June 8, 2017

Editor's Note

Welcome to the second quarter edition of *SuperVision*, the e-newsletter of Spilman Thomas & Battle's Labor & Employment Group. The look of *SuperVision* may have changed, but the goal remains the same: to provide timely information that will help you find solutions and alternatives in managing your people.

First, some breaking news. Just this week, Secretary of Labor Alexander Acosta announced the Department of Labor ("DOL") was withdrawing two informal guidance memoranda that the department issued during the Obama administration. These informal guidance memoranda addressed joint employer status as well as the distinction between employees and independent contractors. Importantly, all of the statutes and regulations addressing joint employer status as well as the distinction between employees and independent contractors remain binding; as the department's news release states the action of the department "does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the department's long standing regulations and case law." Indeed, employers should still be mindful of classifying individuals correctly - especially because state and federal taxing agencies are also concerned about the proper classification of workers as employees or independent contractors. But, the announcement should offer some relief to employers and reduce some of the uncertainty that the DOL may be interpreting some statutes more aggressively than the courts.

A large part of our mission is our annual SuperVision symposia series. Our Charleston, West Virginia session is scheduled for Friday, June 23, at the University of Charleston. The symposium will address many of the hottest topics and issues in the realm of employment law, including pregnancy-related policies and practices, wage and hour and overtime regulation, social media, workplace investigations and the latest from the West Virginia Legislature. These sessions are more than just a description of the legal issues, but highly interactive sessions with an eye towards helping you do long-term planning. In addition, we will continue the very popular lunch and learn session where you will have an opportunity to sit down with the attorneys of the Labor & Employment Group for conversations regarding many key topics of interest. The full agenda can be found **here**. If you have any questions about this seminar, please contact April Bias, marketing assistant, at **abias@spilmanlaw.com** or by phone at 304.720.5699.

This issue of *SuperVision* includes the latest on class action waivers from Mitch Rhein, a look by Spencer Cook at the evolving field of sexual orientation discrimination in the workplace, and a summary of the most recent session of the West Virginia Legislature by Jay Ford. We appreciate the time that you have taken to review this edition of *SuperVision* and invite you to pass on any comments or feedback that you may have. We look forward to speaking with you throughout 2017.

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

Waving in Class Action Waivers?

By **Mitchell J. Rhein**

Later this year, the Supreme Court of the United States will address the enforceability of class action waivers in employment arbitration agreements in *Ernst & Young LLP v. Morris*. The Supreme Court's decision will resolve a disagreement among the National Labor Relations Board and several courts of appeals over whether arbitration agreements that prohibit employees from participating in "any class, collective, or representative proceeding" violate the employees' right to engage in concerted activity

under the National Labor Relations Act ("NLRA"). If the Supreme Court rules that class action waivers violate the NLRA, then the decision whether to include such waivers in employment arbitration agreements is easy. Otherwise, employers will have to consider several pros and cons when deciding whether class action waivers should be included in their employee arbitration agreements.

Click here to read the entire article.

Sexual Orientation Discrimination and Title VII - The Seventh Circuit Weighs In

By **J. Spencer Cook**

In July 2015, the Equal Employment Opportunity Commission ("EEOC") published a guidance titled *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, which took the position that employment discrimination against members of the LGBT community is covered under Title VII of the Civil Rights Act of 1964's ("Title VII") prohibition of sex discrimination. The EEOC's Guidance, at the time, stood in direct contradiction to 10 out of 13 United States Circuit Courts of Appeals that held that sexual orientation was not protected by Title VII. The EEOC's Guidance foreshadowed that discrimination against LGBT individuals in the workplace would begin to face greater scrutiny.

Fast forward to 2017.

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

2017 and the West Virginia Legislature - The Year of the Employer

By **Joseph A. (Jay) Ford**

The 2017 regular session of the West Virginia Legislature saw several changes in laws relevant to employers. Changes of interest to employers include the West Virginia Safer Workplace Act, Second Chance for Employment Act, West Virginia Workplace Freedom Act, West Virginia Medical Cannabis Act, striking employees and unemployment benefits, Physicians Freedom of Practice Act, and bonds for wages and benefits.

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