SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
July 2020

U.S. Supreme Court Extends Ministerial Exception

On July 8, 2020, the U.S. Supreme Court issued the opinion in the combined cases of *Our Lady of Guadalupe School v. Morriessey-Berru* and *St. James School v. Biel*. The Court addressed whether the ministerial exception to claims under Title VII of the Civil Rights Act should extend to employees who do not hold the title "minister" (or something similar), or the expertise in religious education. In a seven to two decision, the Court said, yes, it does. The ministerial exception, developed pursuant to the First Amendment, insulates a religious institution from employment discrimination claims arising from actions related to its "ministers." In *Hossana-Tabor Evangelical Lutheran Church and School v EEOC*, 565 U.S. 171 (2012), the Court helped define the ministerial exception, but did not expressly declare that the exception applied to those employees who do not carry a revered title or hold religious degrees. However, in this current case, the Court made it abundantly clear that any individual who is charged with the "responsibility of educating and forming students in the faith" of the employing religious organization is subject to the ministerial exception. It does not matter the title, but rather what the employee does to determine whether the courts can interfere with a religious organization's decisions.

To read more about this decision, please refer here.

Supreme Court holds that Contraceptive Mandate Violates Religious Freedom

In the recent case of *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, The Supreme Court analyzed the administrative rules adopted by the Departments of Health and Human Services, Labor, and the Treasury related to the Affordable Care Act ("ACA"). Pursuant to these administrative rules, all employers were required to provide health insurance coverage that provided contraceptives approved by the Food and Drug Administration at no cost to employees unless the employer was exempt from such requirements due to sincerely-held religious beliefs. Pennsylvania brought suit, alleging that the exemption was procedurally defective and both the District Court and the Third District Court of Appeals determined that the exemption was procedurally defective and issued a nationwide ban on the use of the exemption. The Supreme Court reversed this decision, determining that the ACA and Religious Freedom Restoration Act of 1993 ("RFRA"), as well as the Court's decision in *Burwell v. Hobby Lobby Stores* permitted the Departments to implement rules exempting employers with sincerely-held religious beliefs from the requirements of its rules and did not suffer from any procedural defects causing them to be invalid.

To read more about this decision, please refer here.

National Labor Relations Board Sets New Standard on Profane Outbursts

Under previous precedent by the National Labor Relations Board ("NLRB"), profane outbursts by employees were still protected so long as the outburst was in connection with activity protected under Section 7 of the National Labor Relations Act. This includes employee speech related to the organization of labor unions, collective bargaining through representatives of the employee's choosing, and other activities related to collective bargaining. In its recent decision in the consolidated cases of *General Motors, LLC* and *Charles Robinson,* the NLRB has reversed this precedent and gone back to its old test for evaluating whether such outbursts are protected under the Act. That test, referred to as the *Wright Line* test, requires that the NLRB's General Counsel show that (1) the disciplined employee was engaged in a protected activity; (2) the employer was aware of the activity; and (3) the activity was a substantial or motivating factor in the discipline. Once this has been established, the employer may rebut this presumption by showing that the employee would have been terminated due to other reasons, namely the profane outburst. The NLRB has determined that the universal application of this test will permit an employer to appropriately discipline abusive employees.

To read more, please go here.

COVID-19 Return to Work Guidance; Updates from the DOL and the CDC

As employees cautiously return to the workplace during the COVID-19 pandemic, the U.S. Department of Labor ("USDOL") and the Centers for Disease Control and Prevention ("CDC") continue to provide guidance. In a recent update to its online "Questions and Answers" resource, the USDOL clarified employers "may not require [an] employee to telework or be tested for COVID-19 simply because the employee took [Emergency Paid Sick Leave]." The CDC also recently updated its online "Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings" resource. The CDC clarified "[a] test-based strategy is no longer recommended to determine when to discontinue home isolation, except in certain circumstances." The CDC advises individuals who were directed to quarantine may discontinue isolation when "[a]t least 10 days have passed since symptom onset; [a]t least 24 hours have passed since resolution of fever without the use of fever-reducing medications; and [o]ther symptoms have improved."

Read the USDOL "Questions and Answers" here.

Read the CDC "Discontinuation of Isolation" here.

OSHA Publishes FAQ's on Return to Work During COVID-19

In July 2020, the U.S. Occupational Safety and Health Administration ("OSHA") released a new resource which provides guidance for employees returning to the workplace during the COVID-19 pandemic. The resource is in a "FAQ's" format, and it includes topics such as personal protective equipment ("PPE"), safety training, and best practices for employers in preparing the workplace for employees' return. For example, in this resource OSHA clarifies, "Cloth face coverings are not considered PPE and are not intended to be used when workers need PPE for protection against exposure to occupational hazards. As such, OSHA's PPE standards do not

require employers to provide them." Employers should keep in mind government agency standards and guidance when considering issues related to return to work and obligations in returning employees to work.

