SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
September/October 2022

Florida Updates Minimum Wage

On September 30, 2022, the Florida minimum wage increased to $11.00 per hour. This is the second annual increase leading to a $15.00 per hour minimum wage throughout the state on September 30, 2026. As a reminder, this increase to the minimum wage also effects tipped and commissioned employees, and you may need to recalculate the compensation provided to these kinds of employees to ensure that your business is compliant with federal and state law.

To read more please refer here.

Department of Labor Issues Proposed Independent Contractor Rule

The United States Department of Labor ("DOL") has issued a proposed rule clarifying who is an independent contractor and who is an employee under the law. The proposed Rule would roll back the President Trump-era two factor test to determine whether a person is an employee or contractor, and institute a six-factor test in its place. Specifically, in addition to the two previous administration's considerations of (1) the Employer's control over the work performed, and (2) the opportunity of the worker to realize profit or loss, President Biden's administration has added four additional factors (3) the investments by the worker and employer, (4) the permanence of the relationship between the worker and employer, (5) whether the work performed is integral to the operation of the employer, and (6) the requires skill and initiative needed to perform the duties. The new test closely mirrors the judicially created factors that were considered prior to the enactment of President Trump administration's test.

To read more, please refer here.

Immigration Roundup

- ***Form I-9 Flexibility was set to end - Gets Extended***

During the COVID-19 pandemic, the Department of Homeland Security, U.S. Citizenship and Immigration Services issued a temporary rule allowing businesses to defer the physical presence component of the Form I-9 until such a time as it would be safe to meet in person with new employees. Originally set to expire in late 2020, this rule has undergone several extensions, but it was set to expire as of October 31, 2022. That is, until it was extended again. The extension is through July 31, 2023. The government also has advised employers to continue using the current version of the I-9 form even though it states it expires on October 31, 2022. The Department of Homeland Security said it was extending the use of this version "until further notice"

To read more please refer here and here.

- ***Automatic Green Card Extension***

On September 26, 2022, U.S. Citizenship, and Immigration Services, automatically extended the validity period of Permanent Resident Cards to 24 months for permanent residents that file a Form I-90 to replace their permanent resident card. Upon filing a Form I-90, a permanent resident will be issued a notice that can be presented alongside their expired green card as proof of continuing status.

To read more please refer here.

Independently Owned Franchise Restaurants are "Separate Economic Enterprises" for the Purposes of the Sherman Antitrust Act

Burger King and its separately owned franchisees (more than 99% of Burger King's restaurants worldwide are independently owned) entered a "No-Hire Agreement," under which each agreed not to hire any former employees of another within six months of that employee leaving the prior location. Plaintiffs sued asserting that the Agreement deprived them of job mobility and led to artificially depressed wages and decreased benefits. The claims were antitrust law claims and to establish such a claim, Plaintiffs had to show a contract, combination, or conspiracy that unreasonably restrains interstate or foreign trade.

The trial court found that Burger King and its franchisees were not separate actors for anti-trust purposes, and thus were incapable of taking "concerted action," and so the complaint was dismissed. However, the Eleventh Circuit Court of Appeals disagreed. As the Supreme Court discussed in *American Needle*, the relevant inquiry for "concerted action" is whether there is an arrangement among separate decision makers pursuing separate economic interests, thus, depriving the marketplace of independent centers of decision-making. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010). Carefully, the Court noted the question did not come down to whether the entities engaged in concerted activity for all decision-making, but the question depended only on whether the decision in question involved concerted action.

The Court found that Burger King and its franchisees were pursuing their own economic interests when hiring employees. Importantly, explicit in Burger King's standard franchise agreement, franchisees are independent contractors which are not the agents, partners, joint venturers, joint employers or employees of Burger King, and no fiduciary relationship between the corporation and a franchisee exists. In fact, the Burger King Disclosure Documents stated that other franchisees may be in competition with one another. Additionally, such independence extended to hiring decisions, as franchisees enjoyed "the sole right to hire…" For these reasons, the Court concluded that Burger King and its franchisees had separate and different economic interests and could be subject to antitrust claims.

A copy of the full opinion is available here.

COVID Update: President Biden's Administration not *Presently* Enforcing Federal Contractor Vaccine Mandate

Read more here.

OSHA Update: ***DOL Expanding Criteria for Placement in the OSHA's Severe Violator Enforcement Program ("SVEP")***

The SVEP was developed in 2010, with the purpose of focusing enforcement attention on significant hazards and violations by employers who demonstrate indifference to occupation safety and health obligations through willful, repeated, or failure-to-abate violations. The program was designed for employers who continuously expose workers to hazardous conditions and fail to mitigate dangers even after receiving citations. In addition to being included on a public list of the nation's severe violators, employers who are placed in this program are subject to follow-up inspections.

