CLE SEMINAR EVALUATION FORM

Name (Optional): _____ Date: February 26-27, 2009

Name of Course: 9th Annual Labor & Employment Law Certification Review (0690R ABF)

City: Orlando Facility: J.W. Marriott Grande Lakes

Please evaluate the speaker presentation for this Florida Bar CLE program based on the following scale: **5=excellent; 4=good; 3=fair/average; 2=poor; 1=unacceptable**. If you rate a presentation 2 or 1, please explain why, in the comment section, so that we may further improve our programs.

Speaker	Speaker Rating	Course Book	Comments
David E. Block	___	___	_____
William R. Radford	___	___	_____
Kevin D. Johnson	___	___	_____
Shane Muñoz	___	___	_____
Susan L. Dolin	___	___	_____
Deborah C. Brown	___	___	_____
Jill Schwartz	___	___	_____
Frank Brown	___	___	_____
Don Spero	___	___	_____
Christopher C. Sharp	___	___	_____
Bernie Mazaheri	___	___	_____
Pat Tyson	___	___	_____
Mary Ruth Houston	___	___	_____
F. Damon Kitchen	___	___	_____
Hon. Alan O. Forst	___	___	_____
David H. Spalter	___	___	_____
Daniel R. Levine	___	___	_____

General Speaker Comments: _____

_____

_____

General Seminar Comments: _____

_____

_____

Coursebook Comments: _____

_____

_____

Please evaluate the facility based on the following scale: **5=excellent; 4=good; 3=fair/average; 2=poor; 1=unacceptable**. If you use a rate of 2 or 1, please explain why, in the comment section, so that we may further improve our programs.

___ convenience
___ aesthetics (comfort, cleanliness, etc.)
___ amenities (restaurants, restrooms, pay phones, parking, etc.)

Facility Comments: _____

_____

Where did you learn of this seminar?

☐ Bar *News* Ad ☐ Brochure ☐ FLABAR Website ☐ Section Website ☐ Other

Please identify any topic that you wish to see as the subject of future or expanded Florida Bar seminars:

_____

_____

Common Questions About CLER

1. **What is CLER?**
   CLER, or Continuing Legal Education Requirement, was adopted by the Supreme Court of Florida in 1988 and requires all members of The Florida Bar to continue their legal education.

2. **What is the requirement?**
   Over a 3 year period, each member must complete 30 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness.

3. **Where may I find information on CLER?**
   Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at www.floridabar.org to Rules Updates to Rules Regulating The Florida Bar.

4. **Who administers the CLER program?**
   Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. **How often and by when do I need to report compliance?**
   Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date either by going to www.floridabar.org to Member Profile to CLE Status Inquiry or the mailing label of The Florida Bar News.

6. **Will I receive notice advising me that my reporting period is upcoming?**
   Three months prior to the end of your reporting cycle, you will receive either:
   1) a CLER Reporting Affidavit, if you still lack hours; or,
   2) a CLER Notice of Compliance, if you have completed your hours.

7. **What do I do with the Affidavit?**
   You are to update and correct the form, complete any hours you lack, and sign and return the affidavit by your reporting date. Complete instructions appear on the reverse side of the form.

8. **What do I do with the Notice of Compliance?**
   If the information is correct, you need not respond. This document is your confirmation that you have completed the requirement for your current reporting cycle.

9. **What happens if I am late returning my Affidavit or do not complete the required hours?**
   You run the risk of being deemed a delinquent member which prohibits you from engaging in the practice of Florida law.

10. **Will I receive any other information about my reporting cycle?**
    Approximately 45 days prior to the end of your reporting cycle, if you have not yet completed your hours.

11. Are there any exemptions from CLER?

Rule 6-10.3(c) lists all valid exemptions. They are:

1) Active military service
2) Undue hardship (upon approval by the BLSE)
3) Nonresident membership (see rule for details)
4) Full-time federal judiciary
5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
6) Inactive members of The Florida Bar

12. Other than attending approved CLE courses, how may I earn credit hours?

Credit may be earned by:

1) Lecturing at an approved CLE program
2) Serving as a workshop leader or panel member
3) Writing and publishing in a professional publication or journal
4) Teaching (graduate law or law school courses)
5) University attendance (graduate law or law school courses)

13. How do I submit various activities for credit evaluation?

Applications for credit may be found either on our website, www.floridabar.org, or in the directory issue of The Florida Bar Journal following the listing of Board Certified Lawyers.

14. How are attendance hours posted on my CLER record?

If you registered for a seminar through The Florida Bar Registrations Department, the credit will be posted to your record automatically. If the course is sponsored by a Florida Bar Section or another organization, you can post your credits online.

15. How long does it take for hours to be posted to my CLER record?

When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

16. How may I find information on programs sponsored by The Florida Bar?

You may wish to visit our website, www.floridabar.org, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

17. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?

Excess hours may not be carried forward. The standing policies of the BLSE, as approved by the Supreme Court of Florida specifically state in 6.03(b):

... CLER credit may not be counted for more than one reporting period
and may not be carried forward to subsequent reporting periods.

18. Will out-of-state CLE hours count toward CLER?

Courses approved by other state bars are generally acceptable for use toward satisfying CLER.

19. If I have questions, whom do I call?

You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

While online checking your CLER, don't forget to check your Basic Skills Course Requirement status.

The Florida Bar Continuing Legal Education Committee and the
Labor & Employment Law Section present

9th Annual Labor & Employment Law Certification Review

- Volume I -

COURSE CLASSIFICATION: ADVANCED LEVEL

February 26-27, 2009

One Location:

J.W. Marriott Grande Lakes

4040 Central Florida Parkway
Orlando, FL 32837

Course No. 0690R

THE FLORIDA BAR

PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLER CREDIT

(Maximum 17.5 hours)

General ..... 17.5 hours Ethics ..... 0.0 hours

CERTIFICATION CREDIT

(Maximum 17.5 hours)

Labor & Employment Law ..... 17.5 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar *News*) you will be sent a Reporting Affidavit (must be returned by your CLER reporting date) or a Notice of Compliance which confirms your completion of the requirement according to Bar records (does not need to be returned). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be ADVANCED.

LABOR & EMPLOYMENT LAW SECTION

Hon. Alan O. Forst, Palm City — Chair
Eric J. Holshouser, Jacksonville — Chair-elect
Jill S. Schwartz, Winter Park — Legal Education Chair
Gregory A. Hearing, Tampa — CLE Chair
David E. Block, Jackson Lewis LLP, Miami — Program Co-Chair
Susan L. Dolin, Susan L. Dolin, P.A., Pembroke Pines — Program Co-Chair

CLE COMMITTEE

Patrick L. Imhof, Tallahassee — Chair
Terry L. Hill — Director, Programs Division

For a complete list of Membership Services, see the September 2008 Directory Issue of The Florida Bar Journal, starting on page 20 or visit our web site at www.floridabar.org.

LECTURE PROGRAM

Thursday, February 26, 2009

8:00 a.m. – 8:30 a.m.	**Opening Remarks** *David E. Block, Jackson Lewis LLP, Miami – Program Co-Chair* *Susan L. Dolin, Susan L. Dolin P.A., Pembroke Pines – Program Co-Chair*
8:30 a.m. – 9:20 a.m.	**Family & Medical Leave Act** *David E. Block, Jackson Lewis LLP, Miami*
9:20 a.m. – 10:20 a.m.	**Constitutional Employment Claims** *William R. Radford, Ford & Harrison LLP, Miami*
10:20 a.m. – 10:50 a.m.	**Worker Readjustment Retraining & Notification Act (WARN)** *Kevin D. Johnson, Thompson Sizemore Gonzalez & Hearing P.A., Tampa*
10:50 a.m. – 11:00 a.m.	**Break**
11:00 a.m. – 12:00 noon	**Whistleblower Statutes and Workers' Compensation Retaliation Claims** *Shane Muñoz, Greenberg Traurig P.A., Tampa*
12:00 noon – 1:00 p.m.	**Lunch (included in registration fee)**
1:00 p.m. – 2:30 p.m.	**National Labor Relations Act** *Susan L. Dolin, Susan L. Dolin P.A., Pembroke Pines*
2:30 p.m. – 4:00 p.m.	**Public Employee Relations Act** *Deborah C. Brown, Stetson University College of Law, Gulfport*
4:00 p.m. – 4:10 p.m.	**Break**
4:10 p.m. – 5:00 p.m.	**Common Law Employment Claims** *Jill Schwartz, Jill S. Schwartz & Associates, P.A., Winter Park*
5:00 p.m. – 6:00 p.m.	**Labor & Employment Law Section Executive Council Meeting (all invited)**
6:00 p.m. – 7:30 p.m.	**Reception (included in registration fee)**

Friday, February 27, 2009

8:25 a.m. – 8:30 a.m.	**Opening Remarks** *David E. Block, Jackson Lewis LLP, Miami – Program Co-Chair* *Susan L. Dolin, Susan L. Dolin P.A., Pembroke Pines – Program Co-Chair*
8:30 a.m. – 9:30 a.m.	**Employee Retirement Income Security Act of 1974/COBRA** *Frank Brown, Macfarlane Ferguson & McMullen, Tampa*
9:30 a.m. – 10:00 a.m.	**Polygraph Protection Act/Fair Credit Reporting Act** *Don Spero, Palm Beach Gardens*
10:00 a.m. – 10:30 a.m.	**Drug Testing Statutes** *Christopher C. Sharp, Sharp Law Firm, P.A., Plantation*
10:30 a.m. – 10:40 a.m.	**Break**
10:40 a.m. – 11:15 a.m.	**USERRA** *Bernie Mazaheri, Mazaheri & Gadd P.A., Clearwater*
11:15 a.m. – 12:00 noon	**OSHA** *Pat Tyson, Constangy Brooks & Smith, LLC, Atlanta, GA*
12:00 noon – 1:00 p.m.	**Lunch (included in registration fee)**
1:00 p.m. – 2:00 p.m.	**EEO Substantive Law** *Mary Ruth Houston, Shutts & Bowen LLP, Orlando*
2:00 p.m. – 3:00 p.m.	**EEO Laws – Administrative Procedures** *F. Damon Kitchen, Constangy Brooks & Smith LLC, Jacksonville*
3:00 p.m. – 3:30 p.m.	**Unemployment Appeals** *Hon. Alan O. Forst, Palm City*
3:30 p.m. – 3:40 p.m.	**Break**
3:40 p.m. – 4:40 p.m.	**Fair Labor Standards Act** *David H. Spalter, Jill S. Schwartz & Associates, P.A., Winter Park*
4:40 p.m. – 5:15 p.m.	**Statutory and Common Law Protection of Business Interests** *Daniel R. Levine, Shapiro Blasi Wasserman & Gora, P.A., Boca Raton*

TABLE OF CONTENTS

National Labor Relations Act
Susan L. Dolin, Susan L. Dolin P.A., Pembroke Pines

Public Employee Relations Act
Deborah C. Brown, Stetson University College of Law, Gulfport

Common Law Employment Claims
Jill Schwartz, Jill S. Schwartz & Associates, P.A., Winter Park

Polygraph Protection Act/Fair Credit Reporting Act
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Christopher C. Sharp, Sharp Law Firm, P.A., Plantation

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STATUTORY AND COMMON LAW PROTECTION OF BUSINESS INTERESTS
Daniel R. Levine, Shapiro Blasi Wasserman & Gora, P.A., Boca Raton

AUTHORS/LECTURERS

DAVID E. BLOCK is a partner of the Miami office of Jackson Lewis LLP. He is a graduate of Cornell University's School of Industrial and Labor Relations and received his law degree from the University of Pennsylvania. Mr. Block has practiced exclusively in the area of labor and employment law for the past 22 years. He is the office's senior litigator, having extensive federal and state court trial experience. Internally, Mr. Block is one of the Firm's experts on reductions in force, releases, the FMLA and alternative dispute resolution. Mr. Block, for example, wrote an amicus brief, on behalf of the Society of Human Resource Management, to the United States Supreme Court urging enforcement of arbitration agreements.

DEBORAH C. BROWN is the Associate Vice President for Legal Affairs and Human Resources at Stetson University College of Law. She is a graduate of Florida State University (B.A.) and Stetson College of Law (J.D.), and was admitted to practice law in 1988. Before joining Stetson in 2005, she was a shareholder and then managing partner at a Tampa law firm. From 1996-2000, she was employed first as a Manager and then Director of Employee Relations for Walt Disney World Co. in Orlando, Florida. She has chaired various Bar committees over the years, including the Labor & Employment Law Committee of the Hillsborough County Bar Association, the Labor and Employment Law Section of The Florida Bar, The Florida Bar Continuing Legal Education Committee, and The Florida Bar Certification Committee for Labor and Employment Law. She is Board certified in Labor and Employment Law and also is certified as a Senior Professional in Human Resources (SPHR). She is a member of The Florida Bar Education Law Committee, the Web Page and Legal Resources Committee for NACUA and the Board of Directors for the Tampa Lighthouse for the Blind. She serves as an adjunct professor at Stetson University College of Law, and is a frequent speaker on various legal topics. In 2004 through 2008, she was selected as one of "Florida's Legal Elite" by *Florida Trend* magazine. She was also named by *Florida Super Lawyers* magazine as one of Florida's top attorneys for 2008. Publications include *Employment Issues in Higher Education: A Legal Compendium* (NACUA, April 2008)(Editor), *Understanding and Applying the Public Employees Relations Commission's Election of Remedies Provision*, Florida Education Law Journal, Volume 6, Issue 2 (January 2008)(Author), *Legal Issues in Distance Education* (NACUA 2007)(Co-editor), *Federal Age Discrimination Litigation*, Florida Bar Journal (December, 1989)(Co-author), *Where They Smoke, They May Get Fired: An Overview of Significant Workplace Smoking Issues*, Florida Bar Journal (October 1994)(Co-author), and *Work Structures of the 21st Century: Implications for the Employment Law Practitioner*, 52 Lab. L. J. 245 (2001).

FRANK E. BROWN's practice areas include labor and employment law litigation, civil rights litigation and business litigation. He received his J.D., with honors, from Florida State University College of Law in 1987. He is a member of The Florida Bar City, County and Local Government Section; Federal Court Practice Committee; Labor & Employment Law Section (Executive Council 2002 - ; Co-Chair of Publications Subcommittee 2003 - ; Chair of Employee Benefits Committee 2000-2003); Trial Lawyers Section; the American Bar Association (Labor & Employment Law Section); and Hillsborough County Bar Association (Labor & Employment Law Section). Mr. Brown was recognized in "The Best Lawyers in America" (2009, 2008) and selected by his peers as a "Florida Super Lawyer" (2007).

SUSAN L. DOLIN has been practicing labor and employment law since 1978, when she joined the National Labor Relations Board, Division of Enforcement Litigation, Appellate Court Branch in Washington, DC, as a trial attorney. Her duties and responsibilities included representing the NLRB in enforcement and review proceedings before every United States Court of Appeals and participating in appeals to the United States Supreme Court. She was the NLRB staff attorney who worked on the seminal case of *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984). Ms. Dolin also worked in the Special Litigation and Contempt Divisions, as well as Region 5 in Baltimore, Maryland, where she conducted union elections and representation and unfair labor practice investigations, hearings and appeals. While still with the NLRB, Ms. Dolin served as an adjunct professor of labor law at George Mason University's School of Law in Arlington, Virginia. Upon leaving the NLRB in 1984, Ms. Dolin relocated to Ft. Lauderdale, Florida, where she spent three years as an assistant professor of law at Nova Southeastern University College of Law, developing and teaching a labor law curriculum for the Law School. She then entered private practice in 1987 with the Ft. Lauderdale law firm of Conrad, Scherer and James, and in 1992 went of counsel to the Hollywood law firm of Litman, Muchnick, Wasserman & Hartman. That firm became Muchnick, Wasserman & Dolin in 1994, and Ms. Dolin remained in practice with that firm, which ultimately became Muchnick, Wasserman, Dolin, Jaffe and Levine, until 2002, when, along with Stuart Rosenfeldt, Scott Rothstein and Michael Pancier, she helped form Rothstein, Rosenfeldt, Dolin & Pancier which eventually morphed into the current Rothstein Rosenfeldt Adler, which has grown into one of Ft. Lauderdale's largest and most prestigious multi-practice Firms. In October 2007, Ms. Dolin left Rothstein Rosenfeldt Adler and formed her own practice nearer to her home, hoping to "slow things down" and start on the road to retirement. In the meantime, Ms. Dolin has enjoyed a notable career as a well recognized and award winning labor and employment lawyer. She served on The Florida Bar's Labor and Employment Section's Executive Counsel for eight years before becoming Chair of the Section in 2003-2004. She served on The Florida Bar's Board of Legal Specialization and Education's Labor and Employment Certification Committee from its inception in 2001, when she served as vice-chair, until 2007, and has been Board Certified in Labor and Employment Law since Board certification was recognized in this field. In 2003-2004, she was named as a top labor and employment attorney in Florida by the Chambers USA Client Guide to America's Leading Business Lawyers. She has been named as one of the top labor and employment attorneys in South Florida by the Miami Metro Magazine's Legal Guide every year since 2003, and a Florida Super Lawyer (top 100 lawyers in Florida) every year since 2006. In 2007, she won the South Florida Business Journal's Key Partner Award, recognizing top attorneys and accountants, for Legal Labor and Employment Law. While Ms. Dolin represents primarily employers, she also does some work on behalf of deserving employees, including obtaining a $20 million settlement in an overtime misclassification case which became a nationwide collective action. She frequently lectures on labor and employment law at CLE seminars, as well as to management groups. Her articles on traditional labor law topics have appeared in national legal periodicals as well as in local publications. Ms. Dolin received her BA degree from Miami University in Oxford, Ohio in 1975; her JD degree *cum laude* from Cleveland State University, Cleveland-Marshall College of Law in 1978, and her LL.M.-Labor from Georgetown University Law Center in 1982. Ms. Dolin is active with no-kill animal rescue associations and enjoys spending time with her family, which includes rescued pit bull Molly and recovered p*aso fino* Stormy. She hopes to retire to either northern Arizona or southern Utah and do *pro bono* work on behalf of animal rights.

HONORABLE ALAN ORANTES FORST was appointed by Governor Jeb Bush to the position of Chairman of the Florida Unemployment Appeals Commission in July 2001 and reappointed him in August 2005 for a second four-year term. On both occasions, the appointment was confirmed by the Florida State Senate. The Unemployment Appeals Commission is an independent commission that conducts appellate review of contested unemployment compensation claims, issues final orders and, if necessary, defends those orders before the district courts of appeal. As Chairman of the Commission, Chairman Forst is the chief executive and chief administrative officer of the Commission, and one of three Commissioners (the Chairman is the only full-time Commissioner) who vote on the final disposition of appeals to the Commission. Before his appointment, Chairman Forst was an associate and partner at Crary, Buchanan, Bowdish, Bovie, Beres, Roby, Negron & Thomas, with offices in Stuart and Port St. Lucie, Florida. Chairman Forst represented both employers and employees in employment law matters. Prior to joining Crary, Buchanan, Chairman Forst spent over two decades in Washington, D.C. A graduate of the Georgetown University School of Foreign Service and the Columbus School of Law of the Catholic University of America, Chairman Forst served under Presidents Reagan, Bush, and Clinton in front office positions at the Departments of Justice and Labor (special assistant to the Administrators of OFCCP and the Wage and Hour Division), as counsel to the Vice Chair/Member of the Merit Systems Protection Board, and as special assistant/counsel to Chairman Clarence Thomas at the Equal Employment Opportunity Commission. He also worked as an employment law litigator at the Department of Commerce. Earlier in his career, Chairman Forst served as an intern on the staffs of Senators S.I. Hayakawa and Richard Stone, authored a newsletter for the National Legal Center for the Public Interest, served in the front offices of the Commission on Civil Rights and the Legal Services Corporation, and taught a class in employment law at the Northern Virginia Law School. And coached a lot of youth soccer teams. Chairman Forst is the immediate past President of the Martin County Bar Association (officer 2004-09) and the current Chair of The Florida Bar's Labor and Employment Law Section (he has been on the Section's executive council since 2000 and has been one of the six officers since 2002). He was appointed by the President of The Florida Bar to serve (2006-09) on the Bar's Voluntary Bar Liaison Committee (VBLC) and is also presently serving on The Florida Bar's Council on Sections (CoS). In fact, he spoke at leadership seminars hosted by both the VBLC and the CoS in 2008. Chairman Forst is a Vice President of the Federalist Society's Labor and Employment Law Practice Section (2000-present) and the Society's Tallahassee chapter (2001-present), and is the host of the Federalist Society's annual reception at The Florida Bar's Annual Meeting (in his capacity as the self-appointed Grand High Exalted Mystic Ruler). Chairman Forst organized and participated on the Labor and Employment Law Section panel that presented one of the Bar President's Showcase CLE Seminars at the 2008 Florida Bar Annual Meeting. Before becoming "Chairman Forst," mere mortal Alan Forst authored a feature article in the March 1999 Florida Bar Journal and was honored with the 2000 Schoonover Professional of the Year Award by the Martin County Human Resources Management Association. He is an active Justice Teaching volunteer and is the originator and chair (2005-present) of the Martin County Bar Association's Constitution Week program (which predates Justice Teaching, thank you very much), which sends attorneys and judges to every school in Martin County to lecture about the Constitution during Constitution Week. Most significantly, Chairman Forst is the co-director of Alan&Diana Forst

Enterprises, responsible for the production and direction of four outstanding high school students (three of their own, plus a foreign exchange student from Argentina).

