SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
March 2021

Coronavirus Lawsuit Protections Bill Signed by Governor Desantis

After passing the Florida House of Representatives and Senate, the Coronavirus lawsuit protections bill has been signed by Governor Ron Desantis. A top priority for business groups this Legislative Session, the bill provides protections for businesses, nursing homes, and physicians.

The bill establishes new rules for COVID-19 related personal injury lawsuits, requiring plaintiffs who are not alleging medical malpractice or violations of nursing-home resident rights to first obtain a signed affidavit from a state licensed physician stating that the defendant caused the plaintiff's injury. If the plaintiffs are alleging medical malpractice, they will not need a signed affidavit but rather will be required to prove that the provider's actions were grossly negligent.

Additionally, business owners will be immune from liability if they can show they made good faith efforts to substantially comply with government issued health standards and guidance. The bill takes effect upon being signed into law, meaning that it took effect on March 29, 2021, when the Governor signed the bill.

More can be read here.

US DOL's Independent Contractor and Joint Employer Rules: We Hardly Knew Ye

The Labor and Employment Law Alert has covered the Department of Labor's recent rules regarding independent contractor status and its focus on the economic realities of the relationship between the contractor and employer. The Alert has likewise covered the recent DOL rule concerning the determination of joint employer status of separate employers. Those rules were issued late in President Trump's administration, and as expected, President Biden's administration has officially announced proposals to rescind both rules. More developments regarding these rules will surely come in the future from the Biden administration.

More can be read here.

Partial Delay of New Tipping Regulations

On December 30, 2020, during the final month of the Trump administration, the Department of Labor published a Final Rule titled "Tip Regulations Under the Fair Labor Standards Act (FLSA)" ("Rule"). This Rule introduced a number of changes to tipping regulations, including the following:

- Permitting employers that do not take a tip credit to operate non-traditional tip pools which traditionally non-tipped employees can participate in.
- Prohibiting employers, supervisors, and managers from retaining any part of employee tips or participating in the tip pool.
- Requiring full distribution of tips in any tip pooling arrangement.
- Mandating record keeping requirements for tip pools.
- Explicitly removing the 80/20 requirement which required that an employer could only take a tip credit when less than 20% of an employee's time is spent on non-tipped duties, in favor of a reasonable relation requirement.
- Imposing a civil fine for willful violations of the new tip pooling regulations.

While this Rule was originally scheduled to go into effect on March 1, 2021, pursuant to guidance issued by the Biden administration it was delayed until April 30, 2021 pending review. As a result of this review, the Rule has been delayed an additional eight months, until December 31, 2021, and will be subject to substantial changes in the interim. Specifically, the Department of Labor is revising those portions of the Rule that address how and when civil penalties will be assessed, how records need to be kept, and considering revising language related to when a manager could keep tips given to them personally and potentially participate in limited manager-only tip pools. In fact, only two portions of the Rule will be enacted as it is currently written, specifically the sections prohibiting employers, managers, and supervisors from participating in tip pools and the ability of employers who do not take the tip credit to establish non-traditional tip pools. We will be monitoring the changes to this Rule to see if any further changes occur.

To read more, please refer here.

Voluntary FFCRA Leave Extended Again

The Alert has extensively covered aspects of the Families First Coronavirus Response Act over the past year. The law, passed by Congress in the spring of 2021, provided expanded family and paid sick leave benefit to employees impacted by COVID. Employers that provided this leave could recover a tax benefit for the monies expended on the leave. The law was enacted with as sunset provision and phased out of effectiveness on December 31, 2020. Nevertheless, the federal government extended the program and its tax incentives on a voluntary basis for employers near the first of the year.

One portion of the recent major COVID relief bill passed by Congress and signed into law by President Biden extended the voluntary phase of the program through September 31, 2021. There are some key changes and items to note though about this program as extended on a voluntary basis by the recent COVID relief law, or the American Rescue Plan Act of 2021:

- The Emergency Paid Sick Leave Act portion of the limited paid sick leave for COVID-related reasons to two weeks. That two weeks has now been renewed or refreshed, meaning that if an employee has already taken 2 weeks of sick leave under the law, they may take another two weeks;
- There are additional reasons that qualify for the Emergency Paid Sick Leave including for employees: (1) obtaining a COVID-19 immunization; (2) recovering from an injury,

disability, illness or condition related to the immunization or (3) seeking or awaiting the result of a COVID-19 test or diagnosis when the employee has either been exposed to COVID-19 or the employer has requested the test or diagnosis; and

- The Emergency Family Medical Leave Act, which provided leave for employees with children that have been impacted by a school or place of childcare closure, originally required that the first two weeks of such leave be unpaid. The new law changes this and requires that those two weeks be paid. An employee can receive a total of 12 weeks of paid leave under these provisions.

The text of the law can be found here.

US Supreme Court Hears Property Case Involving Union and Employer

The Supreme Court recently heard a case involving the constitutionality of a California regulation that permits union organizers onto employer property for a certain amount of time over the course of the year. The regulation issued by California's Agricultural Relations Board permits union organizers to enter onto agricultural business owners' property for the purpose of speaking with employees about joining or supporting a union for three hours a day over a thirty-day period and up to a total of 120 days per year. Several employers have brought suit arguing that the regulation is an unconstitutional taking in violation of the Fifth Amendment to the US Constitution. Notably, the regulation does not require that the organizer obtain employer consent before entering the property, just that the organizer notify the employer and the California Board that issued the regulation that it will be entering the property. The case has wide implications in the property rights sphere and on the limits of governmental takings of private property.

