



Labor & Employment Issues In Focus

Pitta LLP
For Clients and Friends
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“All that serves labor serves the Nation. All that harms labor is treason to America. No line can be drawn between these two. If any man tells you he loves America, yet hates labor, he is a liar. If any man tells you he trusts America, yet fears labor, he is a fool. There is no America without labor, and to fleece the one is to rob the other.”

Abraham Lincoln

REMINDER - NEW ROUND OF PAYCHECK PROTECTION PROGRAM FUNDS AVAILABLE - UNIONS AND SOME EMPLOYEE BENEFIT PLANS MAY BE ELIGIBLE – DEADLINE MARCH 31, 2021

On March 11, 2021 President Joe Biden signed the American Rescue Plan of 2021 (“ARPA”). The ARPA includes another \$7.25 billion in funding for the Paycheck Protection Program (“PPP”) and lifts some of the Program’s earlier restrictions. The ARPA expands coverage to all Internal Revenue Code 501(c) entities including labor unions under 501(c)(5) and voluntary employee beneficiary association entities created pursuant to 501(c)(9), such as certain health benefit, vacation or other employee plans.

The PPP provides forgivable loans that can be used to cover payroll, rent, mortgage interest, utilities, and certain COVID-19 related expenses, such as personal protection equipment. Eligible entities are able to borrow from private financial institutions the lesser of 2.5 times the borrower’s monthly payroll costs or \$10 million. The PPP loans can be forgiven if at least 60% of the funds are spent on payroll costs over either an 8-week period or 24-week period.

Under the ARPA, entities will only qualify for a PPP loan if: (1) the entity does not receive more than 15% of its receipts from lobbying activity; (2) the lobbying activities of the entity do not compromise more than 15% of the total activities of the organization; (3) the cost of lobbying activities for the entity did not exceed \$1,000,000 during the most recent tax year prior to February 15, 2020; and (4) the entity does not employ more than 300 employees. **Applications for a second draw of PPP loans are due on March 31, 2021.** Further guidance from the United States Small Business Administration is probably to be expected, but all 501 (c) organizations are encouraged to apply as soon as possible. This is a link to the SBA’s website for guidance: <https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>.

OSHA INSPECTIONS AND NYS LEAVE AIM TO STEM COVID-19

In an effort to protect workers from COVID-19, the long silent Occupational Safety and Health Administration (“OSHA”) launched a national emphasis program, or NEP, designed to enforce health and safety protocols in the workplace. On the state level, Governor Andrew Cuomo recently signed legislation amending § 159-c of the New York State Civil Service Law and § 196-

c of the New York State Labor Law to allow for all employees in both the private and public sectors paid leave in order to receive COVID-19 vaccine injections.

Watch Out for OSHA

The Biden Administration is using the NEP to target industries where workers, due to the nature and environment of their job sites, are at the highest risk to contract this deadly disease. The NEP will use enhanced inspections of workplaces by both in-person and virtual inspections to ensure employer compliance with relevant medical guidelines, and conduct follow-up inspections to ensure that remedial measures are being implemented. According to Jim Fredericks, the Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, the NEP is designed “to protect workers who raise concerns that their employer is failing to protect them from the risk of exposure.” Although adoption by states of the NEP is not mandated under the Biden Administration’s latest COVID-19-related guidance, OSHA is strongly encouraging states to adopt the NEP, if they have not already adopted similar measures prior to the NEP’s issuance; moreover, states have 60 days to apprise OSHA whether they plan on doing so. Finally, the NEP will remain in effect for at least one year, but the NEP’s duration may be modified depending upon overall health conditions concerning the pandemic.

OSHA’s new centralized and focused effort to reduce workplace exposures to COVID-19 is another stark departure from the previous administration’s response to the pandemic. Under the Trump Administration, OSHA relied solely on the general duty clause contained in the Occupational Safety and Health Act of 1970 to ensure compliance with overall employee safety measures and did not emphasize inspections, in-person or otherwise. Accordingly, enforcement of pertinent medical guidance in workplaces was often negligible and inconsistent. OSHA’s NEP announces that there is a new sheriff in town.