MARY RUTH HOUSTON's problem-solving approach helps clients stay focused on their core business. Her legal skills are based on over 20 years of litigation experience in handling complex disputes. But it's her understanding of business issues outside of the courtroom that adds a valuable perspective for clients. She uses this understanding to help companies avoid litigation, minimize its effects or, when litigation is required, handle it efficiently and effectively. As a partner in the Litigation Department and a member of Orlando's Labor & Employment Law Practice Group, Ms. Houston focuses on both business and employment-related disputes. She is named in Best Lawyers in America Guide in the area of Labor and Employment. Ms. Houston helps companies throughout Central Florida with legal challenges that may permanently affect their businesses. Corporations of all sizes turn to Ms. Houston for her experience in pretrial, trial (jury and non-jury) and appellate work. Ms. Houston defends employers and management in a broad range of labor and employment issues. These involve employee discharge and discrimination cases, including age, sex, race, national origin, religion and disability claims, as well as cases involving restrictive covenants and wage-hour matters. She also has extensive experience in negotiating and drafting complex employment and severance agreements. As a lawyer with wide knowledge of labor and employment law, Ms. Houston teaches the subject in the Master of Human Resources Program at Rollins College. She also speaks frequently at seminars on employment related matters and conducts training on employment issues for businesses. Ms. Houston's litigation practice also encompasses a wide variety of commercial, contract, and business tort disputes. Before joining Shutts & Bowen, Ms. Houston was a litigation associate at a national law firm in New York City, where she worked on a wide variety of litigation matters. She is a 1986 graduate of Harvard Law School.

KEVIN D. JOHNSON is a partner in Thompson, Sizemore, Gonzalez & Hearing, P.A. He is AV rated and Board Certified in Labor and Employment Law by The Florida Bar. He received his J.D., with honors, from the University of Florida in 1994. He is admitted to practice in Florida, the U.S. District Court, Northern, Middle and Southern Districts of Florida, and the U.S. Court of Appeals, Eleventh Circuit. He is a member of The Florida Bar, Civil Procedure Rules Committee, 2007, Practice Management and Development Section, Executive Council Member 2001-06, General Practice, Solo and Small Firm Section, Executive Council Member 2007, and the Federal Bar Association, Tampa Bay Chapter, Board of Directors, 2006-07. Mr. Johnson is a contributor to the 2006 Cumulative Supplement to the ABA/BNA treatise The Fair Labor Standards Act, listed in Florida Trend's Florida Legal Elite 2006 – 2008, and listed in Florida SuperLawyers, 2008.

F. DAMON KITCHEN has successfully defended cases in all areas of labor and employment law, including, but not limited to: claims of unlawful discrimination, sexual harassment, retaliatory discharge, equal pay violations, wage and hour violations, employment-related freedom of speech, due process and equal protection claims arising under both the federal and state constitutions, as well as cases involving claims of defamation, invasion of privacy, negligent hiring, retention and supervision, intentional infliction of emotional distress, fraud, and breach of contract. Damon also has experience in representing clients in traditional labor law matters, such as defending unfair labor practice charges, grievance arbitrations, opposing union

organizing campaigns and serving as chief negotiator in collective bargaining negotiations. Damon assists employers in problem prevention and legal analysis of complex employment issues. Damon is a frequent lecturer and presenter and addresses human resource directors, managers and small business owners regarding labor and employment law issues several times throughout each year. Before joining Constangy, Damon was a Partner in the law firm of Malfitano Campbell & Dickinson. Damon Kitchen has been recognized in the publication, Best Lawyers In America, Chambers USA Guide, and Florida Super Lawyers. He is a member of: Member, The Florida Bar (1990 to present), Member, Executive Council of the Labor and Employment Law Section (1996 to 2001 and 2008 to present), Secretary/Treasurer of the Labor and Employment Law Section (2001 to 2003), Legal Education Chair of the Labor and Employment Law Section (2004), Chair Elect of the Labor and Employment Law Section (2005), Chair of the Labor and Employment Law Section (2006), Immediate Past Chair of the Labor and Employment Law Section (2007). He has been board certified in Labor and Employment Law by The Florida Bar since 2001. He is a member of: State Bar of Georgia, Labor & Employment Section (1990 - present); American Bar Association, Labor & Employment Section (1990 - present); Federal Bar Association, Jacksonville Chapter (1990 - present) - President (2000-2001), Officer (1995-2000); Jacksonville Bar Association, Labor & Employment Section (1990 - present), Vice Chair (2002 - 2003); Society for Human Resource Management, Jacksonville Chapter (1996 to present); Northeast Florida League of Cities (1990 to present); North Florida Manufacturers Association (2006 to present). Damon is married and the proud father of two boys. He enjoys spending time with his family, reading, and fishing. Damon is also an avid fan of NASCAR.

DANIEL R. LEVINE is Board-Certified in Labor and Employment Law by The Florida Bar, concentrating his practice on the litigation of labor and employment law disputes, as well as on preventive labor relations, including employment training and drafting of employee handbooks. Mr. Levine was named a "Top Up and Comer" by the South Florida Legal Guide 2008. Mr. Levine received his Bachelor of Arts degree from the University of Florida and his Juris Doctor, cum laude, from the University of Miami School of Law. Mr. Levine is admitted to practice before all state courts in Florida, as well as the United States Supreme Court, the United States Court of Appeals, Eleventh Circuit, and the United States District Court, Southern and Middle Districts of Florida. In May 1996, The Florida Bar Journal published Mr. Levine's article on Florida's private Whistleblower's Act. Mr. Levine frequently lectures on labor and employment law matters. Most recently, Mr. Levine spoke on the subject of non-compete agreements as part of The Florida Bar Labor and Employment Section's Certification Review Course Seminar. Recently Mr. Levine was named to the Executive Committee of the Labor and Employment Law Section of The Florida Bar. Mr. Levine also is a past President of the Federal Bar Association, Broward County Chapter, and currently serves on the Chapter's Executive Board. Mr. Levine is active in the community, having served as 2003-04 Chair of Leadership Boca for the Greater Boca Raton Chamber of Commerce. Mr. Levine also is a Florida Supreme Court Certified Mediator, as well as a Federal Court Certified Mediator.

BERNIE MAZAHERI was born on May 27, 1979 in Tehran, Iran. Mr Mazaheri grew up in Auburn, Alababma where he obtained his Bachelor of Arts in Geography in August of 2000. Mr Mazaheri graduated from Loyola Law School in New Orleans in May of 2002. As a third year law student, Mr Mazaheri prosecuted over two dozen trials and/or motions at the Orleans

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SHANE MUÑOZ has an active civil trial and client counseling practice, with an emphasis on labor and employment law. Throughout his 18-year career, Shane has successfully represented business organizations in a wide range of labor and employment matters, including employment discrimination, whistleblower, harassment, restrictive covenants, wage and hour, and other complex litigation. In addition, Shane is frequently retained to represent clients in federal, state, and local investigations. He also has wide-ranging experience in representing clients in internal investigations involving alleged harassment, disparate treatment and other employee misconduct. Shane has substantial experience in helping clients develop and implement employment policies and procedures designed to foster positive employee relations and to minimize legal risks. Shane lectures and writes on a regular basis on wage and hour law, the Americans with Disabilities Act, family and medical leave, discrimination, harassment and other issues, including presentations for clients, The Florida Bar, the National Business Institute, the Council on Education in Management and Lorman Educational Services.

WILLIAM R. RADFORD, the Managing Partner in Ford & Harrison LLP's Miami office, grew up in a small town in Ohio. Bill graduated with honors from Wittenberg University and earned his J.D. from the University of Michigan in Ann Arbor. Having practiced traditional labor law and employment law solely on behalf of management for more than 40 years, Bill has successfully represented employers in over 150 union representation campaigns in Michigan, Ohio, West Virginia, Texas, Alabama, Maryland and Florida. Bill has successfully defended employers in numerous unfair labor practice and discrimination charges and has obtained favorable decisions for employers in a number of cutting edge decisions before federal appellate courts, including a recent major class action. Bill has successfully defended a major U.S. retailer in limiting a nationwide subpoena brought by the Equal Employment Opportunity Commission and received the Navy Commendation Medal for his defense of the United States Navy in a class action. Bill provides counseling to employers on compliance with federal and state employment laws, including preparation of various internal policies and programs for clients and development of strategies for defense of various charges of employment discrimination and their operational impact. He also provides defense and advice to employers covered by the National Labor Relations Act regarding their rights and obligations, and union avoidance programs. In addition, Bill conducts collective bargaining for and provides contract administration to employers in their relationships with labor unions. He also counsels public employers concerning their

constitutional rights and obligations, as well as their rights and obligations under employment-related statutes and is a co-editor of Ford & Harrison's 2006 Public Employer Source Book. Bill is admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Fifth, Sixth, Eleventh and D.C. Circuits and state courts in Ohio and Florida. Active in professional organizations, Bill is a past contributor to the Development of Law under the National Labor Relations Act, a publication of the American Bar Association's Labor and Employment Law Section and a member of the ABA's Litigation Section. He also is a member of the Florida and Dade County Bar Associations, The Florida Academy of Management Attorneys, and a Charter Fellow of the Litigation Counsel of America. Board certified by The Florida Bar in Labor and Employment Law, Bill is a frequent speaker on law and employment topics before trade and professional groups. He was a Chinese linguist in the military and is a Commander in the United States Naval Reserve, retired. Bill was honored by Florida Trend as a member of its 2004 and 2005 Legal Elite in labor and employment law and was selected by Best Lawyers in America in its 2005, 2006, 2007 and 2008 editions in labor and employment law.

JILL S. SCHWARTZ graduated Phi Beta Kappa from Rutgers University and received her Juris Doctor degree from the University of Maryland School of Law. After completing a Judicial Clerkship in Maryland, Ms. Schwartz was hired by the Special Litigation Division of the United States Department of Labor in Washington, D.C. Ms. Schwartz is listed in the Martindale-Hubbell Bar Register of Preeminent Lawyers. Ms. Schwartz has been active in the litigation of employment discrimination cases in various federal and state courts, and has significant experience in all aspects of the practice of employment law. She has handled employment litigation under the Florida Civil Rights Acts, Title VII, the Americans with Disabilities Act, the Pregnancy Discrimination Act, the Age Discrimination in Employment Act, the Family Medical Leave Act, as well as whistleblower actions, employment-related torts and civil rights matters. Additionally, she is an author and a frequent lecturer on employment law topics for The Florida Bar, the American Bar Association, the Orange County Bar Association, the National Employment Lawyers Association and the Florida Dispute Resolution Center. She was selected as the monthly columnist for a national magazine, *Venture Woman,* regarding workplace issues and has appeared in *Smart Money*, The Wall Street Journal Magazine of Personal Business, and has been quoted in the Wall Street Journal, The Orlando Sentinel and The Orlando Business Journal. From July 2004 until July 2005, Ms Schwartz was a monthly columnist in the "Ask The Legal Professional" section of The Orlando Business Journal. As a certified mediator, Ms. Schwartz concentrates on resolving employment litigation matters. She is also certified by the Fifth District Court of Appeal as an appellate mediator. She has continued to attend and conduct seminars on alternative dispute resolution. Ms. Schwartz mediates litigation pending in the United States District Courts and Florida State Courts. She also conducts pre-suit mediation. Additionally, Ms. Schwartz was selected by the Equal Employment Opportunity Commission and the United States Postal Service to mediate employment matters for these agencies. Ms. Schwartz is a certified arbitrator and has served as an instructor for the Supreme Court of Florida Dispute Resolution Center, Arbitration Certification Training. Ms. Schwartz is admitted to practice law in state and federal courts in Florida and in Maryland, before the United States Court of Appeals for the Seventh and Eleventh Circuits, as well as The United States Supreme Court. She has been selected by her peers for inclusion in the "Law and Leading Attorneys" publication as a leading American Attorney in the areas of Employment Law and Alternative Dispute Resolution. She has also been selected for membership in "Foxington's Who's Who." Since 2002, each year the firm has been selected as *The Orlando Sentinel*'s Top 100 Companies

for Working Families. In 2007, the firm received the prestigious Community Service Award from *The Orlando Sentinel*. In 2002, Ms. Schwartz was selected as Small Business Person of the Year by the Seminole County Lake Mary Chamber of Commerce. Additionally, Ms. Schwartz was named "Best Of The Bar" (Top 5%) by *The Orlando Business Journal* and one of Florida's Legal Elite (Top 1.6%) by *Florida Trend* magazine. Ms. Schwartz has also been named one of the "Best Lawyers in Central Florida" and "Orlando's Best Lawyers" by *Orlando Magazine* and included in "Florida Super Lawyers" and "Florida Super Lawyers Top 50 Women." In 2005, Ms. Schwartz was inducted into The College of Labor and Employment Lawyers, Inc., which is the highest recognition by her colleagues of sustained outstanding performance in her profession, exemplifying integrity, dedication and excellence. Mrs. Schwartz was the first woman in the State of Florida to be inducted into the College. In 2004, Ms. Schwartz was appointed by Governor Jeb Bush to a four-year term on the Fifth District Court of Appeals Judicial Nominating Commission, and served as its Chair. Also in 2004, she was appointed to sever on the Executive Council of The Florida Bar Labor and Employment Law Section and is currently serving as the Chair of the Continuing Legal Education Committee. In December, 2004, Ms. Schwartz was appointed to serve on the Merit Selection Panel to reconsider the appointment of U.S. Magistrate Judge Karla R. Spaulding. Ms. Schwartz is the immediate past-President of the Orlando Chapter of the Federal Bar Association. She currently serves as National Delegate of the Federal Bar Association. Ms. Schwartz also serves as a Vice-Chair for The Florida Bar Foundation Life Fellows Program. In 2000 - 2001, she served as President of the Florida Chapter of the National Employment Lawyers Association. In 2000 - 2001, she was also selected to be Chairperson of the Orange County Bar Association Labor and Employment Law Committee. In 2000, Ms. Schwartz was appointed to serve a two year term on the Orange County Bar Foundation, Inc. She was appointed by the Board of Governors of The Florida Bar to a three-year term on the Ninth Judicial Circuit Grievance Committee, which was completed in 1998. Ms. Schwartz also serves on the Board of Directors of Hospice of the Comforter.

CHRISTOPHER SHARP is the sole shareholder of The Sharp Law Firm, located in Plantation Florida. Mr. Sharp has been Board Certified in Labor and Employment Law since 2001, and his practice currently focuses on FLSA claims on behalf of both employees and employers, as well as public sector employment issues and federal employees' rights. Following his 1993 graduation from Temple Law School in Philadelphia, Mr. Sharp relocated to South Florida, where he initially worked for the plaintiffs' employment law firm of Amlong & Amlong, P.A., focusing on Title VII and sexual harassment claims exclusively on behalf of employees. Mr. Sharp had his own firm, Christopher C. Sharp, P.A., from 1997 through 2004, where he developed expertise in the area of federal employees' rights. In 2004, he became an associate in the employment law department of Rothstein Rosenfeldt Adler, located in Fort Lauderdale. At Rothstein Rosenfedlt Adler, Mr. Sharp advised and represented both employees and employers, before he left to resume his solo practice in June 2007. Mr. Sharp is an active member of the National Employment Lawyers Association and the Florida Employment Lawyers Association, and volunteers much of his free time to motorcyclists' rights issues and various animal rescue groups.

DAVID H. SPALTER is presenting the FLSA portion of the Certification Review for the sixth consecutive year. Since 1992, Mr. Spalter has concentrated his practice in the field of labor and employment law, representing both employers and employees. In 2006, he joined the law firm

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DONALD J. SPERO is a graduate of the University of Michigan Law School who has practiced labor and employment law for over 35 years, both in private practice and as in-house counsel for Sears, Roebuck and Co. from which he retired as Senior Employment Counsel. He is Board Certified by the Florida Bar in Labor and Employment Law and a Fellow of The College of Labor and Employment Lawyers. He now devotes his time to serving as a mediator and an arbitrator as well as frequently speaking and writing articles on employment law subjects. He is on labor arbitration panel of the Federal Mediation and Conciliation Service, the panels of employment and labor law arbitrators of the American Arbitration Association and the arbitration and mediation panels of FINRA as well as the mediation panels of the United States District Courts for the Southern and Middle Districts of Florida. He is a member of the Labor and Employment Law Sections of the Florida and the American Bar Associations. He is also a member of the Chicago and Illinois Bar Associations.

PATRICK R. TYSON is a partner with Constangy, Brooks & Smith, a law firm representing management, exclusively, in labor and employment law matters since 1946. Pat is based out of the firm's Atlanta office, one of 18 offices across twelve states. Since joining the firm as head of the OSHA practice group, Mr. Tyson has continued his extensive involvement in the field of safety and health after being appointed Acting Assistant Secretary for OSHA under the Reagan Administration. In addition to representing clients on a wide range of safety and health issues, he is the former Chairman of the Board of Directors of the National Safety Council, and Counsel to the Voluntary Protection Programs Participants' Association. He is a member of the Virginia State Bar and the American Bar Association's Committee on Occupational Safety and Health Law.

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Family & Medical Leave Act

By

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I. Introduction

In 1993 Congress enacted the Family and Medical Leave Act, 29 U.S.C. 2601 et seq. ("FMLA"). The statute authorized the United States Department of Labor ("DOL") to promulgate regulations interpreting the FMLA. See 29 C.F.R. §825.100 et seq. Finally, the DOL has issued a series of advisory opinion letters.

In 2008 the FMLA was amended to add leave to care for a military servicemember with a serious injury or illness and for a qualifying exigency associated with a military servicemember who is called to active duty.

The DOL recently issued revised regulations effective January 16, 2009 to address the new military leave provisions and to modify the existing provisions of the FMLA.

This outline focuses on the federal FMLA's requirements.

II. FMLA Requirements

A. Covered Employers

1. Private-sector employers with 50 or more employees in 20 or more work weeks in the current or preceding year.

   a. Employees added to the payroll after the beginning of a calendar week or terminated prior to the end of a calendar week are not counted. Otherwise any employee whose name appears on the employer's payroll is counted as employed during each day of that calendar week.

   b. Part-time employees are counted as one employee (not a fraction of an employee) where they work for the entire week as long as they are maintained on the payroll.

   c. Employees on paid or unpaid leave of absence are counted. Employees on temporary or permanent layoff, however, are not counted.

a. Leave for birth of a child must be completed within 12 months of the date of birth.

b. Employers are not required to grant intermittent or reduced leave to eligible employees to care for (meaning "to bond with") their newborn.

2. For the placement with the employee of a son or daughter for adoption or foster care placement;

a. Leave for adoption or foster placement of a son or daughter into an employee's family must be taken within 12 months of the date of placement or adoption, rather than 12 months from the date the leave is requested.

b. Leave may begin before the actual start of adoption or foster care placement when the employee needs to be absent from work or proceed with adoption or foster care arrangements.

c. Foster care is considered a 24-hour care for children away from their parent(s) or guardian(s).

d. Intermittent or reduced leave to care for a newly placed foster child or adopted child requires approval by the employer.

i. Exception to this rule: if where the intermittent or reduced leave is necessary for short notice adoption procedures.

e. An employee is not required to adopt through a licensed adoption agency to take leave for an adoption.

f. For foster care children, state action is required for FMLA leave.

i. An informal arrangement where a non-parent cares for a child for 24 hours a day is not covered under the FMLA.

ii. A relative may be a foster care agent, but state action would be needed to remove the child from the custody of the parent.

3. Serious health (physical or mental) condition of employee, or the spouse, parent, or child of the employee;

a. A "serious health condition" means an illness, injury impairment, or physical or mental condition that involves one of the following:

b. Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity

or subsequent treatment in connection with or consequent to such inpatient care.

c. Incapacity, for purposes of FMLA, is defined to mean the inability to work, to attend school or to perform other regular daily activities due to the serious health condition, treatment thereof or recovery therefrom.

d. A period of incapacity of more than three days, meaning 72 consecutive hours, (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

   i. Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

e. Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examination:

   i. Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

f. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

g. Any period of incapacity due to pregnancy, or for prenatal care.

h. A chronic condition which:

   i. Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

   ii. Continues over an extended period of time (including recurring episodes of a single underlying condition); and

   iii. May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

i. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

j. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), and kidney disease (dialysis).

i. Definition of Spouse, Parents, Child

"Spouse" means husband and wife as recognized by state law.

"Parents" include a person's biological parents or a person that acted in the capacity of a parent towards the employee, but does not include parents in-law.

"Child" includes biological, adopted or a foster care child, a stepchild, a legal ward, or a child of a person standing "in loco parentis" (in the capacity of a parent) who is:

(1) under 18 years old; or

(2) over 18 years old and incapable of self-care because of a mental or physical disability.

k. "Needed to Care for" includes both physical and psychological care or comfort. A parent who goes to the hospital with his/her child of ten years who is receiving chemotherapy because the child feels better having mom and/or dad with them satisfies the definition.

l. Employer may require documentation of family relationships by the family requesting leave.

