



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

PUBLIC SECTOR UNIONS LOSE FED CHALLENGE TO BENEFIT CUTS

On October 28, 2020 the United States Court of Appeals for the First Circuit ruled that Puerto Rico was within its rights to pass laws that cut benefits for public sector workers because the laws were a reasonable means to address the island’s fiscal crisis. See *Hermandad de Empleados v. FOMB*, 1st Cir., No. 19-2028 (10-28-20). This case may establish a precedent as many state and local governments grapple with crippling deficits and debt caused by the COVID-19 pandemic and look for ways to reduce costs.

Public sector unions in Puerto Rico including the Hermandad de Empleados del CFSE and Union de Medicos de la CFSE challenged several laws that the commonwealth government passed between 2014 and 2017 to address public spending in the wake of the island’s debt crisis.

In federal court, the unions argued that the laws which changed collective bargaining agreements were neither reasonable nor necessary to address a significant government interest. Further the unions argued that the CFSE – which is a government-owned corporation of Puerto Rico that provides workers’ compensation in the island is solvent and independent of the government and should not be subject to cost-cutting measures. The cost cutting measures include capping vacation days and eliminating the ability of its workers to convert unused vacation days into cash payments.

A panel of judges from the First Circuit Court of Appeals disagreed with the union’s arguments and concluded that “there is no basis, however, for the unions’ contention that the benefit cuts implemented by the challenged laws are unrelated to Puerto Rico’s interests in addressing the fiscal challenges faced by its central government. In recent years, Puerto Rico has passed a series of measures that enable its central government to benefit from the fiscal savings generated at public corporations.” The unions offered alternative cost cutting measures that the court rejected as “bare-bones” and insufficient to address the fiscal crisis.

NLRB TELLS PAVING CO. IT CAN'T SHIFT UNION MEMBER WORK WITHOUT BARGAINING

The National Labor Relations Board (“NLRB or Board”) recently held that New York Paving Inc. (“New York Paving”) violated federal labor law by shifting the work that had traditionally been done by members of Construction Council Local 175 (“Local 175”) to members of the Highway Road and Street Construction Laborers Local 1010 (“Local 1010”). *New York Paving, Inc. and Construction Council Local 175, Utility Workers Union of America, AFL-CIO and Elijah Jordan*, 29-CA-233990 and 29-CA-234894.

New York Paving provides paving services to utilities companies including National Grid and Hallen Construction, a subcontractor for ConEd. New York Paving employs members of Local 175 and Local 1010. The members of each union have performed different work for New York Paving. Members of Local 1010 have historically performed concrete paving while members of Local 175 performed asphalt paving.

In 2017, New York Paving started to use members of Local 1010 to perform asphalt paving. New York Paving argued that it started this practice to comply with its renegotiated subcontract with Hallen which incorporated new ConEd rules that requires that workers who perform certain jobs belong to unions affiliated with the Building & Construction Trades Council of Greater New York. Local 1010 is a member while Local 175 is not.

The NLRB held that New York Paving violated Section 8(a)(5) and (1) of the National Labor Relations Act because it transferred paving work without providing Local 175 notice and an opportunity to collectively bargain. The Board pointed out that New York Paving had knowledge of the change to ConEd rules while it was renegotiating its sub-contract with Hallen and could have incorporated the issue of the impact to Local 175 in its negotiations.

The Board ordered New York Paving to cease and desist from transferring Local 175 work without negotiating with the union. The Board ordered New York Paving to make Local 175 members whole for any “lost earnings and other benefits suffered as a result of the unilateral transfer of bargaining unit work outside the bargaining unit.”

OSHA SAYS THAT CLOTH MASKS ARE NOT PPE

The Occupational Safety and Health Administration (“OSHA”) issued guidance stating it does not consider cloth masks personal protective equipment (“PPE”) under the legal standard it uses to determine efficacy. However, OSHA has told employers that it may determine that cloth face coverings must be worn to abate COVID-19. OSHA wanted to be clear that it does not have enough information to determine that cloth masks are as safe as the masks used by medical professionals which include surgical and N-95 masks.

OSHA issued the guidance after the Center of Disease Control and Prevention published a scientific brief that found that some cloth face coverings have the potential to provide benefits

consistent with PPE. While OSHA recommends that employers mandate that their employees wear face coverings to help mitigate the transmission of COVID-19, OSHA declined to define cloth masks as PPE under its legal standard because not enough information is available to determine the efficacy of cloth face coverings against COVID-19.

This is the statement that OSHA issued in its Frequently Asked Questions website:

“Cloth face coverings are not considered personal protective equipment (PPE) and are not intended to be used when workers need PPE for protection against exposure to occupational hazards. As such, OSHA's PPE standards do not require employers to provide them.

- The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act, requires each employer to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm. Control measures may include a combination of engineering and administrative controls, safe work practices like social distancing, and PPE.
- However, employers may choose to ensure that cloth face coverings are worn as a feasible means of abatement in a control plan designed to address hazards from SARS-CoV-2, the virus that causes COVID-19. Employers may choose to use cloth face coverings as a means of source control, such as because of transmission risk that cannot be controlled through engineering or administrative controls, including social distancing.”

STEPHEN MC QUADE JOINS PITTA LLP

Pitta LLP is delighted to announce that Stephen Mc Quade, a senior labor and employment attorney, has joined the firm as Of Counsel effective November 16, 2020, to broadly serve the firm's private and public sector clients.

A seasoned litigator, Mr. Mc Quade has represented labor unions and individual employees in both federal and state courts in New York and New Jersey, as well as in various administrative and quasi-judicial proceedings, including the NYC Office of Collective Bargaining, the NYS Public Employment Relations Board, and the American Arbitration Association. Stephen has represented police unions in Nassau, Suffolk, and Rockland counties, as well as the Uniformed Firefighters Association, Local 94 IAFF, AFL-CIO and Assistant Deputy Wardens/Deputy Wardens Association. Additionally, Mr. Mc Quade represented employees in actions invoking Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act and the state and local equivalent statutes.

Earlier, Mr. Mc Quade served as a Trial Examiner for the NYC Office of Collective Bargaining from 2004 to 2011, where he drafted decisions involving claimed violations of the New York City Collective Bargaining Law, issues concerning arbitrability, and matters regarding bargaining unit certification. He also presided over evidentiary hearings and status conferences involving various municipal employers and recognized employee organizations.

Mr. Mc Quade earned his Juris Doctor from Brooklyn Law School and a Bachelor of Arts in history from the University of Notre Dame, where he was a member of the men's Varsity Fencing team.

Please join us in welcoming Stephen to our circle of friends and colleagues, working together to meet the challenges of these unprecedented times.

THANKSGIVING MESSAGE

As the Thanksgiving Holiday begins, we at Pitta LLP would like to extend our sincere thanks and gratitude to all of our clients and friends for their confidence and friendships as always and throughout this difficult year. May you all celebrate a healthy, peaceful, and happy Thanksgiving, and may you enjoy the holiday and the coming year with good health and happiness in abundance.



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