SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
June 2021

EEOC Approves COVID-19 Vaccination Incentives

The Equal Employment Opportunity Commission ("EEOC") recently updated its guidance regarding providing incentives to employees for vaccination for COVID-19. The new guidance makes clear that an employer may offer employees an incentive to receive the COVID-19 vaccination from a third party. This stated, if an employer sponsors a vaccination plan and administers the vaccine through its employees or agents, the incentive offered to employees cannot be "so substantial as to be coercive". Unfortunately, it is wholly unclear what coercive means in this context, and the EEOC has not provided any examples of permissible or prohibited incentives as guidance.

As always, it is important for employers to maintain any records related to vaccination as confidential under the Americans with Disabilities Act. This includes vaccination cards, pre-vaccination checklists, and other records related to vaccination, whether generated by an employer or received by the employer from the employee or a third party. Finally, it is important to remember that an employer must reasonably accommodate individuals who cannot or will not get the vaccine due to a disability or sincerely held religious belief. The EEOC's latest guidance does not state whether an employer must offer the incentive to an employee that does not receive the vaccination due to either medical or religious reasons.

To read the EEOC's guidance, please refer here.

The Eleventh Circuit Holds that the Florida Civil Rights Act Does Not Prohibit Associational Discrimination

The federal United States Court of Appeals for the Eleventh Circuit has held that the Florida Civil Rights Act ("FCRA") *does not* prohibit disability discrimination based on association. The plaintiff, in this case, Carolina Matamoros, brought suit against her former employer, the Broward County Sherriff's Office alleging that she was discriminated against because of her association with her son, who suffered from severe asthma. Matamoros took FMLA leave in March 2016. To spend more time caring for her son, Matamoros then applied for a part-time position, to which she was not selected. After being denied additional FMLA leave, Matamoros filed a discrimination charge and eventually a federal lawsuit alleging discrimination based on her association with her son, who has a disability.

In its opinion, the Eleventh Circuit affirmed the district court's summary judgment order dismissing the plaintiff's discrimination lawsuit finding that the FCRA does not prohibit associational discrimination because the plain language of the law simply does not state that it

does. The Court emphasized that it did not wish to expand state law and interpret it differently than Florida courts.

More can be found here.

The Eleventh Circuit Rules that Circumstances of Teacher's Condition Allowed School District to Discharge a Mentally Ill Teacher

On May 27, 2021, the Eleventh Circuit Court of Appeals ruled, in *Todd v. Fayette County School District*, No. 19-13821 (11th Cir. 2021), that a school district's firing of an art teacher who allegedly threatened to kill herself and her son was lawful because it was based on her conduct and not her major depressive disorder as she had claimed. After being fired, the teacher sued the school district, claiming discrimination under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., and the Rehabilitation Act, 29 U.S.C. §§ 701 et seq.; interference with her Family and Medical Leave Act, 29 U.S.C. §§ 2601 et seq., rights; and retaliation in violation of all three statutes. In chief, the teacher alleged that, in ending her employment, the school district discriminated against her because she suffers from major depressive disorder and retaliated against her for asserting her statutory rights. The District Court granted the school district's motion for summary judgment, and the Court of Appeals affirmed.

The teacher had been diagnosed with major depressive disorder, which she had confided in her school's principal prior to being terminated. In reaching a conclusion on the discrimination counts, the Eleventh Circuit assumed that the plaintiff could establish a *prima facie* case of discrimination but found the school district could meet its burden of articulating a legitimate, nondiscriminatory reason for ending the plaintiff's employment and that the plaintiff could not establish that such reason was a mere pretext for discrimination. The Court found that, even if her mental health issues did contribute to her behavior, the school district had an obligation to keep students and staff safe from violence. The Court found that the teacher's violent threats were sufficient cause for the school district to terminate her employment, especially since her position put her in charge of the welfare of children. The opinion reinforces the principle that, while disabled employees may not be treated less favorably than non-disabled employees because of their disabilities, an employer is entitled to eliminate from the workplace an employee who exhibits misconduct, in the same manner, it would if the employee were not disabled.

A copy of the opinion is available here.

Supreme Court Clarifies Computer Fraud and Abuse Act

The Computer Fraud and Abuse Act ("CFAA") was originally enacted in 1986 in an effort to address problems associated with hacking and carries penalties including between five and twenty years in prison as well as fines and civil penalties for violation. The CFAA prohibits intentionally accessing a computer without authorization or in excess of authorization, but historically there has been some disagreement amongst the Federal Circuit Courts regarding what "without authorization" means. The Supreme Court has recently shed some light on this statute in the case of *Van Buren v. United States,* a case in which a police officer was arrested under the CFAA after he was paid by a private party to use his police credentials to look up a license plate

information. The officer used his police credentials to access the database and obtain information.

The Supreme Court analyzed the facts of the case and found that the officer had appropriate credentials to access the police database, including the license plate information. Moreover, the prosecutor's primary argument rested on the thin distinction between an employer prohibiting the use of a confidential database for an improper purpose and prohibiting the use of information in a confidential database for an improper purpose. Noting that this fine distinction would transform a contractual use restriction into a potentially criminal act, the Supreme Court declined to uphold the ruling of the Eleventh Circuit, which affirmed that the officer had violated the CFAA. Accordingly, the Court found that the information was not accessed "without authorization" as the officer was permitted to access the license plate information, regardless of whether or not he did so for an improper purpose.

To read more, please refer here.