4. *For any "qualifying exigency" arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty), in the Armed Forces in*

support of a contingency operation (unpaid leave may be provided for up to 12 workweeks during a "single 12-month period").

The Final FMLA Regulations define "qualifying exigency" by providing a specific and exclusive list of reasons for which an eligible employee can take leave. These reasons are divided into eight categories:

(1) short-notice deployment (a call or order given no more than seven calendar days before deployment);
(2) military events and related activities (such as military-sponsored welcome home or send-off events and family information briefings or support programs);
(3) childcare and school activities (must be urgent and not routine);
(4) financial and legal arrangements caused by the family member's active duty;
(5) counseling (family marital, emotional, or other counseling not already covered by the FMLA);
(6) rest and recuperation (rest break during deployment; up to five days per break);
(7) post-deployment activities (like meetings sponsored by the military, arrival ceremonies, reintegration briefings or arrangements relating to the death of the servicemember); and
(8) additional activities.

5. *For any eligible employee to care for a spouse, son, daughter, parent, or next of kin of a current member of the Armed Forces, including a member of the National Guard or Reserves, with a serious injury or illness (unpaid leave may be provided up to a total of 26 workweeks during a "single 12-month period").*

   a. *The "single 12-month period" in which an eligible employee may use up to 26 work weeks of leave begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date. That method applies regardless of the employer's method used to determine the employee's 12 week leave entitlement for other FMLA-qualifying reasons.*

   b. *The 26 week leave entitlement is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness.*

c. *A "serious injury" means an injury or illness incurred by a servicemember on active duty and in the line of duty that may render the service member medically unfit to perform the duties of his or her office, grade, rank, or rating and which requires either ongoing medical treatment, therapy, or recuperation, whether in an inpatient or outpatient facility (servicemembers who have been discharged from the military or who are on permanent disability don't qualify).*

d. *"Next of kin" means the nearest blood relative other than the covered servicemembers' spouse, parent, son, or daughter.*

D. Length of Leave

1. 12 weeks in a 12 month period.

   a. For determination of what 12-month period to use, the employer may elect to use: (i) the calendar year; (ii) a fixed 12-month leave or fiscal year; (iii) or a 12-month period to or after the commencement of leave (a/k/a the "rolling 12 month period").

2. *26 workweeks of unpaid leave during a "single 12-month period" to care for an injured servicemember.*

E. Length of Leave When Employer Employs Both Husband and Wife

1. Spouses employed by the same employer may be limited to a combined total of 12 weeks when leave is taken because of birth, adoption, or foster care placement or for the care of a parent with a serious health condition.

   a. This limitation applies even when the spouses are employed at different work sites by the same employer.

   b. This limitation does not apply, however, when one of the spouses takes leave for his/her own serious health condition.

2. *The aggregate number of workweeks of leave to which both a husband and wife may be entitled to in the aggregate is 26 weeks during the single 12-month period*

F. Intermittent/Reduced Leave

1. Intermittent leave is leave taken in separate blocks of time due to a single qualifying condition.

a. Calculating intermittent leave time:

i. a week is measured by the employee's normal workweek (thus, a full-time employee who normally works a five-day/week is entitled to 60 days of leave);

ii. a day is measured by an employee's normal workday (thus, a employee who normally works 8-hour days will be charged with one day after an 8-hour leave).

iii. if the employee's schedule varies, a "normal workweek" is the average of hours worked per week over the 12 weeks prior to the start of the FMLA leave.

2. Employee may take intermittent leave for the shortest period of time the employer's payroll system uses to account for absences or uses of leave.

a. Employers are not required to account for FMLA leave in increments of six minutes or even fifteen minutes simply because their payroll systems are capable of doing so. The employer must account for the intermittent or reduced schedule leave under FMLA "using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided it is not greater than one hour."

b. For example, if an employer accounts for sick leave in 30-minute increments and vacation leave in one-hour increments, the employer could not account for FMLA leave in an increment larger than 30 minutes

3. A reduced leave schedule reduces an employee's usual number of working hours per workweek for a period of time, usually from full-time to part-time.

4. Intermittent/Reduced leave can be taken for employees or covered relation's serious health condition.

5. Intermittent/Reduced leave is not required for leave because of birth, adoption, or foster care placement.

6. Employer may "dock" exempt employees for time taken on reduced leave.

7. Employer cannot require employee to take more FMLA leave than is necessary.

Exception: Where the nature of the workplace makes it physically impossible for employees to join (or leave) work mid-way through the "shift," the entire period of absence should be considered FMLA leave

even if the employee could have started work sooner.

8. An employer temporarily may transfer an employee on intermittent or reduced schedule leave to an available alternative position, for which the employee is qualified, which:

   a. better accommodates the recurring leave, and

   b. for which the employee receives equivalent pay and benefits.

9. If the employer does transfer the employee on intermittent or reduced schedule leave in accordance with the FMLA, that employee remains entitled to the same or equivalent position as he/she held prior to the commencement of the intermittent or reduced schedule leave.

10. A temporary transfer is not permitted if it:

   a. works a "hardship" on the employee needing reduced schedule or intermittent leave, or

   b. discourages an employee from taking such leave.

G. Notice of Leave to Employer

1. Employee must give 30 calendar days' prior notice if leave is foreseeable.

2. Employee must give notice "as soon as practicable" if leave is unforeseeable.

   a. *Under the new military leave laws, an employee must provide notice to employer as soon as is reasonable and practicable after notification of an impending call or order to active duty of an employee's spouse, son, daughter, or parent.*

   b. "As soon as practicable" ordinarily means within one to two business days of when the employee knows of the need for leave, except in extraordinary circumstances.

   c. At a minimum, the employee must orally notify the employer of the need for leave as well as the anticipated timing and duration of the leave.

3. The employee need not expressly assert FMLA rights in giving notice.

   a. If employees seek leave due to their own serious health condition, they must provide sufficient information indicating that a condition renders them unable to perform the functions of their jobs.

b. "Calling in sick," without providing more information, will not be considered sufficient notice to trigger an employer's obligations under the FMLA

4. The employee also may be required to provide a medical certification verifying his/her or covered relations' serious health condition. The employer must give the employee at least 15 calendar days to do so.

   Absent unusual circumstances, employers may require employees seeking foreseeable FMLA leave to comply with the employer's usual and customary notice and procedural requirements for requesting leave.

5. An employee should attempt to schedule planned medical treatment, intermittent leave or reduced schedule leave so as to avoid unduly disrupting the employer's operations, subject to the approval of the health care provider.

6. An employer may, for justifiable cause, require an employee to attempt to reschedule a planned medical treatment, subject to the approval of the health care provider.

7. Notice may be given by the employee's representative (e.g., spouse, family member or other responsible party) if the employee is unable to do so personally.

8. Employer's options when an employee fails to give proper notice:

   a. waive the notice requirement; or

   b. in the case of foreseeable leave, deny leave until at least 30 calendar days after the employee gives proper notice. This is only permitted when:

      i. employer had satisfied the FMLA's posting requirement; and

      ii. employee clearly knew of his/her own need for leave 30 calendar days in advance.

H. Employer Notice Obligations

1. In addition to posting requirements, employers that have employee handbooks or other written materials concerning benefits and leave must include a notice of FMLA rights in those materials, as long as they have at least one FMLA-eligible employee.

2. An electronically disseminated handbook that is accessible to all employees satisfies this requirement.

3. Employers must provide "eligibility notice" to an employee within five business days (three business days more than under the current rules) after the employee either requests leave or the employer learns that the employee's leave may be for an FMLA-qualifying reason.

4. If employees are eligible for FMLA leave, then at the time of the eligibility notice they also must receive what the Final FMLA Regulations refer to as "Rights and Responsibilities" Notice. This is a form that, among other things, informs FMLA-eligible employees of any requirement to provide medical certification, the right to substitute paid leave, whether and how to pay premiums for continuing benefits, and job restoration rights upon expiration of FMLA leave

5. If the information that is available is insufficient to make this determination, it is incumbent on the employer to inquire further to obtain enough information to make the determination.

6. Once an employer has obtained sufficient information to determine whether an employee's leave will be protected by the FMLA, the employer must notify the employee within five business days (a change from the current requirement of two business days) that the leave is designated as FMLA leave, absent extenuating circumstances.

7. In the designation notice, employers must inform employees of the specific number of hours, days or weeks, if known, that will be counted against the employee's FMLA leave entitlement.

8. Also in the designation Notice, the employer must advise the employee if it requires substitution of paid leave for FMLA leave. If a fitness-for-duty certificate will be required at the end of the FMLA leave, the Designation notice must inform the employee of that requirement, and must include a list of the employee's essential job functions

9. Employer retroactively may designate leave as FMLA leave after employee has returned to work (and give appropriate notice of this designation) only if:

    a. employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return to work;

    b. employer knows of the reason for the leave, but has been unable to confirm that the leave qualifies under the FMLA, the employer should make a preliminary designation and so notify the employee (upon receipt of the information or medical certification which

confirms that the leave either is or is not for an FMLA reason, the preliminary designation must either be withdrawn or be made final), or

c. the employee cannot demonstrate harm as a result of the employer's failure to provide the required eligibility and designation notices.

I. Medical Certification

1. Employer may require medical certification for serious health conditions of employee or covered relation within 15 calendar days.

a. When leave is taken for an employee's own serious health condition, an employer may request medical certification that the employee is unable to perform the essential functions of the position. A description of the employee's essential functions may be provided by the employer or the employee. If the employee cannot work at all, then a job description is unnecessary.

i. See Certification of Health Care Provider for Employee's Serious Health Condition (Form WH-380E), created by the Department of Labor, attached hereto as "Exhibit 1." This form can also be found at: http://www.dol.gov/esa/whd/forms/WH-380-E.pdf

b. When leave is taken for serious health condition of covered relation, employer may require the health care provider to certify that third party care is required or that the employee's presence would be "beneficial" or desirable for the care of the patient.

i. See Certification of Health Care Provider for Family Member's Serious Health Condition (Form WH-380F), created by the Department of Labor, attached hereto as "Exhibit 2." This form can also be found at: http://www.dol.gov/esa/whd/forms/WH-380-F.pdf

2. Employer must give notice of a requirement for medical certification each time a certification is necessary.

a. See Notice of Eligibility and Rights and Responsibilities (Form WH-381), created by the Department of Labor, attached hereto as "Exhibit 3." This form can also be found at: http://www.dol.gov/esa/whd/fmla/finalrule/WH381.pdf

3. When the leave is foreseeable and employee fails to provide a medical certification, employer can delay leave until the proper certification is provided.

4. When the need for leave is unforeseeable and employee fails to provide a medical certification, employer can deny the continuation of leave if employee fails to provide the certification within the time requested or a reasonable time.

5. When FMLA leave is foreseeable and at least 30 calendar days notice has been provided, the employee should furnish the medical certification before the leave period starts. When this is impossible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's good faith efforts.

6. When the need for FMLA leave is unforeseeable, employer should request certification within 5 business days after the commencement of the leave. The employer may request certification at some later date if it has reason to question the appropriateness or length of the leave time.

7. Employer should advise the employee of the consequences of not providing the proper certification when it requests a medical certification. When the employer finds the certification furnished by the employee to be inadequate, the employee should be informed and provided with the opportunity to remedy the certification.

8. Employers may use the Medical Certification Forms created by the U.S. Department of Labor. Employers wishing to create their own form may not require any additional information other than what is requested on the Department of Labor's form. The information on the forms must relate only to the serious health condition for which the current need for leave exists. The forms can request information as to the health care provider and, among other things:

    a. the approximate date the serious health condition began, its likely duration, including the probable length of the patient's present incapacity, if different;

    b. if the condition is pregnancy or chronic (within the meaning of §825.114(a)(2)(iii)), whether the patient is currently incapacitated and the likely duration and frequency of episodes of incapacity;

    c. if additional treatments will be necessary, the probable number of the treatments;

d. if the patient's incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the number and interval between such treatments, actual or estimated dates of treatment, and period of recovery, if any;

e. if a regiment of continuing treatment by the patient is required under the supervision of the health care provider, a general explanation of the regiment;

f. if medical leave is required due to employee's own condition, the form indicates whether the employee is unable to perform work of any kind; is unable to perform any one or more of the essential functions of the employee's job, including a statement of the essential functions the employee is not able to perform, based on either information provided on a statement from the employer of the essential functions of the position or, if not supplied, discussion with the employee about the employee's job functions; or must be absent from work for treatment;

g. if leave is needed to care for a family member of the employee, the employee must provide the relationship to the family member and must indicate on the form the care he/she will provide and an estimate of the time period;

h. if medical leave is required to care for an ill or injured servicemember, the employee must indicate the care required and an estimate time of the leave needed. The military family leave provisions do not explicitly require information regarding the covered servicemember's serious injury or illness as part of the certification. The certification does, however, request information such as when the condition commenced, the probable duration, and whether or not the ill or injured servicemember is undergoing any treatment, recuperation, or therapy.

i. See Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave (Form WH-385), attached hereto as "Exhibit 4." This form can also be found at: http://www.dol.gov/esa/whd/forms/WH-385.pdf

i. a certificate of qualifying exigency for military family leave must denote the relationship to the covered military personnel and must describe the exigency. An employer may require that the employee provide a copy of the covered military member's active duty orders or other military issued documentation that indicates the covered military member is on active duty or called to active duty status in support of a contingency operation, and the dates of the covered military member's active duty service. In addition, an employer

may require that leave for any qualifying exigency be supported by a certification from the employee, the approximate date on which the qualifying exigency will commence, the length of leave requested, and whether leave is sought on an intermittent or reduced schedule basis. If leave is needed to meet with a third party (i.e. counselor, financial or legal advisor, etc.), the name and address of the third party must be provided, along with a description of the nature of the meeting.

i. *See Certification of Qualifying Exigency for Military Family Leave (Form WH-384), attached hereto as "Exhibit 5." This form can also be found at: http://www.dol.gov/esa/whd/forms/WH-384.pdf*

J. Challenging the Medical Certification

1. If employee submits a complete medical certification signed by the health care provider, the employer may not request additional information from the health care provider.

2. If the certification is incomplete or insufficient, the employer must identify, in writing, the specific information needed to make the certification complete and sufficient. The employee is then given seven calendar days to cure the identified deficiencies.

3. Employers may contact directly an employee's health care provider, with the employee's permission, to authenticate or clarify a certification, provided the employee is first given the opportunity to cure deficiencies with the certification. Only human resources professionals, leave administrators, third party administrators and management officials may contact the health care provider. The employee's direct supervisor may never contact the health care provider.

An employer may request additional information from an employee seeking FMLA leave if that information is required under a workers' compensation statute, the employer's paid leave policies or a disability plan. Additional information received pursuant to workers' compensation, paid leave or ADA procedures may be considered in determining an employee's entitlement to FMLA leave.

a. If leave is running concurrently with workers' compensation, the employer may have direct contact with the employee's workers' compensation doctor, consistent with the applicable workers' compensation statute.

4. Employers who have reason to doubt an employee's medical certification may require the employee to obtain the second opinion of a health care provider selected by the employer, at the employer's expense.

   a. The Regulations do not elaborate on what constitutes "reason to doubt" the employee's certification.

   b. *Under military leave law, an employer may seek authentication and/or clarification of the certification. However, second and third opinions are not permitted for leave to care for a covered servicemember.*

5. The health care provider furnishing the second opinion may not be regularly employed by the employer unless the employer is located in an area with limited access to health care.

6. Employer must pay the employee's reasonable travel expenses incurred to obtain these opinions.

7. Employee may not be required to travel outside normal commuting distance, except in unusual circumstances.

8. If dispute exists, may require a third opinion, at the employer's expense, which will be final and binding.

9. If the second opinion differs from the first, the employer may require a third opinion from a mutually agreeable health care provider, at the employer's expense.

   a. The employer and employee must act in good faith in selecting the third health care provider.

10. Pending receipt of the second or third opinion, the employee provisionally is entitled to the benefits of the FMLA (i.e., maintenance of health benefits). If it turns out the employee is not entitled to leave, then the time off may not be designated as FMLA time off, and will be treated as paid or unpaid leave as appropriate under the employer's established leave policies.

11. At the request of the employee, the employer must provide the employee with copies of the second and third medical opinions.

12. When the employee or sick family member is visiting or resides in another country, the employer must accept medical certifications and second and third opinions from a health care provider in that country.

K. Re-certifications

1. Employer may request a medical certification and re-certifications when dealing with a serious health condition.

2. Employer can require updated re-certifications on a reasonable basis (not greater than every 30 calendar days, unless circumstances have changed).

    a. "Reasonable basis" is defined as no more than every 30 days, unless:

        i. employee requests an extension of leave;

        ii. circumstances in the original certification have changed significantly;

        iii. employer receives information to doubt the continuing validity of the original certification; or

        iv. employee is unable to return to work at the end of the leave because of the continuation, recurrence, or onset of a serious health condition.

3. If the minimum duration of the condition (and not the duration of the incapacity) on initial certifications is more than thirty days, employers must wait until that minimum duration expires before requesting recertification.

4. In all cases, an employer may request recertification of a medical condition every six months in connection with an absence.

5. Employee must pay the cost of re-certification, unless the employer provides otherwise.

L. Return to Work Certificate/Notice

1. Employer may require certification prior to returning employee to work.

2. Employee must pay the cost of re-certification, including the cost for travel and time to obtain the certification.

3. Employer may not require return-to-work certification for each absence when employees utilize intermittent leave except under limited circumstances.

    a. An employer may require fitness-for-duty certification once every 30 days if the employee has actually used leave during the thirty-day period; and reasonable safety concerns exist.

b. Reasonable safety concerns exist when there is a significant risk of harm to the employee or others. The DOL intends for this to be a "high standard." If the employer chooses to require a fitness-for-duty certification, the employer shall inform the employee at the time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification

4. The certification may only address the condition which caused the leave.

5. When requested by employer, a health care provider must assess the employee's ability to return to work against the essential functions of the employee's position. If the employer wants the health care provider to consider a list of essential functions, it must include the list of essential job duties with the Designation Notice

6. Any return-to-work physical must be job related (as required under the Americans with Disabilities Act).

7. Employer may <u>not</u> require a second or third opinion. Employers may, however, contact directly the health care provider for purposes of authenticating and clarifying the fitness-for-duty statement. Clarification of the fitness-for-duty certification may result in the employer obtaining additional information. The additional information is limited to the condition for which leave was taken and the employee's ability to perform the essential functions of the position.

8. Employer may not delay employee's return to work while contact with the employee's healthcare provider is being made if the employee provided an otherwise adequate certification.

9. Employer may refuse to reinstate employee until the employee provides a properly requested fitness-of-duty medical certification.

10. When an employee cannot return to work due to the continuation, recurrence, or onset of the employee's or a covered relation's serious health condition, the employer may require a medical certification of the employee's or the covered relation's serious health condition.

11. Employer may <u>not</u> refuse to reinstate employee who failed to report his/her *intent* to return to work.

M. <u>Job Restoration</u>

1. Employer must return employee to same or equivalent position.

a. The Regulations state an "equivalent position" is one which has "the same pay, benefits, and working conditions, including privileges, prerequisites and status" and involves "the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."

b. "Equivalent pay" includes:

   i. entitlement to any unconditional pay increases which occurred during the leave period, but are not based on length of service or work performed; and

   ii. entitlement to a position with the same number of hours of overtime.

c. "Equivalent benefits" includes all benefits provided or made available to employees. Such benefits must be resumed at the same levels and provided in the same manner as before the leave, subject to changes that occurred during the leave.

   i. An employee cannot be required to re-qualify for benefits to which he/she was entitled before the leave began.

   ii. An employee is not entitled to accrue additional benefits and seniority during unpaid FMLA leave.

   iii. The FMLA leave period is treated as continued service for purposes of vesting and eligibility to participate in pension and other retirement plans.

d. "Equivalent terms and conditions" include:

   i. reinstatement to the same or geographically proximate work site, meaning one which does not require a significant increase in commuting time or distance;

   ii. the same shift or equivalent work schedule;

   iii. the same or an equivalent opportunity for bonuses, profit sharing and other discretionary and non-discretionary payments.

2. Restoration is contingent upon employee's continued ability to perform all of the essential functions of the job.

3. An employee's right to FMLA leave and job restoration are not affected by light duty assignments resulting from a workers' compensation injury.

Thus, the employee's right to restoration is essentially on hold during the period of time an employee performs a light duty assignment. At the conclusion of the voluntary light duty assignment, the employee has the right to be restored to the position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. If the voluntary light duty assignment ends before the employee is able to perform the essential functions of the same or equivalent position, the employee may use the remainder of his or her FMLA leave entitlement and would be eligible to return to the same position the employee held when the FMLA leave first commenced

4. Employer does not have to reinstate employee if it can show that the employee would not otherwise have been employed at the end of the FMLA leave. The Regulations clarify this point by explaining that in the case of a layoff, the employer would have the burden of showing that the employee would have been laid off if employed during the FMLA leave period and, therefore, is not entitled to reinstatement. Similarly, if a shift had been eliminated or overtime decreased while an employee was on FMLA leave, that employee would not be entitled to return to work on that shift or receive the original overtime hours.

