

SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT May 2020

Supreme Court hears Ministerial Exception Case

Earlier this month, the U.S. Supreme Court heard oral argument in two cases brought by teachers who sued the Catholic schools where they worked after their contracts were not renewed. The issue before the Supreme Court is the “ministerial exception” – an idea that courts should not interfere with the operations of religious organizations. Previously, the exception meant that employees were unable to sue religious employers for wrongful termination. Supporters of the exception argue that it protects the autonomy of religious organizations to select those who teach the faith. Opponents argue that it deprives hundreds of thousands of employees of the protections provided by employment discrimination laws.

In 2012, a unanimous Supreme Court held that a teacher at a religious school who taught religion classes was rightfully classified as a “minister” by the employer church. In the recently argued cases, both teachers spent some time each week teaching religion and also taught other subjects. Based on the Justices’ questions, it appears these cases are less likely to be unanimously decided.

Source: [Scotusblog.com](https://www.scotusblog.com)

CDC Releases Decision Trees for Reopening Amid COVID-19 Crisis

The Centers for Disease Control and Prevention (CDC) released decision trees regarding reopening during the COVID-19 pandemic. The decision trees apply to reopening workplaces, bars, restaurants, mass public transit, schools, and youth programs and camps. The decision trees are designed to assist businesses and administrators.

To view the workplace decision tree, click [here](#).

To view the bars and restaurants decision tree, click [here](#).

To view the mass transit decision tree, click [here](#).

To view the youth programs decision tree, click [here](#).

OSHA Injury Reporting and COVID-19

The Occupational Safety and Health Administration (“OSHA”) revised its policy for when employers must record COVID-19 cases in their injury and illness logs. Under this new policy, employers who are required to keep OSHA logs must make a determination as to whether workers’ COVID-19 cases are job-related. Employers are also expected to perform an investigation into the determination of work-related COVID-19 cases. When making its determination, OSHA will look into the reasonableness of the employer’s investigation and the evidence available to the employer with respect to whether COVID-19 was contracted in the workplace.

If an employer cannot determine whether it is more likely than not that an employee's COVID-19 exposure was work-related, after conducting a reasonable and good faith inquiry, then the employer does not have to record the illness in its log. The revised policy is intended to be time-limited to the current COVID-19 pandemic. Employers should frequently check OSHA's webpage for updates.

To view the revised policy, click [here](#).

U.S. Department of Labor Withdraws Rules Designating Retail Establishments

On May 18, 2020, the U.S. Department of Labor withdrew 29 CFR §§ 779.317 and 779.320, which established lists of business which may qualify for the commission exemption to the overtime provisions of the Fair Labor and Standards Act ("FLSA"). In order to qualify for this exemption, an employer must demonstrate as follows:

1. An employee is employed by a retail or service establishment;
2. An employee is paid not less than one and one-half times the applicable minimum wage during any week in which more than 40 hours is worked; and
3. Not less than 50% of the employee's earnings for a given period were earned through commissions.

By eliminating the lists of presumptive and probable retail establishments, the Department of Labor has opened this exemption to new businesses which may not have been traditionally considered to be retail establishments. It is important to note that in order to meet the qualifications for the third part of the test, the minimum "given period is not less than one month and not more than one year."

We anticipate that the withdrawal of these rules will be clarified by the Courts in the coming years. To read more about the withdrawal of these Rules, please click [here](#).

EEOC Return to Work Guidance under the ADA and its Brethren

It is permissible to ask questions of returning employees which are related to their job or are of a business necessity if the medical condition at issue, e.g. symptoms of COVID-19, would pose a direct threat to the health and safety of the employee or others within in facility of employment. To determine whether there is a direct threat, employers should turn to the best available objective medical advice, e.g. CDC or other public health authorities. As long as the employer is consistent with the chosen authority's guidance, the employer will be in compliance with the Americans with Disabilities Act ("ADA").

