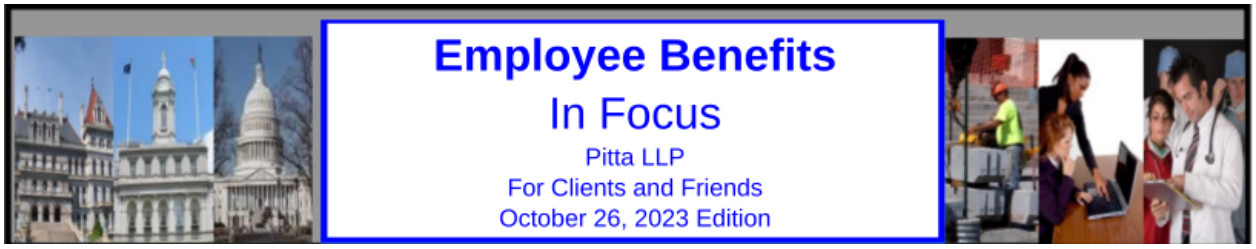

FORD AND UAW REACH TENTATIVE DEAL TO END 41 DAYS OF INTERMITTENT STRIKES

After a 41 day, intermittent, plant by plant strike, Ford and the United Auto Workers ("UAW") reached a tentative contract agreement this week. Based on past industry practice, this agreement will likely lead to agreements at General Motors and Stellantis (formerly Chrysler), resulting in labor peace among the "Big 3" automakers.

The proposed agreement faces a ratification vote by 57,000 UAW members at Ford. This strike was unique in the Union 's history as it had struck all of the Big 3, rather than focusing on one company, but had been striking in pre-planned durations and various plants. The tentative agreement includes an 11% wage increase the first year and totals 25% over a 4½-year contract, plus a $5,000 ratification bonus and cost-of-living adjustments. The gains in the deal are valued at more than four times the gains from the last UAW contract in 2019, and provide more in base wage increases than Ford workers have received in the past 22 years, the UAW said in a news release. The Union said the tentative agreement also includes: cumulatively raising the top wage by more than 30% to more than $40 an hour; raising the starting wage by 68%, to more than $28 an hour; providing a raise of more than 150% to the lowest-paid workers at Ford over the life of the agreement, with some workers receiving an immediate 85% increase upon ratification; reinstating major benefits lost during the Great Recession, including cost-of-living allowances and a three-year wage progression; eliminating pay tiers; improving retirement benefits for current retirees, those workers with pensions, and those who have 401K plans; and including the right to strike over plant closures.

A meeting of local union leaders to discuss forwarding the proposed deal to members will occur this weekend.

BOARD DELIVERS HIGHLY ANTICIPATED FINAL RULE ON DETERMINING JOINT-EMPLOYER STATUS

On October 26, 2023, the National Labor Relations Board ("NLRB" or "Board") issued a Final Rule ("Rule") establishing the standard to determine joint-employer Status under the National Labor Relations Act ("NLRA" or "Act"). The new Rule, the entirety of which can be read here, rescinds a 2020 rule that the prior Trump-era Board promulgated, which made it more difficult to establish a joint-employer relationship. The Rule follows a Notice of Proposed Rulemaking which was published by the Federal

Register in September 2022, and a public comment period that lasted until December 7, 2022. The Board reviewed and considered each of more than 13,000 comments it received. The Rule will go into effect on December 26, 2023 and will only apply to cases filed after that date.

The new Rule, which the Board describes as "a legally correct return to common-law principles and a practical approach to ensuring that entities effectively exercising control over workers' critical terms of employment respect their bargaining obligations under the NLRA," reestablishes that an entity will be considered a joint employer when it shares or codetermines one or more essential terms and conditions of employment. The "essential" terms and conditions of employment are: (1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) assignment of duties to be performed; (4) supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees. This list is considered to be exclusive.