5. Employer does not have to reinstate employee who obtained leave fraudulently.

6. Employer does not have to reinstate employee who violates employer's uniformly applied and disseminated policy governing outside supplemental employment while the employee is on leave.

7. Additionally, a limited exception to having to restore an employee to his/her job exists if:

    a. the employee would otherwise be terminated, or

    b. restoration would cause substantial and grievous economic injury to employer's operations and employee is "key" employee.

        i. The Regulations provide that in order to prove "substantial and grievous economic injury," an employer must show how "reinstatement" (not the taking of leave) would threaten the economic viability of the company or cause substantial long-term economic injury.

        ii. "Key" employee is defined as a salaried employee among the highest paid 10% of all employees employed by the employer in a 75-mile radius. According to the Regulations:

(a) The determination of being within the highest paid 10% of all employees is based on year-to-date earnings at the time leave is requested.

(b) Earnings include wages, premium pay, incentive pay, and bonuses.

iii. Employer, however, must:

(a) provide written notice to key employee at the time leave is requested (or the commencement of leave, if earlier) or as soon thereafter as practicable, that the employee qualifies as a "key" employee and notify him/her of the potential for non-reinstatement. Employers failing to do so lose the right to deny restoration;

(b) provide written notice to the employee as soon as it determines that substantial and grievous economic injury will result from reinstatement and explain the basis for this conclusion;

(c) offer the employee a reasonable amount of time to return to work after notice of non-reinstatement is given;

(d) continue to provide a "key" employee who does not return to work after notice of non-reinstatement with health benefits until:

(1) employee gives notice that he/she does not intend to return to work; or

(2) employer denies reinstatement at the end of the leave.

(e) at the employee's request, provide a final determination at the end of the leave period that substantial and grievous economic injury will result from reinstatement, based on the facts at that time.

N. Other Statutory Benefits

1. Employers must maintain the employee's medical coverage under any group health plan as if the employee continued to be employed.

2. If the employee is on a paid leave, the employee's share of the premiums should be paid in the same manner as during any other paid leave period, presumably as a payroll deduction. If the FMLA period is unpaid, an employer may:

   a. demand payment from the employee at the same time as if payments were deducted from payroll;

   b. demand payment on the same schedule as payments made under COBRA;

   c. demand payment pursuant to an employer's existing rules for payment by employees on leave without pay;

   d. allow prepaid payment pursuant to cafeteria plan, provided the employee consents; or

   e. use any other system agreed to by it and the employee.

3. Employer may cease coverage when the employee's premium payment is more than 30 calendar days late. (This is not a COBRA event.) However, the employee is entitled to resume coverage upon return from leave at the same level as prior to the leave and without having to meet any qualification requirements.

   a. In order to drop the employee's coverage, however, the employer must send the employee a letter stating that continuation of coverage depends upon receipt of premium payments within 15 days. The employer cannot drop the employee's coverage until at least 15 calendar days after the date of the letter and provided that the employer does not receive the employee's payment in the interim. In such cases, the employer may be able to cease coverage retroactively, in accordance with its own policies.

   b. Although this is not deemed a triggering event for COBRA notices, such notices may be sent as a precaution.

4. An employer may recover its share of premiums paid during an unpaid FMLA leave if the employee fails to return at the end of the leave, unless the employee does not return because of:

   a. the continuation, recurrence or onset of a serious health condition which would entitle the employee to FMLA leave; or

   b. other circumstances beyond the employee's control.

5. If an employer maintains other employee benefits during an unpaid FMLA leave (e.g., life insurance), the employer can recoup those premiums paid

regardless of whether the employee returns from leave to prevent a lapse of the employee's coverage upon reinstatement.

6. An employer's obligation to maintain health benefits ceases when:

   a. employee unqualifiedly informs the employer of his/her intent not to return from leave;

   b. employee fails to return from leave; or

   c. the FMLA leave entitlement is exhausted.

7. An employee who elects not to continue health care coverage during the FMLA leave period is entitled to immediate reinstatement of health care coverage and all other benefits upon returning to work, with no waiting or qualifying period and at the same level of benefits as prior to taking leave. This may require continuing benefits.

8. An employee's entitlement to benefits other than group health benefits during an FMLA leave (e.g., holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is out on other forms of leave.

O. Substitution of Paid Time Off

1. Employer may require employee to use accrued paid time off for unpaid FMLA leave.

2. The terms and conditions of an employer's paid leave policies apply and must be followed by employees when any form of accrued paid leave, including paid vacation, personal leave, family leave, paid time off (PTO), or sick leave, is substituted for unpaid FMLA leave.

3. Where an employer's paid leave policy requires the use of leave in an increment of time larger than the amount of FMLA leave requested by an employee, if the employee wishes to substitute paid leave for unpaid FMLA leave, the employee must take the larger increment of leave required under the paid leave policy. Where an employee chooses to take a larger increment of leave in order to be able to substitute paid leave for unpaid FMLA leave, the entire amount of leave taken shall count against the employee's FMLA entitlement.

4. Even though the substitution of paid leave for unpaid leave provisions are not applicable when employees receive part of their pay from disability or workers' compensation benefits during FMLA leave, the employer and employee may agree to run paid leave concurrently with FMLA leave to supplement disability or workers' compensation benefits. Therefore, if

employees only receive two-thirds of their regular salary from disability plans or workers' compensation, by mutual agreement, employees can use paid leave to make up the difference.

P. Employer Notice to Employees of FMLA Rights

1. Employer must put up a poster in the workplace informing employees of their FMLA rights. See Department of Labor Poster of Employee Rights and Responsibilities, attached hereto as "Exhibit 6." This poster can also be found at: http://www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf

Q. Record-Keeping

1. Records must be kept for a minimum of 3 years.

2. Records must include:

   a. basic payroll and identifying employee data;

   b. the dates FMLA leave is taken;

   c. designation that leave is taken pursuant to the FMLA;

   d. the hours of leave taken (where leave is taken in less than full day increments);

   e. copies of employee notices of leave and all general and specific notices given to employees;

   f. documents describing employee benefits or employer policies and practices regarding taking leaves;

   g. records of premium payments;

   h. records of disputes between the employer and employee regarding the designation of leave as FMLA leave;

   i. records similar to those required by the FLSA for non-exempt employees;

   j. records clearly demonstrating FLSA-exempt employees worked less than 1,250 hours in a 12-month period, if leave is denied; and

   k. records and documents relating to medical certifications and re-certifications. Just as required under the ADA, these records must be kept in separate files and treated as confidential, except that:

i. supervisors and managers may be informed of work restrictions or duties that must be imposed, as well as of necessary accommodations;

ii. first aid and safety personnel may be told of the employee's physical or medical condition if the condition might necessitate emergency medical attention; and

iii. government officials investigating FMLA compliance shall be furnished relevant information upon request.

3. The DOL may inspect records no more than once every 12 months, unless it has a reasonable cause to believe there is a violation or it is investigating a complaint.

R. Employees' Enforcement of Their Rights

1. No administrative procedures or prerequisites to filing a lawsuit.

2. Civil lawsuit may be commenced within 2 years of the last alleged violation or within 3 years when alleging willful allegations.

3. Complaints may be filed with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. The filing of a Complaint with the DOL is not a prerequisite to filing a civil suit under the FMLA.

4. No specific form of complaint is required. Complaint must be in writing and include a full statement of the acts and/or omissions, with pertinent dates, alleged to be violations of the FMLA.

S. Damages

1. Remedies include: "for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered."

a. any wages, salary, employment benefits or other compensation denied or lost as a result of the FMLA violation,

i. in cases where no back wages or benefits were lost by the employee, any actual monetary losses sustained by the employee as a result of the violation, up to a sum equal to 12 weeks of wages/salary for the employee;

ii. language in the January 2009 revised regulations leaves open the possibility of compensatory damages to be awarded under the FMLA.

b. interest on the monetary damages,

c. equitable relief (*i.e.*, reinstatement, promotion),

d. for willful violations, liquidated damages equal to the sum of the monetary damages (amounts provided in (1) and (2) above);

i. a liquidated damage award of twice the actual damages is imposed and may be reduced in the court's discretion if the employer can show the violation was in good faith and it had reasonable grounds to believe its acts/omissions were not in violation of the FMLA;

e. attorneys' fees, expert witness fees, and costs.

2. Corporate officers, managers, and supervisors who act in the interest of the employer have been held individually liable under the FMLA.

3. Employees and employers are permitted to voluntarily settle past claims without first obtaining permission or approval from the DOL or a court.

T. Special Rules For School Employees

1. All rules and regulations of the FMLA that apply to covered employers also apply to local educational agencies and private elementary and secondary schools, regardless of the number of employees employed, with some special exceptions and rules.

a. These special rules do not apply to colleges, preschools, or trade schools.

b. "Local educational agency" includes public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools.

c. "Instructional employees" are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting.

i. Includes teachers, athletic coaches, driver's education instructors, and special education assistants (like signers, etc.)

ii. Excludes teachers aides, counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, or bus drivers.

d. "Academic term" means the school semester, which typically ends near the end of the calendar year and the end of the spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA.

2. Eligibility requirements for employees are the same as those for of noneducational agencies.

U. Intermittent/Reduced Leave

1. Leave taken for a period that ends with the school year and begins the next semester is considered to be taken consecutively rather than intermittently. The summer vacation period when the employee would not have been working is not counted against his/her FMLA entitlement. The employee retains all benefits over the summer break that he/she would normally receive.

2. If an eligible employee needs intermittent leave for his/her foreseeable serious health condition, or to take care of a family member, and the employee would be out on leave for more than 20 percent of the total number of working days over the time the leave would extend, the employer may require the employee to elect either to:

a. take leave for a period of a particular duration (not longer than the duration of the planned therapy); or

b. temporarily transfer to an available alternative position for which the employee is qualified (of equal pay and benefits) which better accommodates the employee's need for recurring leave.

i. Periods of a particular duration means "a block, or blocks, of time beginning no earlier than the first day for which leave is needed, and may include one uninterrupted period of leave."

3. If an instructional employee does not give required notice of foreseeable FMLA leave to be taken intermittently or on a reduced leave schedule, the employer may make the employee take leave of a particular duration, or

temporarily transfer the employee to an alternate position. The employer may decide to delay the leave until the employee fulfills the notice requirement.

V. Taking of Leave Near the End of Academic Term

1. Regular rules apply except when an employee begins leave more than five weeks before the term's end. The employer may require the employee to continue taking leave until the end of the term if:

   a. the leave will last at least three weeks, and

   b. the employee would return to work during the three-week period before the end of the term.

2. If the employee begins leave for a reason other than his/her own serious health condition, the employer may require the employee to continue taking leave until the term's end if:

   a. the leave is expected to last more than two weeks, and

   b. the employee would return to work during the two-week period before the term's end.

3. If the employee starts leave for a reason other than the employee's own serious health condition during the three-week period before the end of a term, and the leave will last over five working days, the employer may require the employee to continue on leave until the end of the term.

W. Counting Leave

1. When an employee opts to take leave for "particular periods of duration" in the case of intermittent or reduced schedule leave, the entire block is counted as FMLA leave.

2. When an employee is required to take leave until the end of a term, only the period of leave until the employee is ready and able to come back to work shall be charged against the employee's FMLA leave.

   a. The employer can allow the employee to return before the academic term is up.

   b. When the employer requires the employee to stay out, the employer must still maintain the employee's group health insurance and restore the employee to the same or an equivalent job.

X. Restoration to Equivalent Position

1. Determining how an employee is to be restored to "an equivalent position" should be made on the basis of "established school board policies and practices, and collective bargaining agreements."

   a. "Established policies" must be in writing, must be made known to the employee before the taking of the leave, and must clearly explain his/her restoration rights upon return.

III. Florida State and Local Leave Laws

1. Under the FMLA, where State leave laws exist, employers must comply with whichever law (State or Federal) is more protective of employee rights.

2. Florida's family-related leave statute only addresses certain public sector employees. The statute provides for an unpaid leave for a period up to six (6) months in a one year period and covers certain career service employees. The statute covers parental and family leave.

3. Florida in 2007 enacted legislation providing leave for victims of domestic violence. Employees who have worked for a Company for 3 months or longer may be granted up to 3 days of unpaid leave in any rolling 12-month period if the employee or a family or household member of an employee is the victim of domestic violence. Whether or not the leave is paid is left to the discretion of the employer. Additionally, before receiving this leave, an employee must exhaust all annual or vacation leave, personal leave, and sick leave. This policy is applicable to all employers that have fifty (50) or more employees.

4. Miami-Dade County's Ordinance mirrors the FMLA and applies to employers in Miami-Dade County with fifty (50) or more employees. The Ordinance, however, adds "grandparent" to the FMLA definition of covered relation.

FMLA CASE LAW

I. Significant Supreme Court Decisions

- Nevada Dep't of Human Resources v. Hibbs, 123 S. Ct. 1972 (2003). Court held that Congress did validly abrogate Eleventh Amendment immunity for claims under the FMLA. Thus, **state employees may sue a State for money damages in federal court for violation of the FMLA's family care provision.** (See also Bylsma v. Freeman, 346 F.3d 1324 (11th Cir. 2003).

- Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002). The FMLA regulations provide that if an employer fails to give prospective notice that an absence is being counted as FMLA leave, the leave can not be counted against the employee's 12-week entitlement under the FMLA. The Court held that this regulation is invalid. As such, the Court held that absent proof that an employee was prejudiced by an employer's failure to provide written notice of her FMLA rights, **FMLA leave commences on the day that an employee leaves work because of his or her serious health condition, not the day written notice of FMLA rights is given to an employee.** Here, an employee had already taken 30 weeks of unpaid sick leave, and thus was not entitled to an additional 12 weeks of leave under the FMLA even though the employer did not give prospective notice to the employee that 12 of the 30 weeks unpaid leave were being designated as FMLA leave because the failure to provide notice in no manner prejudiced the employee. (See also, McGregor v. Autozone, Inc., 180 F.3d 1305 (11th Cir. 1999).

II. Significant Eleventh Circuit Court Decisions

A. Who is an Employer?

- Wascura v. Carver, et al., 169 F.3d 683 (11th Cir. 1999). The court held that **a public official sued in his or her individual capacity is not an "employer" under the FMLA and thus cannot be held liable thereunder.**

B. Employee and Employer Eligibility

- Batchelor v. South Florida Water Mgmt. Dist., 2007 U.S. App. LEXIS 17424 (11th Cir. 2007). Court reaffirmed Garrett v. The U. of Ala. at Birmingham Board of Trustees, 193 F.3d 1214 (11th Cir. 1999), holding that the **states are immune from suit under the self-care provision of the FMLA.**

- Morrison v. Magic Carpet Aviation, et al., 383 F. 3d 1253 (11th Cir. 2004). After being denied medical leave under the Family Medical Leave Act because the employer did not have the statutory prerequisite 50 employees within a 75 mile radius, the employee pilot sued his employer, the employer's owner and a company that had contracted with the employer's owner, claiming that the entities were 'joint'

or 'integrated' employers. **The Court affirmed the United States District Court for the Middle District of Florida's judgment that neither the employer's owner nor the company that had contracted with the employer's owner either were joint employer's or integrated employers with the employee's employer. The Court noted that "the fact that a major client can pressure an employer into firing a particular individual does not transmute that client into that individual's employer." In order to utilize the joint employer and/or integrated employer theories to establish the jurisdictional prerequisites for coverage under the FMLA, the employee must establish that all factors of being a joint or integrated employer are present within the relationship between the allegedly joint or integrated companies.**

- Walker v. Elmore County Board of Education et al., 379 F. 3d 1249 (11th Cir. 2004). The employee teacher claimed she was terminated in retaliation for her request for leave under the FMLA. **Affirming the District Court, the Eleventh Circuit Court of Appeals held that, because the employee was ineligible for leave at the time when she requested FMLA leave *and* was ineligible at the time when the leave would have begun, she was not protected by the FMLA.** The determination as to whether an employee has been employed for at least twelve (12) months, in order to determine FMLA eligibility, must be made *as of the date the leave commences.*

- Smith v. BellSouth Telecomms., Inc., 273 F.3d 1303 (11th Cir. 2001). A former employee who reapplied for a position several months after resigning claimed that the decision not to rehire him was retaliatory in violation of the FMLA. The FMLA provides for a right of action "against any employer . . . by any one or more employees." **The Court ruled that the definition of employee is not limited to current employees, and thus the plaintiff, a former employee, had standing to sue under the FMLA.** The court reasoned that the term employee as defined in the FMLA is ambiguous, and that the Department of Labor's interpretation in a regulation prohibiting discrimination against employees or prospective employees who have used FMLA leave was reasonable. The court also ruled that refusing to rehire an individual based on his past use of FMLA leave is a prohibited act under the FMLA.

C. Serious Health Condition

- Russell v. North Broward Hospital, 346 F.3d 1335 (11th Cir. 2003). Plaintiff was under the employer's progressive disciplinary system for excessive absenteeism when she fractured her elbow and knee in a slip and fall at work. Plaintiff was discharged after she was absent for various parts of several days for approximately 10 days. Plaintiff claimed that her discharge violated the FMLA because her absences were due to a "serious health condition" requiring continuing treatment. **The court held that in order to qualify as a "serious health condition" under 29 C.F.R. §825.411, an injury must result in more than three consecutive *full* calendar days of incapacity**, and thus her discharge did not violate the FMLA. In other words, time taken off over a period of time that totals three calendar days is not protected under

the FMLA. Rather, the period of incapacity resulting from a serious health condition must last at least 72 hours to be covered under the FMLA.

D. Standards of Proof (Interference/Retaliation Claims)

- Scott v. Honda Mfg. of Alabama, 270 Fed. Appx. 814 (11th Cir. 2008). Plaintiff filed an action against her former employer alleging that she was fired because she sought FMLA leave. Plaintiff sought leave to care for her mother. The Eleventh Circuit held that Plaintiff failed to produce sufficient evidence that her mother was suffering from a serious health condition and thus, failed to state a prima facie case of FMLA retaliation.

- Bass v. Lockheed Martin Corp., 287 Fed. Appx. 808 (11th Cir. 2008). Plaintiff brought an FMLA retaliation action, alleging that he was terminated because he sought FMLA benefits. Plaintiff argued that the proximity in time between the protected conduct and the adverse action satisfied the casual connection. The Eleventh Circuit held that eleven months was insufficient temporal proximity to support the causal connection, and therefore, denied Plaintiff's action.

- Martin v. Brevard County Public Schools, 543 F.3d 1261 (11th Cir. 2008). Plaintiff brought an action for retaliation under the FMLA, alleging that he was terminated because he sought protected leave. The Defendant sought summary judgment, which was denied by the district court. The Eleventh Circuit noted that Plaintiff easily demonstrated a prima facie case of retaliation because of the close temporal proximity between Plaintiff's being on leave and his termination (Plaintiff was terminated while on FMLA leave). The Defendant responded that it was not hostile to FMLA leave, rather, was simply indifferent to it. The Court concluded that the Defendant's proffered legitimate, non-retaliatory reason for terminating Plaintiff could represent pretext and therefore, a genuine dispute of material facts remained. Thus, the Eleventh Circuit reversed the district court's granting of summary judgment.

- Daugherty v. Mikart, Inc., 205 Fed. Appx. 826 (11th Cir. 2007). Plaintiff filed an action against his former employer alleging that he was retaliated against for using medical leave, in violation of the FMLA. **To establish a prima facie case of retaliation, the plaintiff must show that: (1) he engaged in statutorily protected activity; (2) he experienced an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse action. If the plaintiff makes out a prima facie case, then the burden shifts to the defendant to put forth a legitimate, non-retaliatory reason for the challenged action. If the defendant puts forth such a reason, in order to avoid a motion for summary judgment, the plaintiff must show that he will be able to demonstrate at trial that the defendant's stated reason for the action is pretextual. Pretext is proven only if it is shown both that the reason was false, and that discrimination was the real reason behind the challenged action.** The Court held that the plaintiff failed to show that the employer's stated reason, submitting a fraudulent medical certification, was pretextual. The Court noted that close temporal proximity between plaintiff's

termination and his application for FMLA leave was not sufficient by itself to show pretext, especially where the employer had a history of granting FMLA leave without penalizing its employees.

- Chambless v. Louisiana-Pacific Corp., 481 F.3d 1345 (11th Cir. 2007). Plaintiff alleged that her disqualification from consideration for a promotion because of her failure properly to complete FMLA paperwork during sick leave was a violation of the FMLA. Subsequently, plaintiff insisted that this was merely a pretense to deny her the promotion based on her gender and age. The Court held that proof that the defendant **violated the FMLA was irrelevant to the inquiry into whether the employer discriminated against the plaintiff based on protected traits.**

- Nichols v. CSG Sys., 2007 U.S. App. LEXIS 20705 (11th Cir. 2007). Employer forced the employee to take FMLA leave rather than assign her to a different work area during her high-risk pregnancy. The employee alleged that this was in retaliation for testimony she provided in a co-worker's lawsuit against the employer, in violation of the FMLA. The Court held that it would be impossible for a rational fact-finder to infer retaliation based on the evidence presented. The Court concluded that the plaintiff failed to provide sufficient evidence that the employer even knew about the testimony. Further, the Court stated that no inference of retaliation would arise from the temporal proximity between the time of employee's deposition and the employer's decision to place employee on FMLA leave, because nearly ten months had elapsed. Finally, the Court noted that the employee failed to provide evidence of other pregnant employees receiving different treatment in the same situation.

