SNIFFEN & SPELLMAN, P.A.

**LABOR AND EMPLOYMENT LAW ALERT**
**June 2023**

## County Not Exempt from Temporary Reinstatement Provision of Public Whistleblower Statute – Appellate Court Rules

The Florida Public Whistleblower Act contains a provision that provides for the temporary reinstatement of a complaining employee under certain circumstances. There is an exemption in the statute for "municipalities." The question confronted by the district court of appeal – is a county a municipality? The answer according to the Florida Third District Court of Appeals, is no.

The County-defendant argued for purposes of the Act, that it was, in fact, a municipality due to its constitutional grant of municipal powers under Art. VIII, Section 6(f) of the Florida Constitution. The court did not agree, finding that despite the County-defendant's right to exercise municipal powers, it is still defined as a county by the Florida Constitution.

The case is *Garavan v Miami-Dade County*, and the decision can be found here.

## Florida 1st DCA Finds DMS Had Standing to Bring Unfair Labor Charge Against Union

The First District Court of Appeal overturned a decision by the Public Employee Relations Commission ("PERC"), and found that the Department of Management Services ("DMS") had standing to bring an unfair labor charge against the Union under §120.52(13)b.

This case began after DMS and the Union failed to reach an agreement on an annual salary raise. The Legislature then stepped in approving a 3% raise for all state employees, ending the impasse. After the raise had been approved, the Union sent a postcard out to state employees at eleven state agencies, including non-member employees, stating that it was the employee's responsibility to approve the raise via vote, or it would not go into effect.

In ruling on DMS's Unfair Labor charge, PERC found that DMS failed to allege an injury to its own interests and did not have standing based on its employees' interests. PERC also found that DMS did not state a prima facie case that the Union had engaged in unfair labor practices.

In overturning PERC's decision, the 1st DCA "declared found" that DMS showed that its interests would be substantially affected by the unfair labor practices by the Union, that DMS can be considered a "person" for purposes of standing, and that DMS had made a prima facie case showing that the Union failed to bargain in good faith.

The case is *State of Florida, Department of Management Services v. AFSCME Florida Council 79 of the American Federation of State, County, and Municipal Employees, et. al.* and can be found

here.

## Florida Court of Appeals Rules for Training to Be a Protectable Business Interest, it must Be Extraordinary.

Russel Vessels began working for Dr. Terrazzo of Florida, LLC, ("Appellee" or "Employer") in 2019, performing terrazzo restoration. Prior to his employment with Appellee, Vessels had no experience in the process of terrazzo restoration. During the course of this employment, the parties entered into the Agreement, which prohibited Vessels from working for a competing company for a period of three years after Vessels's employment with Appellee terminated. In late December 2020, Vessels left his employment with Appellee; and, in April 2021, he opened Coast to Coast, LLC, which also provides terrazzo restoration.

Ultimately, Appellee filed a two-count complaint against Appellants for temporary injunctive relief and breach of contract. Appellee alleged that Vessels "learned specialized knowledge" when trained that was not otherwise known to the general public. During the injunction hearing, Vessels testified that he sharpened his terrazzo restoration skills and processes by watching videos on YouTube. The trial court found Vessels acquired a great deal of knowledge regarding the repair and restoration of terrazzo floors during his employment with the employer and that the employer proved a legitimate business interest worth being protected by the injunction.

Vessels challenged the trial court's preliminary injunction enforcing a non-compete agreement against him. The Florida Court of Appeals reversed the trial court's preliminary injunction on the grounds that the knowledge that Vessels gained while employed by Appellee is neither extraordinary nor specialized, not worthy of protection by the covenant, and merely an attempt to prevent ordinary competition.

This is an important decision for all employers that enforce non-compete agreements.

To read the decision, click here.

## National Labor Relations Board Takes Aim at Non-Disparagement and Confidentiality Clauses

The National Labor Relations Board ("Board") recently held that requiring departing employees to broadly waive their rights outlined in Section 7 of the National Labor Relations Act ("NLRA") as part of a severance agreement violated Section 8(a)(1) of the NLRA.

