SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
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EEOC Broadens Categorization of COVID-19 as a "Disability"

On December 14, 2021, the EEOC updated its COVID-19 technical assistance to provide guidance detailing that COVID-19 may be considered a "disability" under the Americans with Disabilities Act. Originally, under Title I of the ADA and Sec. 501 of the Rehabilitation Act, only "long COVID", meaning that post-COVID conditions remaining within patients long after they contract COVID-19, counted as a disability. Now, the EEOC has expanded the qualification, stating that "brain fog", substantially limited respiratory function, chest pains, or intestinal pains, are all distinguishable from the less-serious symptoms such as "congestion, sore throat, fever, headaches, etc." Case law on this subject is sparse as the rule changes are happening more and more frequently.

Going forward, employers need to keep an eye on the technical assistance questions and answers, as well as any other guidance published by the EEOC.

Bargaining Update From the NLRB: Micro-Units Are Returning

A micro-unit, or a smaller bargaining unit, is a tool primarily used by unions to break apart a single collective bargaining session into several bargaining units. Per *PCC Structurals, Inc*, the community of interest shared among employees encompassed by the proposed unit must be sufficiently distinct from the interests of other employees excluded from the petitioned-for unit. This view was later revised in *The Boeing Company* to hold that if the distinctions among excluded and included employees' interests do not outweigh their similarities, the unit is not "appropriate in scope." The Board has invited public input on these standards in a pending case called *American steel Construction*, 371 NLRB No. 41 (2021). Currently, the Board is awaiting amici briefs due on or before January 21, 2022 that answers two questions:

1. Should the standard from *PCC Structurals, Inc.* and *Boeing* be adhered to in the instant case?
2. If not, what should the standard be?

NLBR Again Revising Joint Standards

On December 10, 2021 the NLRB announced that it plans to initiate rulemaking on the standard for determining whether two employers are "joint employers" under the National Labor Relations Act. The standards were revised in February 2020, as codified in 29 C.F.R. § 103.40, providing that a joint employer relationship requires that the purported joint employer possess and exercise "…substantial direct and immediate control" over one or more "essential terms and conditions of employment" of another employer's employees, such that the entity "meaningfully affects matters relating to the employment of those employees."

The new rulemaking agenda indicates a potential reversion back to the *Browning-Ferris* standard, which is generally seen as a more relaxed standard as it extends joint employer status even to entities possessing an ability to control employment terms and conditions indirectly, even if the entity never actually exercised that ability.

Read the NLRB's announcement and see its agenda here.

Fair Chance Act Revised; Criminal Backgrounds Becoming More Protected for Contractors

The Fair Chance to Compete for Jobs Act (Fair Chance Act, sec. 1123) bans civilian and defense executive agencies from either 1. Awarding federal contracts or 2. Releasing payment to a contractor who violates the statutory requirements. This restriction applies to criminal background requests made both verbally and in writing. There are some exceptions, however; 1. Consideration of the criminal history recorded is required by law; or 2. The employee will have access to classified information or have sensitive law enforcement or national security duties, if hired. This law does not appear to apply to federal subcontractors.

11th Circuit Affirms No Reasonable Expectation of Privacy on Work Computers, But Reverses Decision on Adverse Employment Action re: Computer Search

On December 10, 2021 the 11th Circuit issued its opinion in *Smith v. City of Pelham*. This case pertains to an employee storing lewd photos of themselves on a work computer, and using their work computer potentially in connection to an approved second job. The district court held that the employee had no reasonable expectation of privacy on their work computer regarding the photos, which was affirmed by the 11th, but held that an action "cannot be adverse if the employee is unaware of that action." The Court reversed the decision on the adverse action, citing *Burlington* and *Crawford* when it discussed that the Plaintiff "presented evidence sufficient for a jury to find that (the supervisor)'s reason for instigating the computer search was pretext for retaliation."

Read the full opinion from the 11th Circuit here.

From the Lighter Side: Ohio DOE Rules High School Was a 'Scam'

Ohio Governor Mike DeWine said he is asking the attorney general and other officials to determine whether any laws were broken by what claimed to be the Columbus-area Bishop Sycamore High School. The high school's report filed with the department for this school year listed only one enrolled student and stated its physical address as a home in a residential neighborhood. A scathing 79-page report claimed investigators could not find proof Bishop Sycamore met any of the requirements for private, non-chartered schools like holding regular classes, verifying teacher credentials or maintaining academic records.

"Unfortunately, the facts suggest that Bishop Sycamore High School was and is, in fact, a scam ...," State Superintendent Stephanie Siddens wrote in a memo attached to the report. Bishop Sycamore was a way for students to play football against high school teams and potentially increase students' prospects of playing football at the collegiate level.

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