SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT ALERT *December 2011*

EEOC Reports Record Number of Charges of Discrimination

According to a November 15, 2011, press release from the EEOC, the number of discrimination claims filed against employers has skyrocketed. In fiscal year 2011, which ended on September 30, 2011, the EEOC received a record 99,947 charges of discrimination. The number is the highest in the Commission's 46-year history. The EEOC also reported a record number of monetary benefits secured through administrative enforcement (more than $364,600,000.00). This is also the highest level obtained in history.

The lesson for employers is clear: more than ever preventative maintenance is critical to preventing and defending against discrimination claims. Policies should be reviewed, training scheduled, compensation levels analyzed, and other risk management procedures audited, to guard against costly litigation by current and former employees, as well as applicants for employment. The New Year is a good time to assess the status of an employer's policies and procedures in the areas of personnel management and risk management.

Florida's Minimum Wage Increases on January 1, 2012

Effective January 1, 2012, the minimum wage in Florida is scheduled to increase from $7.31 per hour to $7.67 per hour. The increase, which is driven by Florida's minimum wage statute, will result in Florida having the 11th highest minimum wage among all states. Additional information can be found at the Florida Department of Economic Opportunity (formerly, the Agency for Workforce Innovation) website at: www.floridajobs.com.

DOL Issues Three New Fact Sheets Regarding Retaliation

The U.S. Department of Labor Wage and Hour Division recently published three new fact sheets regarding retaliation protections.

Fact Sheet 77A addresses retaliation under the Fair Labor Standards Act ("FLSA"). Fact Sheet 77A provides information regarding the FLSA's prohibition of retaliating against an employee who has filed a complaint, including oral and written complaints, or cooperated in an FLSA investigation. Employees alleging retaliation under the FLSA may file a complaint with Wage and Hour Division or file civil action seeking remedies including, but not limited to, employment, reinstatement, lost wages, and liquidated damages. Fact Sheet 77A is available at the following link: DOL Wage and Hour Fact Sheet 77A.

Fact Sheet 77B provides information concerning retaliation and interference prohibitions under the Family and Medical Leave Act ("FMLA"). Fact Sheet 77B offers the following examples of conduct that violate the FMLA: refusing to authorize FMLA leave for an eligible employee; discouraging an employee from using FMLA leave; manipulating an employee's work hours to avoid entitlement to FMLA benefits; using an employee's request or use of FMLA leave as a negative factor in hiring, promotions, firing, disciplinary actions, and other employment actions; and counting FMLA leave under "no fault" attendance policies. Fact Sheet 77B is available at the following link: DOL Wage and Hour Fact Sheet 77B.

Fact Sheet 77C offers information regarding the Migrant and Seasonal Agricultural Worker Protection Act's ("MSPA") prohibition of discrimination and retaliation against migrant and seasonal agricultural workers. The MSPA regulates wages, housing, transportation, disclosures, and recordkeeping for migrant and seasonal agricultural workers. The anti-retaliation provisions of the MSPA offer protections to employees who have filed a complaint or participated in any proceeding under or related to the MSPA. Fact Sheet 77C is available at the following link: DOL Wage and Hour Fact Sheet 77C.

Eleventh Circuit Upholds Summary Judgment for Employee in Transgender Sex Discrimination Case

The Eleventh Circuit Court of Appeals affirmed summary judgment granted to a former employee of the Georgia General Assembly's Office of Legislative Counsel who alleged she was fired because of sex discrimination. Plaintiff was born a biological male, but after several years of feeling as as though she was a female was diagnosed with Gender Identity Disorder. Shortly after beginning the process of physically becoming a woman, Plaintiff came to work on Halloween dressed as a woman and was sent home with her employer calling her "unnatural." A year later, Plaintiff told her employer she would be coming to work as a woman, changing her legal name, and proceeding with her gender transition. Thereafter, Plaintiff was terminated.

