SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
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Supreme Court Speaks on COVID Vaccine Mandates

As reported in our recent special alert, the Supreme Court has stayed the implementation of OSHA's vaccine or test mandate for employers with 100 or more employees. Since that report, and shortly after the Supreme Court's decision, OSHA formally withdrew the mandate. Importantly, OSHA indicated it intended to implement the mandate through its rulemaking power, a more formal process than the emergency standard it initially attempted to use to implement the mandate. While there is no current enforceable federal mandate, it is important for employers with over 100 employees to stay up to date with OSHA standards and subsequent legal challenges to best protect themselves from fines or other penalties as this matter continues to evolve.

Also as reported in our special alert, the Supreme Court did not stay the implementation of the Center for Medicare and Medicaid Services ("CMS") mandate requiring all employees of healthcare providers enrolled in Medicare or Medicaid programs to receive the COVID-19 vaccination. Covered employers should pay attention to CMS deadlines and guidelines as failure to comply could result in monetary fines and possibly termination from Medicare and Medicaid programs.

The Supreme Court has not addressed the vaccine mandate regarding federal contractors, which remains halted nationwide after a federal judge in Georgia issued a stay in *State of Georgia v. Biden*. Employers who are parties to federal contracts still need to be aware of changes though, as a stay could be lifted by a reviewing court. It is important to note that employees of a company which contracts with the federal government and is also enrolled in Medicare or Medicaid would still be covered by the CMS mandate.

US Supreme Court to Hear Arbitration Clause Case

The United States Supreme Court is set to review a case involving the limits on waivers of rights to pursue certain claims in courts in favor of neutral arbitration. The case comes to the Supreme Court from California. California has a state statute called the Private Attorneys General Act which allows private citizens to bring private civil enforcement actions against employers for violations of the state's labor code. The case the Supreme Court is set to hear involves a challenge by an employee to language in an arbitration agreement waiver that encompassed these types of actions and specifically, class actions under the statute.

Of course, arbitration agreements can be utilized to have employees agree to waive the right to pursue employment related claims in courts. Such claims must be pursued before a third-party neutral arbitrator then and without a jury.

Law in California, including the California Supreme Court's holding in *Iskanian v. CLS Transportation Los Angeles*, contemplates that waivers such as those contemplated here violate public policy given that the state is the real party in action in these types of claims which are just being enforced by a private party.

Now the Supreme Court is set to decide the propriety of that point of law in light of the expansive manner in which the Federal Arbitration Act is interpreted.

The EEOC's and DOL's HIRE Initiative

The U.S. Equal Employment Opportunity Commission ("EEOC") and the US Department of Labor ("DOL") recently announced the launching of a new initiative called the *Hiring Initiative to Reimagine Equity* (HIRE). The initiative seeks to remove discriminatory hiring barriers and opportunity limitations. This is yet another example of heightened enforcement activity that employers can expect to see under President Biden's administration.

Read the announcement here.

Department of Labor and National Labor Relations Board to Partner for Enforcement Purposes

The DOL and the National Labor Relations Board ("NLRB") recently announced plans to work together "to enhance and maximize the enforcement of the federal laws administered between the two agencies." Of course, the DOL enforces wage and hour law and the NLRB enforces private sector labor relations law throughout the country. The two agencies have agreed that when they learn of a potential legal violation that implicates the other agency's jurisdiction, they will inform employees of the opportunity to pursue further action with the other agency. The initiative also contemplates that both agencies might conduct coordinated investigations into alleged violations of federal labor and employment law. Naturally, some issues, like employee classification and joint employer relationships, will certainly continue to be a focus of both agencies and may be implicated by agency investigations conducted by either agency, representing potential cross-over topics contemplated by this initiative.

