Labor & Employment Issues
In Focus

Pitta LLP

For Clients and Friends

December 15, 2022 Edition

NLRB REVIVES MICRO-UNITS FOR UNION ORGANIZING

In a move highly relevant to boosting union organizing efforts, on December 14, 2022, the three Democratic Members of the National Labor Relations Board ("NLRB" or "Board") reinstated the Obama-era NLRB decision in *Specialty Healthcare*, that a union may presumptively organize a group of some but not all employees at a workplace who share a "community of interest," subject to the employer showing that non-included employees should be included because they share an "*overwhelming* community of interest" with unit employees. *American Steel Constr. Inc. and Local 25, Iron Workers*, 372 NLRB No. 23 (Dec. 14, 2022).

Chair McFerran and Members Wilcox and Prouty approvingly reviewed the decision and reasoning of *Specialty Healthcare & Rehab. Ctr. Of Mobile*, 357 NLRB 934 (2011) *enfd. sub. nom, Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) ("*Specialty Healthcare*"). They argued that the two-step process of presuming the propriety of the Union's petition for a "micro-unit" under a simple community of interest standard, but any move to add other employees under an "overwhelming" community of interest standard, "properly protected the statutory rights being exercised by employees seeking representation" in the petition while allowing for challenge on a rational basis. The Majority overruled the Trump-era NLRB decision that had replaced *Specialty Healthcare, PPC Structural*, Inc. 365 NLRB No. 160 (2017), explaining that *PPC Structural* wrongly "discounted the rights of employees seeking representation," contrary to the policies of the Act. *Specialty Healthcare*, stressed the Majority, "was upheld in the face of numerous challenges in the federal courts of appeals, with every reviewing court finding that the *[Specialty Healthcare]* framework was consistent with the Board's longstanding unit-determination test," and the core policies of the Act.

Republican Members Kaplan and Ring dissented, defending *PPC Structural* and criticizing the Majority for giving short shrift to the rights of the excluded employees.

ADULT SURVIVORS ACT CREATES ONE-YEAR WINDOW OF OPPORTUNITY TO BRING BYGONE SEXUAL ASSAULT CLAIMS

Survivors of sexual abuse in New York have a new window of opportunity to seek legal recourse against their abusers, regardless of when the abuse occurred. The Adult Survivors Act (ASA), which went into effect on November 24 and lasts for one year, allows survivors to bring sexual harassment claims that otherwise would be time-barred by the statute of limitations. The law permits claims against not only individual abusers, but also employers for intentional and negligent acts and omissions, such as failure to protect victims from sexual abuse, negligent hiring, negligent supervision, and failure to implement proper safety and reporting protocols.

Among the employers already dealing with claims under the ASA are NBCUniversal Media, for suits filed against actor and comedian Bill Cosby, and Atlantic Records, for suits filed against music mogul Ahmet Ertegun. Former President Donald Trump and billionaire investor Leon Black have also been targeted. Other high-profile companies and individuals dealing with ASA claims will likely have an interest in settling them in mediation to avoid negative publicity.

Critics of the law say it allows victims to abuse the court system by targeting defendants with deep pockets and bringing old uncorroborated claims that are "difficult to defend." However, the plaintiff still bears the burden of proof, and claims arising under the law are likely to present high evidentiary hurdles. For example, where abuse occurred years or even decades ago, witnesses may no longer be available, or documents and records may not have been kept. Moreover, many victims of sexual abuse keep their experiences secret for fear of retaliation or professional consequences. In some cases, sexual abuse takes years to mentally process. And rehashing traumatic experiences, even years later, can take emotional and psychological tolls on survivors.

Despite evidentiary hurdles, the ASA represents lawmakers' most recent effort to fill some of these gaps. Like the Child Victims Act of 2019, which temporarily lifted the statute of limitations on claims by people who said they were abused as minors, the law recognizes that there are myriad reasons that victims of sexual abuse do not come forward within a statute of limitations period. Hopefully, in addition to inspiring victims to speak out, the law will inspire employers in New York to revisit their sexual harassment policies and protocols.

