SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
September 2020

Supreme Court of Florida Holds Sovereign Immunity Caps Apply to Claims by Multiple Victims of a Single Criminal Event

In two cases released earlier this month, the Supreme Court of Florida held that a mass shooting is a single incident and not individual events under Florida's sovereign immunity law. In *Barnett v. State Department of Financial Services* (No. SC19-87), the Florida Supreme Court unanimously held that a mass shooting that resulted in the tragic deaths of five people was a single incident or occurrence under Florida law, and the total liability for any negligence claim against a state agency could not exceed the cap set forth in Section 768.28(5), *Florida Statutes*. Section 768.28(5) limits the financial liability of state agencies or subdivisions for claims "arising out of the same incident or occurrence."

In *Barnett*, the plaintiff sued the Florida Department of Children and Families, claiming that the agency failed to protect the victims of the shooting. Plaintiff argued that the shooting of each individual victim should be viewed as a separate event. However, the Court held that the phrase "same incident or occurrence" refers to a criminal event as a whole and not to the distinct crimes against each individual victim. The opinion is available at the following link: Barnett.

Sniffen & Spellman, P.A. attorneys Michael Spellman and Jeff Slanker filed an *amicus brief* in *Barnett* on behalf of the Florida League of Cities.

Separately, in *Guttenberg v. School Board of Broward County* (No. SC19-487), the Court applied the rationale from *Barnett* to a case stemming from the tragic Marjory Stoneman Douglas High School shooting in 2018. Ultimately, the Court upheld a lower court decision that an event where a gunman killed 17 people and wounded 17 others is a single incident or occurrence under Florida's sovereign immunity statute. The opinion is available at the following link: Guttenberg.

Department of Labor Revises Regulation on The Families First Coronavirus Response Act

Last month the District Court of the Southern District of New York struck down four parts of the Department of Labor's (DOL) Families First Coronavirus Response Act (FFCRA) final rule: (1) the requirement that leave under the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA) are available only if an employer has work available for the employee from which leave can be taken ("the work availability requirement"); (2) the requirement that an employee must have employer consent to take FFCRA leave intermittently; (3) the definition of an employee who is a "health care provider," who an employer may exclude from use of FFCRA leave; and (4) the requirement that employees must provide their employers with certain notice and documentation before taking FFCRA leave (rather than after the leave begins).

Following the decision, the DOL revised its FFCRA regulation. In the revised regulation the DOL reaffirmed that EPSLA and EFMLEA leave may be taken only if the employer has work available from which an employee can take leave, and provides its reasoning why this precondition is critical; confirms that intermittent leave under FFCRA can only be taken with employer approval; provides an amended definition of "health care provider" that is narrower than its original regulations to cover employees who are health care providers under the classic Family and Medical Leave Act (FMLA) definition, as well as other employees who are employed to provide diagnostic, preventive, or treatment services, or other services that are integrated with and necessary to the provision of patient care; and clarifies the timeline for when an employee must provide notice of the need for leave and supporting documentation.

To read more, click here.

Updated EEOC Workplace Guidance on COVID-19

The Equal Employment Opportunity Commission (EEOC) again updated in September its online resource "*What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*." This resource, which is in a "frequently asked questions" format serves as a guide for employers on how to comply with anti-discrimination laws in the workplace during the COVID-19 pandemic. The update includes information incorporated from a webinar the EEOC conducted in March including guidance on teleworking as a reasonable accommodation; permissible health inquiries made of employees; and reporting instances of COVID-19 without violating confidentiality laws.

Read the updated EEOC COVID-19 guidance.

Employees v. Independent Contractors; Department of Labor Weighs In with Proposed Rule

In a proposed rule published in September, the DOL interprets for the first time the Fair Labor Standards Act (FLSA) on the issue of classifying workers as employees versus independent contractors. Misclassifying workers as independent contractors exposes an employer to potential liability for both FLSA and tax violations. When made final, the proposed rule will be a valuable resource for employers when classifying workers. The Department intends this proposed rule to be its "sole and authoritative interpretation of independent contractor status under the FLSA" and summarizes in a press release its proposed rule:

> Adoption of the FLSA's "economic realities" test to determine a worker's status, which considers whether a worker is in business for himself or herself (independent contractor) or is economically dependent on a putative employer for work (employee);
>
> Application of two core factors (nature and degree of the worker's control over the work and the worker's opportunity for profit or loss based on initiative and/or

investment) in determining whether a worker is economically dependent on someone else's business or is in business for himself or herself; and

Application of three other factors to determine whether a worker is an independent contractor versus an employee: the amount of skill required for the work; the degree of permanence of the working relationship between the worker and the potential employer; and whether the work is part of an integrated unit of production.

Read the Department press release and proposed rule.

DOL Clarifies Multiple Elements of the FLSA

The DOL recently released numerous opinions related to the FLSA, including clarification on the rules related to the fluctuating workweek, reimbursements, and the learned professional exemption to the FLSA's overtime and minimum wage requirements.

