SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
December 2020

EEOC Releases Guidance on Vaccines

Earlier this month, the United States Equal Employment Opportunity Commission (EEOC) updated its COVID-19 guidance. The updated guidance comes in the form of questions-and-answers addressing the issues related to mandatory COVID-19 vaccination policies in the workplace. According to the EEOC, employers can require that employees receive the COVID-19 vaccine, as a condition of returning to, or remaining in, the workplace. However, employers must accommodate employees who decline to receive the vaccine due to a medical disability or their sincerely-held religious beliefs.

The updated guidance also clarified that the administration of the vaccine by an employer, or a third-party the employer has contracted to provide the vaccination is not a "medical examination" for the purposes of the Americans with Disabilities Act (ADA). However, any pre-vaccination screening questions that inquire into a person's disability-status may constitute a "medical examination." If such questions are asked, the employer must demonstrate that such questions are job-related

The guidance further stated that employers may exclude employees who are determined to be direct threats from the workplace. If an employer determines that an unvaccinated employee presents a direct threat to the health and safety of persons in the workplace and the risk cannot be reduced through a reasonable accommodation, such as remote work, the employer can exclude the employee from the workplace.

To read the updated guidance, click here.

Florida New E-Verify Law Goes into Effect the First of the Year

Starting January 1, 2021, Florida's new "Verification of Employment Eligibility" statute will come into effect. This new law will require many employers to use the federal E-Verify system before hiring new employees. Once in effect, every Florida public employer, as well as their private contractors and subcontractors, must enroll in and use the E-Verify system to confirm the eligibility of all employees hired after January 1, 2021.

As for entities who contract with the state and hire a subcontractor, they must require an affidavit from the subcontractor stating that the subcontractor does not employ, contract with, or subcontract with any unauthorized aliens. If a public employer has a good faith belief that these requirements have been knowingly violated, it can terminate the contract, without liability for breach of contract, or demand that its contractor terminate any noncompliant subcontractors. In addition to private employers who contract with public entities, these new requirements will also

apply to employers who receive taxpayer-funded incentives through the state Department of Economic Opportunity (DEO).

For all other private employers, this law will require private employers to use E-Verify, or use the Form I-9 and maintain copies of the documents used to complete the form for three years. DEO will notice a private employer of any noncompliance and the employer must terminate any unauthorized employees, bring themselves into compliance, and respond with an affidavit of compliance within 30 days.

To read the Senate Bill on E-Verification, Click here.

New Tip Rule Issued by DOL

The Department of Labor recently announced a final rule related to tipped employees based on amendments made to the Fair Labor Standards Act ("FLSA") by the Consolidated Appropriations Act of 2018. The final rule is set to be implemented within 60 days of publication in the Federal Register. This timing is important because a change in presidential administrations could result in the rule not being implemented come February 2021.

One of the major changes in the new rule is employers are allowed to apply tip credits to time which a tipped employee spends doing non-tipped duties so long as these duties are done contemporaneously with or "for a reasonable time immediately before or after" the tipped duties. Prior guidance provided tip credits could not be claimed where employees spent more than twenty percent of their work time on non-tipped duties (commonly known as the 80/20 rule), meaning employees would be entitled to the full minimum wage for non-tipped work time. The new rule would reduce potential liability exposure for employers in the form of back-pay being owed to employees and associated litigation defense costs for this hot topic area under the FLSA.

Additionally, the type of employee eligible to be included in tip pools is affected by the final rule. Historically, back-of-the-house workers like cooks and dishwashers were excluded from taking part in tip pools because they were not customarily and regularly tipped. Under the new rule, employers may choose to implement non-traditional tip pools for these types of employees. If the employer does so, it must not take a tip credit against the wages.

Another major change is employers are prohibited from keeping any portion of tips earned by tipped employees. This change includes managers and supervisors, but does not impact their ability to continue to earn tips themselves. One exclusion from the new rule is employers may continue to deduct costs for credit card processing on tips paid by credit card.

More here.

NLRB: Employer's Good-Faith Belief in Employee's Misconduct Insufficient to Justify Terminating Employee Engaged in Protected Activity

On December 7, 2020, the National Labor Relations Board ("Board" or "NLRB") issued a decision holding an employer's discharge of an employee engaged in a protected activity may not be justified by the employer's good-faith subjective belief misconduct occurred, but instead by the misconduct actually occurring.

In *Nestle USA, Inc.*, 370 NLRB No. 53 (2020), employees submitted a petition to their employer complaining of verbal abuse and violations of safety protocols. The employer performed an extensive investigation of the complaints. During the course of one interview, an employee stated he was told about an incident where a supervisor allegedly called black employees "monkeys" after a problem occurred on the assembly line in which they worked. The employer gave the supervisor a verbal warning and a week-long suspension.

