

SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT

July 2022

Federal District Court Enjoins EEOC and U.S. Department of Education from Enforcing Guidance

In June 2020, the United States Supreme Court in *Bostock v. Clayton County* found that under Title VII of the Civil Rights Act of 1964 (Title VII) prohibited “sex” discrimination includes discrimination against employees because of their gender identity or sexual orientation. The Court found that sexual orientation and gender identity were “inextricably bound up with sex.” Thereafter, President Biden issued Executive Order No. 13988 directing federal agencies to interpret federal laws that prohibited sex discrimination to also prohibit discrimination based on gender identity or sexual orientation. The U.S. Department of Education (US DOE) issued guidance documents on Title IX and the Equal Employment Opportunity Commission (EEOC) issued guidance documents on Title VII. The guidance documents stated that discrimination based on sexual orientation and gender identity was prohibited by federal law.

Last year, 20 states brought an action against U.S. DOE and the EEOC stating that their guidance was unlawful, because it for violated the Administrative Procedure Act and the Tenth Amendment. The states also sought a preliminary injunction from enforcing the guidance. The preliminary injunction was granted on July 15, 2022, by the U.S. District Court for the Eastern District of Tennessee in *Tennessee v. U.S. Dept. of Education* (Case No. 3:21-cv-308).. In granting the injunction, the Court found that plaintiffs demonstrated a likelihood of success on their claim that the guidance documents were legislative rules that had to go through notice and comment rulemaking. The Court also stated that US DOE expanded the Bostock opinion through its guidance documents. The federal agencies have not yet appealed the ruling. With the injunction in place, the guidance documents from the Department of Education and EEOC cannot be enforced in the 20 states that brought the action. Florida is not one of the 20 states involved in the case as a plaintiff.

Click [here](#) to read the order.

National Labor Relations Board General Counsel Pushing for Expanded Penalties in Labor Disputes

Jennifer Abruzzo, the General Counsel for the National Labor Relations Board (the Board), continues to push for the Board to adopt a compensatory make-whole remedy in refusal to bargain cases. This position of the General Counsel, taken in a motion in a case before the Board, would disincentivize employers from refusing to bargain with unions by putting them at risk of facing potentially significant monetary penalties.

In conjunction with a 1970 case called *Ex-Cell-O*, in cases where an employer unlawfully refuses to bargain with the chosen bargaining representative of its employees, the remedy is a prospective bargaining order commanding the employer to stop its unlawful refusal. Abruzzo proposed that this “provides no incentive for employers to bargain in good faith at an earlier date as required by the Board.” Abruzzo petitioned the Board to overrule its decision in *Ex-Cell-O* so that employees in refusal to bargain cases receive certain monetary relief.

While the case has been remanded back to a Board Regional Director, this type of remedy was mentioned in a previous memorandum issued by the General Counsel.

Read case related documents [here](#).

Well-Intentioned Businesses Receive Relief in the Form of Florida SB 542

Florida SB 542, effective July 1, 2022, helps shield employers who assist independent contractors in times of emergency.

Prior to its passage, employers had to toe the line when providing support to non-payroll workers, worrying the relationship might be misclassified as that of an employee-employer. For instance, during the Covid-19 pandemic, many employers made the tough decision to avoid providing protective equipment to avoid misclassification concerns.

The new law shields Florida businesses from misclassification claims when opting to assist “engaged individuals” during declared emergencies. An “engaged individual” is “an individual who provides a good or service to a business or on behalf of a business and who is remunerated for the good or service regardless of the individual’s classification as an employee or independent contractor.”

At its core, Florida SB 542 provides that specified actions taken by a business during certain declared emergencies may not be used as evidence in certain civil causes of action. This is a win for Florida business and individuals alike, alleviating the employer’s stress of semantics when aiding during a crisis and ensuring individuals receive the necessary support.

Click here to read [Florida SB 542](#).

New Limits for Employer-Mandated COVID Testing?

The U.S. Equal Employment Opportunity Commission (EEOC) recently updated its guidance on COVID-testing. On July 12, 2022, the EEOC issued guidance that declares an employer can only require an employee to undergo COVID viral testing when it is (1) job-related and (2) a "business necessity."

Thus, the employer must consider ever-changing criteria for employee viral COVID testing requirements to fulfill this "business necessity" requirement. Such criteria include employees' vaccination status, the current variant's effect, and the work's specifics. This rule pertains to viral

COVID testing only as the EEOC clarified that employers could no longer require an employee to undergo an antibody test before entering the workplace.

However, the EEOC reiterated the right for employers to ask employees working in-person if they have symptoms of COVID pre-shift and subsequently exclude employees with current symptoms from the day's workplace as their presence would create a direct threat.

Original text from [EEOC](#).

New Background Check Requirements for Landlords and Building Managers

Important update from the last legislative session here in Florida. Florida law now requires landlords and building managers to make applicants undergo background screening as a condition of employment. This now-required background screen uses a consumer reporting agency to gather a screening of the applicant's criminal history and sexual predator/offender history from all 50 states (including the District of Columbia). Applicants with a criminal history involving the disregard for the safety of others may be disqualified for employment by the landlord.

The law comes about after the death of building resident at the hands of a maintenance employee that used a "master key" to enter the tenant's apartment. The law also seeks to protect the access of a renter's keys by requiring the maintenance of a key log, raising the period of reasonable notice provided to tenant's prior entry of a tenant's unit from 12 to 24 hours, and subjecting the key log and background screenings to annual inspections.

The competing laws and obligations concerning employee background screening are numerous. Employers have been found liable for harm caused by employees to customers and clients in some circumstances so background screening and background screening the right way is an important consideration for employers.

The original text from Senate Bill 898 can be read [here](#).

From the Lighter Side: Do the Truffle Shuffle! Scientists Stumble onto 330-Year-Old Shipwreck in Cave off Oregon Coast

NPR reports on the discovery of nearly 330-year-old timbers from a real-life shipwreck off the Oregon Coast. According to NPR, for centuries "mysterious blocks of beeswax and Chinese porcelain have washed up on the Oregon coast." This rings of legends and lore of pirates and sunken treasure becoming the known as the Beeswax Wreck.

Timbers from the wreck were found in a hard to access cave in Oregon. Very [Goonies](#).

Read more [here](#), including a discussion had by NPR with Scott Williams, the president of the [Maritime Archeological Association](#).

Firm News

Rob Sniffen presented “Something Old, Something New – Current Issues Facing Florida School Districts” at the Florida School Boards Insurance Trust Summer Meeting in St. Augustine, Florida.

Elmer C. Ignacio moderated a panel discussion on “The Great Resignation” and co-presented “Labor and Employment Case Law Update” at the Florida Association of Self-Insureds (FASI) Annual Educational Conference in Naples, Florida.

Elmer C. Ignacio was a featured speaker and presented “Labor and Employment Law: Topics and Special Issues” and “Employment Contracts” at the Florida Veterinary Medical Association (FVMA) Power of 10 Leadership Conference in Orlando, Florida.

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