- Wascura v. City of South Miami, 257 F.3d 1238 (11th Cir. 2001). The plaintiff claimed her FMLA rights were interfered with when she was terminated three and one half months after notifying her employer that she might need time off to take care of her son, who was experiencing the end-stages of AIDS. **To state a claim for retaliation, a plaintiff must prove: (1) that he availed himself of a protected right under the FMLA; (2) that he suffered an adverse employment decision; and (3) that there is a causal connection between the protected activity and the adverse employment decision.** The court ruled that aside from temporal proximity the plaintiff failed to establish a causal connection between her request for FMLA leave and her termination; defendant provided evidence of legitimate reasons for the termination unrelated to her indication that she might need to take time off in the future to care for her son.

- Earl v. Mervyns, Inc., 207 F.3d 1361 (11th Cir. 2000). The plaintiff had a perpetual tardiness problem that she claimed was the result of an obsessive compulsive disorder. Plaintiff received several written warnings and was then placed on a probationary warning, and a subsequent second probationary warning because of her tardiness. After several more punctuality infractions, plaintiff was suspended, and then terminated. *After* being told of her termination, the plaintiff requested disability leave. **The court granted summary judgment for the defendant, finding that the plaintiff failed to raise a genuine dispute of material fact as to whether her**

termination was caused by her FMLA request because she was terminated pursuant to the specific terms of the defendant's detailed policy for her repeated tardiness. The court noted that the plaintiff was even given an additional warning, not required by the policy, prior to being terminated.

- Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274 (11th Cir. 1999). **The court held that in order to maintain a claim for retaliation under the FMLA, an employee must establish that he/she was subjected to adverse employment action.** The placing of a memorandum in an employee's file expressing concern over her FMLA-related absences and classifying her as AWOL during her FMLA leave did not constitute adverse employment actions.

E. Medical Certification

- Cash v. Smith, 231 F.3d 1301(11th Cir. 2000). The employer requested that the employee have her doctor complete a FMLA certification form. The employee's physician did so, stating on the form that **the employee did not qualify for FMLA leave because her conditions were being controlled by medication and she was able to perform the functions of her position. Accordingly, the court upheld the lower court's grant of summary judgment on employee's FMLA claim because she was ineligible for FMLA leave.**

F. Notice of FMLA Eligibility

- Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791 (11th Cir. 2000). **The Court held that the FMLA regulations providing that an employee will be deemed eligible for FMLA leave if the employer fails to advise the employee that he/she is ineligible within 2 business days of receiving the employee's request for leave is invalid insofar as it purports to extend the eligibility provisions of the FMLA to an otherwise ineligible employee.** As such, the court held that an employee who is ineligible for leave (*i.e.*, because the employee did not work 1,250 hours in the past 12 months), remains ineligible regardless of whether the employer promptly notified her that she is ineligible for FMLA leave.

- Cruz v. Publix Super Markets, Inc., 428 F.3d 1379 (11th Cir. 2005). The plaintiff made a request for leave when she learned that her adult daughter was pregnant and due to give birth. The request for leave sought two weeks of unpaid leave, and the store manager approved the unpaid leave request from October 31, 2003 to November 16, 2003. When plaintiff learned that her daughter was going to deliver early, plaintiff notified the assistant manager that she planned to begin her leave early on October 17, 2003 and that she would still return to work on November 17, 2003. The store manager then called plaintiff into the office and asked her to explain the situation. The plaintiff advised that she believed her daughter was in labor and her daughter's husband had broken his collarbone, so her daughter needed her help. The store manager, however, would not approve more than two weeks of unpaid leave. The plaintiff never advised management that her daughter was having complications

due to pregnancy. Thus, when she asked if she was eligible for "family leave" she was advised that she was not. Later that day, the plaintiff inquired at the personnel office regarding how to apply for leave under the FMLA. She was advised that she needed to provide a letter from her daughter's physician. A letter from the physician was obtained, but it stated that the plaintiff's son-in-law had a broken collarbone and was therefore unable to help in coaching the plaintiff's daughter through labor. The letter also stated that the plaintiff's daughter felt she needed her mother's help because she had no one else. **The note did not make any reference to or provide any indication that the plaintiff's daughter was having complications because of pregnancy.** As a result, the plaintiff's request for FMLA leave was denied. Despite this denial, the plaintiff did not return to work for four weeks. When she called to find out her scheduled, she learned that she had been terminated for job abandonment, as she did not return to work after her two weeks of approved leave.

Plaintiff filed a complaint alleging the defendant improperly denied her request for FMLA leave to care for her pregnant daughter who had a serious medical condition and that she was terminated in retaliation for exercising her rights under the FMLA. The district court granted summary judgment in favor of the defendant, finding that the plaintiff failed to give sufficient notice that her leave was because of a potentially FMLA-qualifying reason. The Eleventh Circuit affirmed this decision, noting that under the FMLA, being pregnant, as opposed to being incapacitated because of pregnancy, is not a "serious health condition." The Court further stated that "the protections of the FMLA do not extend to an employee taking leave to care for his or her adult child simply because that child is pregnant, unless, for example, that child is incapacitated due to the pregnancy." The plaintiff's termination, therefore, was not in violation of the FMLA, because an "employee cannot merely demand leave; [s]he must give the employer a reason to believe that [s]he is entitled to it." The plaintiff in this case also was found to have withheld critical information regarding the reason for her request, even though she did not do so deliberately. The facts she supplied to her employer were found to be insufficient to shift the burden to her employer to request further information and the Court determined it was not reasonable to expect the employer to conclude her absence qualified for FMLA leave.

EXHIBIT 1

Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

WHD
U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

Employee's job title: _____ Regular work schedule: _____

Employee's essential job functions: _____

_____

Check if job description is attached: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name: _____
First Middle Last

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Please be sure to sign the form on the last page.

Provider's name and business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____) _____ Fax:(_____) _____

CONTINUED ON NEXT PAGE

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

Probable duration of condition: _____

Mark below as applicable:
Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
___No ___Yes. If so, dates of admission:

_____

Date(s) you treated the patient for condition:

_____

Will the patient need to have treatment visits at least twice per year due to the condition? ___No ___ Yes.

Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
____No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

_____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

Is the employee unable to perform any of his/her job functions due to the condition: ____ No ____ Yes.

If so, identify the job functions the employee is unable to perform:

_____

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

_____

_____

_____

_____

_____

_____

_____

CONTINUED ON NEXT PAGE

PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of incapacity: _____

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? ___No ___Yes.

   If so, are the treatments or the reduced number of hours of work medically necessary? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Estimate the part-time or reduced work schedule the employee needs, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ___No ___Yes.

   Is it medically necessary for the employee to be absent from work during the flare-ups? ___ No ___Yes. If so, explain:

   _____

   _____

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER

_____

_____

_____

_____

_____

_____

CONTINUED ON NEXT PAGE

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.**

Form WH-380-E Revised January 2009

EXHIBIT 2

Certification of Health Care Provider for Family Member's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

_____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: _____
First Middle Last

Name of family member for whom you will provide care: _____
First Middle Last

Relationship of family member to you: _____

If family member is your son or daughter, date of birth: _____

Describe care you will provide to your family member and estimate leave needed to provide care:

_____

_____

_____

_____ _____
Employee Signature Date

CONTINUED ON NEXT PAGE

Form WH-380-F Revised January 2009

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider's name and business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____) _____ Fax:(_____) _____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

Probable duration of condition: _____

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
___No ___Yes. If so, dates of admission: _____

Date(s) you treated the patient for condition: _____

Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

Will the patient need to have treatment visits at least twice per year due to the condition? ___No ____ Yes

Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
____ No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

_____

_____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

_____

_____

_____

_____

CONTINUED ON NEXT PAGE

PART B: AMOUNT OF CARE NEEDED. When answering these questions, keep in mind that your patient's need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care.

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? ___No ___Yes.

   Estimate the beginning and ending dates for the period of incapacity: _____

   During this time, will the patient need care? __ No __ Yes.

   Explain the care needed by the patient and why such care is medically necessary:

   _____

   _____

   _____

   _____

   _____

5. Will the patient require follow-up treatments, including any time for recovery? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery? __ No __ Yes.

   Estimate the hours the patient needs care on an intermittent basis, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

   Explain the care needed by the patient, and why such care is medically necessary:

   _____

   _____

   _____

   _____

CONTINUED ON NEXT PAGE

7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities? ____No ____Yes.

Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency: _____ times per _____ week(s) _____ month(s)

Duration: _____ hours or ___ day(s) per episode

Does the patient need care during these flare-ups? ____ No ____ Yes.

Explain the care needed by the patient, and why such care is medically necessary: _____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210.
DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.

EXHIBIT 3

Notice of Eligibility and Rights & Responsibilities (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

In general, to be eligible an employee must have worked for an employer for at least 12 months, have worked at least 1,250 hours in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c).

[Part A – NOTICE OF ELIGIBILITY]

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave beginning on _____ for:

____ The birth of a child, or placement of a child with you for adoption or foster care;

____ Your own serious health condition;

____ Because you are needed to care for your ____ spouse; _____child; _____ parent due to his/her serious health condition.

____ Because of a qualifying exigency arising out of the fact that your ____ spouse; _____son or daughter; _____parent is on active duty or call to active duty status in support of a contingency operation as a member of the National Guard or Reserves.

____ Because you are the ____ spouse; _____son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

____ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)

____ Are **not** eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):

____ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately ___ months towards this requirement.

____ You have not met the FMLA's 1,250-hours-worked requirement.

____ You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact _____ or view the FMLA poster located in _____.

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by** _____. (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

____ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request ____is/____ **is not** enclosed.

____ Sufficient documentation to establish the required relationship between you and your family member.

____ Other information needed: _____

_____

_____

____ No additional information requested

CONTINUED ON NEXT PAGE

If your leave does qualify as FMLA leave you will have the following **responsibilities** while on FMLA leave (only checked blanks apply):

____ Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

____ You will be required to use your available paid _____ **sick,** _____ **vacation,** and/or _____**other leave** during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.

____ Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We ___**have**/____ **have not** determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

____ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following **rights** while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:
  - ____ the calendar year (January – December).
  - ____ a fixed leave year based on _____.
  - ____ the 12-month period measured forward from the date of your first FMLA leave usage.
  - ____ a "rolling" 12-month period measured backward from the date of any FMLA leave usage.
- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on _____
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have ____ **sick,** ____**vacation,** and/or ___ **other leave** run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

  ____For a copy of conditions applicable to sick/vacation/other leave usage please refer to _____ available at: _____.

  ____Applicable conditions for use of paid leave:_____

  _____

  _____

  _____

  _____

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

_____at _____.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

EXHIBIT 4

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

Notice to the EMPLOYER INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a covered servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave INSTRUCTIONS to the EMPLOYEE or COVERED SERVICEMEMBER: Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a covered servicemember. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 C.F.R. § 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a member of the Regular Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a covered servicemember's serious injury or illness includes written documentation confirming that the covered servicemember's injury or illness was incurred in the line of duty on active duty and that the covered servicemember is undergoing treatment for such injury or illness by a health care provider listed above. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave.

CONTINUED ON NEXT PAGE

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave: (This section must be completed first before any of the below sections can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and Address of Employer (this is the employer of the employee requesting leave to care for covered servicemember):

Name of Employee Requesting Leave to Care for Covered Servicemember:

First Middle Last

Name of Covered Servicemember (for whom employee is requesting leave to care):

First Middle Last

Relationship of Employee to Covered Servicemember Requesting Leave to Care:
☐ Spouse ☐ Parent ☐ Son ☐ Daughter ☐ Next of Kin

Part B: COVERED SERVICEMEMBER INFORMATION

(1) Is the Covered Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves? ☐ Yes ☐ No

If yes, please provide the covered servicemember's military branch, rank and unit currently assigned to:

Is the covered servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)? ☐ Yes ☐ No If yes, please provide the name of the medical treatment facility or unit:

(2) Is the Covered Servicemember on the Temporary Disability Retired List (TDRL)? ☐ Yes ☐ No

Part C: CARE TO BE PROVIDED TO THE COVERED SERVICEMEMBER

Describe the Care to Be Provided to the Covered Servicemember and an Estimate of the Leave Needed to Provide the Care:

CONTINUED ON NEXT PAGE

SECTION II: For Completion by a United States Department of Defense ("DOD") Health Care Provider or a Health Care Provider who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider. If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator). (Please ensure that Section I above has been completed before completing this section.) Please be sure to sign the form on the last page.

Part A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider's Name and Business Address:

_____

Type of Practice/Medical Specialty: _____

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider: _____

Telephone: ( ) _____ Fax: ( ) _____ Email: _____

PART B: MEDICAL STATUS

(1) Covered Servicemember's medical condition is classified as (Check One of the Appropriate Boxes):

☐ **(VSI) Very Seriously Ill/Injured** – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **(SI) Seriously Ill/Injured** – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **OTHER Ill/Injured** – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating.

☐ **NONE OF THE ABOVE** (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a "serious health condition" under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380 or an employer-provided form seeking the same information.)

(2) Was the condition for which the Covered Service member is being treated incurred in line of duty on active duty in the armed forces? ☐ Yes ☐ No

(3) Approximate date condition commenced: _____

(4) Probable duration of condition and/or need for care: _____

(5) Is the covered servicemember undergoing medical treatment, recuperation, or therapy? ☐ Yes ☐ No. If yes, please describe medical treatment, recuperation or therapy:

PART C: COVERED SERVICEMEMBER'S NEED FOR CARE BY FAMILY MEMBER

(1) Will the covered servicemember need care for a single continuous period of time, including any time for treatment and recovery? ☐ Yes ☐ No
If yes, estimate the beginning and ending dates for this period of time: _____

(2) Will the covered servicemember require periodic follow-up treatment appointments?
☐ Yes ☐ No If yes, estimate the treatment schedule: _____

(3) Is there a medical necessity for the covered servicemember to have periodic care for these follow-up treatment appointments? ☐ Yes ☐ No

(4) Is there a medical necessity for the covered servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? ☐ Yes ☐ No If yes, please estimate the frequency and duration of the periodic care:

_____

_____

Signature of Health Care Provider: _____ **Date:** _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE PATIENT.**

EXHIBIT 5

Certification of Qualifying Exigency For Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a qualifying exigency to submit a certification. Please complete Section I before giving this form to your employee. Your response is voluntary, and while you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.309.

Employer name: _____

Contact Information: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II fully and completely. The FMLA permits an employer to require that you submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a qualifying exigency. Several questions in this section seek a response as to the frequency or duration of the qualifying exigency. Be as specific as you can; terms such as "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Your response is required to obtain a benefit. 29 C.F.R. § 825.310. While you are not required to provide this information, failure to do so may result in a denial of your request for FMLA leave. Your employer must give you at least 15 calendar days to return this form to your employer.

Your Name: _____
First Middle Last

Name of covered military member on active duty or call to active duty status in support of a contingency operation:

_____
First Middle Last

Relationship of covered military member to you: _____

Period of covered military member's active duty: _____

A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes written documentation confirming a covered military member's active duty or call to active duty status in support of a contingency operation. Please check one of the following:

- ☐ A copy of the covered military member's active duty orders is attached.
- ☐ Other documentation from the military certifying that the covered military member is on active duty (or has been notified of an impending call to active duty) in support of a contingency operation is attached.
- ☐ I have previously provided my employer with sufficient written documentation confirming the covered military member's active duty or call to active duty status in support of a contingency operation.

CONTINUED ON NEXT PAGE

PART A: QUALIFYING REASON FOR LEAVE

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):

_____

_____

_____

_____

_____

_____

2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached. ☐ Yes ☐ No ☐ None Available

PART B: AMOUNT OF LEAVE NEEDED

1. Approximate date exigency commenced: _____

   Probable duration of exigency: _____

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency? ☐ No ☐ Yes.

   If so, estimate the beginning and ending dates for the period of absence:

   _____.

3. Will you need to be absent from work periodically to address this qualifying exigency? ☐ No ☐ Yes.

   Estimate schedule of leave, including the dates of any scheduled meetings or appointments: _____

   _____

   _____

   _____

   Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours ___ day(s) per event.

CONTINUED ON NEXT PAGE

PART C:

If leave is requested to meet with a third party (such as to arrange for childcare, to attend counseling, to attend meetings with school or childcare providers, to make financial or legal arrangements, to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: _____ Title: _____

Organization: _____

Address: _____

Telephone: (_____) _____ Fax: (_____) _____

Email: _____

Describe nature of meeting: _____

_____

_____

_____

_____

_____

_____

_____

_____

PART D:

I certify that the information I provided above is true and correct.

_____ _____

Signature of Employee Date

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE EMPLOYER.**

EXHIBIT 6

EMPLOYEE RIGHTS AND RESPONSIBILITIES
UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement
FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements
Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

Benefits and Protections
During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements
Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

Definition of Serious Health Condition
A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave
An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave
Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities
Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities
Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers
FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement
An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.

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Constitutional Employment Claims

By

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PERSONAL AND GOVERNMENTAL LIABILITY UNDER 42 U.S.C. §1983

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I. 42 U.S.C. § 1983

§ 1983 reads: "**Every person** who, **under color** of any statute, ordinance, regulation, custom, or usage, of any State or Territory ... subjects, or causes to be subjected, **any citizen** of the United States **or other person within the jurisdiction thereof** to the **deprivation of any rights**, privileges, or immunities **secured by the Constitution and laws**, shall be liable **to the party injured** in an action **at law, suit in equity, or other proper proceeding for redress**."

It must first be noted that § 1983 creates no substantive rights it is simply the statutory vehicle through which alleged U.S. Constitutional and federal law deprivations are redressed. The deprivation of a federally protected right is the essence of a claim under § 1983. But, § 1983 creates no substantive rights. "One cannot go into court and claim a violation of §1983 – for § 1983 by itself does not protect anyone against anything." Davis v. Town of Lake Park, 245 F.3d 1232, 1244 (11th Cir. 2001); Denney v. City of Albany, 247 F.3d 1172, 1188 (11th Cir. 2001).

II. WHO MAY SUE OR BE SUED UNDER § 1983

A. Public Employees May Sue under § 1983 - - "Any citizen of the United States or other person within the jurisdiction" may sue. This includes public employees and applicants for public employment.

B. Public Employees and Officials May Be Sued Individually under § 1983 - - "Every person" who under color of law deprives another of rights, privileges and immunities secured by the Constitution and federal laws may be sued. This includes individuals, including governmental officials and employees.

1. In the Eleventh Circuit, individuals working in either the public or private sector are not personally liable for discrimination under Title VII (42 U.S.C. § 2000 et seq.), the Age Discrimination in Employment Act, or the Americans With Disabilities Act. Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (Title VII); Smith v. Lomax, 45 F.3d 402, 403 n. 4 (11th Cir. 1995) (ADEA); Mason v. Stallings, 82 F.3d 1007, 1009 (11th Cir. 1996) (ADA). The same is true under the Florida Civil Rights Act. Jolley v. Wallace, 1995 WL 463709 (M.D. Fla. May 30, 1995).

C. Local Governments May be Sued under § 1983 - -Local government entities can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where the challenged

action implements a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that entity. Although the touchstone of a § 1983 action against a government entity is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, in exceptional cases **local governments may be sued** for **constitutional** deprivations brought about by **governmental** custom and usage, even though that custom did not receive formal **approval** through the body's official decision-making channels. Monell v. Dept. of Social Servs. of the City of New York, 436 U.S. 658, 690 (1978).

D. States and their Agents May Not Be Sued under § 1983 in Certain Circumstances -- The Eleventh Amendment of the U.S. Constitution bars suits by private parties against a state, a state agency, an instrumentality of the state, or a state official when "recovery would be paid from state funds." Fouche v. Jekyll Island State Park Auth., 713 F.2d 1518, 1521 (11th Cir. 1983) (citing, Edelman v. Jordan, 415 U.S. 651, 663 (1974)). §1983 does not provide a federal forum for litigants who seek a remedy against a state for alleged deprivation of civil liberties; states are protected by the Eleventh Amendment and also are not persons under § 1983. State police department and state police director sued in his official capacity also were not persons subject to suit under § 1983. Pillsbury Co., Inc. v. Port of Corpus Christi Auth., 66 F.3d 103 (5th Cir. 1995) (holding that local port authority immune from suit), cert. denied, 116 S. Ct. 1705 (1996); Citrano v. Allen Correctional Center, 891 F.Supp. 312, 321 (W.D. La. 1995) (holding that private corporation operating prison immune from suit); Berman Enterprises, Inc. v. Jorling, 793 F.Supp. 408 (E.D. N.Y. 1992) (recognizing that executive departments are generally immune from suit), aff'd, 3 F.3d 602 (2d Cir. 1993), cert. denied, 510 U.S. 1073 (1994).

