

SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT ALERT *April 2011*

Career Service Employee Discharged from Probationary Position was Entitled to a Hearing

Pesta was a career service employee with the Florida Department of Corrections (“DOC”). She was promoted to Correctional Officer Captain, and while still on probationary status as captain, DOC issued an “Extraordinary Dismissal Letter” terminating her employment at DOC. The issue presented was whether Pesta, who had not completed her 1-year probationary period, could be dismissed from the position without cause and without a PERC hearing.

On appeal, the Court found that where a career service employee serving a probationary period in a promotional position disputed that she was discharged by the employer for cause, and asserted that there was a position available to which she should have been returned or transferred, the employee was entitled to a hearing at which the question of whether the employer had cause for the discharge could be decided. Without such a hearing, an employing agency could strip all permanent career service employees of PERC hearing rights by promoting them from one career service position to another on one day and firing them the next.

The First DCA’s opinion in Pesta is available at the following link: [Pesta v. Dept. of Corrections](#).

Legislation Prohibiting State and Local Governments from Automatically Deducting Union Dues from Employees’ Paychecks Passes Senate Budget Committee

Senate Bill 830 (SB 830), which would bar agencies from deducting union dues from public employees’ paychecks, narrowly passed the Senate Budget Committee on April 13, 2011. SB 830 is aimed to protect union members and gives these members the right to prevent the union from spending their union dues on politics. The proposed bill will further provide the members with a partial refund of their dues if they disagree politically with a decision made by the union. Additionally, this legislation will allow members to remain in the union without fear of reprisal. Significantly, SB 830 removes the option of using payroll deduction of dues by public sector employers, thereby removing public employers from handling union dues.

More information regarding SB 830 is available at the following link: [SB 830](#).

Federal E-Verify System May be Imposed on Florida Employers

In March of 2011, the Florida House introduced House Bill 7089 (HB 7089) which contains provisions requiring that all private employers use the Federal E-Verify system to verify immigration status of all new hires after July 1, 2013. Private employers with 100 or more employees would be required to utilize the Federal E-Verify system for all new hires after July 1, 2012. Public employers would be required to use the Federal E-Verify system for employees hired after January 1, 2012.

The Federal E-Verify system allows employers to determine whether its new hires are authorized workers by electronically comparing the identification and authorization information provided by employees with the information contained in the federal Social Security Administration and Department of Homeland Security databases. HB 7089 provides limited immunity to both public

and private employers who register and utilize the Federal E-Verify system. We will keep you apprised of any updates related to HB 7089.

More information regarding HB 7089 is available at the following link: [HB 7089](#).

Proposed Florida Legislation Adjusts Florida Minimum Wage Calculation Methods

Senate Bill 1610 (SB 1610) continues to move favorably through the Florida Senate. SB 1610 amends various sections of Chapter 448, Florida Statutes, by tweaking the method of calculating Florida's state minimum wage. The proposed method of calculation would take deflation into consideration since it is not currently addressed in either the Florida Constitution or current Florida Statutes. Despite the proposed changes, Florida's state minimum wage would never fall below federal minimum wage requirements. Moreover, Florida's state minimum wage would not drop when there is deflation.

More information regarding SB 1610 is available at the following link: [SB 1610](#).

United States Supreme Court Addresses Scope of the Federal Arbitration Act

On April 27, 2011, the United States Supreme Court issued an opinion (5 to 4) in AT&T Mobility, LLC v. Concepcion (Case No. 09-893) addressing the issue of whether the Federal Arbitration Act ("FAA") prohibits states from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures. In AT&T, a cell phone contract between the parties provided for arbitration of all disputes but did not permit classwide arbitration. The Concepcions sued AT&T in a California Federal Court after they were charged sales tax on phones they received for free under their service contract. California state law provided that arbitration agreements were unconscionable if they disallowed classwide arbitration. Ultimately, the Court held that California's law was "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and was thus preempted by the FAA.

The Supreme Court's decision is available at the following link: [AT&T Mobility v. Concepcion](#).