NYS Paid Leave for Vaccinations

Pinning hopes for recovery on widespread vaccinations, New York State now entitles both private and public sector employees to a total of eight hours of paid leave to receive either the two-dose Moderna or Pfizer vaccination or four hours for the one-shot Johnson & Johnson vaccination. Additionally, the receipt and usage of this paid leave will not be counted against an employee’s already accrued leave banks. These amendments prohibit an employer from discharging, threatening, penalizing, discriminating, or retaliating against any employee who seeks to utilize this vaccination leave. The statutory benefits shall remain in effect until December 31, 2022.

APPELLATE COURT APPROVES MANDATORY RETIREMENT FOR NEW YORK STATE JUDGES

In a tightly split 3-2 decision reversing the trial court, the Supreme Court of the State of New York Appellate Division for the Third Department last week ruled that the New York State Office of Court Administration (“OCA”) could continue to enforce mandatory retirement at age 70 for judges. The case is called *Hon. Ellen Gesmer et al. v. Administrative Board of the New York State Unified Court System et al.* (Sup. Ct. App. Div. 3rd Dept. 2021).

The majority upheld the longtime New York State rule based on its belief that Court administrators had that power under the state constitution, thus overcoming the apparent age discrimination inherent in the rule. The lawsuit was brought by a group of Judges over the age of 70 who were among the 46 of 49 Judges whose requests to serve an additional two years were denied. Because of the split decision, the New York Court of Appeals will accept an appeal.

In the wake of anticipated budgetary problems and anticipating a need to save money this year, the OCA took a different approach from its usual rote extension of older Judges' terms. The spurned Judges struck back by filing this lawsuit. The closely divided Appellate Division found that the ability under the state Constitution of the OCA to set budgets and act in the broader interest of the Court system justified the refusal to extend the Judges' terms.

The Court dismissed discrimination concerns. "To the extent that petitioners take the position that the Board's decision amounted to discriminatory nonhiring based on age, they have not made a prima facie showing that the Board's decision was made 'under circumstances giving rise to an 'inference of discrimination'," the majority wrote.

The dissent argued that the budget crisis did not permit the OCA to bypass the recertification process set forth in the State Constitution. While recognizing the difficulties of the current circumstances, the dissent added, "despite the very real exigencies of our current situation, we simply cannot allow the board to elide the specific process outlined by the NY Constitution and Judiciary Law."

ORIGINAL SIN - J & J VACCINE VARIANT RAISES RELIGIOUS OBJECTIONS

Amid the rush to roll out vaccines to stem the COVID-19 pandemic, Johnson & Johnson ("J & J") pulled ahead with a one dose version that has most eligible Americans vying for a shot. However, J & J may also win the distinction of creating a vaccine that spawns the most religious objections and discrimination lawsuits in the workplace due to its origins.

Unlike the Pfizer and Moderna vaccines, the J & J version uses cloned cells derived from a fetus that was aborted in the 1980s. For the Catholic Church and other religious groups that strongly oppose abortion, J & J's vaccine poses a dilemma. While the Vatican pronounced the vaccine "morally acceptable," the U.S. Council of Bishops urged avoidance if possible and one Archdiocese called it "morally compromised."

Employers reopening or returning from remote operation face increasing pressure to require or reward employees who vaccinate, and the J & J one-shot is particularly attractive. Generally speaking, employment discrimination law encourages reasonable accommodation of employee religion based objections unless their objections create an imminent risk or undue hardship that cannot be ameliorated by a reasonable accommodation. The J & J vaccine's genesis in aborted fetal tissue illustrates one such likely religious objection, requiring employers to combine the wisdom of Solomon with the patience of Job as they navigate the issue. One bright line may help – employers may not unduly dissect employee religious beliefs. Thus, for example, an employee raising good faith religious objections to the J & J vaccine because of its fetal origins cannot be forced to take that vaccine on the grounds that it is permissible by the Vatican or other

religious authorities. But acknowledging the religious objection only begins the legal balancing act of risk and accommodation. Attorneys at Pitta LLP stand ready to help.

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