Read the OSHA "FAQ's" return to work guidance here.

Employers Still Have Time to Enact COVID-19 Related Policies and Procedures

For the last several months, employers have had to grapple with the effects of COVID-19 on their workforce and their way of doing business. The economic impact is readily apparent, with the rash of regulations pertaining to seemingly every business. However, employers will increasingly have to learn to navigate a web of new, and sometimes novel, COVID-19 related litigation.

There are several types of lawsuits which may become even more common in the era of COVID-19. Whistleblowing, retaliation and wrongful discharge for those employees who object to an unsafe work environment are almost certain to arise. Employees are also likely to increasingly allege that employers failed to provide a safe working environment, such as not providing personal protective equipment to employees. COVID-19 will also create fertile new ground for workers' compensation claims in an attempt to link the virus to the workplace. Sadly, there are also many potential issues related to mass layoffs through the Worker Adjustment and Retraining Notification Act (WARN Act). Finally, employers must be consistent in allocating and mandating paid leave time. This is not an exhaustive list, but does demonstrate the uncertain times in which employers operate. Now more than ever, employers need to protect themselves from an increasingly hostile litigation environment.

Fortunately, there are steps employers can take to minimize risk. First, ensure that relevant policies and procedures are up to date. This should include a specific policy on paid leave time, attention to determining and providing the appropriate personal protective equipment required within the workplace and making sure that reasonable accommodations are provided to those employees who require them.

Second, employers would be wise to go over these policies, in detail, with managers and supervisors. This should include a detailed workplace safety plan, policies and procedures for investigating COVID-19 related illnesses as well as employee concerns about work and returning to work. Compliance with applicable state and local health codes should also be a focus of employers.

Finally, it is very well-possible that an employee will at some point become exposed to the virus. Employers should not wait until this scenario arises to develop an action plan for how to address that situation in their workforce. A little bit of work and documentation now will go a long way in getting your business through these challenging times.

New FMLA Forms Released by the Department of Labor are Touted as Clear, Helpful and User-Friendly

Employers who are covered by the Family and Medical Leave Act ("FMLA") (generally, those employers with 50 or more employees and public agencies) are required to provide their employees with certain notices about the FMLA. Effective communication is critical to having a successful FMLA program. To aid in this communication, the Department of Labor ("DOL") has developed optional-use forms which can be utilized by employers to provide the required notices to employees, and they may also be used by employees to provide certification of their qualifying reason for FMLA leave.

The updated forms include more explanatory language, better definitions, and spaces for employers to explain to an employee what information is needed and when. Moreover, the medical certification forms require health care providers to clearly identify the medical condition of the employee and the type and amount of leave needed. Though the FMLA does not require the use of any specific form or format, it is a best practice for employers to utilize the updated and current versions of the DOL's template forms.

The Notice forms can be accessed here

The Lighter Side: Work from Home Hazards: Scottish MP's Cat Interrupts Parliamentary Zoom Meeting

Scottish National Party (SNP) MP, John Nicolson's cat had *purrfect* timing during a committee debate earlier this month. The MP was in the middle of asking about the use of subtitles on children's TV during a meeting of the Digital, Culture, Media and Sport Committees when a tail popped up before him. The MP's cat, Rojo, not only brought the debate to a temporary halt but brought some laughs as well.

To watch the video, click here.

Firm News

Sniffen & Spellman, P.A. is proud to be recognized in the Martindale-Hubbell's Bar Register of Preeminent Lawyers™. The Bar Register is a guide to the legal community's most eminent professionals.

Jeff Slanker has been admitted into the First District Appellate American Inn of Court as a Barrister Private member. The mission of the Inn is to inspire the legal community to advance the rule of law by achieving the highest level of professionalism through example, education, and mentoring. The First District Appellate American Inn was founded in 2008 and is specifically focused on appellate practice. The Inn's membership consists of a mixture of approximately 70 members, including judges, professors, lawyers, and law students from Florida State University, Florida Coastal, and the University of Florida.

Supervisor's alleged anti-Cuban comments leads to employee attempting suicide in the workplace and lawsuit in Fernandez v. Trees, Inc. Court rules supervisor's alleged comments were "severe or pervasive" enough for hostile work environment claim. **Elmer Ignacio** with the Firm delved into the case for HRLaws' Labor and Employment Law Letter subscribers.

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.