The employee met with the plant manager to further discuss the supervisor's alleged comment. A new investigation was started. During the course of the new investigation, the employee provided evasive responses to questions. Several co-workers provided statements to the employer which painted a picture that the employee's complaints about the supervisor were at least partially motivated by his desire to take the supervisor's position. The employer claimed the employee falsely attributed comments to a co-worker and refused to provide answers to other questions. Thereafter, the employer suspended the complaining employee to prevent interference with the investigation, and ultimately terminated the employee for refusal to cooperate in the investigation and provide honest answers during interviews.

An administrative law judge ("AJL") found the fired employee was engaged in protected activity by submitting the complaint on behalf of his co-worker. The AJL determined it was immaterial as to whether the fired employee's ulterior motive in reporting the complaint was to get the supervisor fired. The employer argued even if the employee was engaging in protected activity, it was not precluded from firing the employee due to the employee's misconduct of trying to instigate a co-worker to complain. However, the ALJ disagreed by finding the fired employee had not acted dishonestly and there was no underlying misconduct.

The Board affirmed the AJL's decision, holding an employee's discharge for misconduct while engaged in protected activity is only justified when actual misconduct occurs. The Board found the employer did not meet its burden of proving it would have discharged the employee absent the protected conduct. The employer failed to provide evidence it had a history of terminating employees for the reasons it purportedly fired the subject employee, which was further exposed by the employer not disciplining two co-workers who had refused to provide statements.

A key takeaway is it is entirely immaterial whether an employee has self-serving or ulterior motives to engage in protected activity. If an employer is going to take adverse action against an employee engaged in such protected conduct, it should carefully consider how it has disciplined similar employees in the past.

More here.

Helpful Guidance for Employers Who Employ Veterans with Disabilities

In an effort to provide employers with a plain and easy way to understand the laws impacting disabled veteran employees and those who employ them, the U.S. Equal Employment Opportunity Commission (EEOC) recently released three documents that address the various laws that apply to veteran employees. Each of the three references address how the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Americans with Disabilities Act (ADA) apply to veteran employees and their employers. The new references provide employers with links to organizations serving veterans, provide information about employment discrimination claims, and up-to-date changes in employment discrimination laws applicable to veteran employees.

Each revised guidance may be found at the link below:

- *EEOC Efforts for Veterans with Disabilities*
- *Understanding Your Employment Rights Under the Americans with Disabilities Act: A Guide for Veterans*
- *Veterans and the Americans with Disabilities Act: A Guide for Employers*

NLRB Ruling on Employer Questioning of Employees Rejected

The United States Court of Appeals for the Second Circuit recently rejected a NLRB ruling that required employers to minimize questioning of employees due to the potential impact on employees' rights to engage in collective bargaining discussions or engage in protected, concerted activity.

The union filed an unfair labor practice charge with the NLRB asserting that employee rights under federal labor relations law were violated by employer questioning about the circumstances of a work stoppage. The union alleged that the questioning was "coercive questioning" in violation of the law. The employer asked the following questions of employees after the work stoppage: "Who told you about this gathering?; "When did you receive notification of the gathering?"; and "How was this event communicated to you?"

The Board ruled that this was in fact coercive questioning and violated labor law, finding that the employer's failure to limit its questioning to the identity of those participating in the work stoppage was unlawful. The NLRB noted that the "inquiry was … required to focus closely on the unprotected misconduct and to minimize intrusion into Section 7 activity."

The employer appealed that decision of the Board to the Second Circuit Court of Appeals and the Second Circuit reversed the decision of the Board. The appeals court did not find any error with the Board's holding that employer questioning must focus closely on unprotected activity where it might touch on protected activity. But, the appeals court found error with the Board's holding that an employer must "minimize intrusion" into section 7 activity during such questioning. The appeals court held that the definition of "minimize" used by the Board was too restrictive and

that legitimate questioning related to unprotected activity might be intertwined with the exercise of rights under federal labor law. The appeals court found that the Board's limitation on employer questioning was inconsistent with the law and Board precedent.

The opinion can be found here.

From the Lighter Side: Pajama Suits – Bringing New Meaning to "Business Casual"

The coronavirus pandemic has led to an increase in the number of employees working from home, which, in turn, has led to an increase in the number of employees working in their pajamas. For some employees, the only thing that could force them to change into regular clothes would be a video conference with coworkers or clients – until now.

Japanese fashion company AOKI has designed the "Pajama Suit" – comfortable sleepwear that looks like a business suit. Now, for some employees, there is one less step between waking up and getting to work.

More information can be found here. (For those willing to pay international shipping, the "Pajama Suit" can be ordered from AOKI's website.)

Firm News

Jeff Slanker presented to the Sunrise Rotary of Tallahassee earlier this month. Jeff presented a retrospective of the major employment law issues of the past year.

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