

SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT August 2021

OSHA Issues New COVID Guidance

The U.S. Occupational Safety and Health Administration (“OSHA”) has recently issued new COVID [guidance](#) for non-healthcare employers. The guidance incorporates recent CDC recommendations. Some highlights are:

- Employers should encourage vaccination among employees or consider mandating vaccines for employees.
- Employers should require employees to wear masks indoors where there is high or substantial community transmission.
- Additional guidance and stricter recommendations are outlined for “higher-risk workplaces” where vaccinated and unvaccinated employees work in the same space. Examples of these workplaces include manufacturing, meat, seafood, and poultry processing, high-volume retail and grocery, and agricultural processing. OSHA’s recommendations in this regard include staggered arrivals, departure times, and breaks, social distancing, requiring masks for unvaccinated workers, and the use of barriers where employees cannot social distance. If the employer provides worker transportation, employees should be required to wear masks during transport, and weather permitting, the windows should be kept open.

Department of Labor Formally Rescinds Trump-Era Joint Employer Rule

On July 29, 2021, the U.S. Department of Labor (“DOL”) announced that it planned to rescind the Trump-era joint employment rule. The rule issued under the former administration concerned when two employers could be deemed joint employers of the same employee and thus whether they could be held liable for violations of wage and hour laws as it relates to that employee. The rule issued under President Trump’s administration provided a four-factor balancing test for this determination and deemphasized the importance of the right to control the employee in the determination.

The Biden DOL has announced that it is rescinding the rule effective September 28, 2021. The DOL referenced a pending legal challenge to the rule in its rescission and noted that withdrawing the rule would benefit workers. The rule was deemed to be employer-friendly when it was issued.

More [here](#).

ATTN: Federal Contractors, the Minimum Wage is Going Up for You

Federal contractors have a host of requirements that apply to them just by virtue of the fact that they are federal contractors. Starting January 30, 2022, the minimum pay for employees of federal contractors will be fifteen dollars per hour. After that, the minimum wage will be recalculated on an annual basis beginning in January 2023 to a new amount based on changes in the consumer price index. The rules also eliminate the tipped minimum wage for federal contractor employees by 2024. Notably, violations of these requirements could lead to a finding that a contractor is ineligible to bid on any government contracts for up to 3 years.

Of course, all Florida employers will soon have to pay employees a \$15 minimum wage after the passage of a recent constitutional amendment phasing in the increase over the next several years. But, federal government contractors must be sure they have done everything they need to do to start paying this new minimum wage beginning in January.

The Biden administration previously issued an [Executive Order on Increasing the Minimum Wage for Federal Contractors](#) and, on July 28, 2021, issued [proposed rules](#) on the increase.

NLRB's Shift to Pro Labor Agenda Marches On

Under President Biden the National Labor Relations Board (“NLRB”) was assured of becoming more labor-friendly. Currently, the NLRB is fully constituted with the senate’s approval of Gwynne Wilcox and David Prouty to seats on the NLRB. These confirmations give democrats a majority on the NLRB and will surely result in the reconsideration of some precedents issued by the NLRB during President Trump’s administration.

The confirmations come on the heels of the release of the NLRB’s new general counsel’s [Memorandum](#) regarding the direction of the NLRB. The memo entitled “Mandatory Submissions to Advice” directs regional directors of the NLRB to submit various cases to the NLRB for consideration with the goal of ensuring that NLRB interpretations are shifting to a more labor and union-friendly position and returning to precedents issued by the NLRB during President Obama’s administration, interpretations that the NLRB had overturned under President Trump.

The memo requires Regions and Regional Directors to seek advice and clearance before overturning NLRB precedent. The three areas where such advice is required are:

- Cases and matters where precedent has been overturned in the last several years,
- Specific subject areas that the general counsel would like to examine including cases involving employee status, Weingarten rights, employers’ refusal to recognize unions, allegations of interference campaigns, and failure to furnish information to unions, and
- Matters traditionally submitted to the NLRB for advice - matters concerning partial lockouts, complex or novel issues, and cases where state law and NLRB precedent merge.

IRS Issues Guidance on Paid Leave Credits Related to COVID Vaccines

On July 29, 2021, the IRS updated guidance on issues related to paid leave credits under the ARPA or the American Rescue Plan Act of 2021. Under ARPA, recovery of paid leave credits under certain COVID-related circumstances was extended to employers that voluntarily chose to continue providing employees those paid leave benefits. The updates to [FAQs No. 8 and No. 9](#) explain that covered employers can claim tax credits for providing employees leave to accompany a family or household member or certain other individuals to obtain COVID vaccinations or provide care to family and household members or other certain individuals recovering from the vaccine.

What is a certain other individual? Under the law, generally, an “individual” is an immediate family member, one who regularly resides in an employee’s home or a person with whom the employee has a relationship that would create the expectation that they would provide that person care or assistance in obtaining or recovering from the vaccine.

Reminder: Some Workplace Injuries Can Lead to Criminal Sanctions

Some workplace injuries can lead to criminal penalties, something that all employers should be aware of. A recent case out of Colorado demonstrates the seriousness of workplace safety. Recently, a business owner there was sentenced to 10 months in prison following the death of one of his employees. The employee died in a trenching accident. The employee was not trained appropriately, and the employer failed to take basic safety measures even though the trench had collapsed just the day prior.

OSHA issued a press release concerning the case. It noted that it is increasingly referring cases to the Department of Justice for criminal prosecution.

More [here](#).

From the Lighter Side: Royal Cake Goes for Royal Price

A real fan of the royals has just paid a pretty penny for a piece of cake from Prince Charles and Princess Diana’s wedding. The slice of cake, which is over 40 years old, went for £1,850 at auction. Let’s hope some unwitting employee or person doesn’t find the slice of cake and pull an [Elaine Benes](#), a move she wound up regretting mightily.

More [here](#).

Firm News

Sniffen & Spellman is pleased to announce that three of the Firm’s attorneys have been recognized in the 28th Edition of The Best Lawyers in America® for their work in the following areas:

- [Robert Sniffen](#): Employment Law – Management; Labor Law – Management; and Litigation – Labor and Employment

- [Michael Spellman](#): Labor Law – Management, Litigation – Labor and Employment, and “Lawyer of the Year” for Employment Law - Management
- [Dawn Whitehurst](#): Personal Injury Litigation – Defendants

Michael Spellman presented “The Latest on a City’s Ability to Mandate Vaccines, Masks and Other COVID-related Issues” on August 16, 2021, as a webinar to the Florida League of Cities.

On October 14, 2021, [Terry J. Harmon](#) will be presenting “Best Practices for Alternative Dispute Resolution Under IDEA and Section 504” at webinar being conducted by LRP Publications. For more information, please visit the following link: [LRP Publications](#).

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.