

# SNIFFEN & SPELLMAN, P.A.

---

## LABOR AND EMPLOYMENT LAW ALERT August 2020

### **Department of Labor Releases New Guidance Regarding the Reopening of Schools**

The Department of Labor (“DOL”) has released a new set of “Questions and Answers” related to the Families First Coronavirus Response Act (“FFCRA”), and specifically addressed issues associated with the reopening of schools. Under the FFCRA, employees are entitled to up to 12 weeks of paid leave at two-thirds of the employee’s regular rate of pay if they have a bona fide need to care for a child whose school or child care provider is closed or unavailable due to COVID-19. Specifically, these questions address when employees can take paid leave for childcare under the FFCRA and specifically address questions related to schools operating under “hybrid schedules” with alternating days of physical and virtual attendance, schools permitting parents to choose between physical and virtual attendance, and schools using a purely virtual attendance methodology.

Under the hybrid schedules, employees are permitted to take paid leave if they are eligible under the FFCRA for days during which their student is required to attend school virtually, as the DOL considers the school effectively closed for virtual attendance. Similarly, for schools that are only offering virtual attendance, employees can use the 12 weeks of FFCRA leave to care for their child while they are learning from home. However, if a school permits parents to choose between in-person and virtual attendance, the DOL has determined that the school is not closed and leave under the FFCRA is unavailable. This stated, if an employee’s child is under a quarantine order or has been ordered to self-isolate, the FFCRA will permit the employee to take two weeks off at two-thirds their regular rate of pay to care for the child ordered to self-isolate or quarantine.

To read more about the DOL’s recent interpretations, please refer [here](#).

### **DOL Issues Guidance on Tracking Remote Worker Time**

Remote employee timekeeping is one of the many headaches of employers in a post-COVID world. Luckily, the DOL has issued some guidance concerning that issue that addresses the obligations of employers for tracking remote worker time. The guidance, which concerns non-exempt workers, notes some key points:

- Employers must pay employees for all hours worked, so long as the employer knows or has reason to believe work is being performed.
- This obligation extends to all hours worked that an employer has actual or constructive knowledge of, including unscheduled working time.
- An employer has actual knowledge of regularly scheduled work hours and other reported time. An employer has constructive knowledge of hours worked "if the employer should have acquired knowledge of such hours through reasonable diligence."

- An employer can exercise reasonable diligence in tracking unscheduled work time by providing a reasonable reporting procedure for such unscheduled work time.
- Under the guidance, an employer has no obligation to further investigate and learn of additional hours worked if the employee does not report the time worked through the reporting procedure.
- Employers must not prevent or discourage, either implicitly or explicitly, employee use of the reporting procedure.

Employers can of course have a policy against working overtime without first obtaining approval, but employers are still obligated to compensate employees appropriately for all hours worked, including paying overtime as it is incurred, even if that work is done in violation of the policy.

Read more [here](#).

### **New York Federal Court Strikes Down Portions of DOL Regulations on Federal Coronavirus Leave Laws**

A New York federal court has struck down several key components of the DOL's regulations concerning the FFCRA. We have written extensively on the obligations of employers under this new leave law passed earlier this year including its requirements for emergency paid sick leave and expanded family medical leave for employees affected by the COVID-19 pandemic. The court's decision strikes down four areas of the DOL's regulations on the statute.

First, the decision found that employers could not require employees to provide documentation supporting leave taken under the act prior to taking leave. Next, the court struck down components of the regulations that prohibited employees from taking leave under the act if the employer determined there was no work available for them to do. The court also struck down the broad definition of "health care provider" in the regulations. Health care providers may be exempted from the leave provisions of the statute. Finally, the court struck down portions of the regulations that required the employer to consent to an employee taking leave under the statute on an intermittent basis.

It is unclear if the decision applies only in New York or nationwide, so employers should consult counsel regarding the applicability of the decision and how it governs the application of the law.

You can read the case [here](#).

### **EEOC Issues Guidance on Opioid Use and the ADA**

The U.S. Equal Employment Opportunity Commission ("EEOC") recently issued two technical assistance documents concerning accommodations under the Americans with Disabilities Act ("ADA") for employees who use opioids as medication or that may be addicted to opioids. Importantly, the guidance indicates that employees may seek a workplace accommodation if they are taking lawfully prescribed opioid medications or if they are recovering opioid users. The guidance also contains information on drug testing and support for accommodation requests. Disability discrimination and accommodation issues can be some of the most challenging

situations employers face. Employers should be aware of this guidance and consult counsel when tough accommodation issues arise.

Read more [here](#).

### **President Trump Issues Executive Order Deferring Payroll Tax**

President Trump has issued a number of executive orders as relief measures in light of the COVID-19 pandemic. One of those actions was a memorandum to the Treasury Secretary directing the deferral of withholding, deposit, and payment of the 6.2 percent share employees pay for social security taxes between September 1<sup>st</sup> and the end of the year.

The deferral generally applies to employees earning less than 4,000 dollars, pre-tax, on a bi-weekly basis. Notably, this is only a deferral. Congress would have the power to forgive those deferred payroll taxes.

Importantly, Congressional action might render the impact of the executive order moot. The Department of the Treasury and the IRS have issued a short guidance document, but given the state of flux concerning this deferral, employers may want to consult counsel and tax professionals for guidance on the best course for addressing this payroll obligation in light of the memorandum.

Read the Executive Order [here](#). Read the guidance [here](#).

### **From the Lighter Side: “Chocolate Snow” Covers Swiss Town After Candy Factory Malfunction**

The Swiss town of Olten was covered in a light dusting of chocolate following an equipment malfunction inside the Lindt and Spreunli chocolate factory. A minor defect in the cooling ventilation area used to roast cocoa nibs resulted in fine cocoa powder being shot skyward where it was spread to nearby areas by strong winds.

The particles are reportedly harmless, and the company has offered to pay for any cleaning that might be required.

Source: [The Guardian](#)

### **Firm News**

[Robert J. Sniffen](#) and [Michel P. Spellman](#) have been selected by their peers as “Lawyer of the Year” in the practice areas of Employment Law – Management (Sniffen) and Labor Law – Management (Spellman) in Tallahassee, Florida. Only a single lawyer in a specific practice area and region is honored with a “Lawyer of the Year” recognition. Mr. Sniffen and Mr. Spellman will be highlighted in the 27<sup>th</sup> Edition of *The Best Lawyers in America*© for high caliber work in the practice areas of Employment Law – Management, Labor Law – Management, and Litigation – Labor and Employment.

**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](http://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.