The NLRB's decision concerned 11 employees of McLaren Macomb Hospital in Michigan who were permanently furloughed during the COVID-19 pandemic. As part of their severance agreements, each employee was required to not disclose the terms of the agreement or any other

proprietary information, nor make statements to the Hospital's current employees or the general public disparaging the Hospital, its affiliates, parent company, or directors. The severance agreements provided for substantial monetary and injunctive sanctions against the departing employee should they breach the terms of the agreement.

In overruling the previous decisions in *Baylor University Medical Center* and *IGT d/b/a/ Int'l Game Tech*, the Board stated that a severance agreement is unlawful if its terms have a "reasonable tendency" to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. In *McLaren*, the Board ultimately found that the confidentiality and non-disparagement clauses restricted the employee's ability to organize and bargain, as well as discuss working conditions. Further, the Board held that "where a severance agreement unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates Section 8(a)(1) of the Act because it has a reasonable tendency to interfere with or restrain the prospective exercise of those rights - both by the separating employee and those who remain employed."

Going forward, it is important for employers covered by the NLRA to not include or offer agreements with language restricting an employee's ability to participate in any Board investigations or broadly waive their Section 7 rights.

The full decision and a press release from the Board can be found here.

After the Board' decision in *McLaren*, the Board's General Counsel issued a Memorandum to all NLRB field officers providing guidance on implementation. Notably, the Memo indicated that the *McLaren* decision has retroactive application. In light of this, it is important for employers who have recently had departing employees sign severance agreements containing broad non-disparagement and confidentiality clauses to seek counsel prior to attempting to enforce such provisions.

More information can be found here.

## Highlights from the EEOC Annual Performance Report

The U.S. Equal Employment Opportunity Commission (EEOC) released its report on the agency's performance during the 2022 fiscal year (FY). The EEOC recognized an increasing demand for equal employment services among the American public.

The report included statistics, both monetary and service based. For instance, the EEOC obtained more than $513 million in monetary benefits for individuals claiming to be victims of discrimination and resolved over 65,000 charges of discrimination. Federally, the EEOC resolved 9,336 hearings and recovered over $132 million for federal workers.

The EEOC spent the past year broadening the agency's reach and informing the public of their services, hosting over 1,000 events, and reaching almost 80,000 people.

The report also recognized an increase in demand for services as American citizens were going back to work after the pandemic. In FY 2022, the EEOC received 73,485 new discrimination charges, close to a 20% increase from FY 2021. To handle the demand, the EEOC filled 352 new positions and 500 staff vacancies in FY 2022.

A copy of the full report can be viewed here.

## Florida Teacher's Retirement Benefits Forfeited After Felony Convictions

On May 10, 2023 the Florida First District Court of Appeal affirmed the State Board of Administration's (SBA) decision to forfeit The Teacher's Florida Retirement System benefits. The Teacher's benefits were forfeited after they were convicted of two felony counts of traveling to meet a minor for unlawful sexual conduct. After a formal hearing the ALJ recommended that forfeiture of said Teacher's retirement benefits as the appropriate penalty, which the SBA accepted in a final order.

Florida Teacher challenged the SBA's final order for failing to follow the procedure for modification and rejection of recommended findings of fact and conclusions of law under section 120.57(1)(l). The Teacher also claimed there was insufficient evidence to support the findings of the SBA. The court found that the SBA's final order did not comply with the procedural requirements but, the court found that the SBA's violation of section 120.57(1)(l) was at most harmless error because the modifications did not "impair the fairness of the proceeding or the correctness of the action." The court also found that said teacher failed to show that there was insufficient evidence of the SBA's findings.

A copy of the opinion can be found here .

## Impact of Holidays on Calculating an Employee's FMLA Leave Entitlement and Amount of Leave Taken

The Wage and Hour Division (WHD) of the United States Department of Labor published opinion letter FMLA2023-2-A, which explains the impact of holidays when calculating an employee's FMLA leave.