Also, an employee has a right to request reasonable accommodations if the personal protective equipment ("PPE") required to be worn by the employer exacerbates health conditions, e.g. latex allergy, of the employee or interferes with the employee's right to wear religious garb. The accommodation, however, must begin with a request from the employee pursuant to the ADA. Further, an employer must not make a unilateral determination that an employee is a "high-risk"

employee and thereby exclude the employee from returning to work. Only the employee may request to be excused because of his or her classification as high-risk. The only exception to this is if the employer can demonstrate that the employee's condition poses a direct threat to his or her health that cannot be mitigated through a reasonable accommodation.

For more information, click [here](#).

SBA Releases Paycheck Protection Program Loan Forgiveness Application

The Small Business Administration released its Paycheck Protection Program ("PPP") loan forgiveness application <https://www.sba.gov/sites/default/files/2020-05/3245-0407%20SBA%20Form%203508%20PPP%20Forgiveness%20Application.pdf> along with instructions for completion of the form for submission to PPP lenders. The form is used to determine the amount of an applicant's PPP loan that will be forgiven. As most small businesses know by now, the PPP program promised loan forgiveness of substantially all of the eight week PPP loan package so long as the loan funds were used for payroll, business mortgage interest, rent and utilities.

The application consists of a three-part test to calculate forgiveness. First, participants must calculate payroll and non-payroll qualifying costs over the eight week PPP period. Then there is a reduction if the employer reduced pay for employees by more than 25% or if the same number of full-time equivalent (FTE) employees were not brought back into employment. Finally, there is a 75% payroll cost test, which requires that the forgiveness amount consist of at least 75% of payroll costs.

PPP lenders are certainly expected to work with their borrowers to ensure proper submission and maximization of forgiven amounts. Unforgiven amounts are still generously treated – 1% interest over two years with no borrower or prepayment fees. For more information on the forgiveness application requirements, click [here](#).

U.S. Department of Labor Clarifies Fluctuating Workweek

Under the FLSA, an employee who would ordinarily be required to receive overtime pay may reach a mutual agreement with their employer wherein the employee is paid a salary for their work up to a maximum number of hours worked each week. This has traditionally been referred to as the "fluctuating work week method" and envisions a scenario where an employee may be required to work a short number of hours one week, 40 hours the next week, and more than 40 hours the week after. For the first two of these weeks, the employee would receive the same payment, while in the third week, the regular rate of pay for the employee would be calculated based on the salary divided by the total number of hours worked, and an overtime payment equal to one half this rate for every hour worked in excess of 40 would be added to the payment.

However, providing additional payments such as bonuses, supplemental pay, and other extra payments to individuals paid in this manner has been difficult, and courts have inconsistently applied whether these extra payments break the flat-payment requirement of the fluctuating work week and therefore would require employers to pay employees a fixed hourly rate and standard

overtime at a rate of one and one half times this rate. The amendments to 29 CFR §778.114, enacted on May 20, 2020, clarify the Department of Labor’s stance that additional payments such as bonuses and premium pay do not disrupt the ability of employers to use the fluctuating workweek method to pay their employees. To read more regarding this rule, please refer [here](#).

From the Lighter Side: Unusually “Still” Guests at Virginia Restaurant

In the wake of new COVID 19 restrictions, a restaurant in Virginia has come up with a clever idea to guide its customers in complying with social distancing guidelines. Diners at a local restaurant in Virginia might find themselves sitting next to a table full of mannequins. Utilizing the mannequins to fill up the empty spaces may be a bit creepy but is a creative way to ensure the restaurant’s customers are properly spaced out in the indoor space. The mannequins, who are dressed in 40s-style outfits, will be offered wine and asked how they are enjoying their visit by the restaurant’s servers. The restaurant owners are hoping that in addition to facilitating a safe environment for its guests, the mannequins will provide for some fun photo ops and elicit a little laughter.

Source: MiamiHerald.com.

Firm News

On May 28, 2020, **Robert J. Sniffen** presented “COVID-19: Employer Responsibilities” in a webinar hosted by the Florida Association of Professional Lobbyists.

On May 8, 2020, **Terry J. Harmon** presented a webinar titled, “The IDEA and COVID-19,” to the Florida School Boards Association.

On May 21, 2020, **Terry J. Harmon** presented “The IDEA and COVID-19: Planning for the Return to School” in a nationally-broadcast webinar through LRP Publications.

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