SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
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New DOL Rule on Independent Contractors Made Final

On January 10, 2024, the Department of Labor released its final rule on independent contractors, returning to a six-factor test instead of the two-factor test that was placed in effect in 2021. The new rule will go into effect on March11, 2024, and be a balancing test based on the following factors:

1. opportunity for profit or loss depending on managerial skill;
2. investments by the worker and the potential employer;
3. degree of permanence of the work relationship;
4. nature and degree of control;
5. extent to which the work performed is an integral part of the potential employer's business; and
6. skill and initiative.

Regarding the first of these factors, this is based largely on how much the contractor controls their own completion of the contract, if they can negotiate the terms of the agreement, decline and schedule jobs based on their discretion, advertise their services independently, and market their services independently, they are more likely to be a contractor than an employee. The second factor focuses on who makes investments into the completion of duties, for example a plumber that purchases their own tools, and retains those tools after a job is completed is more likely to be a contractor than an employee.

The third and fourth factors are closely related, for example if a chef has a standing catering job every week, and is expected to prepare a specific menu chosen by a hotel for that job every week, they are more likely to be an employee. Similarly, if the chef rejects these engagements due to other jobs, and sets their own menu, they are more likely to be an independent contractor.

The fifth factor is dependent on the nature of the work provided and the business of the employing group. To illustrate this type of interaction, an electrician providing services to a law firm is clearly not integral to the business activities of a law firm, but if a construction company hired the same electrician for installation services in buildings they were constructing, they may start looking more like an employee.

Finally, regarding the sixth factor, the more specialized a person is, the more likely they are to be a contractor, by way of example, a company hiring a someone with an HVAC license to install an air conditioning unit for their home is unlikely to create an employment relationship

with that individual, where the same company that hires someone to monitor their phones would likely create an employment relationship.

It is important to bear in mind that these factors are balanced against each other based on the particular facts of the relationship between an individual and the entity retaining them to provide services.

To read more on this issue, please refer here.

Fifth DCA Rules Employee Must Pay Unpaid Balance to Employer

Florida's Fifth District Court of Appeal issued an opinion discussing a contractual dispute between Dr. Kun Xiang and his former employer Ocala Heart Clinic. Xiang was a member physician at the Clinic. To become a member physician Xiang entered into two agreements with the Clinic. These agreements provided that Xiang would buy 100 membership units in the Clinic for more than $300,000. Xiang made numerous payments toward his buy-in. Ultimately, Xiang resigned from the Clinic.

Xiang's resignation triggered the Clinic's repurchase of his membership units. No promissory note was ever executed between Xiang and the Clinic as required in their agreement. The trial court ruled that Xiang breached his Member Employment Agreement. The court also found that Xiang owed the balance of the buy-in price as required by the Operating Agreement. Xiang appealed and argued that since the Clinic failed to prove damages the court erred in finding that the Clinic was the prevailing party on the second count.

The Court found that since it was clear that Xiang agreed to the buy-on amount that the parties' failure to execute a promissory note as stated in the Operating Agreement was not fatal to the existence of the debt that Xiang owed to the Clinic. The Court concluded that the Operating Agreement makes clear that Xiang remained liable for unpaid balance of the buy-in.

Find the Fifth DCA's opinion here.

Pay Transparency Laws Continue to Grow in Popularity

Throughout 2023, several states passed pay transparency laws that require certain disclosures in both internal and external job postings. The requirements vary by state, but there continues to be a movement towards jurisdictions passing laws that implement pay disclosure requirements.

Washington, D.C. recently hopped on the trend, signing a pay transparency law on January 12, 2024 that will go into effect on June 30, 2024. The D.C. law applies to all private employers with at least one employee in D.C. Since the law does not address whether this encompasses employees who sometimes work in D.C. (remotely or otherwise) it is in the best interest of employers to remain cognizant of where their workforce is located and whether their workplace has a presence in D.C.

The main provisions of the D.C. law are: (1) a ban on wage history inquiry, (2) required disclosures, (3) required notice, and (4) a private right for Attorney General only. The D.C. law prohibits an employer from screening prospective employees based on their previous pay or wage history and prohibits seeking the wage history of a prospective employee from a person who previously employed that individual. Under the D.C. law, an employer must disclose the minimum and maximum projected salary or hourly pay "in all job listings and position descriptions advertised." Employers must also disclose existing healthcare benefits a prospective employee may receive before the first interview. While the law does not create a private right of action for individuals, it does authorize the Attorney General (AG) to take certain action, such as bringing a civil lawsuit for injunctive, compensatory, or other authorized relief for any violations. The D.C. law also requires covered employers to post a notice relaying the pay transparency requirements and employees' rights under the new law.

