

SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT September 2021

President Biden Issues Sweeping Vaccination Mandates

President Biden has issued sweeping COVID vaccination mandates taking several different forms. These mandates can be broken down into three categories: 1) for employees of federal contractors, 2) for employees of private employers with over 100 employees, 3) for employees of entities that employ healthcare workers.

Much is still being learned about these new standards that are in varying stages of development. Contractors with new or renewed contracts must have workers vaccinated by December 8, 2021. Private sector employers with over 100 employees will be subject to a to-be-issued Emergency Temporary Standard (“ETS”) that will be issued by the Occupational Safety and Health Administration (“OSHA”). For employers subject to this standard, employees must either be vaccinated or produce weekly negative COVID-19 tests. Enforcement comes in the way of potential fines up to and including \$14,000 per violation. Finally, the President has also mandated that all staff within a Medicare and Medicaid-certified facility will need to be vaccinated. The Center for Medicare & Medicaid Services (“CMS”) had formerly developed a rule that required this of all nursing homes. This rule, while still subject to notice and comment periods, will be expanded to include hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, among others, as a condition for participating in Medicare and Medicaid. CMS expects the new rule to be implemented by October.

Much is still unknown about these new mandates. More to come. More information about these measures can be found by reviewing the [President’s Path Out of the Pandemic](#) and his Executive Order on [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#).

Florida’s Minimum Wage to Increase Effective September 30, 2021

Florida’s minimum wage will increase to \$10.00 per hour effective September 30, 2021. The increase is consistent with the constitutional amendment approved by Florida voters last November, which will eventually see the minimum wage rise to \$15.00 by 2026. The tip credit towards the minimum wage for tipped employees of \$3.02 is still in effect.

New Reporting Requirement in Florida for those Using Independent Contractors

Beginning on October 1, 2021, Florida businesses that have paid an independent contractor 600 dollars or more in a calendar year must submit new hire information to the Florida Department of Revenue within 20 days after their first payment to the independent contractor or the date on which the business and independent contractor entered into the contract, whichever is earlier. The law, [Senate Bill 1532](#), defines a “service recipient” one that must make a report, as “a

person engaged in a trade or business who pays an individual for services rendered in the course of such trade or business.”

The report must include the following information regarding the contractor:

- (i) name
- (ii) address
- (iii) social security number or other identifying number assigned to the individual under section 6109 of the Internal Revenue Code
- (iv) the date services for payment were first rendered by the individual and
- (v) the name, address, and employer identification number of the service recipient.

There is an exception for contract workers that are performing intelligence or counterintelligence functions with a state or federal agency and where disclosure could endanger their safety or compromise an ongoing investigation.

Florida Supreme Court Adopts Apex Doctrine for Private Sector Entities

The Florida Supreme Court recently [issued an opinion](#) adopting the apex doctrine for private sector entities. The doctrine, previously applied in the context of litigation involving governmental entities, prevents high-ranking officials of an entity from being deposed in litigation unless there is a showing that they have unique knowledge about pertinent information that cannot be obtained from another source.

Department of Labor Enhances Penalties for Incorrect Tipping and Clarifies Manager Tipping

On September 24th, the Department of Labor (“DOL”) issued its Final Rule regarding tip regulations, enhancing the potential penalties for businesses that improperly or incorrectly take the tip credit and clarifying when managers can keep tips and participate in tip pools. Under the Final Rule, the DOL has removed language requiring that violations of the FLSA tip provisions be willful or repeated in order to assess fines against businesses. In practice, this means that the DOL can assess fines of up to \$1,100 for each violation of the FLSA tip provisions, regardless of whether such violations were intentional. While the Rule states that the DOL must consider the seriousness and size of an employer when determining whether or not to fine a business, the practicalities of this requirement are not well defined, essentially permitting the DOL wide discretion in determining if they will assess a fine and how much the fine will be.