The employer called the gender transition "inappropriate" and "disruptive" and feared the other workers would be uncomfortable. The lower court granted summary judgment in favor of Plaintiff. The appellate court determined that discriminating against someone based on gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause of the United States Constitution. The Eleventh Circuit then rejected the employer's justification for the termination - concern that other women might object to Plaintiff's use of the restroom - as being too hypothetical to meet the strict-scrutiny test for government action.

The opinion is available at the following link: Glenn v. Brumby.

Florida House Subcommittee Recommends Further Changes to Florida Unemployment Compensation Program

The House Business and Consumer Affairs Subcommittee of the Economic Affairs Committee voted 10-3 to approve Proposed Committee Bill 12-02 ("PCB 12-02"), which if passed into law, would make some significant changes to Florida's Unemployment Compensation program. First and foremost, the bill calls for the renaming of the program from "Unemployment Compensation" to "Reemployment Assistance Program." More substantively, the bill would call on the Department of Economic Opportunity to establish a minimum score for the initial skills review required of new assistance applicants. Individuals who fail to meet the minimum score would be provided free training to improve workforce skills. Another major change allows union members who customarily obtain employment through a union hiring hall to satisfy their weekly search requirement by reporting daily to their union hall. Other changes include non-charging employer accounts due to layoffs caused by "disasters of national significance" such as oil spills or terrorist attacks; exempting short-time plan applicants and temporary workers from making minimum weekly contacts; and extending the statute of limitations for the collection of overpayments made due to fraud. The proposed bill will next travel to the full Economic Affairs Committee.

More information related to the proposed bill is available at the following link: PCB 12-02.

Proposed Legislation to Revamp Regional Workforce Boards

On December 15, 2011, House Bill 7023 ("HB 7023") was filed in Florida's House of Representatives by the Business and Consumer Affairs Subcommittee. HB 7023 proposes changes to the current structure of Florida's Regional Workforce Boards, namely providing for more State control of the regional agencies. HB 7023 provides the Governor authority to remove any member of a regional workforce board for cause, and the authority to appoint the chair and executive director of each regional workforce board. Other oversight measures included in HB 7023 require each regional workforce board develop an annual budget to be submitted to Workforce Florida, Inc. HB 7023 also requires Workforce Florida, Inc., to evaluate the development of a single, statewide workforce system for Florida to be presented to the Governor, the President of the Senate, and the Speaker of the House of Representatives. If passed, HB 7023 will take effect July 1, 2012.

More information related to HB 7023 is available at the following link: HB 7023.

First Circuit Court of Appeals Affirms State Agency did not Waive FLSA Immunity by Removing Case to Federal Court

The First Circuit Court of Appeals in Bergemann, et al. v. Rhode Island Dept. of Env. Management, et al. recently affirmed a district court's ruling that upheld state immunity to claims brought under the FLSA. Plaintiffs, a group of environmental police officers, argued that Rhode Island waived its entitlement to immunity when it removed the case to Federal Court. The Court distinguished the current set of facts from the United States Supreme Court's ("USSC") ruling in Lapides v. Bd. of Regents of the Univ. Sys. Of Georgia, where the USSC held that Georgia waived its right to immunity because its action of removal was an "end-run" attempt to circumvent Georgia's state-court wavier of immunity for certain claims.

In Bergemann, the Court reasoned that Rhode Island was immune from FLSA claims in both state and federal court and gained no special advantage from removing the case. Affirming the dismissal of the FLSA claims against the state, the Court stated, "when a state has maintained a consistent, across-the-board position regarding its immunity, the invocation of the federal jurisdiction to enforce that immunity does not effect a waiver."

The opinion is available at the following link: Bergemann, et al. v. Rhode Island, et al.

