Labor & Employment Issues
In Focus
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For Clients and Friends
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NLRB PRESERVES PRO-BUSINESS STANDARD IN THE WAR OVER WORKPLACE EMAILS

For as long as there has been email in the workplace, there has been a debate over whether employers may prohibit employees from using company-provided email for pro-union activities. Recently, the National Labor Relations Board ("NLRB" or "Board") once again weighed in on the conflict. In *T-Mobile USA, Inc. and Communications Workers of America, AFL-CIO*, issued September 30, 2022, the NLRB found that T-Mobile unlawfully disciplined a worker for sending union-related emails. N.L.R.B., 14-CA-155249. However, the Board fell short of revisiting the larger question of whether employees have a presumptive Section 7 right to use company-provided email servers for union-related communication during non-working time.

The dispute in *T-Mobile* began in 2015, when a customer service representative at a Wichita call center sent a union-related email to coworkers as part of an organizing campaign. Days later, the call center director addressed the email in a message to all employees informing them that they were not permitted to send mass communications for "non-business purposes." The company-provided email server, though, had routinely been used by both management and non-supervisory employees to widely distribute non-business-related information, such as announcements about free food, "nacho day" in the cafeteria, deaths and condolences, birthdays, invitations to baby showers and bowling parties, missing phone chargers, and so on. That same day, the customer service representative was called into a closed-door meeting where management informed her, in no uncertain terms, that she was prohibited from sending union-related emails to employees' work email addresses and that she had violated numerous company policies by doing so.

An NLRB administrative law judge ("ALJ") found that T-Mobile violated § 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act") by selectively enforcing its email policies against union-related email. The ALJ also found that T-Mobile had unlawfully promulgated new work rules in response to the pro-union email, and that these new rules were overbroad. Lastly, the ALJ found that T-Mobile violated NLRA § 8(a)(1) when management told the employee that she could not use the company-provided email to conduct union-related activity.

The Trump-era Board reversed the ALJ's findings based on its decision in *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 368 NLRB No. 143 (2019), which overruled precedent providing employees with a presumptive right to use work email for union purposes and narrowed the definition of discrimination, which the Board stated, "consists of disparate treatment of activities or communications of a similar character because of the union or other Section 7-protected status." *T-Mobile I*, 369 NLRB No. 50, slip op. at 3. Under this new framework, the Board determined that the NLRB General

Counsel had failed to establish discrimination, in part, because T-Mobile had never permitted emails "in favor of a specific union or against union activity," and that the emails T-Mobile had previously permitted were not sufficiently "similar in character" to the union email. On appeal, the D.C. Circuit Court reversed and remanded the case to the NLRB in July 2021, largely for the reasons cited by the ALJ.

Now, the NLRB has thrown out its earlier ruling, finding that T-Mobile had unlawfully drawn a line between permissible and impermissible email use that did not exist before the conflict occurred, thereby discriminating against Section 7 activity. However, the three-panel board, consisting of two Republicans and a Democrat, declined to overrule *Caesar's Entertainment*, which revived the *Register Guard* standard from a 2007 decision. *See Guard Publishing Co.*, 351 N.L.R.B. 1110 (2007) (ruling that employers may restrict all non-work matters on company-provided email, as long as the restriction does not single out union activity).

Republican Members Marvin Kaplan and John Ring opined that, although it was reasonably clear that T-Mobile unlawfully discriminated against the union under *Register Guard*, the *Register Guard* standard itself was not in question. Democrat Member David Prouty, on the other hand, argued that the *Register Guard* standard is too restrictive and that the Board's failure to correctly apply the rule in its original *T-Mobile* decision demonstrates the shortcomings of the analysis, which questions only whether the employer had allowed other union or organizational email prior to the allegedly discriminatory action, rather than the actual reasons relied upon by the employer at the time of the action.

Because Members Kaplan and Ring declined to engage in the argument presented by Prouty, the narrowed definition of Section 7 discrimination remains intact. It seems that the pendulum remains on the pro-business side of the email debate, at least for now.