Taping of Indiscriminate and Excessive Conversations to Support Whistleblower Claim is Not Considered Protected Activity

The Department of Labor's ("DOL") Administrative Review Board ("ARB") recently clarified in an opinion that the lawful taping of conversations to obtain information about safety-related conversations is protected activity and should not subject an employee to adverse action. However, indiscriminate and excessive recording of topics unrelated to safety is not protected activity. In Hoffman v. NetJets Aviation, Inc., Hoffman was placed on paid administrative leave because NetJets was concerned that Hoffman was recording confidential information and non-safety related conversations. The record established that Hoffman had over 750 recordings. NetJets argued that it had a reasonable belief that some of the recordings did not involve the protected activity of gathering evidence of air safety violations and discovery for an ongoing whistleblower proceeding. The ARB held that Hoffman engaged in indiscriminate and excessive recording of topics unrelated to air safety, including NetJets' business strategy and finances. As such, the tape recordings were not protected activity.

The ARB's opinion can be found at the following link: [Hoffman v. NetJets Aviation, Inc.](#)

DOL Handbook Interpretation of FLSA's Dual Jobs Regulation Considered Reasonable

In Fast v. Applebee's International, Inc., Fast alleged Applebee's improperly applied the "tip credit" to calculate acceptable minimum wages. Fast argued he performed non tip-producing duties for significant portions of his shift and was entitled to the full minimum wage of \$7.25 under DOL regulations. The parties agreed the dual jobs regulation applied and that DOL's interpretation of that regulation was entitled to some measure of deference. DOL concluded that employees who spend substantial time (20% or more) performing related but nontipped duties should be paid the full minimum wage for that time without a tip credit.

Ultimately, the Court agreed and found that DOL's interpretation was reasonable. The Court further explained that Fast carried the burden to establish that he spent a substantial amount of time performing non tip-producing duties such that he was not performing a tipped occupation for at least portions of his shift; and, if the employer did not maintain sufficient records, then Fast could use the relaxed Mt. Clemens standard.

The Eight Circuit's Opinion in Fast is available at the following link: [Fast v. Applebee's International, Inc.](#)

Department of Labor Enforcement Updates

As part of our continuing effort to keep employers apprised of DOL's greater enforcement efforts of FLSA and other violations, the following news items were publicized by DOL this month:

- DOL's Wage and Hour Division (WHD) has initiated two separate enforcement initiatives to enforce the requirements of the FLSA. The two initiatives will occur in Hillsborough County, Florida, with a focus on restaurants, and in New Jersey, with the focus being gas station workers. The Hillsborough County initiative is based on past significant and systemic violations at Tampa area restaurants. From 2006 to 2010, the Tampa office conducted 1,166 investigations of restaurants, recovering more than \$2.8 million in minimum wage and overtime back wages for 3,873 workers. The WHD also considers gas station workers to be particularly vulnerable to illegal wage practices. Investigators will be making unannounced visits to remedy what the WHD believes are widespread labor violations and to ensure that law-abiding employers who pay proper wages are not placed at a competitive disadvantage.
- Continuing with the gas station theme, the Labor Department filed suit to recover back wages and an equal amount in liquidated damages for 23 current and former workers at BP and Marathon gas stations located in Cincinnati. The WHD found that certain employees are owed \$111,468.00.
- WHD secured an agreement from the International Security Management Group to pay more than \$282,000.00 in back wages for 46 security employees after an investigation revealed that the company had failed to pay employees the required prevailing wage rates and fringe benefits for all hours worked in violation of the federal McNamara-O'Hara Service Contract Act.
- DOL filed a petition in federal court in Cincinnati seeking to recover from Hamilton Avenue Animal Hospital \$85,253.00 in back wages and damages for 21 workers at its two locations. An investigation by WHD determined that the company and its owners violated the FLSA by requiring some animal handlers to pay earned overtime premium wages back to them. The petition also seeks to hold the Defendants in contempt for violating an injunction entered in a 2007 court order.

Past Issues of the Labor and Employment Alert Posted on Website

You may view past issues of the Labor and Employment Alert on the Firm's website: www.sniffenlaw.com. After entering the Firm's website, click on the "Publications" page.

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