Proposed Law Would Prohibit Discrimination of the Unemployed

A proposed law filed in Florida's House of Representatives would prohibit an employer from refusing to consider for employment or refuse to offer employment to a person on the basis of that person's status as unemployed. Titled the "Fair Employment Opportunity Act," House Bill 815 ("HB 815") which is sponsored by Representative Betty Reed (Hillsborough), is presently before the Business and Consumer Affairs Subcommittee. If passed, the law would prohibit an employer who employs 15 or more employees as well as an employment agency from discriminating against a person based on that person's unemployed status, regardless of the length of time the person had been unemployed. The proposed law also provides relief for a person who claims he has been retaliated against for opposing such discrimination.

Earlier in 2011, President Barack Obama proposed the American Jobs Act, which also contained an anti-discrimination provision intended to prevent employers from discriminating against job applicants on the basis of their status as unemployed. That proposed legislation died in the United States Senate when it was not considered after a cloture motion failed.

Under the current proposed Florida legislation, only the Attorney General could commence a civil action, with any damages inuring to the benefit of the aggrieved individual.

More information related to HB 815 is available at the following link: HB 815.

National Labor Relations Board Postpones Effective Date of Posting Requirement for Second Time

In our October 2011 edition of the Sniffen & Spellman *Labor & Employment Law Alert*, we reported that the National Labor Relations Board decided to postpone the effective date of a rule that would require private sector employers to post in the workplace an 11 by 17 inch notice of the right to form and join a labor union. (To view the October 2011 article on this issue, go to: October 2011 Labor & Employment Law Alert).

Lightning has struck again, this time at the request of a federal court in Washington, DC that has scheduled a hearing in response to a legal challenge to the rule. The Board's ruling states that it has determined that postponing the effective date of the rule would facilitate the resolution of the legal challenges that have been filed with respect to the rule. The new implementation date is April 30, 2012.

Unless the legal challenge is successful, most private sector employers will be required to post the notice on or before the new implementation date of April 30. The notice is available at no cost from the NLRB through its website, www.nlrb.gov, which has additional information on posting requirements and NLRB jurisdiction.

Florida Representative Files Bill Proposing Change to Definition of "Good Cause" in Unemployment Statute

On December 20, 2011, Representative Soto filed House Bill 1083 ("HB 1083") for consideration in the 2012 Legislative Session. HB 1083 proposes some linguistic modifications to certain unemployment compensation statutes. Of significance, the bill would alter the definition of "good cause" as applicable to situations when an employee leaves work voluntarily but maintains eligibility for benefits. The current statute, §443.101(1)(a)1, defines "good cause" as including only "that cause attributable to the employing unit which would compel a reasonable employee to cease working or attributable to the individual's illness or disability requiring separation from his or her work." Under the new bill, "good cause" means "cause attributable to the employing unit or an illness or disability that requires separation from work; or domestic violence…verified by reasonable and confidential documentation that causes the individual to reasonably believe that continued employment will jeopardize the individual's safety and the safety of a member of his or her immediate family." The removal of the "reasonable employee" language might lead to a lower standard of proof for employees to obtain benefits. The addition of domestic violence as a justifiable reason for eligibility as worded would require not only domestic violence against the employee but against an additional family member as well.

More information related to HB 1083 is available at the following link: HB 1083.

Firm News

Sniffen & Spellman, P.A. welcomes new associate **Jake Whealdon.** Mr. Whealdon is a 2011 graduate of the University of Pennsylvania Law School and holds a Certificate in Business and Public Policy from the Wharton School. While in law school, Mr. Whealdon coached a national championship winning high-school moot court team through the Marshall-Brennan Project. He

also served as a Senior Editor of the Journal of Business Law. Mr. Whealdon received his B.A. in History and American Studies, *magna cum laude*, from Florida State University, where he was a member of Phi Beta Kappa and an Honors Delegate. Additionally, Mr. Whealdon is currently pursuing an LL.M. in Environmental Law and Policy from the Florida State University College of Law.

Mr. Whealdon's practice areas include Labor and Employment Law, Environmental and Land Use Law, Civil Rights Litigation, and Governmental Law.

Happy New Year

The attorneys and staff of Sniffen & Spellman, P.A. wish you and yours a happy, safe and prosperous 2012!

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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