SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
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Temporary Mandatory COBRA Subsidy in Stimulus Act

On March 1st, President Biden signed the American Rescue Plan Act (ARPA) that contains a mandatory COBRA subsidy for former employees. Specifically, the ARPA requires employers to cover 100% of an employee's cost of continuing group health insurance coverage under COBRA between April 1, 2021 and September 31, 2021. The cost of paying for these benefits is deductible from the employer's quarterly payroll filings. Importantly, eligibility for this benefit is contingent on the employee's hours being reduced or an involuntary termination of employment. On April 7th, the Department of Labor released model notices for continued COBRA coverage, extended election of COBRA coverage, and other notices.

To read more, please refer here.

Model ARPA compliant notices are available here.

OHSA Provides Guidance on Logging COVID Vaccine Reactions and Other Things Vaccine Related

OSHA has provided guidance on when adverse reactions to COVID vaccines must be reported on OSHA 300 injury logs. Reporting is required if the vaccine is mandated by the employer, but not if it's not mandated or even just recommended. If the vaccine is mandated, then adverse reactions must be recorded, if they are work-related, are a new case, and meet the recording criteria in the OSHA regulations. This is a fact-specific inquiry, so special care should be taken to determine if adverse reactions should be recorded on OSHA 300 logs.

The guidance can be read here.

In other vaccine news, the EEOC has announced that it will provide guidance on whether employers can offer employees incentives to take the COVID vaccine. The EEOC made this announcement in a letter after business groups asked for specific guidance on the topic, as such incentive programs could trigger the protection of laws the EEOC enforces. The EEOC's letter can be read here. The EEOC has previously stated that employers can require employees be vaccinated for COVID, subject to exceptions including accommodations for medical or religious reasons, but has not provided any guidance on incentive programs. The EEOC maintains a question-and-answer site related to COVID issues, including vaccinations, which can be accessed here.

Employers May Claim Tax Credit For Providing COVID-19 Vaccination Paid Leave, With Qualifications

As part of the American Rescue Plan Act, President Biden announced that small and medium sized employers offering vaccine-related paid leave will be eligible for a significant tax credit. The tax credit will fully offset the cost of providing paid time off to employees to get vaccinated, as well as any time needed to recover from vaccine related side effects.

This tax credit comes in addition to employers who voluntarily provide emergency paid sick leave and emergency family medical league created under the Families First Coronavirus Response Act, and will apply to companies with fewer than 500 employees for leave granted between April 1 and September 30, 2021. The IRS has posted a fact sheet that provide more information on how to claim the paid sick leave credit on quarterly tax filings.

You can read more here.

NLRB Rules Employer Lawfully Instructed Employees on Confidentiality During Investigation

The National Labor Relations Board regulates and adjudicates private sector labor relations disputes. It recently ruled that an employer lawfully instructed employees to keep information related to an investigation confidential. Some demands such as these can run afoul of federal labor laws if they chill or infringe on workers' rights to talk amongst themselves for the purposes of forming a union. This case involved an employer's investigation of reports of employee wrongdoing. While investigating the report, a management official instructed individual employee witnesses that were interviewed to keep their conversation confidential even from other employees and supervisors.

While an Administrative law judge of the Board initially found that this directive was unlawful, the full Board reversed. It held, contrary to the Administrative Law Judge, that the directive was not unlawfully unlimited in time and place merely because management did not tell employees they could disclose the interview conversation after the investigation concluded. The directive was not given pursuant to a company policy or rule and only to the employees involved and interviewed during the investigation, meaning, according to the Board, that the employees would reasonably understand that the restriction would only be for the duration of the investigation.

Employee investigation issues, especially in a unionized workplace, present unique challenges for employers and this is one of many of those challenges.

The decision can be read here.

In Surprise Move, Florida Surgeon General Rolls Back Guidance on Masks, Social Gatherings – Orders Government Offices Open for "In-Person Operations"

In a surprise move, on May 29th, Florida's Surgeon General, Dr. Scott Rivkees, rescinded all prior COVID-19 Public Health Advisories regarding protective measures including face masks, gatherings of private citizens, and workforce densities. The new Public Health Advisory states

that COVID-19 vaccines should be provided to every eligible (as prescribed by the Federal Food and Drug Administration) Florida resident. The Advisory goes on to state that because COVID-19 vaccines are readily available state-wide, all Government offices should be conducting in-person operations and services. The Advisory notes that due to the "risk of adverse and unintended consequences" from the "long-term use of face coverings and withdrawal from social and recreational gatherings" face coverings should no longer be required or social recreational gatherings avoided "except in limited circumstances."

The Public Health Advisory is at odds with current Federal CDC guidance for fully vaccinated individuals issued by the CDC on April 27th.

More information can be found here.

Websites Not Places of Public Accommodation Under the ADA; Appeals Court Rules

In *Gil v. Winn-Dixie Stores, Inc*., 17-13467 (11th Cir. Apr. 7, 2021), the Eleventh Circuit Court of Appeals issued a ruling that comes as much needed relief for businesses who face website accessibility lawsuits by serial litigants. Juan Carlos Gil has filed numerous website accessibility lawsuits against business – 175 lawsuits in South Florida alone according to the Palm Beach Post. In these lawsuits, Gil claims as a visually impaired individual he is unable to access websites maintained by these businesses which he contends violates the Americans with Disabilities Act (ADA). In his lawsuit against Winn-Dixie, a lower court ruled in Gil's favor and found Winn-Dixie violated the ADA by failing to maintain its website in a manner that can be accessed by visually impaired individuals such as Gil.

