SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
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NLRB Issues a Pair of Important Decisions Concerning Arbitration Agreements

The National Labor Relations Board ("NLRB") has issued a pair of important decisions regarding arbitration agreements relevant to private employers. The first, Cordúa Restaurants, Inc., 368 NLRB No. 43 (2019), is the first decision issued by the NLRB concerning class and collective action waivers, or agreements to submit class or collective action disputes to arbitration, since the Supreme Court held in Epic Systems Corp. v. Lewis, 584 U.S. (2018) that such waivers do not violate federal private sector labor law and the right to engage in protected concerted union activity. In *Cordúa*, the NLRB held that private employers are not prohibited from informing their employees that not signing or refusing to sign mandatory arbitration agreements will result in their termination, or from promulgating a mandatory arbitration program in response to employees opting into a collective action under the Fair Labor Standards Act or state wage and hour law. Employers are however prohibited from retaliating against an employee for engaging in protected concerted activity by filing a class action.

Along these lines, and one thing the NLRB did make clear in another recently-released decision, Alorica, Inc., and its subsidiary/affiliate Expert Global Solutions, Inc., is that overbroad arbitration agreements or waivers can be a violation of the National Labor Relations Act. In this case, the company maintained an arbitration agreement that required "any" employment dispute be arbitrated. The NLRB found that this broad language chilled the rights of employees under private sector federal labor law because it forbade employees from filing unfair labor practice charges with the NLRB.

These cases make clear that the application of federal labor law to arbitration agreements is not without nuance and that there is value in making sure language in arbitration agreements is refined to account for this nuance.

NLRB Refines Rights of Employees to Distribute Union Literature

In other noteworthy news from the NLRB, the agency recently issued an order curtailing the rights of non-employees to distribute union literature. The case, Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts and Local 23, American Federation of Musicians, Case 16–CA–193636, involved musicians with the San Antonio Symphony who wished to distribute leaflets to patrons of the performing arts center where they performed. The NLRB held that the musicians did not have the right to distribute literature at the performing arts center because it was not employer property as the arts center did not employ the musicians. The holding is that employees have no right to distribute union literature on private property where they might work, but that is not owned by their employer.

Eleventh Circuit Reverses Summary Judgment in Employment Case

On August 15, 2019, the Eleventh Circuit Court of Appeals issued another opinion in the matter of Lewis v. City of Union City, an employment discrimination case brought by a female African-American police detective who was fired by Union City, Georgia in 2012. At the time of her termination, Ms. Lewis was on administrative leave pending resolution of the questions whether she safely could be subjected to a Taser shock or exposed to pepper spray.

In early 2010, the City's Police Chief purchased Tasers for all officers and required each to carry one. The Chief required officers to receive a five-second shock as part of their Taser training. Officers were also permitted to oleoresin capsicum ("OC") spray.

According to Ms. Lewis, a heart condition prevented her from being able to fully participate in the Taser training – specifically, the portion of the training where she would receive a five-second shock. Ms. Lewis' doctor wrote the City a letter explaining that because of Ms. Lewis' heart condition she would not recommend that a Taser gun or OC spray be used on or near Ms. Lewis. Following receipt of the letter, the City placed Ms. Lewis on "administrative leave without compensation until such time as [her] physician releases [her] to return to full and active duty." The City later terminated Ms. Lewis, stating that she had exhausted all of her accrued paid leave and had failed to turn in the necessary FMLA paperwork. Ms. Lewis sued the City for discrimination on the basis of race, gender, and disability.

A divided Eleventh Circuit panel held that genuine disputes of material fact on whether the Taser training or exposure to OC spray were essential parts of Ms. Lewis' job precluded summary judgment. The court also held that Ms. Lewis had presented "a mosaic of circumstantial evidence" to support her race and gender discrimination claims.