Under the new rule, it is an employer's power to control essential terms and conditions of employment that matters, regardless of whether such control is exercised, directly or indirectly. By contrast, the Trump-era rule required that an entity not only possess such control but also exercise it in a direct and substantial way. The text of the Rule was designed to provide extensive guidance to parties, laying out their specific rights and responsibilities as clearly as possible. However, the Board still intends to analyze the facts of each specific case that comes before it to determine whether two or more employers meet the standard.

FRESH UNION BUSTERS OF BEL-AIR: NINTH CIRCUIT HOLDS L.A. HOTEL ILLEGALLY REFUSED TO RE-HIRE UNIONIZED WORKERS

On October 18, 2023, the U. S. Court of Appeals for the Ninth Circuit ("Ninth Circuit" or "Court") affirmed the National Labor Relations Board's ("NLRB" or "Board") finding that a hotel violated National Labor Relations Act ("Act") when it refused to rehire unionized workers after renovating and reopening. The case is *Kava Holdings, LLC v. NLRB*, No. 21-70225, No. 21-70638, No. 21-71334, (9th Cir. Oct. 18, 2023).

In September 2009, Kava Holdings, LLC, which did business as the Hotel Bel-Air ("Hotel"), temporarily closed for renovations, laying off all of its employees including those represented by UNITE HERE Local 11 ("Union"). A few months later, the Hotel ended negotiations with the Union and unilaterally implemented its "last, best and final offer" on severance packages, waiver of re-call rights, and release terms. It bypassed the Union and dealt directly with laid off employees. The Board found this to be a violation of the Act. *Hotel Bel-Air I*, 358 NLRB 1527 (2012), *adopted by* 361 NLRB 989 (2014), *enforced* 637 F. App'x 4 (D.C. Cir. 2016).

This case before the Ninth Circuit addressed the Hotel's misconduct after reopening, where the Board found another violation of the Act. *Hotel Bel-Air II*, 370 NLRB No. 71 (2021). In July 2011, a few months before reopening, the Hotel had a three-day job fair which required written applications and a three-step interview process. The Hotel invited union-affiliated former employees to apply the morning of the first day, and the rest of the time was for the general public. The Hotel was looking to fill 306 positions. 176 former union employees applied. The Hotel hired only 24 of them. Upon reopening in July 2011, the Hotel refused to recognize the Union and made unilateral changes to terms and conditions of employment including wages, benefits, breaks and paid time off. The Board Administrative Law Judge found that the hotel intended to prevent a majority of former employees from being rehired when the Hotel reopened so it could avoid its statutory duty to recognize and bargain with the Union. The Board affirmed the ruling and the Hotel appealed while the NLRB General Counsel ("General Counsel") moved to enforce the order. The Court affirmed the ruling and enforced the order.

As the Court noted, in cases alleging discriminatory refusal to hire, the General Counsel must show (1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; and (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) the antiunion animus contributed to the decision not to hire the applications. Here, it was undisputed that the Hotel was hiring, and former employees had relevant experience and training. The Hotel disputed whether it had antiunion animus. The Court found it did based on its prior unlawful conduct when it initially closed: testimony of the Human Resource manager where she stated that the Hotel was taking "preventative measures to make sure that a union doesn't need to come, or [the employees] don't need to be represented by a union ..."; and its hiring practices, including job fair records revealing that Hotel disfavored former, unionized employees. The Hotel's "affirmative business reason" for not rehiring the workers, namely that it intended to adopt a new luxury service model and wanted employees who were well suited for that, was found pretextual.

Therefore, the Court enforced the Board's ordered remedies including reinstatement of former employees who applied to the Hotel.

AMAZON ASKED TO DELIVER PROPOSAL ON HOW TO DECIDE WHICH OF 500,000 PAGES OF DOCUMENTS ARE LEGITIMATELY CONFIDENTIAL

On Monday, October 23, 2023, a magistrate judge in the United States District Court for the Western District of Washington told Amazon's attorneys that they cannot classify over 500,000 subpoenaed documents as confidential. Instead, Amazon's attorneys and the U.S. Attorney's office for the Southern District of New York must propose either jointly or separately how the Court can handle deciding which documents

can be shared with various agencies. The documents deal with worker safety information, and the United States Justice Department wants the freedom to share the documents with several other agencies.

