

# SNIFFEN & SPELLMAN, P.A.

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## LABOR AND EMPLOYMENT LAW ALERT

July 2021

### **Quick Tidbits: Does the new passport ban under Florida law prevent employers from inquiring about employee vaccination status?**

Employers throughout Florida are wondering what exactly they can do in terms of requesting information from an employee about vaccination status. The EEOC has indicated that employers may request information related to vaccination status. But, how does that square with the state's passport ban?

The state's passport ban ostensibly does not apply to the employer-employee relationship. That said, language contained in the statute banning vaccine passports suggests or can be interpreted that the ban extends to even employment situations.

The moral of the story is that it remains to be seen how courts will interpret the new Florida law in the context of other legal requirements, and what limits this new law has on what employers are legally permitted to ask employees about vaccination status. Employers are well-served to cautiously approach this issue in the workplace and consult employment counsel in developing a policy.

More information on the law containing the vaccine passport provision can be found [here](#). The EEOC's guidance on all things COVID-related, including COVID vaccines, can be found [here](#).

### **EEOC Issues Guidance on Vaccine Incentives Programs**

The EEOC continues to issue guidance concerning vaccines in the workplace. Of note, and highlighted here, is additional information from the EEOC on vaccine incentive programs that encourage employees to get the COVID-19 vaccine. The EEOC has said that an employer may provide employees such incentives to voluntarily receive the COVID-19 vaccine so long as the incentive is not so substantial as to be coercive. This means generally that employee incentives should be fairly small and limited. Seek legal guidance for more information if considering such an incentive because the ultimate resolution of this issue can be fact-specific.

The updated guidance can be found [here](#) under items K.16 - K.21.

### **President Biden Asks Federal Trade Commission to Curtail Non-Competes**

President Biden has issued an executive order that takes direct aim at non-compete agreements. The [Executive Order](#) on Promoting Competition asked the Federal Trade Commission ("FTC") to consider limiting the use of non-compete agreements and revising guidance that permits companies to limit sharing information about wages and benefits. It remains to be seen what the FTC will do in response to the Executive Order.

Non-compete agreements typically limit what an employee can do after leaving the employ of an employer and principally limits where and for whom that employee can work. It is unclear exactly how the FTC will seek to regulate this area of the law. Challenges are likely to whatever is issued. Employers are well-served to review their current non-competes in place or those considering to be implemented in anticipation of a changing regulatory world.

### **New Developments for Tipped Employees**

On June 23, 2021, the Department of Labor (“DOL” or “Department”), provided insight regarding when a worker can be classified as a “tipped” employee and an employer can take the “tip credit” effectively reducing an employee’s wage down to as low as \$2.13 per hour, when supplemented by tips. Specifically, the DOL has revisited its definition of a tipped occupation as well as its dual job guidance.

Regarding the definition of a tipped employee, the Department has largely returned to the 80/20 rule, where an employee is considered to be “tipped” if they spend a minimum of 80% of their time performing tipped work and up to 20% of their time performing duties directly in support of the tipped work. This stated, the proposed regulation further limits this rule, requiring that an employee be paid the full minimum wage if they spend more than 30 minutes performing non-tipped work, regardless of whether it is in support of their tipped activities or not. Essentially, this means that an employee who works as a server in a restaurant and spends an hour of their eight-hour shift cleaning after the restaurant closes would be considered to have dual employment with the restaurant for the purposes of the FLSA, with seven of those hours being in their tipped server position and one hour in a non-tipped cleaning position.

Regarding dual jobs, the DOL’s proposed rule would return to long standing precedent that, when an employee works in both a tipped and untipped position, an employer may take the tip credit only for that time that the employee is working in their tipped position.

To read more please refer [here](#).

### **Jennifer Abruzzo is Sworn in as NLRB General Counsel**

President Biden’s pick for general counsel of the National Labor Relations Board (“NLRB”) has been sworn into her new role. The change marks what will assuredly be a more labor friendly NLRB.

### **From the Lighter Side: Man Returns Library Books Almost 100 Years Past their Due Date**

This month, a man in Massachusetts discovered books in his basement that were checked out from the Somerville Public Library in the 1920s and 1930s. Fortunately for the man, the library discontinued charging late fees on July 1, 2021. Lucky guy.

Source: [AP News](#).

## **Firm News**

[Rob Sniffen](#) served as Chapter Editor for the *Age Discrimination in Employment Law* treatise published by the ABA/Bloomberg. Mr. Sniffen co-edited the chapter addressing claims for age discrimination brought against public employers.

[Michael Spellman](#) presented “HR Jeopardy” to over 100 human resource professionals at the 18<sup>th</sup> Annual Greater Pensacola SHRM Conference on July 14, 2021.

[Jeff Slanker](#) spoke at the Florida Society of Self-Insured’s (“FASI”) Annual Conference in Naples, Florida earlier this month. Jeff provided the conference attendees an overview of recent legislative, executive, and judicial branch developments in the field of labor and employment law and separately lectured on addressing social media issues in the workplace. From FASI’s website: FASI is comprised of employers who self-fund some aspect of their insurance program, or are engaged in a profession or business related to self-funding. FASI was formed in 1969 by individual and group self-insurers to promote and maintain a healthy environment for self-insurance. The self-insured may be private and public companies as well as public entities such as cities and counties in Florida.

[Elmer C. Ignacio](#) presented “Return to Work in the Era of COVID” at the Florida Public Human Resources Association 2021 Annual Conference which took place in Orlando, Florida.

[Vickie Gesellschaft](#) has been elected to the Board of Directors for Ballet Pensacola. She begins her three-year term in 2021.

### **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](http://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.