The FMLA entitles eligible employees of covered employers to take unpaid job-protected leave for qualifying family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees may take up to 12 workweeks of leave in a 12-month period for various qualifying reasons, and up to 26 workweeks of leave during a single 12-month period to care for a covered servicemember.

The WHD explains that, under the Family and Medical Leave Act, the employee's normal workweek is the basis of the employee's leave entitlement. Therefore, when a holiday falls during a week that an employee is taking a full workweek of FMLA leave, the entire week is counted as

FMLA leave. For instance, an employee who works Monday through Friday and takes leave for a week that includes Memorial Day on Monday would use one week of leave and not 4/5 of a week.

Conversely, when a holiday falls during a week when an employee is taking less than a full workweek of FMLA leave, the holiday is not counted as FMLA leave unless the employee was scheduled and expected to work on the holiday and used FMLA leave for that day. Therefore, if the employee was not expected or scheduled to work on the holiday, the fraction of the workweek of leave used would be the amount of FMLA leave taken (which would not include the holiday) divided by the total workweek (which would include the holiday).

A copy of the full opinion can be viewed here.

## Supreme Court Holds Concrete Company Can Bring Claims Against Union

On June 1, 2023 the Supreme Court of the United States issued a decision regarding a company's tort claims against a union. The case dealt with Glacier concrete truck drivers after the driver's collective bargaining agreement with Glacier had expired. Once the agreement expired the Union called for a work stoppage in the middle of mixing large amounts of concrete and making deliveries. Drivers returned with trucks loaded with concrete. While Glacier was able to prevent significant damage to trucks, all the concrete mixed that day became unusable. Glacier sued the Union for common law conversion and trespass to chattels. The Union moved to dismiss the claims on the ground that the National Labor Relations Act (NLRA) preempted them.

The Washington Supreme Court sided with the Union. The US Supreme Court reversed and remanded, holding that the NLRA did not preempt Glacier's claims. The Court found that the Union did not meet its burden to prove that the NLRA protected their conduct because the NLRA does not protect strikers who fail to take "reasonable precautions" to protect their employer's property from "foreseeable, aggravated, and imminent danger." Further, the Court found that the union's arguments for why their conduct should be protected by the NLRA were unpersuasive.

Read the decision here.

## National Labor Relations Board Files Complaint Against NCAA, Pac-12 Conference, and USC over Classification of Student Athletes

On May 18, 2023, the National Labor Relations Board's (NLRB) regional office in Los Angeles, California filed a complaint against the National Collegiate Athletic Association (NCAA), Pac-12 Conference, and the University of Southern California (USC). The complaint alleges that the three institutions acted as joint employers and violated federal labor laws by failing to treat their student-athletes as employees.

More specifically, the NLRB's complaint alleges the three institutions have deliberately classified men's and women's basketball and football players as non-employee student athletes, as opposed to employees. The NLRB states this deprives these players of certain rights under the National Labor Relations Act, including the right to organize and form unions.

The NLRB's General Counsel seeks to declassify the players as non-employee "student-athletes" and reclassify the players as employees in their files, including the institutions' handbooks and rules, and to notify the players of the proposed changes.

On June 1, 2023, the three institutions filed separate responses to the complaint, denying the allegations. Further, the NCAA argued that the NLRB was overreaching beyond its jurisdiction. A hearing on the NLRB's complaint is set before an administrative law judge for November 7, 2023.

The full complaint can be viewed here.

### Wage Raises to Professional Foreign Workers Postponed

The Biden administration has postponed its plans to raise the wages of professional foreign workers in the H1-B and employment-based green card categories. The proposal to raise the wages has been moved to the long-term agenda. The administration has also confirmed their intentions to pursue reforms to the H1-B reform program by the end of the year.

The USCIS intends to pursue a rule to amend parts of the H1-B program. This rule will:

- Redefine the H-1B employer-employee relationship.
- Establish new guidelines for employer site visits.
- Clarify rules for F-1 students awaiting a change of status to H-1B.
- Clarify the requirement that an amended or new H-1B visa petition must be filed if there are material changes to employment, including a new worksite location.

Find out more here.

