SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
June 2020

OSHA Issues FAQs on Facemasks in the Workplace and Return to Work Guidance

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has published a series of frequently asked questions and answers regarding the use of masks in the workplace. These FAQs outline the differences between cloth face coverings, surgical masks and respirators and when each type of face covering should be used. Additionally, the FAQs recommend following CDC guidance on washing face coverings, which states cloth face coverings should be washed after every use. The FAQs also note the need for social distancing measures in the workplace, even when workers are wearing face coverings.

OSHA also issued guidance to assist employers reopening non-essential businesses and their employees returning to work during the evolving coronavirus pandemic. The guidelines provide general principles for updating restrictions originally put in place to slow the spread of the coronavirus. During each phase of the reopening process, employers should continue to focus on strategies for basic hygiene, social distancing, identification and isolation of sick employees, workplace controls and flexibilities, and employee training. OHSA reminds employers that they should continue to consider ways to use workplace flexibilities, such as remote work and alternative business operations, to provide goods and services to customers and to continually monitor federal, state, and local government guidelines for updated information.

For more on OSHAs FAQs, click here.
For more on OSHAs return to work guidance, click here.

What Employers Should do in Light of Bostock...

As our readers know from our Firm's recent special alert on the Supreme Court's decision in the consolidated cases of *Bostock*, *R.G. Harris*, and *Zarda*, the Supreme Court has now held that termination of an individual because they are homosexual or transgender is sex discrimination, in violation of Title VII. Recognition of this holding and how it is at play in the workplace is key to continued compliance with the law.

First and foremost, business owners and HR professionals must make sure that their policies and procedures, whether that is expressed in an employee handbook or policy and procedure manual, are consistent with the holding and reasoning of the Supreme Court. If there is a need to change a policy to be consistent with the Supreme Court's interpretation of federal employment discrimination law, that change must be made.

Next, business owners and HR professionals must consider the need to re-train or conduct follow-up training on any changed policies. Even if your policy is not changing, it is wise for

employers to conduct follow-up training on a regular basis and it may be wise to conduct training with employees and managers to make sure that everyone in your workplace understands the contours and applicability of your anti-harassment and anti-discrimination policy and reporting procedures.

These steps will make sure that your business is compliant with federal law, such that it is and how it has been interpreted. Involvement of legal counsel in this review may be worth it, and can be part of a regular audit of policies and procedures that should be conducted on a semi-regular basis to make sure that these types of changes are reflected in your way of doing business. An ounce of prevention is worth a pound of cure.

Employee Claims Hostile Work Environment Led Him to Attempt Suicide at the Workplace

The Eleventh Circuit Court of Appeals in *Fernandez v. Trees, Inc*., overturned the dismissal of a Title VII hostile work environment claim filed by Alexis Fernandez, an employee of Cuban descent. Fernandez worked as a crew foreperson and cleared trees and other vegetation from utility lines. He claimed his supervisor harassed him on an almost daily basis by making derogatory comments about Cubans. Because of being subjected to such harassment for two months, Fernandez attempted suicide at the job site. He doused himself with gasoline, but a co-worker was able to tackle him and prevent him from setting himself on fire. Before trial, the trial court dismissed Fernandez's claim, finding the alleged harassment by his supervisor was not sufficiently severe or pervasive to support a hostile work environment claim under Title VII.

The Eleventh Circuit, however, overturned the dismissal and allowed Fernandez to proceed to trial on his hostile work environment claim. Based on the oft-cited case of *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993), Title VII requires proof "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Moreover, it must be shown the work environment was both subjectively and objectively hostile. Fernandez's employer did not dispute he subjectively perceived his work environment to be abusive, but his employer argued the alleged harassment by his supervisor was not objectively hostile. The Eleventh Circuit disagreed and concluded Fernandez demonstrated his work environment was one "that a reasonable person would find hostile or abusive." Evidence presented by Fernandez included the fact that his supervisor "continually — often in vulgar terms — disparaged, ridiculed, and insulted all the employees in a protected class and persisted in doing so despite Fernandez's and other Cuban employees' complaints and specific requests that he stop." The Eleventh Circuit found such evidence sufficiently established an objectively hostile work environment.

To read the Eleventh Circuit opinion in *Fernandez v. Trees Inc*., please click here.

New Rule Clarifies Fluctuating Workweek Method of Computing Overtime

Earlier this month, the U.S. Department of Labor published a new rule which clarifies payments in addition to fixed salary are compatible with the use of the fluctuating workweek method under the Fair Labor Standards Act. The final rule expressly allows employers to pay

bonuses, premium payments, or other additional pay (such as commissions and hazard pay) to employees compensated using the fluctuating workweek method of compensation. This is especially important as employees slowly return to the workplace during the COVID-19 pandemic. To promote social distancing, employers will likely adopt variable work schedules for their employees. According to the Department, "[t]his rule will make it easier for employers and employees to agree to unique scheduling arrangements while allowing employees to retain access to the bonuses and premiums, including hazard pay, they would otherwise earn."

To read more about this new rule, please click here.