1. § 768.28 F.S. - - § 768.28, F.S. waives sovereign immunity in state tort actions but is not a waiver of Eleventh Amendment immunity under § 1983.

2. Divergent Holdings Whether Sheriffs Are State or County Officials For Immunity Purposes - - These two cases appear to have divergent holdings. Hamm v. Powell, 874 F.2d 766, 770 (11th Cir. 1990), cert. denied, 496 U.S. 938 (1990). County sheriffs and deputies in Florida are state agents for official immunity purposes. Schmelz v. Monroe County, 954 F.2d 1540, 1543 (11th Cir. 1992). "A panel of this court earlier determined that Florida sheriffs are not entitled to eleventh amendment immunity in section 1983 cases because they are county officers instead of state officials. Hufford v. Rodgers, 912 F.2d 1338 (11th Cir. 1990), cert. denied, 499 U.S. 921 (1991), limitation of holding recognized by Abusaid v. Hillsborough County Board of County Comm'rs, 405 F.3d 1298 (11th Cir. 2005) . Consequently, because they are not state officials, they may not take advantage of state immunity as otherwise permitted by the eleventh amendment."

3. No Eleventh Amendment Immunity in § 1983 Individual Capacity Suits - - However, a state official may not assert the absolute immunity of the Eleventh Amendment as a defense to claims raised against him in his individual capacity. Hobbs v. Roberts, 999 F.2d 1526, 1528 (11th Cir. 1993) (citing, Hafer v. Melo, 502 U.S. 21, 25 (1991)).

4. Affirmative Defense - - Eleventh Amendment immunity may be waived. It is an affirmative defense that is waived when a state appears and defends without raising the immunity as a defense. Atascadero State Hospital v. Scanlon, 475 U.S. 234 (1985). It also may

be waived in other ways. See Garrett v. University of Alabama at Birmingham Bd. of Trustees, 2003 WL 22097772 (11th Cir., Sept. 11, 2003).

E. Congress Has Abrogated State Sovereign Immunity In Some Instances - - The United States Supreme Court has held that state sovereign immunity has been abrogated by Title VII and FMLA. See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)(holding that Congress validly abrogated state sovereign immunity by extending application of Title VII to the States); Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721 (2003)(holding that Congress validly abrogated state sovereign immunity by extending application of FMLA to the States).The Court has held, however, that the ADEA and the ADA do not validly abrogate state sovereign immunity. Kimel v. Florida Board of Regents, 528 U.S. 62, 73 (2000)(holding that the ADEA does not validly abrogate state sovereign immunity). Board of Trustees v. Garrett, 531 U.S. 356, 365 (2001)(holding that Congress did not validly abrogate state sovereign immunity when it extended the ADA to the states).

F. Aliens and Section 1983 - - Section 1983 affords aliens within the United States access to federal courts to assert claims for violations of the due process and equal protection clauses of the United States Constitution. See Humphries v. Various Federal USINS Employees, 164 F.3d 936, 948 (5th Cir. 1999), citing to, Bolanos v. Kiley, 509 F.2d 1023 (2d Cir. 1975). Note, however, section 1983 applies only to United States citizens or aliens within United States jurisdiction. See Martinez v. City of Los Angeles, 141 F.3d 1373, 1382 (9th Cir. 1998)(holding that a Mexican man arrested in Mexico by American authorities cannot bring a claim under section 1983).

III. INDIVIDUAL LIABILITY--PERSONAL/OFFICIAL CAPACITY LIABILITY IN § 1983 CASES

A. Personal Capacity Suits under § 1983:

seek to impose personal liability upon a government official for actions he or she has taken under color of state law;

seek to impose liability where the official caused deprivation of a federal right;

are subject to a qualified immunity defense;

allow for damages against the official's personal assets, including punitive damages;

do not allow for an award of fees against the government entity.

B. Official Capacity Suits under § 1983:

are, in essence, suits against the governmental entity that the officer represents, Kentucky v. Graham, 473 U.S. 159, 166 (1985);

require that the entity's "policy or custom" "caused" the violation of federal law;

are not subject to the personal immunity defenses but are subject to Eleventh Amendment defenses;

allow for damages against the governmental entity, but do not ordinarily allow for recovery of punitive damages;

are no longer necessary regarding certain local government entities because under Monell and its progeny such governmental entities can be sued directly for damages and injunctive and declaratory relief.

IV. § 1983 INDIVIDUAL QUALIFIED IMMUNITY

The doctrine of qualified immunity shields government officials "for liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Although § 1983 on its face contains no provisions on its face for any immunities, the doctrine of qualified immunity has evolved by court decisions to "protect the public from unwarranted timidity on the part of public officials by . . . contributing to principled and fearless decision-making"; "to ensure that talented candidates are not deterred by threat of damages suits from entering public service"; and to avoid distracting public employees from their duties). Richardson v. McKnight, 521 U.S. 399 (1997).

A. § 1983 Clearly Established Law Test

1. Qualified "Good Faith" Immunity in § 1983 Cases - - In Harlow, a suit for damages under § 1983 for an alleged unlawful discharge from employment, the U.S. Supreme Court held:

a. an employee of a state of local governmental entity sued in an individual capacity carrying out his or her duties enjoys a qualified or "good faith" immunity under certain circumstances.

b. this qualified or "good faith" immunity is an affirmative defense that must be pled,

c. **subjective** good faith test is incompatible with preventing insubstantial claims from proceeding to trial,

d. "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known,"

e. if the law was not clearly established, the official could not "know" that law forbade such conduct,

f. the court may determine this issue on summary judgment and preclude further discovery until this threshold question is resolved,

g. reliance on the objective test to determine the reasonableness of the official's conduct, as measured by reference to clearly established law, should permit the resolution of insubstantial claims on summary judgment,

h. extraordinary circumstances may exist where an official can prove that he or she neither knew nor should have known the established legal standard and the defense can still be sustained but objective factors will control.

2. § 1983 Official Must Be Acting within Discretionary Authority - -To be eligible for qualified immunity, a defendant must first demonstrate that he was a public official acting within the scope of his discretionary authority. Rich v. Dollar, 841 F.2d 1558, 1563-64 (11th Cir. 1988).

a. What Constitutes Discretionary Authority - -The Supreme Court said in Harlow that an action is discretionary rather than "ministerial" when the action at issue was "influenced by the decisionmaker's experiences, values, and emotions." Harlow, 457 U.S. at 816. Ministerial actions are those acts that do not require the exercise of independent thought or deliberation by the person taking the action. Kitchen v. CSX Transp., Inc., 6 F.3d 727, 732 (11th Cir. 1993). The Eleventh Circuit Court of Appeals has gone further by providing a concrete standard for determining whether an action is discretionary for purposes of applying the doctrine of qualified immunity. Qualified immunity is available to a government official — even if his actions appear to be ministerial in nature — so long as the official's actions "'(1) were undertaken pursuant to the performance of his duties,' and (2) were within the scope of his authority.'" Jordan v. Doe, 38 F.3d 1559, 1566 (11th Cir. 1994). If the conduct at issue falls within this definition, then it is established that the official was acting within the scope of his discretionary authority. See McCoy v. Webster, 47 F.3d 404, 407 (11th Cir. 1995).

3. Reasonable Belief Prevents Personal Liability under § 1983 - - An FBI agent who conducted a forcible, warrantless search of a home in the mistaken belief that a bank robbery suspect might be found there was sued by homeowners asserting damages under the Fourth Amendment. The Court held:

a. that an officer will not be personally liable for money damages if it is found that a reasonable officer could have believed the action was lawful under the Constitution in light of clearly established law and the information possessed by the officer;

b. if the actions alleged by the plaintiff are found to be those that a reasonable officer could have believed lawful, the officer would be entitled to dismissal prior to discovery;

c. but if they were found not to be so, and if the actions that the officer claimed to have taken are different from those alleged by the plaintiff and could have been believed lawful by a reasonable officer, then discovery might be necessary before the

officer's motion for summary judgment on qualified immunity grounds could be resolved. Anderson v. Creighton, 483 U.S. 635 (1987).

4. Reasonable Belief under § 1983 Is an Objective Test - - Under Harlow and Anderson, the relevant question is the objective one of whether the officials could have believed their actions to be lawful in light of clearly established law and the information they possessed. Childress v. SBA, 825 F.2d 1550 (11th Cir. 1987).

Comment - - In an interesting case that frankly troubles the editors of this Chapter and Chapter VI, *infra*, the Oklahoma Supreme Court held that three Edmond Oklahoma police officers had a property interest in their rank because their bargaining agreement provided that they could be demoted only "for cause." Clearly, in the abstract this created a protected property interest in their rank.

However, the list from which they had been promoted was challenged by an unsuccessful candidate and was invalidated because of a defective oral component by an arbitrator whose decision and award was issued after the list had expired.

To comply with the arbitrator's award, the police chief summarily demoted the three officers and later denied their grievance. They sued under § 1983 both the City and the Chief individually. Denying the chief's defense of qualified immunity in his motion for summary judgment the Court first concluded that the promotion list could not be invalidated because it had expired.

If the test's oral component was defective as to all candidates rather than the single unsuccessful candidate who challenged the list, was it not valid from its inception and thereafter defective in creating the three promotions of the three officers in the first place. Therefore, did they have a protected property interest in their rank?

Second, did they have a clearly established constitutional right to their rank under an objective test for a reasonable person when their achieved rank was obtained from a list found defective by an arbitrator?

The test is not what the chief might have done to enforce the award, but whether given his predicament, did he violate their clearly established constitutional rights under these circumstances. See Barnthouse, et al. v. City of Edmond, et al., 73 P.3d 840 (Okla. 2003).

5. § 1983 Qualified Immunity Is Shifting Burden - - In Rich v. Dollar, 841 F.2d 1558 (11th Cir. 1988), the court reviewed the application of the "clearly established law" test of Harlow on summary judgment and held:

a. The defendant public official must first prove that "he was acting within the scope of his discretionary authority when the alleged wrongful acts occurred." **Observation: It is important here to note that the initial focus should on the type of conduct or action taken that is under challenge (the context) rather than on whether the**

official acted within the guidelines applicable to that action or conduct. By focusing on the departure from guideline parameters, courts sometimes misplace the evidentiary burden on the official rather than on the plaintiff. See e.g. Taylor v. Florida State Fair Authority, 919 F.Supp. 410 (M.D. Fla. 1996); Compare, Hudgins v. City of Ashburn, 890 F.2d 396, 404-407 (11th Cir. 1989).

b. Once the defendant public official satisfies his burden of moving forward with the evidence, the burden shifts to the plaintiff to show lack of good faith on the defendant's part. This burden is met by proof demonstrating that the defendant public official's actions "violated clearly established constitutional law." Rich v. Dollar, 841 F.2d at 1563-64.

B. § 1983 Qualified Immunity Is a Case-by-Case Determination - - In Noyola v. Texas Dept. of Human Resources, 846 F.2d 1021 (5th Cir. 1988), the court dealt with the application of the qualified immunity test to a claim by an employee that he was terminated for making an internal grievance, which allegedly violated his First Amendment rights. The court, like the court in Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986), noted that determining whether a public employee has been discharged in violation of his Constitutional rights requires a case-by-case inquiry. The court held:

> One consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's First Amendment rights. There will rarely be a basis for a priori judgment that the termination or discipline of a public employee violated "clearly established" constitutional rights. 846 F.2d at 1025 (emphasis added).

This holding was specifically adopted by the Eleventh Circuit in Dartland v. Metropolitan Dade County, 866 F.2d 1321 (11th Cir. 1989).

C. § 1983 Qualified Immunity Controlled by Federal Law - - Qualified immunity is not forfeited by violation of a state personnel regulation; there must be violation of a clearly established constitutional right. Davis v. Scherer, 468 U.S. 183 (1984).

D. § 1983 Qualified Immunity - - First Amendment Examples

1. § 1983 Qualified Immunity and Complaint of Sexual Harassment - - In Azzaro v. Allegheny County, 110 F.3d 968 (3d Cir. 1997), the County's layoff of employee, allegedly due to budgetary constraints, could have been for retaliation for a confidential report to the employee's supervisor that the employee was sexually harassed. The court found that the sexual harassment complaint was speech protected by the First Amendment and that the layoff could have been a pretext for retaliation in violation of Title VII. The court also reversed the grant of summary judgment based on qualified immunity in favor of a county commissioner and an official.

2. §1983 Qualified Immunity and Complaint of Widespread Discrimination - - In Rice-Lamar v. City of Ft. Lauderdale, 54 F.Supp.2d 1137 (S.D. Fla. 1998), the City was sued

under §1983 for allegedly terminating an affirmative action specialist for her refusal to remove her opinions from an Affirmative Action Report about systematic, widespread racial and gender discrimination. The court held that the city managers that terminated plaintiff were entitled to qualified immunity where the city managers had good faith belief that it was disciplining the employee for insubordination and where the employee's supervisor disagreed that widespread discrimination existed.

3. § 1983 Qualified Immunity and Petition - - In Jannetta v. Cole, 493 F.2d 1334 (4th Cir. 1974). City manager's dismissal of fireman for circulating critical petition was an unconstitutional infringement on employee's First and Fourteenth Amendment rights and no immunity was applicable given the violation of a well-established and known right.

4. § 1983 Qualified Immunity and Statements regarding Need for More Employees - - In Berdin v. Duggan, 701 F.2d 909 (11th Cir. 1983), a City maintenance worker discharged by mayor for remarks expressing a need for more workers violated employee's First Amendment right and the mayor was not protected by qualified immunity.

5. § 1983 Qualified Immunity and Criticism of Members of School Board - - In Anderson v. Central Point School Dist., 746 F.2d 505 (9th Cir. 1984), a school superintendent and school board members' suspension of teacher/coach for comments in letter to school board members held to violate First Amendment rights and they were not entitled to good faith immunity. The letter directly to school board on matter of public concern was "clearly established right." $10,000 in damages awarded for emotional distress and injury to reputation although suspension was rescinded by superintendent.

6. § 1983 Qualified Immunity and Violation of Chain of Command - - In Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984), a police department radio operator-dispatcher's discharge for violating department's chain of command policy requiring officer misconduct be reported first to police chief and then to mayor constituted a First Amendment violation. However, qualified immunity applied where they acted in reasonable good faith belief that they could legally discharge employee for disregard of chain of command.

In First Amendment matters, the Eleventh Circuit has stressed that, because the law involving protected free speech is a balancing test under Pickering v. Board of Ed., 391 U.S. 563 (1968) rather than a bright line test, qualified immunity protects the public official in all but "the extraordinary case". Williams v. Alabama State Univ., 102 F.3d 1179, 1183 (11th Cir. 1997). See also, Section II.B., above.

E. § 1983 Qualified Immunity - - Procedural Due Process Examples

1. § 1983 Qualified Immunity and Discharge without Post-Termination Hearing - - In Barnett v. Housing Auth., 707 F.2d 1571 (11th Cir. 1983), overruled on other grounds by McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), a division director of City Housing Agency dismissed by the agency was held to have been deprived of procedural due process for discharge without cause and without a post-termination hearing. The decision-maker was not

entitled to qualified immunity because the personnel policy required "cause" for discharge which clearly established a property interest.

2. §1983 Qualified Immunity and Discharge Without Pre-Termination Hearing -- In Peery v. Brakke, 826 F.2d 740 (8th Cir. 1987), a tenured director of pesticide section was called into supervisor's office at 3:45 p.m. and told to resign by 5:00 p.m. or be fired. When the employee refused to resign he was terminated. The Court of Appeals for the Eighth Circuit affirmed the district court's retroactive application of Loudermill and held that the employee's procedural due process was violated since he was discharged without a pre-termination hearing and had no meaningful opportunity to challenge the employer's assertion of cause for termination. Qualified immunity was not available to the city administrator, also sued individually, on the ground that the pre-termination due process standard later set out in Loudermill was already "clearly established." The court awarded $16,000 in damages.

3. § 1983 Qualified Immunity and No Disclosure of Reasons - - In Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984), members of a county board of election commissioners were entitled to qualified immunity after terminating director of elections who was not deprived of any constitutionally protected property or liberty interest since there was no public disclosure of the reasons for the discharge and the personnel policies manual did not clearly establish that she, as the director, was protected by its contents.

Observation: This holding may now be somewhat limited in Florida as citable authority because of the Eleventh Circuit Court of Appeals' decision in Buxton v. City of Plant City, 871 F.2d 1037 (11thCir. 1989) and there was no discussion of what went into her employment record by the court in Tubbesing.

Observation: In view of the Eleventh Circuit's en banc decision in McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1995) and its subsequent decision in Cotton v. Jackson, 216 F.3d 1328 (11th Cir. 2000) (see infra extending McKinney's rationale to a professed liability inference there is no federal process claim in federal courts for the deprivation of either a property or liberty interest because Florida state procedures are adequate to remedy the alleged deprivations. Qualified immunity now shields governmental officials from such process claims under § 1983 because they are no longer clearly established constitutional rights in those states, including Florida falling within the Eleventh Circuit. This does not preclude an allegedly injured employee from pursuing a constitutional process claim against a governmental official in a Florida state court.

F. § 1983 Qualified Immunity and Discrimination Examples - - Purposeful discrimination based on sex has been held to violate equal protection law.

1. § 1983 Qualified Immunity and Sexual Discrimination

a. Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984) - - Female employees sued the municipal lighting commission and several elected commissioners for sex discrimination. The Court held that since the district court instructed the jury that the commissioners, in order to be liable for sex discrimination, must have engaged in purposeful

discrimination, a separate instruction on qualified immunity was unnecessary. The law was "clear" that intentional sex discrimination was unlawful.

b. Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir. 1984) - - A Judge was sued for sex discrimination after transferring female lawyer from hearing officer to county legal department. The court held the defense of good faith or qualified immunity was not available in a sex discrimination action where there was sufficient evidence to support jury's finding of intentional discrimination. The right to be free from sex discrimination is "clearly established."

c. Knussman v. Maryland State Police, 16 F. Supp. 2d 601 (M.D. 1998). A Maryland jury awarded $375,000 for reverse sex discrimination in connection with a state trooper's denial of parental leave under the Family and Medical Leave Act. The American Civil Liberties Union brought the case and successfully argued that the trooper's female supervisor's denial of medical leave to care for his newborn violated the Equal Protection Clause of the United States Constitution. The court held that the supervisor was entitled to qualified immunity with regard to employee's FMLA claim for money damages but not entitled to qualified immunity with regard to equal protection claim.

G. § 1983 Qualified Immunity and Defense of Advice of Counsel

1. §1983 Qualified Immunity and Erroneous Advice of Independent Contractor Status - - In Wentz v. Klecker, 721 F.2d 244 (8th Cir. 1983), qualified immunity was available to the director of the state advocacy program for the mentally retarded because he was a state official and his actions were held to be within the scope of his duties. The director fired plaintiff, a resident advocate, without a hearing in reliance that plaintiff was an independent contractor not entitled to any hearing. Court noted that while such reliance was not always dispositive, the unique employment situation was such that defendant's soliciting legal advice from attorney was good faith action. *Note*: See Discipline and Discharge Chapter. Independent Contractor may be entitled to due process as result of the Supreme Court's decision in Board of County Comm'rs of Wabaunsee County v. Umbehr.

2. §1983 Qualified Immunity and Erroneous Advice that Formal Hearing Not Required - - In Okeson v. Tolley School Dist, 766 F.2d 378 (8th Cir. 1985), qualified immunity was available to individual school board members because their actions were held to be within the scope of their duties. The board members had been advised that no formal hearing was required before a former employee could be discharged. The court held that the individual board members relied on the attorney's advice in good faith.

H. § 1983 Qualified Immunity Not Applicable to Private Employees Doing Governmental Functions

1. Private Prison Guards - - In 1997, the U.S. Supreme Court determined that prison guards employed by a private firm are not entitled to a qualified immunity from suit by prisoners alleging a violation of § 1983. The Court found that there was no history of a firmly rooted tradition applicable to privately employed prison guards. Furthermore, the immunity

doctrine's purposes did not warrant immunity for private prison guards. Ordinary marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or non-arduous employee job performance. The Court also found that the comprehensive insurance coverage requirements increased the likelihood of employee indemnification and thus reduced the fear of unwarranted liability which might otherwise cause applicants to seek employment elsewhere. The Court conceded that lawsuits may well distract these employees from their duties which factor would tend to support qualified immunity. However, the Court determined that the risk of distraction alone cannot be sufficient grounds for an immunity. Richardson v. McKnight, 521 U.S. 399 (1997).

2. § 1983 Liability for Private Employers Is An Open Question - - Interestingly, the Court did not decide whether the defendants were liable under § 1983 even though they were employed by a private firm. The Court thus left open the possibility that privately employed guards could be liable under § 1983 as acting "under color of state law" and yet not receive the qualified immunity available to governmental employees. The Court's decision specifically did not address the issue of a private individual who is briefly associated with a government body or acting under close official supervision. Finally, the Court specifically left open the question of an affirmative defense based on good faith and/or probable cause and that §1983 suits against private, rather than governmental, parties might require plaintiffs to carry additional burdens. Richardson v. McKnight, 521 U.S. 399 (1997); see also Wyatt v. Cole, 504 U.S. 158, 169 (1992); Sherlock v. Montifiore Med. Ctr., 84 F.3d 522, 527 (2d Cir. 1996).