## Highlights from this year's Legislative Session

### Changes Coming to Employer Verification with Senate Bill 1718 Signed into Law

The new law amends s. 448.095, F.S., related to public and private employer verification of employment eligibility. The bill requires certain private employers to also verify the employment status of an individual before recruiting or referring for a fee the individual for employment, similar to federal law.

The bill revises the definition of "employee" to limit the term to individuals filling permanent positions. Individuals hired for casual labor which is to be performed within a private residence and those who are independent contractors, as defined by federal law or regulations, are not within the definition. It also defines a "public agency" as any office, department, agency, division, subdivision, political subdivision, board, bureau, commission, authority, district, public body, body politic, state, county, city, town, village, municipality, or any other separate unit of government created or established pursuant to law, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency. Other changes include deleting the definitions of "agency", "department", "legal alien", "license", and "public employer".

The bill retains the requirement that public agencies use the E-Verify system to verify the employment eligibility of new employees. Beginning July 1, 2023, the bill requires a private employer with 25 or more employees to use the E-Verify system to verify the employment eligibility of new employees. If the E-Verify system is unavailable for the three business days after the first day a new employee begins working and the employer cannot access the system to verify the employee's employment eligibility, the employer must use the I-9 Form to verify employment eligibility. The employer must document the unavailability of the system by retaining:

1. A screenshot each day that shows the employer's inability to access the system;
2. Public announcement that the E-Verify system is not available; or
3. Any other communication or notice regarding the unavailability of the system.

The legislation also imposes new requirements on counties and municipalities by creating a prohibition on providing funds to any person, entity, or organization to issue identification documents to an individual who does not provide proof of lawful presence in the United States. It also specifies that certain driver licenses and permits issued by other states exclusively to unauthorized immigrants are not valid in this Florida.

## Employee Organizations Representing Public Employees Face New Requirements with "Paycheck Protection" Bill – SB 256

SB 256 requires a public employee who desires to be a member of an employee organization (labor union) to sign a membership authorization effective July 1, 2023. Such labor unions must revoke a public employee's membership upon receipt of his or her written request for revocation and may not have dues and uniform assessments deducted and collected by the public employer. The new law revises requirements for applications for initial registrations and renewals of registration of public employee labor unions.

The bill also requires an employee organization, at the time of its renewal of registration, to submit information regarding its membership and whether employees eligible for representation pay dues to the employee organization. If this information shows that less than 60 percent of the employees eligible for representation paid dues to the employee organization certified as the bargaining agent during its last registration period, the employee organization must petition PERC for recertification as the bargaining agent. This means the employee organization and the employer will share the cost of conducting an election. If the majority of the employees voting in this election choose to be represented by the employee organization, the employee organization retains its certification as the exclusive bargaining agent. Section 3 allows the public employer or a bargaining unit employee to challenge an employee organization's renewal of registration based on a belief that the application is inaccurate. If PERC finds the application is inaccurate or does not comply with the requirements of s. 447.305, F.S., the employee organization's registration and certification must be revoked.

## HB 837 – Tort Reform

HB 837 makes the following changes to Florida's civil justice system:

- Changes Florida's comparative negligence system from a "pure" comparative negligence system to a "modified" comparative negligence system, so that a plaintiff who is more at fault for his or her own injuries than the defendant may not recover damages from the defendant.
- Provides uniform standards to assist juries in calculating the accurate value of medical damages in personal injury or wrongful death actions.
- Modifies Florida's "bad faith" framework to:
    - Require a claimant to notify an insurer that the claimant intends to bring a bad faith action in all bad faith cases.
    - Allow an insurer 60 days to pay the claimant damages or correct the circumstances giving rise to the alleged violation, thereby avoiding bad faith liability.
    - Clarify that negligence alone is not enough to demonstrate bad faith.
    - Require a claimant to act in good faith with respect to furnishing information, making demands, setting deadlines, and attempting to settle the insurance claim.
    - Allow an insurer, when there are multiple claimants in a single action, to limit the insurer's bad faith liability by paying the total amount of the policy limits at the outset.
    - Provides that a contingency fee multiplier for an attorney fee award is appropriate only in a rare and exceptional circumstance, adopting the federal standard.

