City responded to the Charge arguing that it had no duty to negotiate because the Mandate was a managerial prerogative excepted from bargaining under NYCCBL § 12-307(b), that it was authorized to unilaterally act because of the highly emergent circumstances surrounding COVID-19, and that Board law did not require pre-implementation impact bargaining.

The relevant statutory provision, NYCCBL § 12-306(a)(4), requires a party to negotiate to fruition or impasse over mandatory subjects of bargaining. This includes, consistent with Board law, procedures for implementing decisions that affect terms and conditions of employment, such as work schedules, compensation and leave policies, privacy, disciplinary procedures for non-compliance, and accommodation policies. Moreover, even where an employer is implementing a managerial prerogative, the policies and procedures adopted in connection therewith are bargainable when they affect mandatory subjects of negotiations.

The Board found that City violated the NYCCBL by unilaterally implementing policies and procedures for processing and appealing Exemption requests and instituting

an arbitrary deadline for submitting the same. While the City initially directed its agencies to discipline employees for non-compliance with the Mandate, after the Petitioners filed the Charge, the City changed gears and claimed that the Mandate was a qualification of employment and thus civil service law due process protections afforded to employees subject to discipline were not applicable. The Board did not address its precedent that employers can violate the NYCCBL by unilaterally modifying job qualifications for incumbent employees, rather, the Board cited several recent federal court decisions that found the Mandate to be a lawful qualification of employment that does not implicate disciplinary procedures. Since there was no evidence that the City disciplined any employees, the Board found that the City did not violate the NYCCBL regarding said procedure.

At this juncture, either party can appeal the Decision to New York State Supreme Court of New York County, though no appeal has been filed to date.

EEOC GUIDANCE ON SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION ENJOINED AND DEEMED UNLAWFUL

On the heels of a federal court in Tennessee issuing a preliminary injunction blocking enforcement of a recent Equal Employment Opportunity Commission ("EEOC") Technical Assistance Document which affords protections to employees suffering from discrimination on the basis of sexual orientation and gender identity ("Guidance"), on October 1, 2022, the United States District Court for the Northern District of Texas issued a decision ruling that the Guidance is unlawful. *State of Texas v. EEOC*, Case No. 2:21-cv-00194-Z.

By way of background, in *Bostock v. Clayton County*, the U.S. Supreme Court issued a groundbreaking decision ruling that the discrimination protections in Title VII of the Civil Rights Act of 1964, which prohibit employment discrimination "because of...sex," extend to homosexual and transgender individuals. 140 S. Ct. 1731, 1738-39 (2020). On January 20, 2021, the President Biden signed Executive Order No. 13988, which sought to prevent and combat discrimination against LBGTQ+ and transgender employees, and directed federal agencies, including the EEOC to fully implement the anti-discrimination statutes consistent with this understanding. On June 15, 2021, the EEOC issued the Guidance explaining the EEOC's legal position on LGBTQ+ related matters, and specifically, how the agency interprets employers' obligations with respect to dress codes, bathrooms, locker rooms, showers, and use of preferred pronouns or names, as well as providing examples of conduct that may constitute discrimination under the Guidance.

In *Texas v. EEOC*, Texas Attorney General Ken Paxton successfully sought to vacate the Guidance claiming that, among others, it misstates the law as interpreted by the U.S. Supreme Court and that the EEOC failed to comply with the proper procedures to issue binding guidance that has a legal effect. District Judge Matthew Kacsmaryk of the Northern District of Texas agreed on both grounds and set aside the Guidance on a nationwide basis. First, District Judge Kacsmaryk explained that the Guidance comingled a person's "status" into prohibiting all "conduct" related to that status. While Title VII

prohibits discrimination on the basis of sexual orientation and gender identity status, it does not necessarily prohibit all related conduct such as workplace policies pertaining to sex-segregated bathrooms, locker rooms, and dress codes. Second, District Judge Kacsmaryk found that the Guidance constitutes a legal rule in that it used mandatory language to identify the EEOC's legal position on whether certain employer conduct would expose the latter to liability. As such, the Court found that the Guidance should have been issued with appropriate notice and rulemaking, which it failed to do.

BIDEN BOARD PUSHES BACK AGAINST WEAKENING OF RULE PRESERVING STATUS QUO POST CONTRACT

During the Trump Administration, National Labor Relations Board ("NLRB" or "Board") General Counsel Peter Robb and certain employers attempted to revise Board rules to weaken the continuation of mandatory contract terms post contract expiration. In *PB Publishing Inc. d/b/a Pittsburgh Post-Gazette*, 371 NLRB No. 141 (Sept. 21, 2022), the Biden appointed Board vigorously reasserted those rules to maintain terms pending bargaining to impasse, finding that the employer violated the promise of five shifts per week contained in an expired contract when eliminating those shifts post contract for economic reasons during prolonged bargaining.