Previously, criteria was limited to cases involving fatalities, three or more hospitalizations, high-emphasis hazards, the potential release of a highly hazardous chemical, or cases classified as "egregious." The new criteria continues the focus on repeat offenders but is expanded to include violations of all hazards and OSHA standards. The updated criteria include:

- Program placement for employers with citations for at least two willful or repeated violations
- Program placement for employers who receive failure-to-abate notices based on the presence of high-gravity serious violations
- Follow-up or referral inspections made one year, but not longer than two years, after the final order
- Potential removal from the program three years after the date of verification that the employer has abated all program-related hazards (formerly, removal could occur three years after the final order date)
- Employers' ability to reduce time spent in the program if they consent to an enhanced settlement agreement which includes the use of a safety and health management system.

NLRB Update: Proposed Joint Employer Rule and Workplace Dress Codes

The following is an update on several major developments from the National Labor Relations Board ("NLRB") which regulates private sector labor relations throughout the country.

- *Joint Employer Rule:* On September 6, the NLRB issued a proposed rule that would revise how "joint employers" are construed under the National Labor Relations Act. As of now, a separate employer must possess and exercise "direct and immediate control" over the terms and conditions of employment of another company's employee to be considered a joint employer. The new proposed rule would broaden that standard, stating that you can be a joint employer if you possess ***or*** exercise direct ***or*** indirect control over the employee's terms and conditions of their employment. If implemented, this broader standard could have a significant impact on employers, as they now could be held responsible for workers, they may not have considered to be their direct employee.

- *Workplace Dress Code Ruling:* In a recent decision, the NLRB overturned previous precedent regarding dress codes in the workplace. The decision involved electric car

maker, Tesla, who began requiring employees to wear "team gear" to prevent damage to vehicles caused by zippers, buttons, or other aspects of clothing. The United Auto Workers challenged the policy, stating that Tesla's policy prohibited wearing pro-union apparel. The NLRB found that absent "special circumstances," an employer may not interfere with an employee's right to display union insignia. While not specifically defined, in the past, special circumstances have been found when the prohibited attire or clothing may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees.

- *NLRB Holds that Employer Needs to Continue Dues Checkoff Even After Expiration of Collective Bargaining Agreement*

- *NLRB Holds that Strike Replacement Employees Have Right to Union Representation during Investigatory Interview that Might Lead to Discipline*

- *NLRB General Counsel Issues Memo on Important Aspect of Enforcement*

  The NLRB's General Counsel issued a memo stating that NLRB Regions should "routinely attempt to obtain full interim relief" when seeking interim relief under the National Labor Relations Act. The Act allows the NLRB to seek an injunction in federal court while a private sector labor law matter is being litigated before the agency. Interim relief that the NLRB and an employer might agree to include "reinstating alleged discriminatees or agreeing to bargain" while the unfair labor practice charge is pending before the NLRB.

From the Lighter Side: A Simply Resolution to an Tight Election!

After all ballots were counted in an election for a city council seat in Rogers City, Michigan, the two candidates vying for a seat were a tie (616-616). After the deadlock was declared, the two candidates resolved the tie the old-fashioned way – they each drew a piece of paper from a bowl. One piece of paper stated, "Elected." The other stated, "Not Elected." To see the election drama (or lack thereof) unfold on video, please follow the link below.

Source: TheAlpenaNews.com

Firm News

Rob Sniffen co-presented "Post-*Dobbs* Employer Considerations" to insurance industry representatives and attorneys at the Execusummit EPLI Conference in Uncasville, Connecticut. The presentation focused on challenges to employers following the U.S. Supreme Court's decision overturning *Roe v. Wade*.

Ryan Dyson recently participated in an intense, week-long course put on by The Division of Administrative Hearings, which was intended to simulate real administrative hearings and teach litigation skills at DOHA's Tallahassee headquarters.

We would like to congratulate Christie Petruzzelli, former law clerk, and now attorney, of the Firm, on being admitted to the Florida Bar.

Rob Sniffen and **Amy Pitsch** co-presented "Florida Sunshine Law/Ethics Update," at the 48th Annual Public Employment Labor Relations Forum in Orlando, Florida.

Rob Sniffen presented "Regulatory and Statutory Update for Florida School Boards" at the Florida School Boards Insurance Trust Fall meeting in St. Augustine, Florida.

Sniffen & Spellman, P.A. was named a Tier 1 firm in Tallahassee for Employment Law – Management, Labor Law – Management, and Litigation – Labor & Employment by *U.S. News – Best Lawyers*® "Best Law Firms" in 2023. The Firm was also named a Tier 2 firm in the area of Personal Injury Litigation – Defendants.

Sniffen & Spellman, P.A. is proud to have four lawyers recognized by Best Lawyers® in 2023 in America:

- Robert J. Sniffen and Michael P. Spellman for Employment Law – Management, Labor Law – Management, and Litigation – Labor and Employment
- **Dawn P. Whitehurst** for Personal Injury Litigation – Defendants
- **Matthew A. Smith** for Litigation - Insurance

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

You may view past issues of the Labor and Employment Law Alert on the Firm's website: www.sniffenlaw.com. After entering the Firm's website, click on the "Publications" page. Our Firm also highlights various articles of interest on our official Twitter feed, @Sniffenlaw.

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