As the trend continues to gain popularity, employers should understand jurisdictional requirements, and consider states or localities where a company's job postings could reach.

Dartmouth Basketball Players Found to Be Employees of the School

A regional official for the National Labor Relations Board ruled on February 5 that Dartmouth basketball players are employees of the university. This decision would clear the way for an election to create the first labor union for NCAA athletes. The members of the Dartmouth men's basketball team signed a petition last September asking to join Local 560 of the Service Employees International Union, which represents other employees at the university. If the players are able to create a union it would allow them to negotiate salary and working conditions, such as practice hours. NLRB Regional director Laura Sacks concluded that because Dartmouth had the right to control the work performed by the basketball team and the players perform work in exchange for compensation, the players were employees within the means of the National Labor Relations Act. The Dartmouth associate vice president for communications released a statement that the school will be seeking review of the decision.

Find the decision here.

Live in Worker Exemption Under FLSA Does not Apply to Nanny

On January 24 the Eleventh Circuit issued an opinion addressing the issue of whether or not nannies are entitled to overtime pay under the Fair Labor Standards Act (FLSA) live-in worker exemption. The Court found that under FLSA generally employers must pay overtime to nannies who reside off the premises where they work.

The case involved Plaintiff Maria Blanco and Defendants Anand Samuel and Dr. Lindsey Finch ("Parents"). Blanco believed she was entitled to overtime compensation, but the Parents argued that Blanco falls under the FLSA provision that exempts "any employee who is employed in domestic service in a household and who resides in such household" from receiving overtime compensation. For the live-in service exemption to apply the employee must (1) work in domestic service, (2) work in the household, and (3) reside in that household. See 29 U.S.C. § 213(b)(21).

The court found that Blanco did not "reside" at the parents' house because she was a night shift worker who treated the house as her place of employment, maintained a separate abode, and was on duty for the entire 79 hours each week. The court concluded that Blanco was entitled to overtime compensation for the hours she worked each week in excess of 40 hours.

Find the decision here.

Lawsuit Filed After AI Generated Fake Comedy Special Imitating Comedian

The estate of comedian George Carlin has filed a lawsuit after AI produced a fake comedy special that recreated the comic's style and material. The fake comedy special, named "George Carlin: I'M Glad I'm Dead," was put on the podcast outlet Dudesy. The podcast is active on YouTube, Instagram, X, TikTok and available on Spotify and Apple Podcasts. The lawsuit was filed in federal court in Los Angeles on January 25. In the beginning of the fake AI comedy special the AI generated voice states, ""I listened to all of George Carlin's material and did my best to imitate his voice, cadence, and attitude, as well as the subject matter I think would have interested him today." The complaint alleges that the defendants used AI to use Carlin's copyrighted works to create a fake script and use an AI generated sound-alike of George Carlin to perform the script. None of the defendants had permission to use Carlin's likeness. This is likely one of the first of many lawsuits on AI using copyrighted material and imitating celebrity likeness.

Find the complaint here.

Tampa Settles Parental Leave Policy Suit

The Justice Department has secured a settlement agreement with the City of Tampa. The lawsuit alleged that Tampa discriminated against male employees who sought parental leave. The suit alleged that Tampa discriminated by denying male employees the same level of parental leave offered to female employees. The complaint stated that the last 10 male employees requested primary caregiver leave and were denied the leave because of their sex and other male employees were discouraged from applying for primary caregiver leave. The alleged discrimination violated Title VII of the Civil Rights Act of 1964. The proposed consent decree states that Tampa will credit up to 240 hours of additional leave time to each of the male employees who would have taken primary caregiver leave if it had been available at the time. Tampa is also responsible for paying $300,000 in compensation to the impacted employees. Tampa is also required to implement new parental leave policies and training.

Find the complaint here.

Find the consent decree here.

From the Lighter Side: Elmo Gets a Lot of Feedback to his "How is everybody doing?" Post

Sesame Street has been delighting audiences, young and old alike, since 1969. One beloved character, Elmo, made a simple post on his X (twitter) account asking his followers how they were doing. The responses were voluminous and varied. Some folks used the opportunity to tell Elmo that they were not doing great. And Elmo of course was very understanding. Appreciate you Elmo!

Read more here and here.

Firm News

Terry Harmon and Rob Sniffen co-presented "Transgender Youth and School Facilities" in Pheonix, Arizona at the 2024 Civil Rights and Governmental Liability Seminar sponsored by Defense Research Institute. The Seminar included speakers and attendees from around the country from the legal, educational and insurance industries.

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