More information can be found here at the Supreme Court's docket for the case.

Employer Requires COVID Vaccine; Employee Refuses and Sues

In January 2021, Doña Ana County in New Mexico issued a mandate requiring its first responders, including certified law enforcement officers, detention center officers and employees that have direct contact with detainees, to receive a COVID-19 vaccination. Detention Center Officer Isaac Legareta refused to comply with the mandate and received a "coaching and counseling" write up. In February 2021, Officer Leagreta sued Doña Ana County, claiming he is in "imminent danger of being terminated from his job for refusing to accept the vaccine."

Officer Lagareta makes several claims in his lawsuit. He asserts federal law required the county to inform him of the option to accept or refuse the vaccine, which he claims the county failed to do. Though he claims the county has only threatened dismissal, Officer Lagareta also made a retaliatory discharge claim. Finally, he claims the vaccine mandate amounts to an "invasion of the zone of privacy and right to bodily integrity," which violates his due process rights under the Fourteenth Amendment.

As COVID-19 vaccines become increasingly more available to more people, many employers may be considering imposing a workplace vaccine mandate. According to the U.S. Centers for Disease Control and Prevention (CDC), "The Food and Drug Administration (FDA) does not mandate

vaccination. However, whether a state, local government, or employer, for example, may require or mandate COVID-19 vaccination is a matter of state or other applicable law." The lawsuit against Doña Ana County demonstrates the potential legal risks for employers who impose a workplace vaccine mandate. Employers should seek legal counsel if considering imposing such a requirement.

The case is *Legaretta v. Fernando Macias, et al.*, Case 2:21-cv-00179, filed Feb. 28, 2021 and has been filed in the federal district court in New Mexico.

OSHA Initiative on Workplace COVID-19 Inspections

The U.S. Occupational Safety and Health Administration (OSHA) in March issued its COVID-19 National Emphasis Program. OSHA is authorized to issue National Emphasis Programs (NEPs), which are temporary programs which focus the agency's resources on a particular hazard such as the COVID-19 pandemic. According to OSHA, the purpose of this new NEP is to ensure employees in high-hazard industries are protected from COVID-19. With regard to workplace inspections, OSHA will target establishments which have workers with increased potential exposure to COVID-19 and puts the largest number of workers at serious risk. In carrying out the NEP, OSHA will also focus on ensuring employees are protected from retaliation.

Read more about the OSHA National Emphasis Program – COVID-19.

FLSA Coverage and Phone Calls- Broader than you Think

In *St. Elien v. All County Envtl. Servs.,* (11th Cir. March 18, 2021), the Eleventh Circuit Court of Appeals analyzed whether an employee's phone calls to vendors and customers located out of state were enough to cause the plaintiff's employment to fall under the Fair Labor Standards Act. The Court reversed the decision of the Southern District of Florida which held that because the plaintiff was not moving commerce across state lines, her administrative position was not subject to the FLSA. However, the Eleventh Circuit examined the language of the FLSA and DOL regulations to reverse the District Court. In examining the language of the statute and DOL regulations, the Eleventh Circuit determined that the phone calls made by the plaintiff constituted engaging in interstate commerce sufficient to bring that employee within the coverage of the FLSA.

More can be read here.

NLRB Withdraws Proposed Rule Intended to Block Student Union Organizing

The NLRB has dropped its bid to reverse a 2016 ruling which allows college and university student employees the right to unionize under the laws, rules, regulations, and protections of the National Labor Relations Act (NLRA). The right of student workers to unionize has changed frequently since its original granting in 2000. The NLRB reversed course and rescinded those rights in 2004, but reinstated them in 2016. The possibility of rescission was once again raised in 2019, but was never adopted.

More can be read here.

Firm News

Dawn Whitehurst, **Michael Spellman**, and **Hannah McKinney** received a defense verdict following a 5-day jury trial in the Middle District of Florida. The team defended two individual defendants alleged under Section 1983 to have violated the constitutional rights of a former pretrial detainee who died shortly after her incarceration in 2015. Originally, this case had seven defendants and eight claims. The trial was the final chapter in a grueling case in which no defendant paid out any damages.

Rob Sniffen has been appointed to the Board of Directors of the Community Foundation of North Florida ("CFNF"), a non-profit organization whose mission is to enhance the quality of life in North Florida through the promotion and support of charitable giving. The CFNF serves an eleven-county area, including Calhoun, Franklin, Gadsden, Gulf, Jackson, Jefferson, Leon, Liberty, Madison, Taylor, and Wakulla Counties.

In March, **Michael Spellman** and **Elmer C. Ignacio** presented a webinar entitled, "*Return to Work in the Time of COVID*," as a part of the Employment Law Advisor Webinar series.

On March 29, 2021, **Elmer C. Ignacio** served as a guest lecturer at Florida A & M University and presented "*Labor and Employment Law: Topics and Special Issues*."

Elmer C. Ignacio authored "*To Meet or Not to Meet – That is the Question; Minimizing Legal Risk for In-Person Events*," a feature article in the March/April 2021 issue of Source, which is published by the Florida Society of Association Executives (FSAE).

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

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