Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
December 6, 2023 Edition

GOVERNOR HOCHUL BALKS AT STATE-WIDE NON-COMPETE BAN: SEEKS TO STRIKE BALANCE

Last week, New York Governor Kathy Hochul commented on the bill to ban non-compete agreements in the state. The Governor told reporters Thursday that she wants to "strike a balance" between keeping businesses in the state and protecting lower- and middle-income workers. The Governor suggested that non-compete agreements could apply to workers making $250,000 or more.

Non-compete agreements prohibit an employee from working for a competitor or opening a competing business after leaving a job. According to the Federal Trade Commission ("FTC"), approximately one in five workers, or 30 million Americans, are bound by non-compete agreements. According to the FTC, banning non-compete agreements could increase workers' earnings by as much as $296 billion per year and increase worker mobility and competition.

As previously reported in *In Focus*, the New York State Senate passed S3100A on June 7, 2023 and the Assembly passed its counterpart, A1278B on June 20, 2023. The bill would prohibit an employer from entering into a non-compete agreement with an employee and would allow an individual to sue the employer to have the agreement voided and for damages, including $10,000 in liquidated damages, damages for lost compensation, reasonable attorney's fees and costs. While passed by both chambers of New York's legislature, it appears the Governor will not sign the bill until a compromise is struck.

Eleven states and the District of Columbia ban non-compete clauses below a certain wage threshold. Four others ban virtually all employee non-competes with exceptions to those people who have an ownership stake. However, if unchanged and signed, New York's law will be the only outright ban in the country.

AMAZON DEMONSTRATES HOW NOT TO DEAL WITH UNION ORGANIZING CAMPAIGNS AT STATEN ISLAND FACILITIES

Amazon violated the National Labor Relations Act ("NLRA" or "Act") at its Staten Island JFK8 and DYY6 facilities, according to a decision issued by an Administrative Law Judge ("ALJ") on November 21, 2023. Among Amazon's unfair labor practices, committed during an organizing campaign by the Amazon Labor Union ("ALU" or "Union"), were retaliating against Union supporters and employees who engaged in protected concerted activity by dismissing them early, altering their work assignments, and subjecting them to closer supervision; unlawfully interrogating employees; disparaging the Union with

appeals to racial prejudice; and prohibiting employees from distributing Union literature and confiscating union literature from break areas.

The 84-page decision, which may be read in its entirety here, depicts multiple instances of imprudence on the part of Amazon and its agents when matched up against employees armed with a reasonable understanding of their basic rights. For example, the decision highlights inconsistency and confusion across Amazon management regarding employees' rights to distribute union literature. When managers removed union literature from break rooms and told employees they were ordered or allowed to do so (one manager stated that she has "lawyer friends" and that they had all stated that removing union literature is "allowed"), Amazon Human Relations then had to walk these statements back by explaining to Union representatives that the managers had been following "standard operating procedures" to keep facilities "clean" and free of "papers and messes." When organizers pointed out that they had never seen managers cleaning public spaces and asked to see the policy, Amazon management was unable to provide any documentation at the time, and no such evidence was presented at the hearing.

The decision describes another incident where an outside consultant from the Burke Group, a known union-busting labor relations firm, told one JFK8 employee that ALU's campaign was "not a serious union drive," but rather "a Black Lives Matter protest about social injustice." In the same conversation, the consultant referred to union organizers as "just a bunch of thugs." The employee on the other end of this conversation was understandably offended. Taking these statements in context, the ALJ opined that "by situating what could have been a generic opinion regarding the ALU leaders' lack of labor relations experience within the context of the Black Lives Matter movement, and subsequently referring to the ALU leaders as 'thugs,' [the consultant] appealed to racial prejudice and derogatory racial stereotypes in a manner which unlawfully disparaged the Union and conveyed that support for the Union was futile." The decision is filled with similar instances of union-busting gone wrong, where the actions and statements of company agents may have been considered lawful had those individuals demonstrated even a basic understanding of how the NLRA works.

The ALJ ordered Amazon to cease and desist from further unlawful activity and ordered Amazon to make whole one union supporter who had been released from a shift early (prior to eventual termination), including for loss of earnings and other benefits, and any other direct or foreseeable pecuniary harms and any adverse tax consequences. However, finding a lack of evidence that the employee was terminated as retaliation, the ALJ did not order Amazon to reinstate the employee. Amazon has also been ordered to post copies of a Notice to Employees explaining their rights under the NLRA and listing activities that the Employer will refrain from. These Notices must be posted for sixty (60) days at both Staten Island facilities and to distribute the Notice electronically.

TESTING THE LIMITS: THE SUPREME COURT'S RECENT ADA DECISION AND ITS IMPACT ON FUTURE LABOR AND EMPLOYMENT LAW LITIGATION

The recent U.S. Supreme Court decision in *Acheson Hotels LLC v. Laufer* presents new issues related to the intersection of disability rights and the evolving landscape of American jurisprudence as it relates to those persons found to have sufficient standing to sue. The case, while ultimately dismissed as moot, highlights critical issues surrounding the Americans with Disabilities Act ("ADA"), the role of "testers" in civil rights litigation, and the broader implications in the context of litigation strategy and its implications for labor and employment law.

Deborah Laufer, a disability rights "tester," sued Acheson Hotels for not providing information online about the accessibility of its rooms, a requirement under the ADA. Laufer's attempt to test the website helped to uncover non-compliance issues that otherwise might have gone unnoticed, especially when individuals directly affected by these issues may not have the resources or knowledge to pursue legal action. Akin to unions who often monitor workplaces for labor law violations, testers monitor businesses for compliance with civil rights laws and seek to protect the rights of a specific group of individuals.

The Court dismissed the suit as moot as the doctrine, which serves as a cornerstone of American jurisprudence, dictates that courts only decide cases that present live, ongoing controversies. In this case, mootness arose from Laufer's voluntary dismissal of her lawsuit, which she did after her lawyer faced sanctions. This strategic withdrawal highlights a critical aspect of litigation: the ability to control the trajectory of a case through procedural maneuvers. The dismissal still leaves many questions unanswered, particularly regarding the standing of testers like Laufer in labor and employment law litigation.

This Court's decision, while not directly addressing the merits of the tester's case, left unresolved the critical question of whether testers like Laufer have standing to sue under the ADA. The Court's acknowledgment that the issue of testers' standing in ADA cases is "very much alive" suggests that future cases will likely address this matter. This issue is pivotal in civil rights litigation, as it determines who can hold businesses accountable for non-compliance. Testers often do not have a direct personal stake in the specific instance of non-compliance they are challenging, which complicates their standing. Unions often advocate for the rights of workers with disabilities, ensuring workplace accommodations and fair treatment, and sometimes also face challenges regarding their standing to represent certain workers or to engage in certain legal actions. Thus, further clarification from the courts could affect how third-party entities seeking to enforce compliance with legal standards for the benefit of a broader group are treated.

This case and others like it have a dual role: they enable potentially affected persons to seek individual remedies while simultaneously creating broader compliance incentives. By challenging non-compliance, testers push businesses to adhere to legal

standards. This is similar to unions monitoring activities, which remain a vital component in using litigation to enforce labor laws and workplace standards and protect the rights of marginalized groups. For labor and employment law practitioners, particularly on the union side, this decision underscores the importance of legal strategy in civil rights and labor law litigation.

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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