



Labor & Employment Issues In Focus

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For Clients and Friends
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COURTS BLOCK AND UNBLOCK NYS MASK MANDATE

On January 24, 2022, Nassau County Supreme Court Judge Thomas Rademaker issued a decision and order striking down 10 NYCRR §§ 2.60; 2.60(a) – New York State’s “mask mandate.” The rule requires all state residents above the age of two to wear a mask if able to medically tolerate it while in public places, including schools and businesses, and if they are not able to maintain social distancing. Petitioners brought the action on behalf of “all minor school children and persons similarly situated within the State of New York” and challenged the enactment of the rule on December 10, 2021 by the Commissioner of Health for the State of New York, Mary T. Bassett, M.D. While initiated in the context of schools, the judge’s reasoning and orders apply more broadly, including to employment and businesses. The next day, New York State’s Attorney General Letitia James won a stay of the stay pending a hearing this Friday, January 28, 2022, so the mandate remains for now.

Judge Rademaker stated that in March 2021, the New York State Legislature “curbed” former Governor Andrew Cuomo’s and any future governor’s authority to issue Executive Orders during a state disaster emergency. Judge Rademaker noted that had Governor Hochul been able to enact a mask mandate then it would have been included in the Executive Order of November 26, 2021 but instead, “the Governor utilized the New York State Department of Health to issue this ‘emergency’ ‘rule.’” Judge Rademaker opined that the Legislature is the appropriate branch of government to enact laws while the Executive branch is charged with enforcing the law. The court held that 10 NYCRR §§ 2.60; 2.60(a) “is a law that was promulgated and enacted unlawfully by an Executive branch state agency, and therefore void and unenforceable as a matter of law.”

Judge Rademaker explained that 10 NYCRR §§ 2.60; 2.60(a), facially, is a rule that is purportedly derived from the Public Health Law and the State Administrative Procedure Act. However, Judge Rademaker stated that the court could not find “any law enacted by the State Legislature that specifically gives the Department of Health and its Commissioner the authority to enact a law.”

Judge Rademaker determined that 10 NYCRR §§ 2.60; 2.60(a) was also violative of the State Administrative Procedure Act because it was “promulgated without any substantive justification for the emergency adoption” as required by certain sections of the State Administrative Procedure Act. According to Judge Rademaker, in addition to violating New York State constitutional principles, the rule also violates the Public Health Law. Ultimately, Judge Rademaker issued an injunction because the “irreparable harm suffered is patent.” The court suggested that Commissioner Bassett and Governor Hochul “take their case to the State Legislature.”

Judge Rademaker cautioned that his decision was not intended “in any way to question or otherwise opine on the efficacy, need, or requirement of masks as a means or tool in dealing with the COVID-19 virus.” Instead, the judge clarified that his role was to decide “whether the subject rule was properly enacted” and, if so, whether it can be enforced.

In response to the decision and order, Governor Hochul issued a statement in which she said “[w]e strongly disagree with this ruling, and we are pursuing every option to reverse this immediately.” While the Governor may indeed take the issue to the State Legislature as Judge Rademaker suggested, she lost no time in appealing Judge Rademaker’s orders to the Appellate Division, Second Department the very next day. There, Associate Justice Robert J. Miller ordered Judge Rademaker’s orders stayed “pending the hearing and determination of the motion” whether the lower court’s orders should continue to be stayed pending the entire appeal process, hearing set for this Friday, January 28 at 10 a.m. In a preview of the State’s arguments for Friday, the Attorney General justified the immediate stay of Judge Rademaker’s orders on the ground of irreparable harm to the public if the mandate is lifted and more than sufficient authority for the mandate itself.

Interestingly, Judge Rademaker’s decision follows the U.S. Supreme Court’s decision striking down the Biden Administration’s large employer vaccination mandate on a similar ground – executive usurpation of the Legislature’s authority. Pending the Appellate Division Second Department opinion soon, employers should follow the State mandate. The New York City mandates remain in force, unaffected by this case, for now.

SCOTUS DENIES RETIREES CHALLENGE OF PENSION PLAN TAKEOVER

On January 18, 2022, in *Black v. PBGC*, U.S., No. 21-495 (Jan 18, 2021) the United States Supreme Court declined to review a case brought by plaintiff retirees from the Delphi Corp. challenging decisions from the 2009 government takeover of their pension plans in the auto industry bailout and the Emergency Economic Stabilization Act of 2008.