WHOLE MEANS WHOLE: NLRB MAKES EXPLICIT ITS APPROACH TO MAKE-WHOLE RELIEF FOR EMPLOYERS' UNFAIR LABOR PRACTICES

In addition to reinstating employees and giving them backpay, employers who commit unfair labor practices may be on the hook for expenses their employees incur *because of* those unfair labor practices. In a decision issued December 13, the National Labor Relations Board ("Board" or "NLRB") made explicit its position that make-whole remedies for unfair labor practices include any "direct or foreseeable pecuniary harms" resulting from those practices. In *Thryv, Inc.*, the Board found that a marketing and software company violated labor law by failing to bargain with the Union before laying off workers. 372 N.L.R.B. No. 22; Case 20-CA-250250 (Dec. 13, 2022). In addition to reinstatement and backpay, the Board ordered payment of search-for-work, interim employment expenses and adverse tax consequences as "direct and foreseeable harms" resulting from the employer's unfair labor practices.

"Direct or foreseeable pecuniary harms" could include anything from interest payments on loans taken out to cover living expenses to late rent and car payments. The relief must be based on specific calculations and will require evidence demonstrating the amount of pecuniary harm, the direct or foreseeable nature of that harm, and how the harm is connected to the unfair labor practice. The Board emphasized that the *Thryv* decision does not increase its power to grant make-whole remedies. Rather, the decision

merely standardizes an existing approach to make-whole relief that has been implicit in a wide range of past cases dating back as far as 1938—only three years after the passage of the National Labor Relations Act (NLRA). See *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938).

The Board clarified that this make-whole relief should not be considered "consequential damages," which is "a legal term of art more suited for the common law of torts and contracts." The Board also emphasized that make-whole remedies should not be considered punitive damages meant to punish bad actors, nor should they be limited to the most egregious violations. Rather, because it is the worker who bears the economic burdens of an employer's unfair labor practice, make-whole remedies are designed to implement the NLRA's principle of restoring victims "to where they would have been but for the unlawful conduct." Accordingly, a direct and foreseeable harm remedy should be a regular part of every NRLB relief order.

The three Democratic members of the NLRB, Chair Lauren M. McFerran, Member Gwynne A. Wilcox, and Member David M. Prouty wrote the decision. The two Republican members, Marvin E. Kaplan and John F. Ring, dissented in part and concurred in part, agreeing that the costs of direct and foreseeable harms resulting from an employer's unfair labor practices could be awarded, but only on a case-by-case basis after compliance proceedings.

RECESSION, REORGANIZATION AND LABOR— WILL THE FTC AND DOJ JOIN WITH NLRB AS PLAYERS?

Though not yet upon us and perhaps avoidable in a "soft landing," a recession or at least a business shakeup usually leads to layoffs fought by labor before the National Labor Relations Board ("Board" or "NLRB"). A recent case and trends from the Biden Administration's Federal Trade Commission ("FTC") and Department of Justice ("DOJ") indicate that labor may have previously untested allies in countering corporate efforts to reduce their workforces as part of a reorganization or merger.

In *U.S. v. Penguin Random House et a*l, DDC No. 21-2886-FYP (Nov. 7, 2022), the DOJ succeeded in blocking the merger of publishing giants Penguin Random House LLC ("Penguin") with Simon & Schuster as violative of the federal anti-trust laws. Significantly, and in a novel move, the DOJ's winning argument was not based on the usual theoretical points and economic business data alone but on the proposed merger's impact on the labor market. Judge Pan agreed with the DOJ that the merger of two of the "Big Five" publishing houses would allow the surviving publishers to more forcefully squeeze authors' compensation, and therefore enjoined the merger.

A potentially similar case is brewing for blue collar workers in the proposed merger, worth $24.6 *billion* dollars, of supermarket leaders The Kroger Co. and Albertsons Co.s. Unions like the United Food and Commercial Workers ("UFCW") bitterly remember the FTC approved merger of Albertsons and Safeway that led to hundreds of layoffs and have urged the FTC not to permit a similar merger on the backs of their members. FTC Chair Lina Khan has been receptive to the labor-impact theory. Surprisingly, so has Congress,

skeptically grilling Kroger CEO McMullen during hearings on the merger over his promise that, "we will not ... lay off any frontline associates as a result of this merger." Notably, such an unenforceable promise met similar skepticism by Judge Pan in blocking the Penguin-Simon & Schuster deal.

Other industries, like healthcare with its hospital titans, may also be vulnerable to labor market criticism as mergers would likely squeeze doctors, nurses and other medical staff in negotiating their compensation, or holding on to their jobs post consolidation.

In response to Congressional questioning, Kroger CFO McMullen praised the companies' unions as "incredibly important partners." If so, perhaps these blue-collar partners should be invited into the front office to negotiate for the interests of their members in considering the merger, not just post-merger effects. That might be an approach to which the DOJ, FTC and the NLRB can all give their A-OK.

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.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.