The U.S. Attorney's Office, along with the Occupational Safety and Health Administration ("OSHA"), has been conducting an investigation into Amazon's worker safety measures since early in 2022. Since then, OSHA has cited Amazon for alleged safety violations at six distribution centers, such as failing to protect workers from muscle and back strains when lifting boxes. Various hearings before administrative law judges are slated for next year, as Amazon has challenged the citations. The investigation also seeks to determine whether Amazon violated the Financial Institutions Reform, Recovery, and Enforcement Act by not disclosing accurate worker injury information. The U.S. Attorney's office has asked for the court's permission to share the documents with other government agencies without providing notice to Amazon.

Amazon claims that "almost all" of the documents contain private information about employees, as well as business practices. But if Amazon and the U.S. Attorney's office cannot figure out a way to determine how the court should decide which documents can be shared with which agencies, a "special master," or third-party attorney, could be appointed to figure it out for them.

STARBUCKS IN ANOTHER ROUND OF LITIGATION

In yet another front of its endless battle with the Union that is attempting to organize it coast to coast, Starbucks recently sued Workers United over the Union's tweets about the ongoing war between Israel and Hamas. The suit relates to the Union's alleged wrongful use of Starbucks' intellectual property after the Union tweeted its support for Palestine under the heading of "Starbucks Workers United."

The lawsuit alleges that the post feeds an inaccurate perception that the coffee giant supports violence against civilians. Unsurprisingly, in light of the ongoing battle between the Union and Starbucks and in the shadow of the endless tension in the Middle East, the Union responded with its own suit for defamation. Starbucks' suit was filed in the United States District Court for the Southern District of Iowa, styled as *Starbucks Corp. v. Service Emps. Int'l Union*, S.D. Iowa, docket number unavailable (10/18/23) and the Union lawsuit was filed in the United States District Court for the Eastern District of Pennsylvania, styled as *Workers United v. Starbucks Corp.*, E.D. Pa., No. 23-04036 (10/18/23).

The Union lawsuit claims that the company "has stated and implied that Workers United supports and advocates for violence and terrorism, as part of a transparent effort to exploit the ongoing tragedy in the Middle East to harm the Union's reputation." The dueling lawsuits escalate the ongoing conflict between Starbucks and the Union, an affiliate of the Service Employees International Union, representing the coffee chain's workers at about 360 stores.

Conversely, Starbucks' lawsuit claims that the Union's "co-opting" of the trademarks has led to calls to boycott Starbucks as well as public officials denouncing the company, numerous complaints to its customer care department, and angry customers, including at least one incident of vandalism at a coffee shop. "The actions taken by the union have nothing to do with its representation of the minority of partners who voted for them to bargain on their behalf," Starbucks said in a statement. "In fact, their continued statements have led to Starbucks partners, including some they represent, being threatened and subjected to graphic messages."

As we have noted in previous issues of In Focus, other large corporations facing organizing drives have resorted to intellectual property lawsuits. For example, Trader Joe's and Medieval Times USA Inc. have each recently filed lawsuits in federal court against unions claiming misuse of trademarks as part of the organizing drives. The Medieval Times suit was dismissed, while the Trader Joe's suit is ongoing. Of course, the Starbucks suits implicate much more serious issues, due to the reference to the Israel-Hamas war and the dangers individuals and companies may face in stating views on it.

"Workers United has no interest in engendering confusion between itself and the corporation whose workers it represents," the Union said in its lawsuit. "Particularly given Starbucks' egregious anti-union campaign, Workers United does not want workers to fear that the Union is somehow controlled or sponsored by the company."

The proliferation of this type of lawsuit against unions underscores the care unions must exercise when they engage in aggressive organizing drives against major corporations.

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.