OSHA Issues Emergency Standard for Health Care Workers

On June 10th, the Occupational Safety and Health Administration ("OSHA") issued an Emergency Temporary Standard ("ETS") for healthcare workers regarding COVID-19 protection protocols. The ETS is applicable to all settings where healthcare and healthcare support services are provided, including hospitals, long-term care facilities, hospice care, healthcare laundry services, patient food services, and medical waste handling, amongst others.

The ETS requires that an employer develop and implement a COVID-19 plan for each qualifying workplace, which must include the designation of one or more COVID-19 safety coordinators, a workplace-specific hazard assessment, a plan to address the identified hazards to minimize the risk of transmission of COVID-19, a plan to effectively communicate with other employees, and a system to coordinate with other employers operating within the same physical space. Moreover, employers covered by the ETS must provide facemasks to their employees and ensure that they are worn at all times while they are in the same room as other people, except when eating, drinking, when wearing other respiratory protection, when necessary to communicate with an individual with hearing issues, for legitimate medical issues, or for sincerely held religious beliefs. Finally, covered employers must provide a respirator and gloves to individuals who are interacting with persons suspected or confirmed to be infected with COVID-19. The ETS also requires social distancing, daily cleaning of high-touch surfaces, daily screening of employees, and the provision of alcohol-based hand sanitizer.

Importantly, if a covered employer removes an employee from the worksite for COVID-19 testing, they must pay that employee their regular wages, up to $1,400 per week, offset by their income from other sources, including sick leave. Additionally, covered employers must provide paid leave and reasonable time to allow employees to be vaccinated.

Notably, the ETS does not apply to the following situations:

1. The provision of first aid by an employee who is not a licensed healthcare provider;
2. The dispensing of prescriptions by pharmacists in a retail setting;

3. Non-hospital ambulatory care settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID–19 are not permitted to enter those settings;
4. Well-defined hospital ambulatory care settings where all employees are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID–19 are not permitted to enter those settings;
5. Home healthcare settings where all employees are fully vaccinated and all non-employees are screened prior to entry, and people with suspected or confirmed COVID–19 are not present;
6. Healthcare support services not performed in a healthcare setting (such as offsite laundry or medical billing); and
7. Telehealth services are performed outside of a setting where direct patient care occurs.

To read more regarding the ETS, please refer here.

EEOC Publishes Resources Related to Sexual Orientation and Gender Identity Discrimination

The EEOC has released new resources on its website concerning Sexual Orientation and Gender Identity discrimination, specifically highlighting last year's Supreme Court decision in *Bostock v. Clayton County*. As readers of the Labor and Employment Law alert surely recall from our coverage of the momentous *Bostock* decision, the Supreme Court, in that case, held that terminating an individual because of their sexual orientation or gender identity was a form of prohibited sex discrimination under the plain language of federal anti-discrimination law.

The EEOC's resources compile information related to this decision and explain the protections that individuals have in the workplace to be free from discrimination based on sexual orientation and gender identity.

The EEOC's publication can be found here.

Florida Court of Appeals Dismisses Breach of Contract Claim for Failure to Exhaust Remedies under the Collective Bargaining Agreement

The Florida Third District Court of Appeals recently issued a decision in *Rousseau v. Miami-Dade County*, with important implications on claims related to employment that may be subject to a collective bargaining agreement. The claims in the case concerned an alleged breach of contract that was covered under the terms of a collective bargaining agreement between the plaintiff's employer and the plaintiff's union. The Third District Court of Appeal affirmed the dismissal of the lawsuit because the plaintiff did not first use the contract grievance procedure in the collective bargaining agreement. Unionized employers take note that employees must utilize the contractually agreed upon grievance procedure in a collective bargaining agreement and not merely pursue a breach of contract claim in Florida courts out of the gate.

A link to the case can be found here.

From the Lighter Side: Florida Gator Found Inside United States Post Office

A seven-foot alligator made its way into a United States Postal Service in Spring Hill, Florida, earlier this month. In the early morning hours of June 9th, a patron stopped by the post office to drop off a package. A seemingly simple errand led to the discovery of an alligator roaming around the lobby of the post office. Officials believe this was a result of the post office's automatic double doors that allow after-hour entry into the building. Thankfully, the alligator could be safely removed by a trapper and presumably returned to its natural habitat, which is not inside a government building.

More can be read about this incident here.

Firm News

This month, **Terry J. Harmon** was appointed as a member of the 22-member Board of Directors of the Council of School Attorneys ("COSA"). COSA is a national organization and "supports 3,000 attorneys representing K-12 public school districts and state school boards associations. The work of the Council is widely respected and a resource for school board attorneys and state association counsel across the country." For more information, please visit the following link: COSA.

Lisa Fountain has been recognized by Martindale-Hubbell with an AV preeminent rating. AV Preeminent is the highest possible rating given by Martindale Hubbell and is based on peer and judicial review of a lawyer's competence and ethics.

Congratulations to our Firm's Super Lawyers! **Robert Sniffen**, **Michael Spellman**, and **Terry Harmon** for being selected as 2021 Florida Super Lawyers. Each year, no more than five percent of the lawyers in the state are selected to receive this honor. **Jeffrey Slanker** has been selected as a 2021 Rising Star. Each year, no more than 2.5 percent of the lawyers in the state are named Rising Stars. Super Lawyers, a Thomson Reuters business, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement.

Rob Sniffen co-presented "The Latest in the Rise of Whistleblower Claims: Defenses, Pitfalls, Strategies and COVID Trends" at the 2021 EPLI ExecuSummit Conference in Naples, Florida.

The Firm sponsored the Florida Society of Association Executive, Inc.'s ("FSAE") 2021 Annual Conference in Orlando, Florida.

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.