NLRB UPDATES TEST FOR MAIL-IN BALLOT ELECTIONS IN ACCORDANCE WITH CDC TRACKING METRICS

Recently, the National Labor Relations Board ("Board" or "NLRB") modified its test for deciding whether COVID-19 pandemic conditions still warrant mail-in ballot elections. *See Starbucks Corporation*, 371 N.L.R.B. 154 (September 29, 2022). In doing so, the Board left unchanged the majority of the six-factor guide established in *Aspirus Keweenaw*, 370 NLRB 45 (2020), but updated Factor (2) to be in line with the Community Level tracker promulgated by the Center for Disease Control and Prevention ("CDC").

The old Factor (2) looked at "either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day positivity rate in the county where the facility is located is 15 percent or higher." The decision would be based on data collected by John Hopkins University and/or state and local governments.

The updated Factor (2) uses the CDC Community Level tracker, which is based on three data points: i) new COVID-19 cases, ii) new COVID-19 hospital admissions, and iii) the percent of staffed inpatient beds used by COVID-19 patients. This tracker is updated weekly and pulls data from a wide variety of sources. The Board found the CDC Community Level tracker would "be a more reliable—and more consistently available—tool for gauging community risk."

The five other *Aspirus* factors are (1) the [Board] office tasked with conducting the election is operating under "mandatory telework" status; (3) the proposed manual election site cannot reasonably be established in a way that avoids violating state or local health orders relating the maximum gathering size; (4) the employer fails or refuses to commit to abide by GC Memo 20-10 "Suggested Manual Election Protocols"; (5) there is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or (6) other similarly compelling circumstances. The Board stated that given the changing circumstances of the COVID-19 pandemic, it will defer to the NLRB Regional Director's discretion in conducting mail-in ballot elections, based on the new updated *Aspirus* factors.

NYS SUPREME COURT INVALIDATES CITY'S VACCINE MANDATE FOR PUBLIC EMPLOYEES

On October 24, 2022, Justice Ralph J. Porzio, Supreme Court, Richmond County ("Court"), issued a decision and order ("Decision") striking down New York City's Vaccine Mandate ("Mandate") as unconstitutional, as arbitrary and capricious under the standard set forth in Article 78 of the Civil Practice Law and Rules ("CPLR"), and held that the Commissioner for the New York City Department of Health and Mental Hygiene ("DOHMH") exceeded his statutory authority. *See Garvey v. City of New York*, Index No. 85163/2022 (Porzio, J. October 24, 2022)

At the outset of the Decision, Justice Porzio denied the City's motion to dismiss on the ground that the petitioners' action was untimely. Generally, Article 78 requires a petitioner to initiate the litigation within four months of the final agency action. Rejecting the claim that the petition was untimely filed because the terminations occurred more than four months before the suit was brought, Justice Porzio determined that the decision to terminate the petitioners did not become "final and binding" until June 2022 because: (1) DSNY had sent the petitioners letters offering them reinstatement if they complied with the Mandate and (2) the Mayor's Executive Order No. 62 ("Order") on March 24, 2022, which exempted certain professions from the Mandate, partially served as a basis for the instant action.

Turning to the merits, Justice Porzio explained that an agency acts capriciously in violation of CPLR Article 78 when "on identical facts [it] decides [matters] differently." Therefore, when the City exempted private sector employees, but not all similarly situated

public sector employees from the Mandate, it treated "identical unvaccinated people" differently. The Court also questioned why the City could not continue with a "vaccinate or test policy" and why the petitioners were kept employed during the months-long pendency of their medical and/or religious exemption applications. Moreover, Justice Porzio found that the City's decisions with respect to the Mandate was based on social and economic considerations, rather than the goal of protecting the public health of the citizenry. As such, the disparate treatment amongst similarly situated employees, the Court explained, supported the conclusion that the City workers' equal protection rights were violated.