EEOC Issues Updated Technical Assistance
Regarding COVID-19 Antibody Testing of Employees

On June 17, 2020, the US Equal Employment Opportunity Commission ("EEOC") issued updated technical assistance to employers regarding COVID-19 antibody testing. The EEOC stated that, at this time, the Americans with Disabilities Act of 1990 ("ADA") does not allow employers to require antibody testing before allowing employees to re-enter the workplace. Note that the ADA applies to employers with 15 or more employees and all units of state and local government. Antibody testing is different from a regular COVID-19 test which, according to the EEOC, may be administered to employees before they enter the workplace to determine if they have the virus.

The EEOC views COVID-19 antibody tests as a medical test under the ADA and, as such, should not be used to make job decisions about returning persons to the workplace. The EEOC is following interim guidelines issued by the CDC with respect to antibody testing. Employers are still authorized to take employees' temperatures and to require (and encourage) infection control practices, including social distancing, regular hand washing, and the wearing of masks in the workplace.

EEOC's technical guidance document may be found here.

Department of Labor Issues Updated COBRA Model Notices

On May 1, 2020, the Department of Labor ("DOL") issued revised model COBRA general and election notices. Plan administrators may use the notices to satisfy the notification requirements imposed by COBRA. Under COBRA, an individual who was covered by a group health plan on the day before the occurrence of a qualifying event (i.e., reduction in hours that causes a loss in coverage under the group health plan or termination of employment) may elect, for a period of up to 18 months, to continue their coverage under the plan. These individuals are referred to as "qualified beneficiaries."

COBRA generally requires that group health plan administrators distribute two notices: (1) a general, or "initial," notice at the time an individual becomes eligible for coverage under the plan that describes the individual's right to COBRA continuation coverage; and (2) an election, or "qualifying event," notice at the time any such qualifying event occurs that describes the qualified beneficiary's process for electing such coverage. The DOL has issued

model notices that plans may utilize to satisfy the requirement of providing the general and election notices under COBRA. Though use of the DOL's model notices is not required, the DOL does deem that use of its model notices fully satisfies compliance with COBRA's notice requirements.

The DOL's updated model general and election notices can be accessed here.

Suspended Entry for Non-Immigrant Workers

On April 23, 2020, President Trump issued Proclamation 10014 which suspended entry to the United States for a broad range of immigrant visas. Proclamation 10014 was originally set for review on June 24, by the Secretary of Homeland Security in consultation with the Secretaries of Labor and State to determine if it needed to be extended or otherwise modified. However, on June 22nd, the President issued a second Proclamation, extending the duration of Proclamation 10014 until December 31, 2020, and suspending the entry of various non-immigrant visa holders, specifically individuals with H-1B, H-2B, H-2A/B, J (except for certain student, research, professor, and specialist categories), and L-1 visas. Importantly, the suspension only applies to those who are outside of the United States on the date of the proclamation, do not have a valid non-immigrant visa on the effective date of the Proclamation, and lack a valid official travel document other than a visa on the date of the Proclamation.

To read more about this Proclamation, please go here.

NLRB Rules on Unions at Religious Colleges

The National Labor Relations Board (NLRB) has ruled that it does not have jurisdiction over faculty members at religious colleges and universities, reversing a 2014 decision. This case involved Bethany College, a Lutheran liberal arts institution in Kansas, and two former assistant professors. The former professors complained to the NLRB that Bethany terminated them in violation of the NLRA, after one of them raised concerns about what he considered to be Bethany’s overly broad confidentiality rules. Both former professors later said that professors at Bethany were prohibited from discussing a proposed tenure plan and general employment terms and conditions among each other. An administrative law judge at the NLRB sided with the former professors in 2017 and Bethany appealed to the NLRB’s full board, which ultimately sided with the religious college.

In the decision, the Board adopted a jurisdictional test established in 2002 by the federal appeals court in Washington, D.C., in a case concerning the University of Great Falls. Under this test, the Board must decline jurisdiction over the faculty members at an institution that (1) “holds itself out to students, faculty, and community as providing a religious educational environment,” that (2) is “organized as a nonprofit,” and that (3) is “affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.”

To read more on the decision, click here.

Florida Fiscal Year 2020-2021 Budget

On June 29, 2020, Florida Governor Ron DeSantis approved the Fiscal Year 2020-2021 budget. Importantly, the final budget includes over $1 billion in vetoed spending. The entire budget, including the veto list, is available at the following link: Press Release.

Firm News

Robert J. Sniffen & Michael P. Spellman have been selected to the 2020 Florida Super Lawyers list. **Terry J. Harmon & Jeffrey D. Slanker** have been selected to the 2020 Florida Rising Stars list.

Michael Spellman presented "Public Employee Considerations During a Declared Emergency" to the Florida Municipal Attorneys Association as a part of its Webinar Series "Public Emergencies & Lessons Learned From COVID-19".

On June 5, 2020, **Terry J. Harmon** presented “The IDEA, COVID-19 and the 2020-2021 School Year” to the Florida School Board Attorneys Association at its 2020 Spring Mini Virtual Conference.

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.