Issue 4, 2019

The Editors' Note

Welcome to the fourth quarter edition of *SuperVision*, the e-newsletter from Spilman Thomas & Battle's Labor & Employment Law Group.

Just as we were going to press, the National Labor Relations Board ("NLRB") issued two major reversals of prior holdings. One reversed a decision allowing employees to use the employer's e-mail system during non-working hours to engage in Section 7 protected discussions regarding wages, hours of work, working conditions, union issues and other terms and conditions of employment. And then, the NLRB announced another change: investigative confidentiality rules are, once again, lawful, at least where the confidentiality rules apply for the duration of any investigation. Kevin Carr takes a longer look at each of these rulings.

As the calendar turns to a new year, this is a great opportunity to plan for 2020, including a full review of job policies and handbooks for compliance. It is also a great time to plan for a wage audit, especially considering the increase in the salary basis for white collar professionals. In addition to adjusting salaries, why not confirm that the employees you are treating as exempt meet the duties. Of course, the Labor & Employment Law Group here at Spilman is more than ready to assist you in reviewing your materials, pay and otherwise assisting in any new year planning you have. Along those same lines, we are doing our planning for the new year as well. A big part of that is getting ready for our SuperVision symposia. So, if there are any topics you would like us to address, please feel free to let us know.

In this edition of *SuperVision*, Mitch Rhein examines the latest from the NLRB on vulgar speech, Chelsea Thompson explains that the Supreme Court of Appeals of West Virginia has narrowed the self-defense public policy exception it created a few years back. For our folks with facilities in Pennsylvania, Pete Rich details the latest in the fight over modernizing overtime and minimum wages laws in that state. And, Carrie Grundmann explores how a change in Virginia legal procedure may change how quickly cases can be resolved in that state.

As always, thank you for reading and we look forward to working with you in 2020.

Eric W. Iskra, Chair, Labor & Employment Practice Group
Eric E. Kinder, Executive Editor, *SuperVision*

NLRB Clears the Purple Haze Around Employee Use of Employer E-mail

By Kevin L. Carr

The NLRB reversed the controversial holding in *Purple Communications*, which allowed employees to use their employer's e-mail system during non-working hours to engage in Section 7 protected discussions regarding wages, hours of work, working conditions, union issues and other terms and conditions of employment. In *Purple Communications*, the NLRB overturned precedent that held that while union-related communications cannot be banned because they are union-related, facially neutral policies regarding the permissible uses of employers' e-mail systems are not rendered unlawful simply because they have an incidental effect of limiting the use of those computer systems for union-related communication.

Click **here** to read the entire article.

I Need You to Keep a Secret: The Board Rules that Employers May (Once Again) Bar Workers from Discussing Pending Investigations

By Kevin L. Carr

A split panel of the NLRB has ruled that employers may implement and consistently enforce policies prohibiting employees from discussing pending investigations where such prohibition is limited to the duration of the investigation. The decision overruled a 2015 decision that severely restricted an employer's ability to require employees to maintain confidentiality during an ongoing workplace investigation.

Click **here** to read the entire article.

Profane, Racist and Sexist - NLRB Rewrites Rules

By Mitchell J. Rhein

The NLRB is expected to rewrite its rules protecting employees who violate employers' policies when they use profane, racist or sexist language. In September, the NLRB requested public comment on whether it should overrule or modify its holdings in three cases in which extremely profane or racially offensive language was judged not to lose the protection of the National Labor Relations Act ("NLRA"). A change in the law is overdue. Currently, employers must consider the context and whether the employer's actions provoked an employee to use profane, racist or sexist language before issuing discipline when the employee's comments could be perceived as protected concerted activity under the NLRA. Allowing employers to discipline employees for inappropriate language, regardless of the context, will harmonize the NLRA with other laws, such as Title VII of the Civil Rights Act, which requires employers to prevent racist, sexist or other discriminatory language in the workplace.

Click **here** to read the entire article.

West Virginia Supreme Court's *Newton* Decision Clarifies Self-Defense in the Workplace

By Chelsea E. Thompson

In the recent decision *Newton v. Morgantown Machine & Hydraulics*, the Supreme Court of Appeals of West Virginia limited the state's public policy regarding the use of self-defense in the workplace. The plaintiff in *Newton* brought what is known as a *Harless* claim, alleging his former employer terminated him in violation of the state's public policy of self-defense. After the Circuit Court granted the employer's motion to dismiss, Newton appealed to the Supreme Court of Appeals of West Virginia.

Click **here** to read the entire article.

Increase the Pennsylvania Minimum Wage or the Overtime Salary Threshold?

By Peter R. Rich

Employers and employees are witnessing a struggle between the administration of Governor Tom Wolf, the Legislature and Pennsylvania employers over efforts to modernize the rules governing overtime and/or increase the Commonwealth's current minimum wage of $7.25 per hour. Most Pennsylvania employers are required to meet the requirements of both federal and state wage laws and employees are entitled to receive the benefits of whichever law is the most favorable. The outcome of that struggle should be known shortly.

Click **here** to read the entire article.

Changes to the Law of Summary Judgment in Virginia

By Carrie H. Grundmann

It has long been said that summary judgment is not available to litigants in Virginia state courts. The difficulty resulted from Virginia's prohibition against using discovery depositions in support of a motion for summary judgment unless the parties agreed to their use. This rule contrasts with most states and all federal courts that permit the use of discovery depositions in support of summary judgment. Thus, while Virginia has long been considered a business-friendly state, when it comes to litigation, the preference has almost always been in favor of federal courts. However, recent legislative enactments may signal a change.

Click **here** to read the entire article.