

SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT

November 2021

COVID-19 Vaccine Mandate Update

The ever-changing world of COVID-19 vaccine mandates has taken another turn. Shortly after the Occupational Safety and Health Administration (“OSHA”) officially announced their rule requiring employees working for private companies with more than 100 employees to receive the COVID-19 vaccination or submit to weekly testing, a flurry of legal challenges were filed. The 5th Circuit Court of Appeals ultimately issued a stay of OSHA’s rule, halting enforcement of the rule through the litigation. Despite initially saying that they would comply with the 5th Circuit’s ruling, the Biden administration and OSHA have requested the 6th Circuit Court of Appeals lift the 5th Circuit’s stay. The 6th Circuit has not issued a decision on the matter at this time. Despite the temporary stay, employers should pay attention to changes as multiple legal challenges are rapidly unfolding.

Additionally, the U.S. District Court for the Eastern District of Missouri granted a preliminary injunction temporarily blocking the Biden Administration and Centers for Medicare and Medicaid Services (“CMS”) from requiring healthcare workers employed at a facility enrolled in Medicaid or Medicare programs to receive the COVID-19 vaccine. While the stay issued out of Missouri only applied to the states that joined the lawsuit (Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota and Wyoming), a federal judge from the U.S. District Court for the Western District of Louisiana issued an order expanding the stay nationwide, covering “all healthcare providers, suppliers, owners, employees, and all others covered by said CMS mandate” pending final resolution of the case. Given the rapidly evolving nature of these legal challenges, it is important for healthcare employers to stay up to date and be aware if a stay that applies to them is dissolved or modified.

As to the mandate relating to federal contractors, a Federal Judge in the U.S. District Court for the Eastern District of Kentucky granted the Plaintiff’s request for a preliminary injunction temporarily halting the mandate for federal contractors in Kentucky, Ohio, and Tennessee. While this decision only applies to workers in those three states, employers should be mindful of upcoming decisions within their jurisdictions.

On the Florida front, the Florida Legislature just recently completed a Special Session, passing legislation prohibiting private and public employers from imposing a vaccine mandate. The new state laws cover any employer within the state not covered by a federal mandate and prohibit private employers from imposing a COVID-19 vaccination mandate without providing individual exemptions for a variety of reasons. Such reasons include:

1. Medical reasons including pregnancy or anticipated pregnancy;
2. Religious reasons;

3. COVID-19 immunity (proof of a positive test is required);
4. Periodic testing (at no cost to the employee); and
5. The use of employer provided protective equipment.

If an employee is terminated after claiming one of the above-referenced exemptions, an employer may be subject to a fine of \$10,000 per violation for employers with fewer than 100 employees or \$50,000 per violation for employers with over 100 employees.

The Florida Legislature has also prohibited public employers from imposing any COVID-19 vaccination mandate with violators being subject to \$5,000 fines per violation.

Obviously, the landscape with respect to vaccine mandates is evolving and changing rapidly. Employers are encouraged to consult with legal counsel before wading into this space.

Find the full text of all the bills passed during the special session [here](#).

College Basketball Players File NLRB Charge Against the NCAA

On the heels of the National Labor Relation Board's recent memorandum classifying student athletes as "employees" comes a one-line charge of unfair labor practice against the NCAA. While the charge only claims that the NCAA has violated labor law by misclassifying student-athletes, it is likely that this case will have further ramifications as it develops.

You can download a PDF of the NLRB charge [here](#).

NLRB Issues Memorandum on Employers' Duty to Bargain Over Implementation of OSHA Emergency Temporary Standard

On November 10, 2021, the NLRB issued a [memorandum](#) outlining employers' duty to bargain with unions over the implementation of the new Emergency Temporary Standard issued by OSHA. The memorandum requires employers to bargain regarding the provisions of the ETS that impact terms and conditions of employment, but employers are relieved of this obligation where a specific change in terms and conditions is statutorily mandated. Essentially, if there is some discretion in implementing a mandate, employers may not act unilaterally.

EEOC Updates Manual To Include COVID-19 Related Retaliation; Gives Additional Guidance to Employers

On November 17, 2021, the Equal Employment Opportunity Commission updated its [Technical Assistance manual](#) to provide more guidance on particular examples of protected activities in regards to COVID-19. The manual provides that employers may not, among other things:

- Retaliate against employees who file charges with the EEOC alleging their supervisor unlawfully disclosed confidential medical information, even if the EEOC later decides there is no merit to the charge.

- Give a false negative job reference to punish a former employee for making an equal employment opportunity complaint, or refuse to hire an applicant because of the applicant's equal employment opportunity complaint against a prior employer.
- Retaliate against employees for reporting harassing workplace comments about their religious reasons for not being vaccinated.
- Interfere with an individual's exercise of their rights under the Americans with Disabilities Act.

To see the full list in the updated manual, please follow the link above.

Federal Contractors' Minimum Wage Will be \$15/Hour Beginning January 30, 2022

On November 22, 2021 the U.S. Department of Labor published its [final rule](#) implementing President Biden's Executive Order increasing the minimum wage for federal contractors. The Department of Labor expects the pay boost to apply to 327,000 workers.

On Appeal, Florida's Third District Court of Appeal Overturns Decision; Grants Employer Full Two-Year Restrictive Period Under Noncompete

Earlier this month, a Florida appeals court overturned a state trial court decision siding for an employee in a suit to enforce a noncompetition agreement in [AmeriGas v. Sanchez](#). Nelson Sanchez resigned from AmeriGas and began working for a competitor in the same industry. As a result, AmeriGas lost 18 clients to Sanchez's new employer. Though there was evidence that Sanchez did not solicit every client to jump ship from AmeriGas, there was undisputed evidence that established that Sanchez solicited some of these clients, thus clearly violating the noncompete he signed with AmeriGas. The appellate court sent the case back to the trial court to grant AmeriGas's temporary injunction request, which entitles the business to the two-year restrictive covenant on Sanchez's contract.

From The Lighter Side: Navy Goat Almost Nabbed by West Point Cadets in Advance of Big Game

West Point cadets attempting to nab the U.S. Naval Academy's mascot ahead of the annual Army-Navy football game ended up grabbing a different goat. Mascot theft is a decades-long service academy tradition, typically viewed by the perpetrators as an innocent prank. However, it has been officially off-limits since the early 1990s.

View the full story [here](#).

Firm News

Kristen C. Diot has joined Sniffen & Spellman, P.A. as an Associate. Ms. Diot will be based out of our Tallahassee office. She received her Bachelor of Science from the University of West Florida and her Juris Doctorate degree from Florida State University College of Law. Ms. Diot

concentrates her practice in the areas of Labor and Employment, Education, and Civil Rights Law. We are truly excited to have her join the team.

[Elmer Ignacio](#) and [Mitchell Herring](#) presented *Rehiring Legal Do's and Don'ts to Rehiring Laid-Off Workers* and *Employee Classification: Applying the Old "New" ABC Test* in a virtual webinar through BLR – HR Connect Virtual.

Mitchell Herring was quoted in HR Daily Advisor regarding the new tip rule issued by the Department of Labor which takes effect on December 28, 2021.

[Rob Sniffen](#) presented “Recent Trends in Employment Litigation and Insurance Claims” at the fall meeting of the Florida Association of Special Districts.

[Sniffen & Spellman](#) proudly sponsored the Goodwill Classic Golf Tournament on November 1, 2021. The Goodwill Classic fundraiser provides funds that support their mission to provide job training, education, and employment to individuals with significant barriers to employment.

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

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