Fifth Circuit Strikes Down Criminal History Guidance

In early August, the Fifth Circuit Court of Appeals struck down the guidance issued by the Equal Employment Opportunity Commission (EEOC) which restricts the use of criminal background checks in the hiring process. The court held the Guidance was a substantive rule the EEOC had no authority to issue, and that the EEOC can no longer enforce the Guidance or treat it as binding in any respect. Although the decision only applies to the State of Texas, it raises the question of how this background check guidance issued in 2012 ultimately could be deemed overreaching in other states.

The Guidance announced that an "employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964." Texas, which prohibits individuals with certain felony convictions from holding specific state jobs, challenged the Guidance in federal court in 2013. Originally, the district court dismissed the case on the basis that the State did not have standing because the Guidance had not been enforced against it. After it was remanded by the Fifth Circuit, the district court enjoined enforcement of the Guidance on the basis that the EEOC failed to comply with the Administrative Procedure Act's notice and comment

requirements. Under the district court's injunction, if the EEOC complied with the Administrative Procedure Act, it could arguably proceed with enforcement.

On appeal, the Fifth Circuit affirmed a modified version of the injunction. The unanimous court agreed that the Guidance constituted a substantive rule, but went a step further, and concluded that the EEOC had no authority to issue substantive rules implementing Title VII in the first place. As such, even if the EEOC followed the notice and comment requirements, it still could not issue the Guidance. The panel modified the injunction issued by the district court "to clarify that EEOC and the Attorney General may not treat the Guidance as binding in any respect."

It is important to note that this case is precedent in the Fifth Circuit (Texas, Louisiana and Mississippi) insofar as the EEOC guidance is concerned. While it may be persuasive in other jurisdictions, employers must also keep in mind state laws and local ordinances which may be enacted to "ban-the-box" or other similar measures.

The Fifth Circuit's opinion can be found here.

EEOC Conferred Broad Power to Issue "Pattern and Practice" Subpoenas

The U.S. Court of Appeals for the Tenth Circuit affirmed the enforcement of a subpoena issued by the EEOC. Eleven former and current employees filed a Charge of Discrimination against a multi-facility health care organization in Colorado. The employees claimed they were subjected to discrimination under the ADA. In investigating the Charge, the EEOC issued an administrative subpoena compelling the employer to provide information relevant to the 11 employees. The subpoena also compelled the employer to provide information about other employees. Although the employer objected to broad scope of the subpoena, the court upheld the subpoena, which essentially granted the EEOC broad "pattern or practice" investigative authority.

Read more here.

NLRB Rules Dismissal of "Known" Union Supporter Was Lawful Even Though Employer's Reason for Dismissal was Pretextual

Oven manufacturer Electrolux dismissed an employee "known" to be a union supporter. The employee had engaged in activities such as distributing union cards and flyers and wearing pro-union shirts. At an organizing meeting, after the employee challenged a manager during a speech, two managers told the employee to "shut up" and said "she did not know what she was talking about." Eight months later, Electrolux discharged the employee, claiming the employee was discharged for insubordination for failing to follow a supervisor's directive to complete a routine task.

The employee appealed her dismissal in a formal administrative hearing. The Administrative Law Judge (ALJ) ruled Electrolux unlawfully discharged the employee for engaging in union activities. The NLRB, however, reversed the ALJ's finding. Although agreeing with the ALJ that Electrolux's proffered reason for discharging the employee was pretextual, the NLRB ruled the employee failed to meet her burden to prove by a preponderance of the evidence that her union

activities were a "motivating factor" in her dismissal. Although having told the employee to "shut up" may have been rude, the NLRB did not consider such a statement as sufficient evidence that Electrolux harbored anti-union animus. Moreover, the NLRB considered the eight- month period of time between the employee's union activities and her dismissal too remote in time to infer a retaliatory motive by Electrolux.

Read more here.

Participation by Unrelated Employers in a Single 401(k) Plan Now Easier

The U.S. Department of Labor issued a final rule that facilitates defined contribution multiple employer plans (MEP's). The new rule reduces costs and administrative fees for employers joining MEP's. Under the new rule, MEP's can be authorized in two ways. First, association retirement plans (ARP) can be run either by existing associations (*e.g.*, chambers of commerce) or by forming associations to run the MEP. Second, professional employer organizations (PEO's) can administer a MEP for their employer clients.

