SNIFFEN & SPELLMAN, P.A.

**LABOR AND EMPLOYMENT LAW ALERT**
**May 2021**

## COVID-19: Vaccines, Facemasks, and The State of Affairs

The Center for Disease Control's (CDC) recent guidance removed the mask requirement for fully vaccinated individuals in most settings, along with stating vaccinated persons no longer have to physically distance. This is the case except where federal, state, local, tribal, or territorial regulations differ, including local business and workplace guidelines. Additionally, those who are fully vaccinated (meaning those who have received the complete dose of the vaccine and waited the requisite number of weeks post vaccine administration) can resume domestic travel without COVID testing or quarantining before or after, refrain from COVID testing before and after international travel, except as required by the other destination, refrain from COVID testing and quarantine after a known exposure, if asymptomatic (with some exceptions), and refrain from routine screening testing. Fully vaccinated people should continue to get COVID testing if they are experiencing any COVID-19 symptoms and should continue wearing masks in airports and transpiration hubs, and on all planes, trains, buses, and other forms of public travel.

When deciding whether a business can lift their COVID-19 workplace restrictions, it is important to look to local legal authority to ensure it is still in compliance with the local laws. The Equal Employment Opportunity Commission (EEOC) has stated that asking whether an employee has been vaccinated is permissible, with the exception of most employers in Montana. However, when inquiring about an employee's vaccination status, it's recommended to not inquire further after receiving a "yes" or "no". The ability to ask patrons of a business for proof of vaccination status differs by state. However, in Florida, asking whether a customer is vaccinated is prohibited by a recently enacted Executive Order issued by Governor Ron DeSantis (Executive Order Number 21-81). Private employers are still well within their right to maintain a mask mandate if they so choose, but enforcing that mandate could prove to have some difficulty.

Another important factor to take into account when deciding workplace regulations is the safety and comfort of employees, customers, and vendors that will be entering the business. With little instruction on how to properly implement this new guidance, especially in areas with low vaccination rates or high transmission rates, some may feel uncomfortable entering a business in which employees and/or patrons are unmasked, despite whether they are vaccinated. Moreover, removing mask requirements for fully vaccinated people could expose those who have not been vaccinated or lead to unvaccinated individuals removing their masks anyway, due to a lack of a need to prove they've received the vaccine. This would directly conflict with guidance issued by the Occupational Safety & Health Administration (OSHA), directing employers not to treat their vaccinated employees and unvaccinated employees differently. Further, OSHA requires employers maintain a workplace free from recognized hazards, and COVID-19 is a recognized hazard. OSHA is currently reviewing the recent guidance issued by the CDC before releasing its

own updated guidance. Until then, they advise to refer to the CDC's guidance for information on how to proceed.

The following links provide more information: CDC Guidance, OSHA, EEOC, Executive Order #21-81

## OSHA Shifts Position on Recordability of Adverse Reactions to COVID-19 Vaccines

OSHA unceremoniously removed the requirement that employers record any adverse reaction experienced by an employee who received the COVID-19 vaccine to comply with federal workplace safety law. This reversal occurred in the publishing of a new set of Frequently Asked Questions (FAQ's) on OSHA's website. As previously reported in the Labor and Employment Law Alert, the previous set of FAQ's included instructions to employers regarding recording adverse reactions to the COVID-19 vaccine when employers mandate employees be vaccinated. The new set of FAQ's omitted these instructions. This clarification should be welcome news to employers who want to encourage their workforce to be vaccinated without the worry of potentially impacting their OSHA Reportable Event ratios.

More can be found here.

## Executive Branch Supports Worker Organizing and Collective Bargaining

President Biden recently issued Executive Order 14025 which promotes private sector collective bargaining and union organization. The Order states the Federal Government has not used its power to promote and implement policies supporting unionization and organizing and labor-management relations laws have not been modernized to reflect the country's current technological advancements and economic conditions.