Pursuant to the fluctuating workweek model of pay, an employee whose hours fluctuate from week to week may be paid at a salaried rate providing that (1) an employee is never paid less than the minimum wage for all hours worked, (2) there is a clear mutual understanding that the employee will be paid under the fluctuating workweek model, and (3) an employee receives additional compensation for working in excess of 40 hours per week at a rate of one and one-half the regular rate of pay for that workweek. In the recently issued FLSA 2020-14, the DOL clarified, that an employee is not required to occasionally work less than 40 hours per week in order to qualify for the fluctuating workweek exemption, and reiterated that an employer may not make deductions from an employee paid pursuant to the fluctuating workweek method except for occasional disciplinary deductions for willful tardiness or absences or infractions of major work rules. To read more on this issue, please refer here.

Under the FLSA, the expenses incurred by an employee which are primarily for the benefit of the employer, such as requiring that an employee use a personal vehicle to make deliveries, count against the wages received by an employee and may result in an employee being paid less than the minimum wage. However, an employer may reimburse these expenses, without it counting towards an employee's wages, so long as the reimbursement reasonably approximates the expenses incurred. In FLSA 2020-12, the DOL clarified that while the Internal Revenue Service's Standard Rate for Reimbursement is presumptively reasonable, other methods may be used to reimburse employees. Unfortunately, the Department of Labor did not expound on the validity of other methods of calculating reimbursements, and instead only noted that reimbursement was appropriate only for expenses incurred on behalf of the employer. To read more about this issue, please refer here.

The learned professional exemption exempts employees from the minimum wage and overtime requirements of the FLSA provided that the position is salaried and requires advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of study. In FLSA 2020-13, the DOL encountered a question regarding whether individuals with PhDs employed to develop and deliver instructional materials qualified under this exemption. While the DOL determined that the work performed met the requirements to qualify as learned professional,

the payment methodology, which was a mix of hourly payments for development and single payments for content delivery, did not qualify as a salary under the FLSA. Because the employees were not paid on a salaried basis, they would not be exempt from the minimum wage and overtime requirements of the FLSA. While this is just a reiteration of the DOL's prior opinions, it is an important reminder that all executive, administrative, professional, and outside sales employees who are not paid overtime must be paid on a salaried basis of not less than $684 per week. To read more regarding this opinion, please refer here.

Trump Issues Executive Order Aimed at Combating Sex and Race Stereotyping

President Trump signed an Executive Order ("EO") on September 22, 2020 which impacts federal contractors, federal agencies and federal grant recipients in a number of ways. First, the EO prohibits employment training that implicates race or sex stereotyping, scapegoating or divisive concepts like unconscious bias. The prohibition expressly applies to training that implicates "conscious or unconscious" bias on the basis of an individual's race or sex. The EO also implements new notice and posting requirements, and requires that contractors and subcontractors post a notice to be seen by employees and applicants, regarding the contractor's commitments under the EO. The notice must also be provided to any labor union with which the contractor has a collective bargaining agreement. Next, the EO instructs the Office of Federal Contracting and Compliance Programs ("OFCCP") to create a hotline and investigate complaints received alleging that a Federal contractor is utilizing such training programs in violation of the contractor's obligations under the EO. Lastly, the EO instructs that a process be initiated for collecting employee training materials and related information used by contractors relating to diversity and inclusion efforts. Even though the EO is in effect now, the key provisions that impact federal contractors will only be applicable to contracts signed after November 22, 2020.

Read the Executive Order here.

Court Strikes Down Rule Related to Joint Employment Determination

The DOL has recognized since 1939 that there are situations in which multiple employers may be jointly liable for the hours worked by an employee under the FLSA, which could result in employers incurring additional liability for overtime. In March of 2020, the DOL adopted a Final Rule recognizing two forms of joint employment, horizontal and vertical. Horizontal employment is when an employee provides services to two related entities, and vertical joint employment, when an employee has a relationship with one employer that provides services to another, such as a staffing agency or subcontractor. Prior to the finalization of this Rule, 18 States filed suit, seeking to vacate the Rule, and in a hearing on the State's Motion for Summary Judgement, succeeded in having the Rule partially vacated.

While the court did not issue summary judgment regarding the horizontal employment provisions of the Rule, it determined that the Rule was in conflict with the FLSA as it applies to a vertical employment relationship because the Rule conflicted with the broad definitions of employer, employee, and employ set forth in the FLSA. For vertical employment, the Rule relied solely on the definition of employer contained in the FLSA, and was therefore an arbitrary and capricious interpretation to the FLSA. Accordingly, the Court determined that the Rule, as it applies to vertical

employment, was in violation of the Administrative Procedures Act and vacated only the portion of the Rule related to vertical employment by granting partial summary judgment to the Plaintiffs. It is unclear if the DOL will appeal this order at this time. To read more, please refer here.