I. § 1983 Qualified Immunity Denial Is Immediately Appealable - - The denial of qualified immunity is immediately appealable. Qualified immunity is an entitlement not to stand trial which would be effectively lost if the action were permitted to go to trial prior to review. Mitchell v. Forsyth, 472 U.S. 511 (1985). The "most common error we encounter in qualified immunity cases involves the point that courts must not permit plaintiffs to discharge their burden by referring to general rules and to the violation of abstract rights . . . [G]eneral propositions have little to do with the concept of qualified immunity" . . ." Hamilton v. Cannon, 80 F.3d 1525, 1531-32 (11th Cir. 1996).

In Johnson v. Jones, 515 U.S. 304 (1995), the Court held that a denial of a summary judgment motion asserting qualified immunity was not immediately appealable when the trial court's decision was based on a disputed issue of fact. The Supreme Court has clarified this point:

> Every denial of summary judgment ultimately rests upon a determination that there are controverted issue of material fact . . . and Johnson surely does not mean that every denial of summary judgment is non-appealable. . . .

Behrens v. Pelletier, 516 U.S. 299 (1996). Accord, Vista Community Servs., 107 F.3d 840 (11th Cir. 1997) (holding that when defendants "make both evidence sufficiency arguments and arguments aimed at the 'clearly established law' inquiry . . . [there is] jurisdiction to hear th[e] appeal").

In McMillian v. Johnson, 88 F.3d 1554 (1lth Cir. 1996) the Eleventh Circuit may have expanded the Supreme Court's holding in Behrens. 88 F.3d at 1563 (holding that "so long as the core qualified immunity issue is raised on appeal . . . the appellate court has jurisdiction to hear the case, including challenges to the district court's determination that genuine issues of fact exist as to what conduct the defendant engaged in") (citing Johnson v. Clifton, 74 F.3d 1087 (11th Cir. 1996), cert. denied, 117 S.Ct. 51 (1996); other citations omitted); See also, Cottrell v. Caldwell, 85 F.3d 1480, 1485 (11th Cir. 1996).

Behrens also held that a defendant may take multiple interlocutory appeals from denials of dispositive motions asserting qualified immunity (unsuccessful appeal of denial of motion to dismiss asserting qualified immunity does not preclude interlocutory appeal of denial of summary judgment motion asserting qualified immunity).

In addition to the opportunity to file multiple interlocutory appeals, a defendant may also appeal a denial of the qualified immunity defense after trial. Cottrell, 85 F.3d 1480.

Qualified immunity protects public officials from both liability and the burdens of responding to a lawsuit, including the burdens of discovery. In order to ensure that officials are afforded the full benefit of this protection, where a qualified immunity defense is raised discovery should be stayed (or appropriately limited) until the immunity issue is resolved. Elkins v. Gallagher, No. 96-464-CIV-T-23A, slip op. at 1-2 (M.D. Fla. Aug. 7, 1996) (citing Harlow, 457 U.S. 800; Mitchell, 472 U.S. at 526); see also Anderson v. Creighton, 483 U.S. at 645 n.6.

Because a public official protected by qualified immunity has a right to be free from the burdens discovery, two federal courts of appeal have held that "in qualified immunity cases . . . immediate appeal is available for discovery orders which are either avoidable or overbroad." Gaines v. Davis, 928 F.2d 705, 707 (5th Cir. 1991), reh'g denied, 1991 U.S. App. LEXIS 10416 (5th Cir. May 15, 1991); Lewis v. City of Ft. Collins, 903 F.2d 752, 754 (10th Cir. 1990) (appellate court has jurisdiction "when a defendant asserting qualified immunity is faced with discovery that exceed[s] that narrowly tailored to the question of qualified immunity").

J. Qualified Immunity Is Not Available To Local Governments

In Owen v. City of Independence, 445 U.S. 622 (1980) the Supreme Court held that a municipality is not entitled to qualified immunity despite the fact that its police chief and its elected officials all acted in good faith and enjoyed that immunity.

V. § 1983 GOVERNMENTAL LIABILITY

A. §1983 Liability Cannot Be Predicated on a Theory of Respondeat Superior - - Before a public entity can be liable under Section 1983, a plaintiff must either prove: (1) that an official policy of the entity caused the alleged deprivation of a Constitutional right; or (2) that a custom or practice of such Constitutional deprivations is so entrenched in the entity so as to have literally become the "force of law." Monell v. Department of Social Services, 436 U.S. 658, 690-691 (1978); City of St. Louis v. Praprotnic, 485 U.S. 112, 127 (1988); Sewell v. Town of

Lake Hamilton, 117 F.3d 488, 489 (11th Cir. 1997); Brown v. City of Ft. Lauderdale, 923 F.2d 1474, 1481 (11th Cir. 1991). It is axiomatic, in Section 1983 actions that liability must be based upon something more than a theory of respondeat superior. Instead of imposing vicarious liability on a local government, since authoring Monell, the Supreme Court has, over the last 24 years, uniformly mandated that the local government itself must be **clearly at fault** in causing the constitutional deprivation before liability attaches under Section 1983.

For example in Monell, the New York City Board of Education had, as a matter of official policy, compelled pregnant female employees to take unpaid leaves of absence before medically necessary, a policy found to be a Constitutional deprivation in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). Any single act implementing that policy **compelled** a constitutional deprivation. Likewise, in Owen v. City of Independence Missouri, 445 U.S. 622 (1980), the City Council authorized the termination of its Chief of Police without affording him a name clearing hearing, thereby **compelling** a Constitutional deprivation of his liberty interest, as established by Roth v. Board of Regents, 408 U.S. 564 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972).

In City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), the Newport City Council cancelled a contract and prohibited a band group, Blood, Sweat and Tears, from performing at its Jazz Festival in direct violation of the First and Fourteenth Constitutional Amendments. And, in Pembauer v. City of Cincinnati, 475 U.S. 469 (1986), the County Prosecutor authorized the forced entry into Pembaur's premises in violation of the Fourth and Fourteenth Amendments. Again, a Constitutional deprivation **was compelled** by this single act and this single act alone. On the other hand, a single incident of unconstitutional excessive force by a police officer even when coupled with direct evidence of inadequate training, is legally insufficient to meet the policy or custom requirement for finding local government liability under Monell. City of Oklahoma City v. Tuttle, 471 U.S. 808, 824 (1985). In City of Canton, Ohio v. Harris, 489 U.S. 378 (1989), the Supreme Court resolved the degree of fault issue that had divided the lower courts. Adopting the deliberate indifference standard in failure to train cases, the Supreme Court cautioned that any lesser standard would expose municipalities to unprecedented liability because in virtually every instance something could have been done to prevent the Constitutional deprivation. City of Canton, 489 U.S. at 391-392.

B. § 1983 Liability Requires That Municipal Policy or Custom Must Have Directly Caused Injury - - In Board of County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997), the Supreme Court focused on causation and held that deliberate indifference by a conceded policymaker in making a hiring decision requires that the Constitutional deprivation be a **plainly obvious consequence** of that hiring decision. Justice O'Connor stressed that "[i]n the broadest sense, every injury is traceable to a hiring decision. **Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability. As we recognized in Monell and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights**. A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose." (emphasis added). Id. at 415.

C. The Determination of the Final Policy Maker or the Requisite Custom or Practice is a Question for the Court Before the Case is Submitted to a Jury - - In 1989, the Supreme Court finally resolved the issue as to whether the identification of those officials whose decisions represent the official policy of a local government is a matter of law for the court to decide or question left for the jury. Jett v. Dallas Independent School District, 491 U.S. 701, 736 (1989):

> in [r]eviewing the relevant legal materials, including state and local positive law, as well as 'custom or usage' having the force of law…the trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur…or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity.

(emphasis in original). Jett, 491 U.S. at 701.

D. The Determination of Who is a Section 1983 Policymaker is a Question of State Law - - Jett, 491 U.S. at 736-737.

E. Establishment of § 1983 Municipal Policy or Custom

1. A § 1983 Formal Policy- - one officially promulgated or adopted by the public employer defendant, Monell, 436 U.S. at 690, or

2. A § 1983 Official Responsible for Establishing Final Policy - - If that action or decision caused the violation of plaintiff's constitutional rights and the official had responsibility for establishing final government policy respecting such activity. Pembaur v. City of Cincinnati, 475 U.S. 469, 481-84 (1986) (plurality opinion) (see Comment below), or

3. A § 1983 Custom or Usage - - The existence of an unlawful practice by subordinate officials so permanent and well settled as to constitute a "custom or usage" and proof that this practice was so manifest or widespread as to imply the constructive acquiescence of the policy-making officials, City of St. Louis v. Praprotnik, 485 U.S. 112, 127, 130 (1988) (plurality opinion) (see Comment below), or

4. A § 1983 Deliberate Indifference - - The failure of a city to train or supervise its employees in a fashion designed to prevent the violation of plaintiff's rights, if such failure amounts to "deliberate indifference" to the rights of those with whom the municipal employees will come into contact. Gottlieb v. County of Orange, 84 F.3d 511, 518 (2d Cir. 1996).

5. Sexual Harassment As a Custom - - In Bohen v. City of Chicago, 799 F.2d 1180 (7th Cir. 1986), a dispatcher subjected to sexual harassment by head dispatcher and others stated a claim under the equal protection clause of the Fourteenth Amendment because sexual harassment is policy or custom and may be proved by a well-settled practice. Where the harassment was engaged in by supervisory personnel, management officials responsible for working conditions knew of the general picture if not the detail, complaints by victims of sexual harassment were addressed superficially and the department had no policy against sexual harassment, the government was liable.

F. When Is an Official a Policymaker - - "Municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered." Pembaur at 481-83 (plurality opinion)*. A policy is established where a "deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Pembaur, 475 U.S. at 483. This is not to say that any official with discretionary authority is necessarily a final decision maker. "The fact that a particular official — even a policymaking official — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." Pembaur, 475 U.S. at 482.

1. § 1983 Liability for Total Discretion and Lack of Review - - An official with authority to make decisions in a particular area can be considered a policymaker where there is an absence of either substantive constraints on or of meaningful review of the official's choices. In one case, the charter authorized mayor and aldermen to make personnel policy. The mayor and aldermen did not enact ordinance permitting retaliation and lower supervisors decisions were not reviewed for substantive propriety. The failure to investigate subordinates decision does not equate to policy-making delegation. The Court held that

> when an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policy-makers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final. Praprotnik, 485 U.S. 112, at 127.

2. Subject Matter of Act Determines Policymaker for § 1983 - - It must be emphasized that whether an official is a policymaker must be determined with respect to the particular subject matter at issue. Thus, a county sheriff may be a policymaker over law enforcement matters without necessarily having policymaking authority over employment matters. Pembaur, 475 U.S. at 469.

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this

> were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. **This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board**. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

(emphasis added). Pembauer, 475 U.S. at 484.

Comment: While Pembauer and Praprotnik were plurality opinions, it is submitted that Pembauer and Praprotnik, linked together, provide the necessary parameters for making the final policymaker determination. The Praprotnik plurality instructed that only municipal officials who have final policymaking authority may subject the local government to § 1983 liability. Second, the policy making official must have final policymaking authority in that area of the city's business. Praprotnik, 485 U.S. at 123-124. Justice Brennon who authored Pembauer, and a dissent in Praprotnik, supported by Justices Marshall and Blackmun, did not contest these principles. He concluded that the department head who had complete discretionary authority to make the alleged unlawful transfer contested by Praprotnik did not establish the city's final employment policy in that respect. Justice Brennan's analysis is as follows:

> The Charter, however, nowhere confers upon agency heads any authority to establish city policy, final or otherwise, with respect to such transfers. Thus, for example, Hamsher was not authorized to promulgate binding guidelines or criteria governing how or when lateral transfers were to be accomplished. Nor does the record reveal that he in fact sought to exercise any such authority in these matters. There is no indication, for example, that Hamsher ever purported to institute or announce a practice of general applicability concerning transfers. Instead, the evidence discloses but one transfer decision – the one involving respondent – which Hamsher ostensibly undertook pursuant to a citywide program of fiscal restraint and budgetary reductions. At most, then, the record demonstrates that Hamsher had the authority to determine how best to effectuate a policy announced by his superiors, rather than the power to establish that policy. Like the hypothetical Sheriff in Pembaur n. 12, Hamsher had discretionary authority to transfer DCA employee laterally; that he may have used this authority to punish respondent for the exercise of his First Amendment rights does not, without more, render the city liable for respondent's resulting constitutional injury.

Praprotnik , 485 U.S. at 140-141. Justice Brennan differed from the plurality in several respects other than those stressed above. First, he felt that it was unnecessary to decide who the actual policymakers were. He felt that it was sufficient to decide that the official transferring Praprotnik was simply not a final policymaker. Praprotnik, 485 U.S. at 142. Second, he would not limit the final policymaker determination to State law. Praprotnik, 485 U.S. at 142-143. Third, he believed that the final policymaker determination was one of fact for a jury and not one of law for a court to make. Praprotnik, 485 U.S. at 143-144. These latter two issues were later resolved by the Supreme Court contrary to Justice Brennan's stance. See Sections C and D above.

Observation: Too often, confusion clouds the distinction between final decisionmaker and final policymaker. The determination of final policymaker can only be made after a careful and global analysis of a governmental entity's charter, its personnel rules and regulations, and its decisional history among other factors. If a final decisionmaker is constrained in any way by policies not made by the decisionmaker, then departures from standing policy are not acts of the governmental entity but simply those of the decisionmaker and the governmental entity may have a defensible position regarding its liability. A review procedure for the decisionmaker's action may well insulate the public entity from liability for those actions. See, e.g., Scala v. Winter Park, 116 F.3d 1396 (11th Cir. 1997). However, the absence of a review procedure does not necessarily make those decisions the final policies of the entity.

G. § 1983 Liability for Failure to Train - - An arrested female slumped to floor at station and no medical attention was summoned. The woman was released and then hospitalized, and the shift commander had discretion to require medical care but only had first aid training. The woman subsequently sued city and city officials under § 1983 for a due process violation. The Court held "where a municipality's failure to train its employees evidences a "deliberate indifference' to the rights of its inhabitants [such that the failure to train] can be properly thought of as a city "policy or custom' that is actionable under § 1983." City of Canton v. Harris, 489 U.S. 378, 389 (1989). However, the fact that a particular officer is not satisfactorily trained is insufficient to establish liability.

1. § 1983 Deliberate Indifference Standard - - In order to establish "deliberate indifference," the alleged failure to train must reflect a "'deliberate' or 'conscious' choice by a municipality." City of Canton, 489 U.S. at 389. The City of Canton Court identified two situations which would justify a finding of liability under the failure to train theory: (1) failure by a city to act in response to repeated complaints of constitutional violations by its officers; or (2) failure to provide adequate training in light of foreseeable serious consequences that could result from the lack of instruction. Examples include:

a. Floyd v. Waiters, 133 F.3d 786, 796 (11th Cir. 1998), vacated on other grounds, 525 U.S. 802 (1998) - - The court found that a school district was not liable for its failure to train and supervise a school guard who sexually harassed students, since the guard's conduct was clearly against basic norms of human conduct, and the district was entitled to rely on common sense of its employees to avoid such conduct.

b. Andrews v. Fowler, 98 F.3d 1069, 1077 (8th Cir. 1996) - - The court found the city's failure to train its police officers not to rape young women was not constitutionally deficient since there was not a "patently obvious" need for the city to conduct such a training since rape was contrary to the duties of law enforcement.

c. Gonzalez v. Ysleta Indep. School Dist., 996 F.2d 745, 760-62 (5th Cir. 1993) (finding the evidence insufficient to establish deliberate indifference where a school district failed to terminate a teacher with a history of abusing students sexually).

H. Inadequate Hiring Policies under § 1983 - - A Chief jailer, who had a history of mental problems and a conviction for indecent exposure, raped a prisoner. The court held that a single incident of negligence or misconduct without more does not constitute official policy but may be indicative of policy or practice. The focus was on inadequacy of employment policy because the sheriff had called National Crime Information Center about jailer's prior record and when they did not call back, he assumed there was nothing. A thorough background check was not customary. The decision to hire the jailer was a reflection of a broader policy of hiring without an adequate background check and resulted in government liability. Parker v. Williams, 862 F.2d 1471 (11th Cir. 1988). The Eleventh Circuit subsequently overruled Parker in Turquitt v. Jefferson County, 137 F.3d 1285 (11th Cir. 1998).

I. Safe Workplace Considerations under § 1983 - - The due process clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace. City's alleged failure to train its employees or to warn them about dangers of working in sewer lines was not an omission that could be characterized as arbitrary or conscience-shocking in the constitutional sense. Training of employees involves policy choices and the due process clause is not a guarantee against incorrect or ill advised decisions. Collins v. City of Harker Heights, 489 U.S. 378 (1992).

J. Single Incident Insufficient for § 1983 Liability - - The court determined that a jury cannot infer from a single incident that causes injury that the related "policy" was the cause of the accident. In Tuttle, the widow of a man shot by police alleged that an unusually excessive use of force was attributable to an inadequate "policy" of training or supervision, which amounted to a deliberate indifference or gross negligence on the part of the city officials in charge. In Tuttle, the Supreme Court said that in order to prove a "policy" of inadequate training, the injured party must prove "that the inadequacies resulted from conscious choice - - that is, proof that the policy makers deliberately chose a training program which would prove inadequate," and that there is an affirmative link between this policy and the alleged constitutional violation. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985).

K. § 1983 Liability "Rare" for Isolated Hiring Decision -- The Court held that a county is not liable for a sheriff's isolated decision to hire deputy who allegedly used excessive force on plaintiff without adequately screening him at hire. The Bryan County Court declined to announce a bright-line rule that municipal officials can never be liable under § 1983 for an isolated hiring decision that neither constitutes nor directs a violation of federal law. But the Court warned that liability in such cases will necessarily be rare: "Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly

obvious consequences of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'" Board of County Comm'rs of Bryan County, Okl. v. Brown, 570 U.S. 397 (1997).

VI. OTHER DEFENSES TO § 1983 LIABILITY

A. § 1983 Judicial Absolute Immunity

1. § 1983 Judicial Immunity Includes Some Personnel Decisions - - The termination of court psychologist was challenged on due process grounds and the trial court held that "when a judge makes important staffing decisions about at-will employees who render advice and counsel to him, he makes such decisions and takes such actions with his robe on and such are actions normally taken by a judge." Thus, personnel matters are not outside the sphere of judicial functions especially where related to matters within the jurisdiction of the court and judicial immunity applies. Further, as to the lack of a "name-clearing" hearing, "judges are sometimes wrong about the law, but they have a right to be wrong without being subjected to civil liability." McQueen v. Judge Page, Judge Patterson and Pinellas County Bd. of County Comm'rs, Case No. 84-619-Civ-T-15 (M.D. Fla. 1985), aff'd, 796 F.2d 1477 (11th Cir. 1986).

2. § 1983 Judicial Immunity Excludes Administrative Acts - - (Functional approach endorsed — in determining immunity courts must look to the nature of the functions with which a particular official or class of officials has lawfully been entrusted and the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions; judicial acts distinguished from administrative acts); Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir. 1984) (The decision of whom to retain as a hearing officer is an administrative personnel decision and not an official judicial act cloaked with judicial immunity). Forrester v. White, 484 U.S. 219 (1988).

B. § 1983 Legislative Absolute Immunity

1. § 1983 Immunity Includes Some Employment Decisions - - The rejection for position of state legislative press officer was covered by doctrine of legislative immunity. While not all employment raises a legislative interest, decisions regarding employees dealing with deliberative and communicative processes are subject to immunity. Agromayor v. Colberg, 738 F.2d 55 (1st Cir. 1984).

2. § 1983 Immunity and Employment Decisions Connected with Legislature - - Immunity applies to employment decisions as to a state legislative budget analyst who has input in preparing documents upon which legislators relied. The job was "connected closely enough" with legislative process due to input in documents upon which committee relied. Bostick v. Rappleyea, 629 F.Supp. 1328 (N.D. N.Y. 1985).

3. § 1983 Local Legislative Immunity - - Federal Court Administrator sued city and city officials alleging local ordinance passed eliminating the administrator's position motivated by racial animus and in retaliation for administrator filing complaint in violation of

First Amendment. Court held local legislators are entitled to absolute immunity for actions taken in a legislative capacity regardless of subjective intent motivating such action where actions are legislative in form. Bogan v. Scott-Harris, 523 U.S. 44 (1998); see also Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981)) including a vote on abolition of positions; Healy v. Town of Pembroke Park, 831 F.2d 989 (11th Cir. 1987); Aitchison v. Raffiani, 708 F.2d 96 (3d Cir. 1983). See, however, such Florida cases as Mitchell v. School Bd. of Leon County, 347 So.2d 805 (Fla. 1st DCA 1977)(school board could not discontinue a position in order to evade incumbent's tenure claim).

