SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
October 2020

Employer Voting Leave Obligations

The U.S. Election will be held on Tuesday, November 3, 2020. While employers are not required under either Florida or federal law to provide paid or unpaid leave to allow employees to vote, many employers do provide such benefits. If employers have locations outside of the state of Florida, there may be obligations for employees working at those locations.

As a reminder, it is a felony in the State of Florida for any employer to discharge or threaten to discharge any employee for voting or not voting in any election. Similarly, it is a felony to attempt to coerce or intimidate any individual to vote or refrain from voting or to vote or refrain from voting for a particular ballot measure or candidate. Polls in Florida are open from 7:00 a.m. until 7:00 p.m. during the local time of the polling location, and polling locations can be obtained by contacting your local Supervisor of Elections.

Contact information for the Supervisors of Elections is available here.

Higher Florida Minimum Wage on the Ballot

Florida voters will notice that one of the constitutional amendments on the ballot this year is one raising the minimum wage in the state. Currently, the minimum wage in Florida is $8.56 per hour. The ballot summary for the amendment provides that the amendment raises the minimum wage to $10.00 per hour effective September 30th, 2021. Under the amendment, each September 30th thereafter, the minimum wage increases by $1.00 per hour until the minimum wage reaches $15.00 per hour on September 30th, 2026. From then on, future minimum wage increases are adjusted for inflation starting September 30th, 2027. Currently, increases in the minimum wage are adjusted for inflation. The state's electorate has approved of minimum wage increases numerous times in the past. If enacted, the constitutional amendment would bring Florida in line with seven other states that have enacted a $15 minimum wage, effective incrementally. Employers of all sizes should keep a close watch on the measure.

COVID Return to Work and Work Best Practices Update - CDC Expands Definition of "Close Contact"

The Centers for Disease Control (CDC) continues to put out advice related to COVID-19 and the effect of the virus on the workplace. As part of this guidance, the CDC previously defined "*close contact*" between two co-workers (or students in a school setting) as someone who spent at least 15 consecutive minutes within six feet of a confirmed virus case. The CDC has updated the definition of "*close contact*" as someone who was within six feet of an infected individual for a total of 15 minutes or more over a 24-hour period.

The key update offered by the CDC is the difference between a "*confirmed*" case of COVID and an "*infected individual*." As you can see, the newer "*infected individual*" language does not require a positive COVID-19 diagnosis. The new CDC definition of "*close contact*" can therefore be contact with a co-worker who is asymptomatic and has no reason to believe they have COVID-19. It is essential for employers to recognize that local and state health departments will follow the updated guidance. Therefore, if an employer is located in an area where local health guidelines mandate adhering to the CDC's "*close contact*" advice, then it would be best to not have in person meetings where employees sit within 6 feet of one another for longer than 15 minutes. This will assist in both improving health in the workplace and minimize liability.

For more information, click here.

NLRB Advice Memo Reminds Employers of Obligation to not Retaliate Against Employees for Protected Discussions About Terms and Conditions of Employment

Celebrity chef Nusret Gokce aka "Salt Bae" owns Nusr-Et Steakhouse New York. The employees of Nusr-Et engage in a tip pooling system. The employer distributes the tips from the pool evenly to all employees, regardless of the shift they worked. Put simply, staff who worked during the prime dinner hours at the high-end steakhouse in New York received the same amount of tips from the pool as those who worked less busy shifts.

A number of employees discussed issues with the tip pool. A number of those employees were then fired or disciplined for behavior or attendance issues. There was a correlation though between those employees who were terminated and disciplined, and those who were active in trying to alter the tip pooling system. The terminated employees brought the issue before the NLRB. The NLRB found that, while the steakhouse is a non-union workplace, the workers raised concerns that fell within the purview of the NLRB, as they engaged in "concerted activity" by raising the tip issues on behalf of themselves and their fellow co-workers. As a result, termination of employees who were engaging in "concerted activity," because of such activity, would be improper.

For more information, click here.

OSHA Clarifies Reporting Obligation for Employees Hospitalized or That Have Died From COVID as Enforcement Activity Rises

The U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") recently updated its COVID-19 Frequently Asked Questions ("FAQ") regarding employers' reporting obligations during the COVID-19 pandemic. These new FAQs clarify when an employer is obligated to report an employee hospitalization or fatality due a workplace exposure to COVID-19.