Further, a Task Force has been created within the Executive Office of the President, focusing on worker organizing and empowerment. The Task Force has been instructed to identify policies and practices that could assist in promoting unionization. Additionally, the Task Force has been given 180 days to submit recommendations on how to better support the promotion of worker organizing and collective bargaining.

The Executive Order can be read here.

## The NLRB is set to Expand Section 7 for Employees, but doing so may place employers in a Catch 22

The NLRB recently released an Obama-era Advice Memorandum which provides the opinion that racially charged comments can be protected concerted activity under Section 7 of the National Labor Relations Act (the Act). The following day, Acting General Counsel Ohr issued a memorandum which notes the protections of Section 7 to non-unionized workers, and further makes topics of discussion between coworkers such as workplace health and safety, racial discrimination, and employee political and social justice advocacy activities potentially covered under Section 7.

More importantly, the term "concerted activity," a term art in the Act for activity engaged in by employees for which an employer cannot retaliate against those employees, has been reduced to requiring only one speaker and one listener. Therefore, there is no longer a requirement that there be a gathering of individuals for activity to be deemed "concerted activity," as long as the topic of discussion can be linked to any part of an employee's workplace conditions or environment. The practical effect of this change is that almost any conversation about political or social justice could result in being deemed concerted activity and therefore protected under Section 7 of the Act.

This broadening of Section 7 protection is especially disconcerting because it now potentially protects even racially charged language in the workplace. Protecting such speech can and will create a conflict for employers attempting to quell any such behavior or language. There is great potential for an employer to inadvertently step on a Title VII landmine, thereby setting off a potential hostile work environment or race discrimination claim from others in their workplace.

A link to the advice memorandum from President Obama's administration can be found on the docket for the case subject of the memo here & Acting General Counsel Ohr's memorandum can be found here.

## President Biden Increases Minimum Wage for Federal Contractors

President Biden has issued Executive Order 14026, increasing the minimum wage for federal contractors. Beginning on January 30, 2022, all executive branch agencies must implement a $15 minimum wage in new contracts. The increase is expected to be implemented into existing contracts if the parties exercise any options to extend.

The Executive Order also phases out the tip credit wage. As of January 30, 2022, tipped workers must earn a minimum cash wage of $10.50/hr. Also, by January 31, 2023, the cash wage must be 85% of the federal contractor minimum wage at that time, and be equal to it by January 1, 2024.

The Department of Labor is expected to issue new regulations implementing the new rules by November 24, 2021.

Read more here.

## Florida Appellate Court Reverses Circuit Court Decision in Case Involving Implied Promises in Employment Litigation Settlement Agreement

A Florida appellate court recently issued a decision reversing a trial court and holding that the trial court Circuit erred in admitting parol evidence to conclude that a settlement agreement included an unwritten promise to pay the employee an additional $75,000.

The plaintiff in the case began his employment in 1991 eventually resigning after being subject of an ethics investigation. The employee resigned in consideration for a onetime payment of $125,000, as well as payment of all scheduled compensation through his resignation date. This information was memorialized in a settlement agreement which also stated explicitly that the employee would not be entitled to any additional consideration not explicitly in the agreement.

The employee believed that an additional $75,000 bonus was part of the compensation due under the agreement, as it was part of his normal compensation.

The appellate court reversed the trial court's decision to accept evidence outside of the contract in interpreting whether the plaintiff was due the contested $75,000 payment and held that the agreement's unambiguous language did not contemplate this payment.

The decision came in the case of *Board of Regents, University of South Florida Board of Trustees v. J. James Rowsey, M.D.*, and can be found here.

## IRS Issues Guidance for Employers on Subsidy for COBRA Premiums Under the American Rescue Plan Act of 2021

The new administration's American Rescue Plan Act of 2021, which took effect in March 2021, provides a subsidy for premiums under the Consolidated Omnibus Budget Reconciliation Act (COBRA). From April 1 - September 30, 2021, eligible individuals qualify for the subsidy in the event of a reduction of hours or termination. The Internal Revenue Service (IRS) recently published Notice 2021-31, which provides guidance for employers relating to the COBRA subsidy. Set forth in a "question and answer" format, the Notice is a useful resource for employers. For example, the IRS guidance provides information on subsidy eligibility for an employee. The guidance also provides information on applying and calculating the payroll tax credit for which employers may claim, which is a refundable tax credit applied to the employer's share of Medicare taxes. For more information, read IRS Notice 2021-31 here.