Under the new Rule, managers may keep tips if they solely provide service to the specific tipping customer and may contribute to but not receive money from tip pools. The DOL provided several examples of when a manager can keep tips given to them, such as when a manager serves a table by themselves due to understaffing but is quick to clarify that if a tipped employee participates in serving the customers at all, such as when a manager runs food to a table otherwise served by a waiter, the manager is not entitled to any of the tips.

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

Recent 11th Circuit Decision Reaffirms Dual Jobs Status for Tipped Employees

In the recent decision of *Rafferty v. Denny's Inc.*, the 11th Circuit reaffirmed that tipped employees may only perform limited untipped work directly related to their tipped position in order for an employer to take the tip credit. In this case, Rafferty, an employee of the Denny's chain of restaurants, claimed that between 30 and 50 percent of the work she performed was not tip-generating work, including preparing salad bar ingredients, slicing fruits, refilling condiment containers, making place settings, and various cleaning tasks.

In a detailed analysis of the various changes that the Department of Labor has made since 1988 regarding whether an employee could perform untipped work as part of their tipped position, the Court found that a tipped employee may only perform untipped tasks less than 20% of the time for the position to be considered a single tipped position, as opposed to two separate positions, one tipped and one untipped based almost entirely on guidance published by the Department of Labor in 2016. Notably, the Court refused to grant any deference to the guidance issued by the Department of Labor in 2018 and the proposed Rule published in the waning days of the Trump presidency, which would permit tipped employees to perform untipped work provided that said work was listed in the position description. Ultimately, the Court reversed the District Court's determination that summary judgment on this issue was warranted for Denny's, which was based entirely on the Department of Labor's 2018 guidance letter.

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

NLRB General Counsel Issues Memoranda on Heightened Penalties

The National Labor Relations Board's General Counsel issued two memos, one on [September 8th](#) and one on [September 15th](#), instructing regional offices to pursue aggressive remedies for violations of federal labor law. These include instructions to seek compensation in the form of consequential damages, front pay, and liquidated back pay in cases involving illegal terminations. There are also expanded remedies recommended in cases involving failures to bargain and interference in a union organizing drive.

The September 15th memorandum highlights the NLRB's approach to settlement negotiations of unfair labor practice charges. Part of the memo directs regional offices to incorporate default provisions into settlement agreements meaning if the settlement is breached, the employer is automatically deemed to have committed an unfair labor practice even though the actual underlying claim was not adjudicated. The memo also instructs regions to seek apology letters from employers, seek 100 percent of the damages an employer owes, and other specific instructions related to the specific underlying charge's allegations.

From the Lighter Side: Financial Advice from Mr. Goxx – A Hamster!

Whose returns beat Warren Buffet's and the S&P 500? Mr. Goxx's. He is a hamster that has been trading cryptocurrencies since June. He does this by running on a hamster wheel that selects dozens

of cryptocurrencies. Then depending on which of two tunnels he decides to go into, a decision is made whether to buy or sell. His portfolio is up 20 percent since he started trading. Not bad.

More [here](#).

Firm News

[Rob Sniffen](#) will present “Navigating the Process of Employment Claims” to Big Bend SHRM on October 7, 2021. For more information or to register, go to BigBendSHRM.org.

[Elmer Ignacio](#) gave a series of presentations in Labor & Employment Law on September 25, 2021, for the Florida Veterinary Medical Association’s “Power of 10” annual leadership program in Orlando, Florida.

[Jeff Slanker](#) wrote an article in the most recent Checkoff, a publication of the Florida Bar’s Labor and Employment Law Section. Jeff wrote on a recent decision of the Eleventh Circuit Court of Appeals concerning disability discrimination claims. Jeff was also the featured author and subject of the author spotlight of the Checkoff. You can read the Checkoff [here](#).

On September 29, 2021, Jeff Slanker presented at the FSU Center for Human Resource Management’s Advisory Board of Director’s Meeting. Jeff spoke about COVID legal issues including leave requirements, vaccine mandates, and workplace accommodations.

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.