An employer must report to OSHA an in-patient hospitalization if it occurs within 24-hours of the work-related "incident" and must report a fatality if it occurs within 30 days of the work-related "incident." For COVID-19 cases, the term "incident" means an exposure to SARS-CoV-2

in the workplace. If it is determined that the cause of the in-patient hospitalization was a work-related case of COVID-19, the case must be reported to OSHA within 24 hours of that determination. Similarly, if it is determined that the cause of death was a work-related case of COVID-19, the case must be reported to OSHA within 8 hours of that determination.

To read the updated FAQs, click here.

The EEOC Seeks Comments on its Proposed Rule Changes to the Conciliation Process by November 9th

The 2015 U.S. Supreme Court case of *Mach Mining, LLC v. EEOC*, 575 US 480, set in motion the EEOC's efforts to meet the requirements of Title VII prior to filing a lawsuit against an employer. The Court confirmed that Title VII *required* the EEOC to engage in a conciliation process following the finding of reasonable cause that an employer had engaged in unlawful discriminatory practices. And, further, the conciliation process must have concrete standards as to what the conciliation process entails. The Fourth Circuit added that because of the significant power afforded to the EEOC under Title VII, it is important that the EEOC clearly articulate the steps of the process to the employer. *See*, *EEOC v. Freeman*, 778 F.3d 463, 472 (4th Cir. 2015). In response to *Mach Mining,* the EEOC implemented an agency-wide conciliation and negotiation training program in 2017. However, even with this effort, the EEOC was only able to resolve 41% of the cases sent through the conciliation process; only slightly higher than what was achieved prior to the training initiative.

In an effort to improve the success rate, and reach the goal of eliminating discrimination in the workplace in an efficient and cost-effective manner, the EEOC has proposed an itemized list of the information to be provided by the EEOC to the employer during the conciliation process. In brief, the EEOC shall provide (1) a summary of the facts upon which the EEOC relied in finding reasonable cause; (2) a summary of the legal basis for its finding, including the basis for any determinations made in light of conflicting evidence; (3) the basis for the relief sought by the EEOC; and (4) identification of a systemic, class, or pattern and practice designation. The EEOC has also proposed allowing the employer fourteen (14) days to respond to the EEOC's conciliation proposal.

The EEOC is seeking public comment on these proposed rule changes. You can find the full text of the proposed rule here. If you would like to provide comments on this rule, you may do so by November 9, 2020, through this link. Note: you must identify your comments by the RIN Number 3046-AB19.

From the Lighter Side: Subway - Let Them Eat Cake?

In a, not so shocking, decision, Ireland's Supreme Court ruled Subway's bread is not *really* bread—at least legally. According to the country's Value-Added Tax Act of 1972, tax-exempt bread can't have sugar, fat and bread improver exceeding 2% of the weight of flour. While admittedly tasty, Subway's bread is high in sugar content; it makes up 10% of the weight of the flour. That is 8% greater than the required 2% to be considered tax-exempt bread. The Court found that Subway's breads are legally closer to cake than bread.

For more on this, click here.

Firm News

Rob Sniffen, **Jeff Slanker**, and **Elmer Ignacio** were part of a litigation team that successfully argued to Florida's First District Court of Appeal that claims against the state under the Uniformed Services Employment and Reemployment Rights Act and Florida's Florida Uniformed Servicemembers' Protection Act were barred by sovereign immunity. The issue was one of first impression in the state. The case is styled *State of Florida, Department of Highway Safety and Motor Vehicles v. James Hightower*. A copy of the opinion can be found here.

Rob Sniffen, **Michael Spellman**, **Mark Logan**, and **Frank Lynch** have been recognized by Martindale-Hubbell with an AV preeminent rating. The AV rating means that the lawyer has been rated by his or her peers and recognized for the highest level of professional excellence. An attorney with an "AV" rating means that the attorney has reached the highest of professional excellence and is recognized for the highest levels of skill and integrity.

Jeff Slanker presented earlier this month at the Annual Conference of the Florida Association of Self-Insureds in Naples, Florida. Jeff presented on two topics to the group of Florida Self-Insureds. One topic concerned the impact of social media in the workplace. The other presentation provided an update on legislative, judicial, and administrative developments in labor and employment law over the past year.

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

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