NLRB: Misclassifying Employees as Independent Contractors Does Not Violate the National Labor Relations Act

On August 29, 2019, the National Labor Relations Board held that an employer does not violate the National Labor Relations Act by misclassifying its employees as independent contractors. The majority reasoned that when an employer decides to classify its workers as independent contractors, it forms a legal opinion regarding the status of those workers, and its communication of that legal opinion to its workers is privileged by Section 8(c) of the Act – even if the opinion proves to be erroneous. The majority rejected the charging party's assertion that mistakenly identifying employees as independent contractors "inherently threatens" them with adverse action if they exercise their rights, or suggest that it would be futile for them to engage in protected activities.

The majority acknowledged that policy concerns supported their ruling. The majority noted that making the distinction between employee and independent contractor is an "unenviable task" – one that involves consideration of all 10 common law factors found in the Restatement (Second) of Agency, with no one factor being decisive. Moreover, reasonable minds can, and often do, disagree about independent contractor status. Independent contractor relationships would be significantly chilled if an employer's misclassification, standing alone, was a per se violation of the Act.

The case is Velox Express, Inc. and Jeannie Edge. Case 15-CA-184006.

OSHA Respirable Crystalline Silica Requirements May Be Loosened

Crystalline silica is a common mineral found in materials like sand, stone, concrete and mortar. Respirable crystalline silica is created when cutting, drilling, crushing stone, rock, concrete, brick and the like. As workers who inhale these crystalline silica particles are at increased risk of developing silica-related diseases, OSHA created two respirable crystalline silica standards, one for construction and the other for maritime and general industry. The standards require employers

to determine the amount of silica that workers are exposed to, and protect workers from respirable crystalline silica exposures above a certain amount.

To help employers comply with OSHA standards, it created a compliance option called Table 1, which is a safe harbor provision which allows employers who follow the requirements contained in Table 1 not to have to do air monitoring, and the employer will be presumed to be below the permissible exposure limit. Earlier this month, OSHA indicated it may consider additional exceptions to the 2016 silica rule in construction by gathering information about which dust control measures and construction tasks could be added to Table 1, thus possibly reducing or loosening the requirements of the silica rule.

Information on OSHA's Crystalline Silica Rule can be found here.

"Would you like a side of fracas with your order?"

In news from the Lonestar state, a Texas school superintendent was suspended for three days following reports that he drunkenly head-butted another superintendent at a San Antonio Whataburger. The superintendents – who were attending a leadership conference – ran into each other at the restaurant, at which time one reportedly made a comment about the other's clothes, triggering the head-butt. An off-duty police officer saw the ensuing melee, then detained the two men until other police officers responded.

The school board based the suspension on the superintendent's failure to promptly report the altercation which took place earlier this summer.

Firm News

Robert J. Sniffen was recently selected by his peers for inclusion in *The Best Lawyers in America*© 2020 Edition in the fields of Employment Law – Management, Labor Law – Management and Litigation – Labor and Employment. Additionally, Michael P. Spellman was named *The Best Lawyers*™ 2020 Litigation – Labor and Employment "Lawyer of the Year" in Tallahassee.

Robert J. Sniffen authored "The ADA and Website Accessibility," which was published in the FSAE Source magazine. The article explores the rash of website accessibility lawsuits filed under Titles II and III of the Americans With Disabilities Act and steps public and private sector entities can take to mitigate their risk

Jeff Slanker has been reappointed to serve as the communications chair of the UCF Tallahassee Alumni Club. Jeff is a 2008 graduate of UCF's business school.

Past Issues of the Labor and Employment Law Alert Available on Website

You may view past issues of the Labor and Employment Law Alert on the Firm's website: www.sniffenlaw.com. After entering the Firm's website, click on the "Publications" page. Our Firm also highlights various articles of interest on our official Twitter feed, @Sniffenlaw.