In 2009, the Pension Benefit Guaranty Corp. (“PBGC”) assumed billions of dollars in new liabilities as the trustee of Delphi pension plans covering thousands of retirees. The Delphi retirees argued that PBGC improperly terminated the pension plans through an agreement between Delphi and General Motors (“GM”) following Delphi’s bankruptcy. In the Sixth Circuit Court of Appeals and before the Supreme Court, the retirees argued that the PBGC should have leveraged its negotiation power over GM, which owned Delphi prior to a 1999 corporate spinoff, to force GM to assume their pension liability.

The Sixth Circuit disagreed with the Delphi retirees’ legal argument, holding that the PBGC was within its rights of making decisions related to the 2009 auto bailout, including terminating pension plans. Despite an amicus brief from a bi-partisan group of 17 federal lawmakers, the Supreme Court declined to review the case, thus affirming the

Sixth Circuit decision and giving the PBGC much desired discretion in deciding whether to save or to sink distressed plans.

BIDEN ADMINISTRATION ABANDONS VACCINE OR TEST MANDATE FOR LARGER BUSINESSES

In the aftermath of a 6-3 defeat at the United States Supreme Court in which the Court majority stated in no uncertain terms that the federal Occupational Safety and Health Administration (“OSHA”) had no authority to mandate a vaccine or testing regimen for business with 100 or more employees, the Biden Administration this week announced that it was withdrawing its attempt to impose such a rule.

In light of the Supreme Court decision, the Administration filed motions to dismiss the pending lawsuits against it by twenty-seven states and a business group as the issues were now moot. In the motion to dismiss, the Administration said that the standard would “no longer be in effect.” The withdrawal is effective January 26, 2022. The Supreme Court majority’s reasoning meant that even if the U.S. Court of Appeals for the Sixth Circuit backed the OSHA standard, the Supreme Court was likely to again rule that the proposed standard exceeded OSHA’s legal authority to prevent workplace health hazards. The high court said that OSHA has the power to regulate risks related to Covid-19 that are “occupation-specific” based on a worker’s job or workplace, permitting OSHA to draft a narrower rule to protect workers. As part of the withdrawal announcement, OSHA said it will continue to work on a permanent standard.

The OSHA mandate was instituted in November 2021 and required that all businesses with 100 or more employees mandate that the employees either be vaccinated or be tested regularly and wear masks with limited exceptions. Predictably, the OSHA rule was immediately challenged in Court and made its way to the Supreme Court with unusual haste. The United States Court of Appeals for the Fifth Circuit stayed the rule before it was revived by the Sixth Circuit and then ultimately blocked by the Supreme Court.

The rule would have applied to approximately 84 million people, and, according to the Administration, would have protected hundreds of thousands of workers from hospitalization or death. The Labor Department said that the Supreme Court ruling would not affect the mandate’s status as a proposed rule. “OSHA is evaluating the record and the evolving course of the pandemic. OSHA has made no determinations at this time about when or if it will finalize a Vaccination and Testing rule. The agency intends to work expeditiously to issue a final standard that will protect healthcare workers from COVID-19 hazards,” an OSHA spokesperson said.

Conversely, business groups celebrated the Supreme Court decision and the Administration’s action in withdrawing from the litigation. “We successfully challenged this misguided mandate all the way to the U.S. Supreme Court, because it was a clear overstep of OSHA’s authority, and because it would have had disastrous consequences

for an already-overstressed supply chain,” American Trucking Association President Chris Spear said in a Jan. 25 statement. “The Supreme Court bounced it, and we are pleased to see the agency has now formally withdrawn it, sending this ETS to the dustbin where it belongs.”

Supporters of OSHA have argued that the mandate is the best way to reduce the number of COVID infections and deaths. The agency’s pre-publication Federal Register announcement said: “Notwithstanding the withdrawal of the vaccination and testing [emergency temporary standard], OSHA continues to strongly encourage the vaccination of workers against the continuing dangers posed by COVID-19 in the workplace.”

Further, Labor Secretary Marty Walsh said he was disappointed in the court’s decision, calling it a “major setback to the health and safety of workers across the country.”

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