SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
September 2017

"The lead is mine" Florida Supreme Court Decision Provides Referral Sources Can Support Non-Compete Agreement

The Florida Supreme Court recently held that protecting business referral sources is a legitimate interest under certain circumstances, for the purpose of supporting a noncompete agreement between an employer and an employee.

The cases before the Supreme Court were *White v. Mederi Caretenders Visiting Services of Southeast Florida*, No. SC16-28, and *Americare Home Therapy, Inc. v. Hiles*, No. SC16-400, which were ultimately consolidated. Both cases concerned the home health care industry and both cases involved situations in which the home health care agency attempted to restrict the ability of its employees to compete with the employer after the termination of employment through a contractual noncompete agreement. Those noncompete agreements were justified, as argued by the home health care agencies, by their interest in protecting their referral sources and avoiding employees from taking referral sources to direct competitors, which happened in these cases.

The Florida Supreme Court held that this interest did justify a noncompete agreement in certain circumstances and that noncompete agreements would not be invalidated on the basis of legitimacy of the justification for the noncompete agreement when that justification is referral sources under certain circumstances.

Noncompete agreements are a useful tool for employers that want to ensure that employees do not take valuable information or resources with them once they terminate employment. The Florida Supreme Court's decision in this case provides employers with another potential legitimate interest that would support the enforcement of a noncompete and also implicitly holds that just because an interest is not specifically listed in the noncompete statute does not mean that it cannot, potentially, justify a noncompete agreement. It is important to note that whether the protection of referral sources, or other legitimate interest, is sufficient to support a noncompete is a fact-intensive inquiry. Consultation with employment lawyers during the contract drafting process to evaluate the existence of a legitimate interest and whether a noncompete would be enforceable is crucial to employers exploring options to protect their relationships and information. A good labor and employment attorney can craft noncompete agreements to withstand court scrutiny and put your entity on the best footing to protect its livelihood.

Read the opinion here.

DOL Establishes Minimum Wage for Contractors and Tipped Workers for 2018

The United States Department of Labor recently published the 2018 wage-rate floor for contractors, as required by Executive Order 13658. The minimum rate for contractors is set to increase 15 cents per hour – to $10.35 per hour – on January 1, 2018. In addition, the minimum cash wage for tipped workers performing work related to a contract will increase by 45 cents per hour, to $7.25 per hour.

The Department is required to conduct annual re-determinations of these rates.

Read more here.

Administration Nominates New General Counsel for NLRB

On September 15, the Administration announced that President Trump will nominate Peter Robb as the new General Counsel for the National Labor Relations Board. If confirmed Robb would replace Richard F. Griffin, Jr., who was appointed by President Obama and will finish his term this November.

The NLRB has been shifting to a Republican-majority for the first time in over a decade. Policy changes are expected to accompany this shift.

Read more here.

Eleventh Circuit Ruling – School Superintendent Entitled to Quality Immunity in First Amendment Case

The Eleventh Circuit recently reversed a District Court ruling for failing to apply the appropriate qualified immunity protections to a school superintendent. The case at issue, *Gaines v. Wardynski*, involved a teacher who claimed her school's superintendent denied her a promotion because of statements her father made in the local newspaper that were critical of the school board and superintendent. The District Court disagreed with the superintendent's argument that he was entitled to qualified immunity because terminating a public employee because her family member engaged in protected speech was not a "clearly established" violation of the First Amendment.

The Eleventh Circuit disagreed with the District Court, reversing their ruling and finding that the superintendent did not have a fair warning that denying plaintiff a promotion because of her father's comments would violate her constitutional rights.

Read the case here.

Possible FLSA Questions and Answers in Wake of Hurricanes

Over the month of September, Florida has been engaged in ongoing cleanup resulting from Hurricane Irma's impact. This can lead to unique and tricky wage and hour questions for affected employers. Employers should note that the Fair Labor Standards Act ("FLSA") does not contain any exceptions for emergency work. If employees are required to work in excess of 40 hours in a designated work week, employers must compensate them at a rate of at least 1.5 times their regular pay, regardless of the reason for the additional work. In addition, employees generally cannot "volunteer" to work, and must be compensated for any time spent while permitted to work. If a non-exempt employee cannot work because of office closures, the FLSA generally does not require the employee be compensated.

For more information about post-hurricane FLSA issues, visit here.

Ruling: Letter to Employees During EEOC Investigation May Constitute Unlawful Retaliation

A Federal Court recently held that an employer might have engaged in unlawful retaliation when it sent a letter to its employees informing them they may be contacted by the Equal Employment Opportunity Commission ("EEOC"). The letter, which contained information about allegations lodged against the company and the employees' rights to speak with the EEOC, was a "standard courtesy notice" as described by the employer. However, the Court found that including the complainant's name and a description of sensitive facts about certain accommodations could reasonably coerce or intimidate employees or the complainant from fully cooperating with the EEOC's investigation.

This case serves as a reminder of the extremely delicate balance between conducting ordinary business operations and exhibiting sensitivity to investigations.

Read more here.

From the lighter side: Employee Attends Beyonce Concert Courtesy of Company Sky Box While Out on FMLA Leave

Immediately after receiving a performance improvement plan, a Dallas-area marketing director left work and called in to advise that she would be filing for short-term disability benefits. Just a week later, however, the employee was seen attending a Beyonce concert in her employer's corporate sky box. Her boss then reached out to the employee via email and requested to discuss her leave requests and attendance at the concert. The employee responded that she was not medically cleared to meet with her employer. After the employee failed to meet a deadline to respond via email, the company terminated her employment.

Apparently, she was not, in fact, irreplaceable.

Read the story here.

Firm News

The Firm is pleased to introduce a new associate attorney, **Michael R. Fidrych**. Mr. Fidrych attended Florida State University School of Law and has been a member of the Georgia Bar since 2009 and the Florida Bar since 2011. Mr. Fidrych brings with him a breadth of knowledge in civil litigation.

Robert J. Sniffen attended the Florida Association of Counties' Policy Development Conference in Osceola County, Florida.

Past Issues of the Labor & 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.