

SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT ALERT *May 2011*

United States Supreme Court Upholds The Legal Arizona Workers Act

The United States Supreme Court in Chamber of Commerce of the United States of America v. Whiting (Case No. 09-115) affirmed the decisions of multiple lower courts that The Legal Arizona Workers Act was not preempted by the Immigration Reform and Control Act (“ICRA”) or the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIA”). The Arizona law at issue imposed licensing restrictions for businesses and mandated that employers use the E-verify system. Challengers to the Arizona law asserted that Arizona was prohibited from placing greater restrictions on employers than is required by Federal law. The Court rejected these arguments and concluded that the Arizona law was limited in its restrictions as to licensing and that the IIRIA, providing for the E-verify system, did not preclude any state from making use of the system mandatory.

It must be noted that the Florida Legislature, despite efforts by some lawmakers, did not pass any laws substantively impacting immigration during the 2011 Regular Session.

A copy of the United States Supreme Court’s opinion is available at the following link: [Whiting](#).

Department of Labor Launches New iPhone Application

On May 9, 2011, the United States Department of Labor (“DOL”) announced the launch of its first application for smartphones, a timesheet to help employees independently track the hours they work and determine the wages they are owed. The app is available in English and Spanish and users can track regular work hours, break time and any overtime hours for one or more employers.

The free app is compatible with the iPhone and iPod Touch. For Android and Blackberry users, the DOL reported it will explore updates that could enable similar versions for other smartphone platforms. Additionally, other pay features not currently provided for are also being explored, such as recording tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest.

For workers without a smartphone, the Wage and Hour Division has a printable work hours calendar in [English](#) and [Spanish](#) to track rate of pay, work start and stop times, and arrival and departure times.

More information regarding the application is available at the following link: [DOL App](#).

Florida Unemployment Benefits Reduced to 23 Weeks

On May 6, 2011, the Florida Legislature enrolled CS/CS/HB 7005 which will reduce unemployment benefits from 26 to 23 weeks when Florida’s unemployment rate exceeds 10.5%. If Florida’s unemployment rate falls below 10.5%, the maximum amount of weeks of unemployment benefits would decline on a sliding scale. Governor Scott has not yet signed the bill.

More information pertaining to CS/CS/HB 7005 is available at the following link: [CS/CS/HB 7005](#).

NLRB Addresses Twitter and Facebook Use by Employees

The National Labor Relations Board (“NLRB”) recently issued announcements regarding claims made by employees against their former employers due to social media websites. In a “Twitter” case, a reporter for The Arizona Daily Star opened a Twitter account at the request of the newspaper and began making posts critical of the editorial staff and which made light of homicide. The newspaper did not have a written social media policy and subsequently terminated the reporter for his comments. The NLRB determined that the claim was not actionable, because the posts by the reporter did not involve protected or concerted activity in that the “tweets” did not relate to the terms and conditions of his employment or seek to involve other employees in issues related to employment.

By contrast, the NLRB issued a complaint against a non-profit employer that provides social services to low-income clients, alleging that five employees were wrongfully terminated for criticizing working conditions on “Facebook.” In their complaint filed against Hispanics United of Buffalo, the NLRB found that comments posted by employees constituted protected or concerted activity because they involved a conversation among coworkers about their terms and conditions of employment (including job performance and staffing levels). The comments were made in response to another employee who had posted a coworker’s allegation that employees did not do enough to help the organization’s clients.

In a similar matter, the NLRB filed a complaint against Knauz BMW for its termination of an employee who complained on his Facebook page about a dealership event. As part of the introduction of a new BMW model, the dealership served hot dogs and bottled water to people attending the event. Sales staff were generally unhappy with the quality of the food served, leading one employee to post complaints about the food and photos on Facebook. A week later, the dealership asked the employee to delete the posts. The employee complied but was fired after a subsequent managers’ meeting. The NLRB complaint alleges the employee’s Facebook posting is protected under the NLRA because it concerned a discussion among employees about the terms and conditions of their employment. The case will be heard by an administrative law judge on July 21, 2011.

These and other NLRB opinions and activities can be found at: [NLRB](#).

United States Supreme Court Declares Information Contained in Public Report Cannot Serve as Basis for Whistleblower Complaint

In Schindler Elevator Corp. v. Kirk (Case No. 10-188), the United States Supreme Court determined that because information obtained through a Freedom of Information Act (“FOIA”) request fit within the typical meaning of report (i.e. something that gives information), plaintiff could not base his *qui tam* action against his former employer under the False Claims Act on such publicly disclosed information. Plaintiff Kirk was a former employee of Schindler and filed a lawsuit under the FCA after resigning from Schindler due to what he alleged were hostile circumstances. Among other things, Kirk alleged that Schindler submitted thousands of illegal invoices through contracts with the Federal Government based on information his wife obtained through a FOIA request.

A copy of the United States Supreme Court’s opinion is available at the following link: [Schindler](#).

Department of Labor's Administrative Review Board Restricts Former Employee's Ability to File Claims Against Former Employer

The Department of Labor's Administrative Review Board ("ARB") issued a ruling placing several conditions on a former employee's ability to file complaints against his former employer based on the number of "vexatious, harassing and duplicative complaints" the employee filed pursuant to the anti-retaliation provision of the Energy Reorganization Act ("ERA"). In Saporito v. Florida Power and Light Co., the ARB determined that Saporito's complaints under the ERA were without any good faith expectation of prevailing and subsequent appeals of lower tribunal decisions against Saporito were without merit. The ARB noted that the right of access to the courts is neither absolute nor unconditional and imposed restrictions requiring Saporito to obtain legal counsel before filing any additional complaints. Saporito is also required to provide a list of all such complaints and their status in the event any future complaints are filed.

The ARB's decision is available at the following link: [Saporito](#).

Eleventh Circuit Affirms that Bankruptcy Code Does Not Prohibit Private Employers From Considering Potential Employees' Prior Bankruptcy

On May 17, 2011, the Eleventh Circuit issued an opinion in Myers v. TooJay's Management Corporation (Case No. 10-10774), holding that although Section 525(b) of the Bankruptcy Code provides that a private employer may not "terminate the employment of, or discriminate with respect to employment against" an individual on the basis that the individual has filed for bankruptcy, this protection does not extend as far as section 525(a) of the Bankruptcy Code for public employers. In Myers, TooJay's denied Myers employment after a pre-employment investigation revealed Myers' prior bankruptcy. Myers alleged that Section 525(b) prevented TooJay's from discriminating against him based on his bankruptcy.

In analyzing Myers' claims, the Court noted that Section 525(a) specifically provides that a public employer may not "deny employment to" an applicant because the applicant has filed for bankruptcy. However, Section 525(b), governing private employers, lacks this particular language and, as a result, the prohibition against denying applicants employment based on the filing of a bankruptcy does not extend to the private sector. The Court noted that the 3rd and 5th Circuits have arrived at the same conclusion.

A copy of the Eleventh Circuit's opinion is available at the following link: [Myers](#).

Past Issues of the Labor and Employment Alert Posted on Website

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