**Mask mandate, COVID-19 vaccine, and testing mandate prohibitions for business and governmental entities**

Senate Bill 252 consolidates mask mandate prohibitions and COVID-19 vaccine and testing mandate prohibitions for business entities and governmental entities in s. 381.00316, F.S., and for educational institutions in s. 381.00319, F.S. Additionally, the bill saves s. 1002.20, F.S., related to face covering mandates in schools, from repeal. The bill provides that it is the intent of the Legislature that Floridians be free from mandated facial coverings, COVID-19 vaccination mandates of any kind, and discrimination based on COVID-19 vaccination status, and receive adequate information regarding treatment alternatives for COVID-19. The bill also provides Legislative findings that society is harmed by discrimination based on COVID-19 vaccination status because healthy persons are deprived of participating in society and accessing employment opportunities and that remedies to prevent such discrimination are in the best interest of the state.

The bill defines the following terms:

- "Business entity" has the same meaning as in s. 606.03, F.S.,30 and also includes a charitable organization as defined in s. 496.404, a corporation not for profit as defined in s. 617.01401, a private club, or any other business operating in this state.
- "Governmental entity" means the state or any political subdivision thereof, including the Executive, Legislative, and Judicial branches of government; the independent

establishments of the state, counties, municipalities, districts, authorities, boards, or commissions; or any agencies that are subject to chapter 286, F.S. The term does not include an educational institution as defined in s. 381.00319, F.S.

- "Educational institution" means a public or private school, including a preschool, elementary school, middle school, junior high school, secondary school, career center, or postsecondary school.

## Firm News

**Robert Sniffen** served as a co-presenter at the 19th Annual HR Tallahassee Conference and Expo sponsored by the Big Bend Chapter of the Society for Human Resources Management. The presentation focused on HR compliance and risk management issues and was held at the Florida State University Turnbull Center.

**Jeffrey Slanker** has joined the Academy of Florida Management Attorneys (AFMA).

**Michael Spellman** spoke at the Florida Municipal Insurance Summit on May 19 in Ft. Myers, Florida, and gave a presentation titled "How to Become a Master Facilitator of Employment Practices."

**Robert Sniffen's** article "Small Employers Beware – Equal Employment Opportunity Law Coverage Issues" was published in the May/June 2023 edition of *ASSOCIATION SOURCE*, magazine.

**Sniffen & Spellman, P.A.** is pleased to announce the inclusion of six attorneys in the 2023 edition of Florida Super Lawyers. Each year, no more than five percent of the lawyers in the state are selected by the research team at Super Lawyers to receive a Super Lawyers honor and no more than 2.5 percent of the lawyers in the state are selected to receive a Rising Star honor.
This year's honorees includes:

2023 Florida Super Lawyers:
-**Matthew Carson**: Schools & Education, Civil Litigation, Civil Rights
-**Terry Harmon**: Schools & Education, Employment & Labor, Administrative Law, General Litigation
-**Rob Hauser**: Appellate, Civil Litigation
-**Robert Sniffen**: Employment & Labor, Civil Litigation, Schools & Education
-**Michael Spellman**: Civil Rights, Employment Litigation: Defense, Civil Litigation: Defense, Constitutional Law

2023 Rising Star:
-**Jeffrey Slanker**: Employment & Labor, Appellate, Civil Rights

**Jeffrey Slanker** has become Board Certified by the Florida Bar in Appellate Practice. Board certification is Florida's official, independent determination of a lawyer's expertise to practice in

a specialty field of law. It is the gold standard for Florida lawyers, representing a recognition by a lawyer's peers that they have attained a level of professional expertise in their chosen fields. Of the over 80,000 lawyers in Florida that are eligible to practice law, there are only 217 Board Certified in Appellate Practice. Jeff's appellate practice spans state appellate courts in Florida and the United States Court of Appeals for the Eleventh Circuit. He represents clients in appellate matters in a variety of subject areas of the law including labor and employment law, state and local government law, constitutional law, and civil rights law.

## 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.