11th Circuit Holds Arbitration Award on Wrongful Termination Claim Appropriate

In *Gherardi v. Citigroup Global Markets*, *Inc.* (11th Cir., No. 18-18131, 9/17/2020), Gherardi, an investment advisor for Citigroup Global Markets ("Citi") brought claims in arbitration against Citi for wrongful discharge. An arbitration panel awarded him nearly $4 million in damages without making any specific findings. Citi filed suit in federal district court to set aside the arbitration award, arguing the arbitrators exceeded their authority by awarding damages to an at-will employee for wrongful termination. The district court agreed with Citi and vacated the award.

The 11th Circuit vacated the district court's judgment. The Court reasoned that the parties had agreed to arbitrate all employment claims, and under the Federal Arbitration Act, the arbitrators had authority to decide the merits of the dispute. The Court held Citi does not get "a mulligan in federal court because it identifies a possible legal error in arbitration" and the district court had erred in substituting its judgment for that of the arbitrators. Additionally, the Court held that it "must defer entirely to the arbitrator's interpretation" of the underlying contract. As such, the 11th Circuit held that a valid arbitration agreement controls the proceedings, as the parties agreed to opt out of the court system. A dissenting judge wrote that the arbitration award was properly vacated because the arbitrators awarded damages on a claim for relief not available to at-will employees.

Read more here.

EEOC Issues Opinion Letter Clarifying Limitations on "Pattern and Practice" Lawsuits

On September 3, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) issued an opinion letter confirming its legal interpretation of the EEOC's ability to sue businesses under Section 707(a) of Title VII of the Civil Rights Act. The EEOC opined that Section 707(a) allows the EEOC itself to sue an employer to remedy workplace violations. Typically, such suits challenge workplace "patterns or practices" which the EEOC believes violate employee rights. The letter contains the EEOC's detailed analysis of the interplay between different sections of Title VII and Section 707.

There are two important takeaways for employers. The first is that Section 707 will be analyzed under the same framework as Section 706 (which covers discrimination claims the EEOC may pursue on behalf of individuals). Section 706 requires, among other things, the filing of a charge of discrimination and the EEOC's participation in the informal conciliation process before filing a lawsuit when it has reasonable cause to believe unlawful employment actions occurred.

The second important takeaway is the EEOC's affirmative statement that EEOC pattern and practice lawsuits under Section 707 must involve behavior that constitutes unlawful retaliation or discrimination under Sections 703 and 704 of Title VII. Analysis under these Sections will provide for a more predictable litigation environment for employers. The EEOC stated that the language in Section 707 referring to an employer's "pattern or practice of resistance" does not give the

EEOC "an independent basis for a lawsuit" that is distinct from other sections under Title VII. The EEOC's interpretation regarding Section 707 is consistent with the Seventh Circuit's rationale in a 2015 case involving a Section 707 claim. In that case, the Seventh Circuit rejected the EEOC's position that Section 707 gives the agency broad authority to bring pattern and practice lawsuits against employers without first participating in pre-suit conciliation or alleging that the challenged employment practices were discriminatory. In sum, the EEOC has adopted the Seventh Circuit's rationale which limits the EEOC's own ability to bring pattern and practice lawsuits.

The EEOC acknowledged that in a few cases it previously argued that it could bring Section 707 pattern and practice lawsuits, even when the employment actions at issue did not allegedly constitute unlawful retaliation or discrimination under the other sections of Title VII. However, the EEOC "now believes the better view" of Section 707 is that pattern or practice claims must be connected with Sections 703, 704, and 706 of Title VII. This "better view" provides employers with additional avenues of defense.

Read more here.

From the Lighter Side: Typos Spell Trouble For Man's Alleged Attempt To Fake His Own Death

A New Jersey man who pled guilty to two felony charges attempted to fake his death in order to avoid jail time. The man, Robert Berger, forged a death certificate in an attempt to fake his own death, however, his typos gave away that it was a forged document. Not only was the font type and size different throughout the document, the word "Registry" was misspelled as "Regsitry" in the "ISSUED BY" section. Now Berger not only faces time for the previous felonies he committed, he also faces up to four years on the felony charge of offering a false instrument for filing.

To read more, click here.

Firm News

On September 23, 2020, **Rob Sniffen** and **Jeff Slanker** presented the webinar "U.S. Supreme Court Update: Title VII and LGTBQ Discrimination – What Florida Employers and Employees Need to Know" to the Florida Bar's Labor and Employment Law Section. The webinar highlighted the recent supreme court case of *Bostock v. Clayton County*, a landmark employment discrimination case issued by the Supreme Court during its last term.

On September 30, 2020, **Jeff Slanker** presented to the Tallahassee Regional Air Conditioning Contractors Association (TRACCA) about key topics in labor and employment law and how the COVID-19 Pandemic has shaped employment law this year.

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