SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
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COVID Employment Law Update

The Alert continues to bring readers updates on the evolving world of employment law in the time of COVID. First, news out of OSHA, that is the Occupational Safety and Health Administration, which announced it will re-open the notice and comment period for their final standard to protect healthcare workers from workplace exposure to COVID. The Emergency Temporary Standard ("ETS") requires healthcare employers to develop and institute a COVID-19 plan to "identify and control" COVID hazards in the workplace. Some of the proposed changes to the ETS that OSHA is seeking comment on involve: Requiring paid leave related to obtaining a COVID vaccine; Redefining vaccination status to include boosters; Relaxing ETS standards in settings where workers, or the community have higher vaccination rates; Extending the ETS to the construction industry when working in a healthcare setting; among others. These proposed changes have nothing to do with the ETS requiring those working for an employer with more than 100 employees to receive a COVID vaccination or submit to weekly testing.

The Equal Employment Opportunity Commission ("EEOC") has updated its guidance regarding accommodations and employer required COVID vaccinations. The updated guidance provides that employers may ask employees claiming a religious accommodation how their beliefs conflict with the employer's COVID vaccination policy. The EEOC has also updated guidance on what constitutes an "undue hardship" on a business sufficient to override a request for a reasonable accommodation. The guidance says that employers may not rely on a "speculative" or "hypothetical" hardship when an employee makes a religious objection. When attempting to deny a request for religious accommodations based on an undue hardship, the employer must only rely on objective and factually specific factors. Finally, the guidance provides that an accommodation that is accompanied by a reduction in pay or loss of benefits is not a reasonable accommodation if there are alternative accommodations.

Major Arbitration Bill Signed into Law by President Biden

The Labor and Employment Law Alert highlighted a major piece of federal legislation last month, that made it impermissible for employer to require employees to sign agreements wherein they waive their right to bring a claim involving sexual harassment in courts, but rather are forced to arbitrate those claims before a neutral third-party arbitrator. At the time of publication, that law had not yet been signed by President Biden. It has at the time of this publication and is now the law of the land throughout the Country.

Many employers opt to utilize arbitration agreements for a slew of reasons that might make it preferable to have claims arbitrated rather than litigated in the courts. Matters before arbitrators

may be resolved quicker and the process may be less costly. Employers with arbitration agreements or considering them however should consider the impact of this new law on those agreements going forward.

More (Not Expressly Covid-Related) EEOC Updates: Agency Issues Guidance on Caregiver Discrimination and Changes Intake Forms to Reflect Non-Binary Gender Identity

The EEOC has issued guidance regarding caregiver discrimination. Notably, caregivers are not protected from discrimination under federal employment discrimination law based solely on their parental or caregiver status. The long and the short of the guidance issued by the EEOC is that employers should keep front of mind that when making employment decisions, they cannot and should not take an adverse employment action against an employee that happens to be a caregiver for a stereotypical notion about someone based on a protected class. An example from the guidance:

> "Employers may not decline to assign female employees with caregiving responsibilities demanding or high-profile projects that increase employees' advancement potential but require significant overtime or travel."

Notably, the guidance does point out that it is impermissible disability discrimination under federal employment discrimination law to discriminate against someone because of their association with someone with a disability. This might be a situation where an individual employee is the caregiver for a child with a disability. It would be unlawful under federal law to discriminate against a person in this situation because of their association with their disabled child.

Also, the EEOC has made it an option to check one's gender as nonbinary on the agency's charge forms. Individuals will now have the option of selecting a nonbinary "X" gender marker on the forms which are part of the intake process for processing complaints filed with the agency. "The addition of a nonbinary gender marker to the EEOC's charge intake process will be an important step to promote greater inclusion for members of the LGBTQI+ community," said EEOC Chair Charlotte A. Burrows.

The caregiver guidance can be found here.

A note about the change involving EEOC charge forms can be found here.

United States Court of Appeals for the Eleventh Circuit Issues Major Wage & Hour Ruling in Tipping Case

In a recent opinion by the Eleventh Circuit in the case of *Vargas v. Nusret Miami, LLC,* the Eleventh Circuit determined that an 18% service charge automatically applied to all bills at a steakhouse in Miami was not a tip, and therefore not subject to the restrictions of the Fair Labor and Standards Act ("FLSA"). Nusret Miami, a restaurant owned by internet celebrity Nusret Gokce, a chef who achieved internet fame under the name "Salt Bae," has charged an 18%

service charge since its opening in 2017, and distributed these charges on a pro-rata basis to traditionally tipped employees such as waiters as well as traditionally non-tipped employees who worked the back of house.