NLRB to Revisit Independent Contractor Classification Standards

The NLRB has issued a notice of proposed rulemaking and invited public participation in *Atlanta Opera v. Make-Up Artists and Hairstylists Union, Local 798*. The case involves the proper test for determining whether a worker is an employee or independent contractor and the notice indicates a potential that the NLRB will revert to a previous interpretation of the law that makes it harder to establish a worker is an independent contractor versus an employee. This is yet another heads-up to employers that administrative agency activity is likely to continue to ramp up under President Biden's administration with potential new and more employee and labor friendly interpretations of the law. Employee classification issues are classically complicated, fact-driven, and hotly litigated, and sticky classification decisions should be well-supported by objective evidence establishing independent contractor status versus employee status.

NLRB Looks to Revisit Workplace Policy Standards

Earlier this month the NLRB invited parties and interested parties to file briefs on the proper law to be applied when interpreting whether a work rule or standard violates the provisions of federal labor law. The invitation came in the case *Stericyle, Inc. and Teamsters Local 628* and the NLRB has specifically asked for briefing on whether the NLRB should continue to abide by its "Boeing" rule. This rule takes its name from the case where it was established. That case in 2017 set forth a tighter standard for determining whether a work rule or policy could be interpreted to chill employee's rights to speak about and form a union under federal labor law. The invitation at least suggests the NLRB is considering reverting to previous interpretations of the law in this realm which made it much easier for employees to establish that an employer's workplace policies were overbroad and chilled federal labor rights of workers. The NLRB specifically noted investigative-confidentiality rules, non-disparagement rules, and rules prohibiting outside employment as ones that it might reconsider, but a wholesale change in the legal standard the NLRB utilizes to determine the lawfulness of employer policies is certainly possible.

The Boeing standard was established by the Board under President Trump's administration. This briefing notice is but another indication that the Board under President Biden is examining and revisiting precedents that favored employers versus employees and organized labor.

From the Lighter Side: Battle over Drug Kingpin's Hippos Brewing

The infamous Pablo Escobar maintained something of a zoo on his former estate in Colombia. There were numerous animals on his former estate and part of this zoo including zebras, giraffes, and oddly enough to South America, hippos. These hippos were appropriately dubbed "cocaine-hippos." While not native to Colombia, these cocaine-hippos are thriving. The population started with just four and has since exploded. This presents some interesting clashes with the local environment with a debate stirring up about whether the hippos are an invasive species, or actually good for the local environment.

Read more about this story here.

Firm News

Sniffen & Spellman, P.A. is pleased to announce that **Elmer C. Ignacio** has become a Shareholder. Elmer focuses his practice in all areas of labor and employment law. He is an experienced litigator and has been lead defense counsel in both state and federal jury trials and administrative hearings. Elmer also counsels employers and management in matters ranging from state and federal labor and employment laws, compliance, and handbook review and drafting. Elmer has published numerous articles and presented programs on various labor and employment law topics. Elmer received his bachelor's degree in psychology from the University of Florida and his law degree from the Florida State University College of Law. Though originally born in the Philippines, Elmer is a long-time Tallahassee resident and enjoys tennis and fishing.

Robert Sniffen, **Michael Spellman**, **Lisa Fountain**, **Mark Logan**, and **Frank Lynch** have been recognized by Martindale-Hubbell with an AV preeminent rating. The AV rating means that the lawyer has been rated by his or her peers and recognized for the highest level of professional excellence. An attorney with an "AV" rating means that the attorney has reached the highest of professional excellence and is recognized for the highest levels of skill and integrity. Additionally, **John Eubanks, Jr.** and **Dawn Whitehurst** were given a "Distinguished" rating from their peers. AV®, AV Preeminent®, Martindale-Hubbell Distinguished℠ and Martindale-Hubbell Notable℠ are Certification Marks used under license in accordance with the Martindale-Hubbell® certification procedures, standards and policies.

Frank Lynch made the President's Circle for 2021 by the Attorneys' Title Fund Services, LLC ("The Fund"). Each year, The Fund reviews and analyzes the highest premium producing Fund Members for the prior year. Only The Fund's top Member firms received this distinction. For more information on The Fund, please read here.

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