In overturning the lower court's decision, the Eleventh Circuit determined Winn-Dixie did not violate the ADA and determined its website was not operating as an "intangible barrier" to accessing the goods, services, privileges, or advantages of its physical stores. An important factor on which the appeals court focused was Winn Dixie's website was of "limited use" in that it did not operate as a point of sale. Therefore, an inability to access the website did not pose as an "intangible barrier" because visually impaired individuals such as Gil can still shop and access Winn-Dixie's services by going to its physical stores.

Even with this Eleventh Circuit decision, the issue of the applicability of the ADA to websites is far from resolved. The Eleventh Circuit has jurisdiction over federal cases originating in Alabama, Florida and Georgia, and other Circuit Courts have issued different rulings. This split among the Circuit courts may persuade the U.S. Supreme Court to take up this issue sooner than later.

Read the opinion here.

Eleventh Circuit Provides Guidance on FMLA Rights in Conjunction with Worker's Compensation

Employees injured on the job who receive workers' compensation may also have rights under the Family Medical Leave Act ("FMLA").

In a recent decision issued by the United States Court of Appeals for the Eleventh Circuit, it was made clear that providing an injured employee with workers' compensation does not discharge the employer's responsibilities of informing the injured employee of their rights under the FMLA. This decision arose from a Georgia case where an employee injured herself while working. The employer processed the injury as a workers' compensation claim, and the employee received treatment. Eventually, the employee received a full medical clearance to return to regular-duty work; however, her employer required the completion of a separate test before resuming her job duties. The employee could not complete this test, due to pain that resulted from her injury. Consequently, the employee was fired and was never informed of her FMLA rights. The Court found the employer had not fulfilled its obligations under the FMLA.

Here, the takeaway for FMLA-covered employers is to always inform an injured employee of their rights under the FMLA, if their injury qualifies as a "serious health condition" under the FMLA and they otherwise qualify for leave, regardless of whether it involves a workers' compensation claim. Additionally, if an injured employee cannot work or feels like they cannot work, subsequent to being cleared by a treating physician, the employer may still have to provide FMLA leave. Employers should of course be mindful of implications of disability discrimination law also.

You can read the opinion here.

NLRB Retains "Contract-bar Doctrine" Making Voting Out Unions Difficult for Employees

On April, 21, 2021, the National Labor Relations Board decided it would keep the contract-bar doctrine, which provides that once an employer and a union agree to a collective bargaining agreement, the employer, employees or any other union cannot challenge the union's status until either three years pass or the collective bargaining agreement expires, whichever is earlier. This bar makes is more difficult for employees to decertify a union that no longer enjoys support from a majority of the workforce, because it creates only a very narrow window for the filing of petitions that could result in a union losing its ability to represent certain employees. A representation or decertification petition may be filed in the 30 – 60-day period before the expiration of the contract. During the Trump administration, the NLRB indicated that it may modify the contract-bar doctrine, and invited public comment on such a change. Earlier this month, however, the NLRB formally announced that it would retain the contract-bar doctrine finding that "a sufficiently compelling case has not been made for any particular proposed modification."

More information can be found here.

Legislature Passes COVID-19 Passport Ban – Governor Likely to Sign

Late on the penultimate day of the 2021 regular legislative session, the Florida Legislature sent COVID-19 "Passport" ban legislation to the Governor, who is expected to sign the same. The House and Senate passed CS/CS/SB 2006, regarding emergency management activities of the

executive and legislative branches of state government as well as local governments during periods of declared public emergencies. The legislation includes a new Section 381.00316, Florida Statutes regarding COVID-19 vaccine documentation.

The provision is similar to the Executive Order previously issued by Governor DeSantis on April 2nd. If, as expected, the bill is signed into law, private business and schools (public and private, including post-secondary) are prohibited from requiring the provision of any documentation certifying COVID-19 vaccination or post-infection recovery for "attendance or enrollment, or to gain access to, entry upon, or services from" the business or school. The provision does include language stating the section "does not otherwise restrict educational institutions from instituting screening protocols in accordance with state of federal law to protect public health." Finally, the proposed statute provides authority for the Department of Health to impose fines for entities violating provision to the tune of $5,000 per violation.

During consideration of the measure there was considerable discussion of the constitutionality of the measure; especially as applied to private entities.

From the Lighter Side: Newly Free Man Lands Himself Back in Jail After Stealing a Police Vehicle

An Arkansas man stole a marked police vehicle and drove away from the Pulaski County jail, after just having been released moments before. Cordell Coleman, 33, following his release after a public intoxication arrest the day prior, landed himself right back where he started.

The stolen vehicle was a 2018 Ford Explorer and had been left unlocked near a jail sally port. The officer who operated the patrol vehicle said he had been assisting with the booking of a prisoner, when he returned to discover his vehicle had been stolen.

Coleman ended up 10 miles down the road at an apartment complex, where he was found inside the vehicle, arrested, and taken back to the jail. When asked about his reasoning for committing the crime, his mumbled response was unintelligible.

Coleman added a felony theft charge to his repertoire and is being held at the county jail on a $25,000 bond.

You can read more about it here.

Firm News

Mitchell Herring and Jeff Slanker were recently published in the April 2021 edition of The Checkoff, a publication of the Florida Bar Labor and Employment Law Section for their Article New Tipping Regulations Delayed, which explored the delay of the new rules eliminating the 80/20 rule for classification of tipped employees and the regulations regarding tip pooling. This article is available online here.

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