Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
October 12, 2023 Edition

LARGEST HEALTH CARE INDUSTRY STRIKE IN US HISTORY HAS ENDED – FOR THE TIME BEING

Last week, more than 75,000 employees in the health care industry across five states and Washington D.C. went on a three-day strike to protest unfair wages and unsafe staffing shortages at Kaiser Permanente facilities. It is considered the largest healthcare strike in United States history. During the strike, all Kaiser Permanente hospitals and emergency departments remained open while routine medical services were interrupted. Although the strike officially ended at 6:00 PM on Saturday, October 7, 2023, the parties still have no deal. The Coalition of Kaiser Permanente Unions warns that if contract negotiations with the Employer do not improve, they will strike again next month.

Strikes in the health care industry are unlike strikes in other sectors because of a federal regulation, implemented in 1974, designed to protect the public's interest in uninterrupted health care. Specifically, Section 8(g) of the National Labor Relations Act ("NLRA" or "Act") prohibits a labor organization from striking, picketing, or otherwise refusing to work in a concerted fashion without first giving at least ten (10) days' notice in writing to the employer and to the Federal Mediation and Conciliation Service, and the notice must indicate the date and time that such action will occur.

The Kaiser Permanente strike highlights issues in the healthcare sector that were exacerbated by the COVID-19 pandemic. The pandemic caused an unprecedented level of occupational burnout among workers, an estimated 5 million of whom left their jobs, triggering widespread staffing shortages. These shortages led hospitals and other facilities to outsource duties to subcontractors, resulting in higher labor costs. This outsourcing has become a sticking point for the Unions alongside the staffing shortages they say have reached unsafe levels. Acting Labor Secretary Julie Su, who previously attempted to mediate contract talks between the Unions and the Employer, is expected to join negotiations in hopes of brokering a deal between the parties.

EEOC RELEASES PROPOSED GUIDANCE ON WORKPLACE HARASSMENT WHICH WOULD BE THE FIRST CHANGE IN 20 YEARS

On September 29, 2023, the Equal Employment Opportunity Commission ("EEOC") published a draft of Proposed Enforcement Guidance on Harassment in the Workplace. If the guidance is issued in final format, it would be the first update on harassment by the EEOC since 1999. The public comment period is open until November 1, 2023. According to the EEOC, "[t]he updated proposed guidance reflects notable changes in law, including the Supreme Court's decision in *Bostock v. Clayton County*, the #MeToo movement, and emerging issues, such as virtual or online harassment." The proposed guidance explains that the federal employment discrimination statutes that the

EEOC enforces protects covered employees from harassment based on race, color, religion, sex (including sexual orientation, transgender status, and pregnancy), national origin, disability, age (over 40), or genetic information. Furthermore, the EEOC has stated it has identified two harassment-related enforcement policies going forward: "preventing and remedying systemic harassment and protecting vulnerable workers and people from underserved communities from harassment."

Some of the updates include guidance around virtual work harassment. According to the EEOC, "conduct within a virtual work environment can contribute to a hostile work environment." The guidance specifically mentions conduct occurring over the employer's email system, electronic bulletin board, instant messaging system, videoconferences, the employer intranet, public website, or official social media accounts. The new guidance also states that employers may be liable for conduct in non-work virtual settings, such as social media posts by an employee on their own account about another employee.

Furthermore, the guidance shows the EEOC's different standards of liability which depend on the harasser's level and authority. Employers also face automatic liability if the harasser is a "proxy" or "alter ego" of the employer. A person is the employer's alter ego or proxy "if the individual possesses such high rank or authority that his or her actions can be said to speak for the employer." Such person includes sole proprietors, owners, corporate officers; *i.e.* people who have the authority or influence to "speak for the company." There is no defense to liability. An employer may also be liable for harassment caused by a "supervisor," someone who is "empowered by the employer to take tangible employment actions against the victim." An employer is vicariously liable for a hostile work environment created by a supervisor. The employer here has an affirmative defense, known as the *Faragher-Ellerth* defense. Under this defense, if the supervisor took tangible employment action against the victim, the employer is automatically liable. If the supervisor did not take tangible employment action, the employer has a defense if it proves it acted reasonably to prevent and promptly correct harassment, and the complaining employee failed to use the employer's complaint procedure or take steps to avoid or minimize harm from the harassment. As for co-workers and non-employees, an employer is liable if it was negligent due to unreasonably failing to prevent harassment or failing to take reasonable corrective action in response to harassment about which it knew or should have known.