In addressing the overreach by the DOHMH Commissioner, the Court stated that he/she is authorized to regulate vaccines and adopt measures to reduce the spread of infectious diseases. However, enforcement measures are statutorily limited to monetary fines for non-compliance. Since the Mandate directed City agencies to terminate non-compliant employees, including the petitioners, Justice Porzio determined that the DOHMH Commissioner exceeded his authority by excluding employees from worksites and "unilaterally and indefinitely" changing the employees' terms and conditions of employment by implementing a vaccine requirement on existing employees when none had previously existed. Rejecting the argument of prior federal and state court decisions upholding COVID-19 vaccine mandates for healthcare workers, Justice Porzio determined that, unlike those workers, who have always been required to be vaccinated against infectious diseases, the employees of the New York City Department of Sanitation ("DSNY") here have never been required to undergo inoculation, as evidenced by the collective bargaining agreement by and between the City and the petitioners' union. Thus, by promulgating a rule with an indefinite duration and enforcing terminations, the DOHMH Commissioner crossed the line from rulemaking into legislative activity.

While the Decision has far-reaching effects considering that Justice Porzio ordered the City to make whole all affected City employees, including the petitioners employed by the DSNY, the City immediately appealed the Decision to the Appellate Division for the Second Department. Consequently, pursuant to CPLR § 5519(a)(1), the Decision was automatically stayed, pending an Appellate Division ruling on the matter.

NEW WORKPLACE OBLIGATIONS:
REMINDERS REGARDING FEDERAL, STATE, AND CITY LAWS

Pursuant to New York State Election Law ("Election Law") § 3-110(1), employers are required to provide employees with up to two hours, without loss of pay, in the event said employees do not "have sufficient time outside of his or her scheduled working hours, within which to vote on any day at which he or she may vote, at any election." However, as set forth in Election Law § 3-110(2), the aforementioned two hours of time off to vote is only applicable to employees who do not have "four consecutive hours either between the opening of the polls and the beginning of his or her working shift, or between the end

of his or her working shift and the closing of the polls." Also, as per Election Law § 3-110(3), if an employee wishes to avail himself/herself of this time off to vote, he/she "shall notify his or her employer not more than ten nor less than two working days before the day of the election." Further, pursuant to § 3-110(4), employers "shall post conspicuously in the pace of work where it can be seen as employees come or go to their place of work, a notice setting forth the provisions of this section." With Election Day approaching, the posting requirement set forth in this provision of the Election Law must now be displayed and must remain posted until the close of the polls on Election Day.

Previously covered in detail in a prior In Focus, the City of New York's "Transparency Law" requires employment advertisements to include a high-to-low salary range starting November 1, 2022, for jobs that can or will be performed, in whole or in part, in New York City. The new law covers virtually all jobs at employers with four or more employees. Though the law imposes stiff fines for violations, there is no liability for a first offense, if cured within 30 days, so quick remedial action can make a big difference.

Also as covered in In Focus, dated October 27, 2022, the U.S. Equal Employment Opportunity Commission ("EEOC") recently updated the "Know Your [Employee] Rights" poster and brought it into the digital age. The poster more easily addresses equal pay, genetic information and retaliation; includes a specific indication that harassment is prohibited; and also clarifies that sex discrimination encompasses discrimination that is based on pregnancy, sexual orientation and sexual identity. The EEOC's revamped poster, now called "Know Your Rights: Workplace Discrimination is Illegal," *inter alia*, explains that employees or applicants can file a charge with the EEOC if they believe that they have experienced discrimination and contains a quick response ("QR") barcode that, when scanned, automatically transports users to the EEOC's webpage detailing the process and procedure for filing an employment discrimination charge. Additionally, this update by the EEOC encourages employers to supplement their physical posting with one electronically posted in an easily accessible location, such as the employer's website. Employers who fail to post the legally required notice in "a conspicuous location in the workplace where notices to applicants and employees are customarily posted" are subject to monetary fines.

With the flood of recent requirements, questions may arise. If you have any, please do not hesitate to reach out to the Pitta LLP attorney of your choice.

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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