The contract clause in *PB Publishing* provided that certain employees "shall be guaranteed a five (5) shift mark-up each payroll week for the balance of the Agreement … " Citing long NLRB and judicial precedent, Chair Lauren McFerran with Democratic Members Gwynne Wilcox and David Prouty, carefully distinguished between the effect of contract language on contractual obligations and the same language on statutory duties. While general expiration language might suffice to end a contractual duty, they explained, a waiver of the statutory duty to maintain mandatory terms and conditions post-contract expiration must be clear and unmistakable. Applying this reasoning here, the Democratic majority held that the term "for the balance of the Agreement" did not waive the employer's statutory obligation to continue the five-shifts because it did not explicitly and effectively state that said right would end with the contract. Maintaining mandatory terms post contract, reasoned the Board majority, strengthened collective bargaining by encouraging the parties to jointly address these issues rather than the employer unilaterally acting upon them while negotiations continued.

Dissenting Republican Members John Ring and Marvin Kaplan saw the facts and policy directly contrary. To them, inclusion of "for the balance of the Agreement" in the very provision establishing five-shifts meant that the parties intended to end the five-shifts at the end of the labor contract. Urging reversal of contrary Board precedent, Members Ring and Kaplan argued that their contract construction rule better advanced collective bargaining by honoring agreed terms and not granting the union a right that it had bargained away.

DOL PROPOSES SCRAPPING TRUMP ADMINISTRATION'S INDEPENDENT CONTRACTOR RULE AND RETURNING TO "TOTALITY-OF-THE-CIRCUMSTANCES" FOR CLASSIFYING INDEPENDENT CONTRACTORS

On October 11, 2022, the Wage and Hour Division of the Department of Labor ("DOL") issued a Notice of Proposed Rulemaking ("Rule") that would modify how the DOL classifies a worker as an employee or independent contractor under the Fair Labor Standards Act ("FLSA" or "Act").

The Rule would rescind the test issued by the Trump Administration's DOL in 2021 ("2021 Rule"). The 2021 Rule identified five economic factors to consider when classifying a worker as an employee or independent contractor. Two of the five factors—(1) the nature and degree of control over the work and (2) the worker's opportunity for profit or loss—were "core factors" that were the most probative and carry greater weight in the analysis. The three non-core factors were: (3) the amount of skill required for the work, (4) the degree of performance of the working relationship, (5) and whether the work is part of an integrated unit of production. The 2021 Rule stated that it was highly unlikely the three non-core factors can outweigh the combined probative value of the two core factors.

The Rule would do away with the "core factors" and return to a "totality-of-the-circumstances" approach. The six non-exhaustive factors to be fully considered are:

1. *Opportunity for profit or loss depending on managerial skill*. This factor considers whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work. The following facts, among others, can be relevant: whether the worker determines or can meaningfully negotiate the charge or pay for the work; whether the worker accepts or declines jobs or chooses the order and/or time for the work; whether the worker engages in marketing, advertising, or other efforts to expand business or secure more work; and whether the worker makes decisions to hire others, purchase materials/equipment, and/or rent space.

2. *Investments by the worker and the employer.* This factor looks at whether any investments by a worker are capital or entrepreneurial in nature. It also notes that the worker's cost to perform his/her job (e.g., tools and equipment) are not evidence of a capital or entrepreneurial investment. Investments that are capital or entrepreneurial generally support an independent business and serve a business-like function. Also, the worker's investments should be considered on a relative basis with the employer's investments in its overall business.

3. *Degree of performance of the work relationship.* This factor examines whether the work relationship is indefinite rather than definite in duration, non-exclusive, project-based or sporadic.

4. *Nature and degree of control.* This factor considers the employer's control, including reserved control, over the performance of the work. Relevant facts

include: who sets the worker's schedule; who supervises the performance of the work; limitations on the worker being employed for another; technological supervision; the right to supervise or discipline; time demands that do not allow for other work; and controlling pricing, rates, and marketing.

5. *Extent to which the work performed is an integral part of the employer's business.* This factor considers whether the work performed is an integral part of the employer's business. It does not depend on whether any individual worker is particularly integral, but rather whether the function that he/she performs is integral.

6. *Skill and initiative.* This factor considers whether the worker uses specialized skills to perform the work and whether his/her skills contribute to business-like initiative.

Further, the Rule allows for additional factors that may be relevant such as whether the worker is in business for him/herself or is economically dependent on the employer for work. Said factors do not have a predetermined weight and are to be considered in view of the economic reality of the whole activity. The Rule is now subject to public comment and the final rule remains to be determined.