The harassment does not even need to be directed at the complaining employee for the employer to be liable. For example, anonymous harassment – conduct directed at other individuals within the complaint's protected class or conduct that occurs outside of complainant's presence that the complainant learns about – can be enough for employer liability.

STARBUCKS GETS BURNED BY SUBPOENA & OLMS PROBE

In the latest developments involving one of America's most recognized coffee chains, Starbucks Corp. has been granted a two-week window by a Seattle federal judge to provide documents the U.S. Labor Department ("DOL") has been seeking. The case, titled *Su v. Starbucks Corp*, is ongoing in W.D. Wash., No. 23-00045. This request comes amidst an ongoing investigation into Starbucks' expenditures against union initiatives.

The genesis of this investigation traces back to May when the DOL took legal action against Starbucks. The move aimed to enforce an administrative subpoena associated with the DOL's Office of Labor-Management Standards' ("OLMS") inquiry. This was initiated after a Starbucks location in Buffalo, N.Y., became the first of over 360 outlets to vote for union formation in late 2021.

DOL Solicitor Seema Nanda, with conviction in her tone, stated, "Any defiance against our call to submit documents, irrespective of the company's stature, even if it's Starbucks Corp., won't be taken lightly. We aim to ensure law compliance." The central issue at hand revolves around Starbucks' alleged violation of reporting mandates as per the Labor-Management Reporting and Disclosure Act ("LMRDA" or "Act"). The Act mandates both employers and unions to transparently disclose specific financial transactions pertaining to unions. Interestingly, Starbucks appears to have overlooked filing these annual disclosure reports for the fiscal years 2021 and 2022, as highlighted by OLMS. A subpoena had been served to Starbucks by OLMS in March, seeking related documents; however, the company chose to withhold compliance.

Turning to October 6, 2023, Jeffrey Freund, OLMS Director, took to the DOL's blog to share his insights about the scope of subpoenas. OLMS is vested with the responsibility of upholding the Act, which was enacted in 1959 by Congress, and promotes employees' rights for self-organization and collective bargaining. This is achieved, in part, by necessitating annual financial reports from unions, employers, and consultants. Director Freund emphasized the rarity of OLMS subpoenas but stressed their indispensable nature, especially in light of the recent Starbucks developments.

To shed light on the legal framework, Section 210 of the LMRDA empowers the labor secretary to initiate civil actions for any perceived violations of the LMRDA's reporting obligations. Concurrently, Section 601 of the LMRDA empowers the Secretary to undertake investigations, including record inspections, to ensure adherence. OLMS has traditionally exercised restraint in issuing subpoenas, reserving them for cases where non-compliance is evident. But, as demonstrated on Oct. 4, 2023, the U.S. District Court for the Western District of Washington upheld an OLMS subpoena directed at Starbucks. While OLMS traditionally focused more on unions than employers and consultants, there is a renewed focus on bridging this gap, evident from the Starbucks case. Starbucks' defense, claiming an unconstitutional shift in the enforcement policy by OLMS, was found to be akin to "putting the cart before the horse" by US District Judge Marsha Pechman,

who dismissed the claim. The jurist explained, the onus remains on Starbucks to demonstrate its compliance with the reporting mandates.

Legal Advice Disclaimer: The materials in this **In Focus** report are provided for informational purposes only and are not intended to be a comprehensive review of legal developments, to create a client–attorney relationship, to provide legal advice, or to render a legal opinion. Readers are cautioned not to attempt to solve specific legal problems on the basis of information contained in this **In Focus**. If legal advice is required, please consult an attorney. The information contained herein, does not necessarily reflect the opinions of Pitta LLP, or any of its attorneys or clients. Neither Pitta LLP, nor its employees make any warranty, expressed or implied, and assume no legal liability with respect to the information in this report, and do not guarantee that the information is accurate, complete, useful or current. Accordingly, Pitta LLP is not responsible for any claimed damages resulting from any alleged error, inaccuracy, or omission. This communication may be considered an advertisement or solicitation.

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.