## Department of Labor Implements Nontraditional Tip Pools

On December 30, 2020, the Department of Labor (DOL) issued a final rule, to take effect March 1, 2021, which would have amongst a number of other things, permitted employers to implement mandatory nontraditional tip pools and abolish the 80/20 rule which required that an employee spend 80 percent of their time performing tipped duties in order to receive a tip credit. During the start of the Biden administration, this Rule was delayed until April 30, 2021. On April 28, 2021, the DOL partially announced the implementation of this rule, and employers are now permitted to implement mandatory, non-traditional tip pools. This means that traditionally tipped employees can be required to share their tips with traditionally untipped positions provided that the following requirements are met:

1. The tip credit is not taken for any participant in the tip pool;
2. Records are kept to show the tips paid to all employees participating in the tip pool;
3. Employers are prohibited from keeping any tips from employees; and
4. No supervisory or managerial employees are permitted to participate in the tip pool.

While the DOL has further delayed the abolishment of the 80/20 rule until December 31, 2021, the enactment of this tip pooling rule is one of the first substantive changes to the regulations regarding tip pooling in many years.

To read more, please go here.

## Independent Contractor Designation Rule Withdrawn by Department of Labor

On January 7, 2021, in the waning days of the Trump administration, the DOL published the first rule that would have substantively changed the classification of Independent Contractors under the Fair Labor and Standards Act (FLSA). Specifically, this rule prioritized two factors, namely the control exerted over an employee and the worker's opportunity for profit or loss, in determining whether an individual was an employee (and thus subject to minimum wage and potential overtime requirements of the FLSA) or an independent contractor. Unfortunately, on May 6, 2021, this Rule was withdrawn by the DOL, meaning that the traditional seven factor test for determining employee status is still in place. Under this test, the following factors are analyzed to determine whether an individual is an employee or independent contractor under the FLSA:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

To read more on the withdrawal of the Rule please refer here.

To read more on the seven factor test under the FLSA please refer here.

## From the lighter side: Don't Jump into Animal Exhibits at Zoos!

Zoo officials in El Paso, Texas plan to press charges against a woman who trespassed into a spider monkey exhibit at the zoo. Of course, the incident was posted to social media gaining the attention not just of admirers, but also zoo officials. The video showed the woman underneath a waterfall in the closure. She entered the enclosure to try to feed the monkeys. Zoo officials noted that the woman's actions were prohibited and could have resulted in a worse outcome explaining about spider monkeys:

> "These are primates. They are strong; they have canine teeth. They can scratch. We don't interact with them on the daily. And we don't interact with them without a barrier in between us."

The woman was an employee of a law firm, which terminated her employment when it learned of her actions, noting their commitment to animals and advocacy.

More can be read here.

## Firm News

**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.

**Rob Sniffen** presented "The Wild, Wild Workplace of 2021" at the Florida Society of Association Executive Foundation's Executive Series Luncheon. The presentation focused on risks to employers in light of the COVID-19 pandemic and steps that may be taken to mitigate that risk.

**Rob Sniffen** presented "New Supreme Court Term: Labor & Employment Issues on the Court's Horizon" at the Florida Bar Labor and Employment Law Section's Advanced Labor Topics 2021.

**Elmer C. Ignacio** authored "Win for Winn-Dixie: Limited-use website isn't place of public accommodations," a feature article in the Employment Law Letter publication by HRLaws.com.

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

You may view past issues of the Labor and Employment Law Alert on the Firm's website: www.sniffenlaw.com. After entering the Firm's website, click on the "Publications" page. Our Firm also highlights various articles of interest on our official Twitter feed, @Sniffenlaw.