In 2019, several traditionally tipped employees brought a class action lawsuit accusing Nusret of violating the tipping provisions of the FLSA, claiming that Nusret had not provided them with the tips required under the FLSA. Nusret in response to these employee's accusations, showed that their distribution of the service charge was, in essence, a bona-fide commission scheme, which he argued was lawful under the FLSA. Indeed, Nusret showed that the employees were paid far more than the 1.5x the minimum wage required under the FLSA to satisfy the requirements of this payment structure, as some of the Plaintiffs earned more than $100,000 per year.

In its ruling, the Eleventh Circuit agreed with Nusret, and found specifically that the service charge was not a tip, as it was not at the discretion of the customer and was a mandatory service charge. Specifically, the Eleventh Circuit cited a specific provision of the Department of Labor Rules which states unequivocally that a mandatory service charge is "not a tip," and affirmed the lower Court's ruling in Nusret's favor.

To read more, please refer here.

United States Department of Labor Issues Guidance for Retaliation Claims

Let's take the last case as a springboard for this recent update and set of guidance from the Department of Labor ("DOL") concerning retaliation claims. Let's say you had an employee that submitted a complaint regarding tipping at their employer's place of business. This person would be protected from retaliation under the FLSA.

The DOL's guidance explains the legal standards for this area of the law which can have some nuance. The guidance is a good reminder for employers to always consider potential risk in the form of a retaliation claim when considering employment decisions.

You can read the guidance here.

Immigration Law Update: Relaxed I-9 Requirements Tightened by the Department of Homeland Security

The Department of Homeland Security ("DHS") has reversed the relaxed I-9 requirements that went into effect in 2020 in response to the COVID-19 pandemic. Due to the return to the pre-COVID rules, employers must require employees to (1) complete section 1 of the Form I-9 prior to or on the first day of employment, and (2) present to an employer or authorized representative of the employer the documents required under List A or List B and C in person no later than the third day of employment.

During the pandemic, DHS permitted employers to accept expired List B documents. However, under the tightening procedures, employees must now present renewed List B documents. There

is a transition period, until July 30, 2022, to gather documentation compliant with these requirements. Additionally, the rule permitting remote presentation of acceptable I-9 documentation is scheduled to expire on April 30, 2022, and DHS has not indicated that it would be renewed or extended.

To read more, please refer here.

United States Department of Justice Issues Web Accessibility Guidance: Another Piece in a New and Developing Area of Law

For years now, serial plaintiffs have filed hundreds of Americans with Disabilities Act ("ADA") lawsuits against and businesses and government entities alleging their websites were not maintained in compliance with the ADA. What made these lawsuits difficult to defend was the lack of any rules or standards on how to maintain websites in compliance with the ADA – until now. On March 18, 2022, the Department of Justice ("DOJ") issued its "Guidance on Web Accessibility and the ADA." This guidance "describes how state and local governments and businesses open to the public can make sure that their websites are accessible to people with disabilities as required by the [ADA]." Rather than setting out specific standards or rules, this "guidance" offers basic information about website accessibility such as examples of common technical issues which pose a barrier to website accessibility. Although issuing this "Guidance on Web Accessibility and the ADA" is a good first step by the DOJ, much more is needed in the way of promulgating actual standards and rules for website accessibility requirements under the ADA.

Click here to read the "Guidance on Web Accessibility and the ADA."

From the Lighter Side: New Perfume out of Idaho – French Fry Perfume!

Your author of the Labor and Employment Law Alert has often wondered, "if I were a scent what would it be?" Much to the chagrin of this author's physician and loved ones, there is finally such a scent: Frites. That's right – a french fry perfume. A spud *eau de toilette* if you will. The new perfume is from the Idaho Potato Commission. Because of course it is.

More here.

Firm News

Michael Spellman has been selected to America's Top 100 Civil Defense Litigators® for 2022. Selection to America's Top 100 Civil Defense Litigators® is by invitation only and is based on an array of criteria, including the candidate's professional experience, litigation experience, significant case results, representative high stakes matters, peer reputation, and community impact. Only the top 100 qualifying defense litigators in each state will receive this honor and be selected for membership among America's Top 100 Civil Defense Litigators®. With these extremely high standards for selection to America's Top 100 Civil Defense Litigators®, **less than one-half percent (0.5%) of active attorneys in the United States will receive this honor** — truly the most exclusive and elite level of litigators in the community.

Kristen Diot authored a piece for the Florida Bar Labor and Employment Law Section's Checkoff Publication on employee privacy issues in the public sector workplace. Her article *Public Employees' Reasonable Expectation of Privacy in the Workplace* can be found on the Section's website here.

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