C. § 1983 Preclusion Defenses

Preclusion means that some other legal proceeding would preclude either a § 1983 lawsuit entirely or some issue raised in the lawsuit.

1. State Court Litigation Preclusion under § 1983 - - The full faith and credit statute (28 U.S.C. § 1738) requires federal courts to give the same effect to a state court judgment as would be given under the law of the state in which the judgment was rendered.

a. Migra v. Warren City School Dist., 465 U.S. 75 (1984) - - § 1983 did not prevent preclusion applied to issues (issue preclusion) actually litigated earlier in state court breach of contract and tort suit and to claims which could have been raised (claim preclusion). "Section 1983... does not override state preclusion law and guarantee... a right to proceed to judgment in state court on... state claims and then turn to federal court for adjudication of... federal claims."

b. Kutzik v. YoungF.2d 149 (4th Cir. 1984) - - State court breach of contract suit by professor who did not receive a continuing contract barred subsequent § 1983 claim because a) § 1983 claim could have been brought in state court suit, b) causes were based on same facts and thus were same, c) parties were not identical but in privity.

2. § 1983 Preclusion Due to State Court Review of Administrative Order - - State court judicial affirmance of an administrative ruling is entitled to preclusive effect in a subsequent § 1983 action. Gorin v. Osborne, 756 F.2d 834 (11th Cir. 1985). See also Burney v. Polk Community College, 728 F.2d 1374 (11th Cir. 1984). However, in Casines v. Murchek, 766 F.2d 1494 (11th Cir. 1985), the court refused to extend preclusive effect to an affirmed civil service order. The Career Service Commission found a lack of "just cause" for a dismissal and ordered reinstatement without back pay. The employee appealed and the decision was affirmed. The state action was against the Career Service Commission over the back pay award and the § 1983 action was against state officials raising constitutional claims and seeking compensatory damages. Held: res judicata not applicable.

3. § 1983 and Unreviewed State Administrative Orders - - When a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the state's courts. University of Tennessee v. Elliott, 478 U.S. 788 (1986).

a. Where an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it, as to which parties have had an adequate opportunity to litigate, res judicata or collateral estoppel is applicable in Florida. Jet Air Freight v. Jet Air Freight Delivery, 264 So.2d 35 (Fla. 3d DCA 1972).

b. Res judicata, which means that a previous case has already been brought and determined on the merits, applies where there is an identity of the demand, cause of action, parties and their capacities. See Casines v. Murchek, supra. See also McDonald v. City of West Branch, 466 U.S. 284 (1984) (res judicata refers to barring a subsequent suit between same parties or their privies on the same claim).

c. Generally, the test for identity of causes of action is determined by whether the essential underlying facts are the same; the claims for relief need only be substantially the same. See Pumo v. Pumo, 405 So.2d 224 (Fla. 3d DCA 1981); City of Lake Worth v. Walton, 462 So.2d 1137 (Fla. 4th DCA 1984)(suit for damages against city distinguished from petition for mandamus against civil service board.)

d. Florida law requires mutuality of parties. See Trucking Employees of N. Jersey Wel. Fund v. Romano, 450 So.2d 843 (Fla. 1984)(litigant who was not a party in a case resulting in a criminal conviction may not use the conviction offensively). See Section 4 below.

e. Where there is a second action between the same parties on a different claim or demand, estoppel by judgment may apply to those points litigated and determined. See McDonald v. City of West Branch, 466 U.S. 284 (1984) earlier collateral estoppel precludes relitigation of decided issue in different cause brought by same party.

f. Preclusive Effect of Decisions of Civil Service or Personnel Boards - - The administrative proceeding in issue in Elliott was a state administrative personnel proceeding. In City of Bartow v. PERC, 382 So.2d 311 (Fla. 2d DCA 1979), the court held that a civil service board finding of insubordination was preclusive under Florida law as to that issue (which was actually litigated and determined) by the principle of estoppel by judgment; however, there was no estoppel as to the unfair labor practice issue.

g. Unemployment Compensation - - Niedhardt v. Pioneer Federal Sav. and Loan, 498 So.2d 594 (Fla. 2d DCA 1986), unemployment decision did not have preclusive effect in court case for wrongful dismissal.

h. Unemployment Compensation - - Florida's unemployment compensation statute was recently amended to preclude "[a]ny finding of fact or law, judgment, conclusion, or final order made by a hearing officer, the commission, or any person with the authority to make findings of fact or law in any proceeding under this chapter" as "conclusive or binding in any separate or subsequent action or proceeding." FLA. STAT. § 443.0315 (2003).

4. Observations Regarding Florida Law Regarding Collateral Estoppel - - A Legal Bramble Bush - - In Quinn v. Monroe County, et al., 330 F.3d 1320 (11th Cir. 2003), the Eleventh Circuit examined the doctrine of collateral estoppel in both offensive and defense contexts and observed:

> Under Florida law, collateral estoppel applies if (1) an identical issue, (2) has been fully litigated, (3) by the same parties or their privies, and (4) a final decision has been rendered by a court of competent jurisdiction. See Community Bank of Homestead v. Torcise, 162 F.3d 1084, 1086 (11th Cir. 1998) (citing Essenson v. Polo Club Assocs., 688 So.2d 981, 983 (Fla.Dist.Ct.App. 1997)); Stogniew v. McQueen, 656 So.2d 917, 920 (Fla. 1995); Mobil Oil Corp. v. Shevin, 354 So.2d 372, 374 (Fla. 1977).
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> [F]lorida requires mutuality of parties in order for the doctrine of collateral estoppel to apply. See, Stogniew, 656 So.2d at 919. Unless both parties or their privies are bound by the prior judgment, neither may use it in a subsequent action. Id. "For one to be in privity with one who is a party to a lawsuit or for one to have been virtually represented by one who is a party to a lawsuit, one must have an interest in the action such that she will be bound by the final judgment as if she were a party."
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> * * *
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> In Gentile v. Bauder, 718 So.2d 781 (Fla. 1998), the Florida Supreme Court held that privity does not exist between a police officer sued under § 1983 and the State of Florida, which prosecuted the § 1983 plaintiff in a previous criminal case. At the criminal trial, the police officer's search warrant of the plaintiff's home was found to be inadequate and the evidence seized was suppressed. In a subsequent § 1983 action against the officer, the plaintiff, who was the defendant in the criminal case, sought to collaterally estop the police officer, a non-party to the criminal case, from raising a qualified immunity defense based upon the findings made at the criminal trial. The Florida Supreme Court rejected the state appellate court's application of collateral estoppel:
>
> > [P]etitioner [police officer] was not a party to the state criminal action against respondent; nor was petitioner in privity with the State of Florida. To be in privity with one who is a party to a lawsuit, one must have an interest in the action such that she will

> be bound by the final judgment as if she were a party. Here, petitioner had no greater interest in the outcome of [the criminal trial] than any other citizen of this state.
>
> * * *

Gentile involved the offensive use of collateral estoppel by a plaintiff against a police officer, who was not a party to the prior criminal case.

* * *

(As to defensive collateral estoppel) in several situations, the Florida courts have relaxed the mutuality requirement and approved the use of defensive collateral estoppel by a defendant who was not a party, or in privity with a party, to the prior suit.

In Zeidwig v. Ward, 548 So.2d 209 (Fla. 1989), the Florida Supreme Court modified the mutuality-of-parties requirement of collateral estoppel when collateral estoppel is asserted in a defensive manner and in a criminal-to-civil context. The Florida Supreme Court concluded that a criminal defendant was estopped collaterally from bringing a civil malpractice action against his former defense attorney after a judicial determination in the criminal case that the criminal defendant received effective assistance of counsel. Although the defendant attorney in the subsequent civil malpractice action was not a party, or in privity with a party, in the prior criminal case, the Florida court allowed the defendant attorney to assert defensively collateral estoppel against his former client, who was a party to both the criminal case and to the subsequent civil malpractice action.

In modifying its mutuality-of-parties requirement, the Florida Supreme Court noted that this "modification has long been recognized by the United States Supreme Court." Zeidwig, 548 So.2d at 212 (citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)). The Florida Supreme Court noted that the United States Supreme Court had "completely abrogated the mutuality requirement in a defensive context and concluded that a defendant may use collateral estoppel defensively to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated and lost against another defendant." Zeidwig, 548 So.2d at 212 (citing Blonder-Tongue, 402 U.S. at 313. The Florida Supreme Court acknowledged that the United States Supreme Court "ruled that the

defensive use of the doctrine gives a plaintiff strong incentive to join all potential parties in the first action without compromising fairness and promotes the interests of judicial economy." Id. (quoting Blonder-Tongue, 402 U.S. at 328).

* * *

In Zeidwig, the Florida Supreme Court further noted the public policy justification for the application of collateral estoppel in this type of circumstance. "It would undermine the effective administration of the judicial system to ignore completely a prior decision of a court of competent jurisdiction in this state in the same issue which plaintiff seeks to relitigate in a subsequent action." Zeidwig, 548 So.2d at 214.

The Florida appellate courts have applied another exception to the mutuality-of-parties requirement in cases where a judgment of conviction is based upon a guilty plea, stating "a defendant is stopped from denying his guilt of the subject offense in a subsequent civil action." Kelly v. Dep't of Health & Rehabilitative Servs., 610 So.2d 1375, 1377 (Fla.Dist.Ct.App. 1992); Paterno v. Fernandez, 569 So.2d 1349, 1350 (Fla.Dist.Ct.App. 1990); see also Lora v. Dep't of State Div. of Licensing, 569 So.2d 840 (Fla.Dist.Ct.App. 1990). Similarly, in Brown v. City of Hialeah, 30 F.3d 1433, 1437 (11th Cir. 1994), this Court affirmed the district court's ruling "that under Florida law, collateral estoppel prevented Brown from introducing and arguing facts inconsistent with his guilty plea." Brown, a defendant in a prior criminal case, filed a § 1983 action against several police officers and the City of Hialeah alleging excessive force during his arrest. Although the parties were different in the two cases, this Court affirmed the district court's determination that collateral estoppel prevented Brown from introducing evidence in his § 1983 civil case contrary to his guilty plea in the prior criminal proceedings. Id. at 1437.

In addition to these two exceptions in the criminal-to-civil context, Florida appellate courts have allowed defensive collateral estoppel in a civil-to-civil context involving product liability claims. West v. Kawasaki Motors Mfg. Corp, 595 So.2d 92, 93 (Fla.Dist.Ct.App. 1992) (citing Zeidwig v. Ward and noting: "Florida courts on occasion recognized exceptions to the identity of parties requirement under the res judicata or collateral estoppel doctrines."). In West, the Florida appellate court concluded: "[F]airness and policy considerations dictate that in products liability cases an exception should be recognized to the identity of parties requirement under the doctrines of res judicata or collateral

> estoppel." Id. at 95. The West plaintiffs had not prevailed in their prior lawsuit against the manufacturer and retailer of the product. In the plaintiffs' subsequent separate action against the wholesale distributor in West, the Florida court determined that the plaintiffs' product liability claim was barred against the wholesale distributor, a non-party in the first action, because the two cases involved the same claims and underlying set of facts. Thus, West carved out another defensive exception to Florida's mutuality requirement.
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> Although Florida courts have recognized these three defensive exceptions to the mutuality requirement, they also have continued to adhere strictly to Florida's mutuality requirement as recently as in E.C. v. Katz, 731 So.2d 1268, 1270 n. 1 (Fla. 1999) (quoting Stogniew v. McQueen, 656 So.2d 917, 919-20 (Fla. 1995) and reaffirming that "we are unwilling to follow the lead of certain other states and of the federal courts in abandoning the requirements of mutuality in the application of collateral estoppel"). In Katz, a family court had determined in the mother's custody dispute with the father that the father had not sexually abused their minor child. In the mother's subsequent medical malpractice action against a doctor for failing to diagnose sexual abuse, the Florida Supreme Court adhered to the mutuality requirement and concluded that the doctor could not assert collateral estoppel defensively to bar the mother from relitigating the alleged sexual abuse of her minor child. Id. at 1270.

Quinn, at pp. 1329-1332.

D. § 1983 Statute of Limitations

Wilson v. Garcia, 471 U.S. 261 (1985) — Federal law governs the characterization of a § 1983 claim for the purpose of selecting a statute of limitations and such claims are best characterized as personal injury actions. Springfield Township School Dist. v. Knoll, 471 U.S. 280 (1985).

1. § 1983 Statute of Limitations in Florida is Four Years Sherrod v. Palm Beach County School Bd., 620 F.Supp. 1275 (S.D. Fla. 1985). The four year statute of limitations in § 95.11(3), F.S., applies to § 1983 actions.

2. § 1983 Actions Limitations Period Begins with Notice. Chardon v. Fernandez, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981). The period within which a terminated employee was required to file First Amendment suit under § 1983 began to run on receipt of the notice of termination, not when employment terminated.

VII. § 1983 REMEDIES AND ETHICAL CONSIDERATIONS

A. Available Damages Under § 1983

1. Federal Common Law Applies - - Damages in Section 1983 actions are based on federal common law and are not grounded upon the law of the forum state. See e.g. Basista v. Weir, 340 F.2d 74, 86 (3rd Cir. 1965).

2. Emotional Distress Damages are Available - - Under federal common law, a broad range of damages is available, including damages for mental and emotional distress. Carey v. Piphus, 435 U.S. 247 (1978).

However, damages for emotional distress are not presumed; they must be proven and they are to be awarded only when a prevailing plaintiff proves an actual injury. Emotional distress damages are "customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff" and that such injury "may be evidenced by one's conduct and observed by others." 435 U.S. at 264.

The Third Circuit Court of Appeals evaluates emotional distress damages by considering four factors: (1) the plaintiffs did not lose the esteem of their peers; (2) the plaintiffs suffered no physical injury as a consequence of their emotional distress; (3) the plaintiffs received no psychological counseling; and (4) the plaintiffs suffered no losses in income. Spence v. Bd. of Educ. of Christina Sch. Dist., 806 F.2d 1198, 1201 (3d Cir. 1986). Similarly, in Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1265 (10th Cir. 1995), the Tenth Circuit contemplated the following factors in analyzing a claim for emotional distress: (1) the degree of emotional distress; (2) the context of the events surrounding the emotional distress; (3) the evidence tending to corroborate the plaintiff's testimony; (4) the nexus between the challenged conduct and the emotional distress; and (5) any mitigating circumstances.

Plaintiffs' testimony as to emotional distress symptoms must be specific and not subjective or vague. The following examples are illustrative:

Vance v. Southern Bell Telephone and Telegraph Co., 863 F.2d 1503 (11th Cir. 1989), cert. denied, 130 L.Ed.2d 1075, 115 S.Ct. 1110 (1995). Affirming district court's finding that a jury award of $500,000 for emotional distress was grossly excessive when based solely on plaintiff's testimony that her hostile work environment caused her mental distress.

Fitzgerald v. Mountain States Telephone and Telegraph Co., 68 F.3d 1257 (10th Cir. 1995). Remanding an emotional damage award of $250,000 per plaintiff as clearly excessive when the award was based solely on the testimony of the plaintiffs, no physicians or psychologists testified, and plaintiffs continued to work in chosen field.

Hetzel v. Prince William County, 89 F.3d 169 (4th Cir. 1996). Jury award of $500,000 for emotional distress remanded where evidence presented at trial consisted almost

exclusively on plaintiff's own statements that she had headaches, stress, trouble reading to her daughter, and problems in her family life.

Price v. City of Charlotte, 93 F.3d 1241 (4th Cir. 1996). Reversing an emotional damage award of $3,000 per plaintiff, in a §1983 claim, when award was based solely on the plaintiffs' testimony, which was in generic terms and found to be entirely speculative.

Forshee v. Waterloo Industries, Inc., 178 F.3d 527 (8th Cir. 1999). Jury award of $9,631 for emotional distress was reversed. Plaintiff suffered no physical injury, was not medically treated for any psychological injury, and no other witness corroborated any manifestation of distress. Plaintiff's own testimony that she "went home and sat and cried about the rest of the day" was insufficient to justify an award.

On the other hand, when a plaintiff presents specific testimony demonstrating severe emotional distress and when that testimony is corroborated, sizable damage awards have been upheld. Again, the following cases are illustrative:

Williams v. Trader Publishing Co., 218 F.3d 481 (5th Cir. 2000). Court upheld compensatory damage award of $100,000 for emotional distress based only on plaintiff's descriptions of severe emotional distress, sleep loss, severe weight loss, and beginning smoking. Court also noted that testimony of plaintiff alone *can* support emotional damages.

Forsyth v. City of Dallas, 91 F.3d 769 (5th Cir. 1996). Court upheld an award of $100,000 to an officer transferred in violation of First Amendment rights. Award premised solely on plaintiff's testimony describing "depression, weight loss, intestinal troubles, and marital problems." Plaintiff did testify that she had consulted a psychologist.

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987). First Circuit affirmed an emotional distress award of $123,000 based on plaintiff's testimony that he was under continuous stress over a seven-year period and suffered severe distress after his discharge. His testimony was corroborated by a psychiatrist who explained that plaintiff suffered from symptoms of anxiety, stress, and some depression for which he was taking an anti-depressant.

Karcher v. Emerson Electric Co., 94 F.3d 502 (8th Cir. 1996). Eighth Circuit upheld award of $150,000 for emotional distress where plaintiff's testimony as to depression and distress was corroborated by plaintiff's treating psychiatrist and psychologist.

Rush v. Scott Specialty Gases, Inc., 930 F.Supp. 194 (E.D. Pa. 1996), rev'd on other grounds, 113 F.3d 476 (1997). Jury award of $1,000,000 remitted to $100,000. Plaintiff's testimony as to emotional distress corroborated by expert witness, friends and family who testified that she suffered from mild to moderate depression; that her personality altered almost completely during her employment; and that she ceased her social activities and spent most of her time at home, sleeping.

Salinas v. O'Neill, 286 F.3d 827 (5th Cir. 2002). Original jury award of $1,000,000 was remitted by the district court to $300,000. Fifth Circuit remitted the award to $100,000 where customs service agent won Title VII claim for retaliation. Plaintiff and his wife testified that the retaliation caused him to suffer from paranoia, take excessive sick leave, and visit physicians more than 70 times. The emotional toll also impacted his relationship with his wife and son.

Observation: While many of these illustrative cases involve damages under Title VII of the Civil Rights Act following the 1991 amendments to that Act, their rationale is equally applicable to §1983 damages for emotional distress.

3. Damage and Remedies for Procedural Due Process Violations - -

a. Deprivation of Liberty Interest - - Where there is deprivation of liberty interest with no deprivation of property, the remedy is a hearing to clear one's reputation. See e.g., Campbell v. Pierce County, Ga., 741 F.2d 1342 at 1346 (11th Cir. 1984); White v. Thomas, 660 F.2d 680, 685 (5th Cir. 1981) cert. den., 455 U.S. 1021 (1982).

(1) Employers are under no obligation to rehire the employee whether or not the reasons offered for discharge prove to be false. Wells v. Doland, 711 F.2d 670 (5th Cir. 1983); Wilbanks v. Smith County, 661 F.Supp. 212 (E.D. Tex. 1987).

(2) Due to the nature of a liberty interest violation, back pay is not available.

(3) No damage entitlement where "name clearing" hearing provided 14 days after dismissal. Campbell v. Pierce County, 741 F.2d 1342 (11th Cir. 1984).

b. Deprivation of Property Interest - - Back pay may not be recoverable for a denial of procedural due process. Damages are limited to compensatory damages as a result of the denial of due process. See Wilson v. Taylor, 658 F.2d 1021, 1035 (5th Cir. 1981) (holding that were there is only a procedural due process violation which is subsequently cured by a post-termination hearing, the plaintiff may not collect back pay).

(1) If the employee was properly discharged he may not be awarded back pay as damages for a procedural due process violation. Wilson v. Taylor, supra; Byrd v. City of Atlanta, 709 F.Supp. 1148, 1153 (N.D. Ga. 1989).

(2) For employee to receive more than nominal damages he must show actual compensable injury.

(3) See also, Laje v. Thomason General Hospital, 665 F.2d 724 (5th Cir. 1982) (holding that back pay is not recoverable where an employee can show that the discharge would still have occurred absent procedural defects). However, $20,000 award for emotional distress caused by the due process violation was affirmed. To the same effect, see also

Metropolitan Dade County v. Sokolwski, 439 So.2d. 932 (Fla. 3d DCA 1983) and Metropolitan Dade County v. Caputi, 466 So.2d 1087 (Fla. 3d DCA 1985).

(4) The remedy for failure to give a pre-termination hearing is not back pay. Only nominal damages are awardable. Simmons v. Department of Natural Resources, 513 So.2d 723 (Fla. 1987).

4. § 1983 Punitive Damages

a. Local Governments Immune - - Local government entities, such as a sheriff's office, are generally immune from punitive damage claims under 42 U.S.C. § 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259 (1981). The Court in Fact Concerts did not close the door precluding an award of punitive damages against municipalities under § 1983 in an "extreme situation where the taxpayers are directly responsible for perpetuating an outrageous abuse of constitutional rights." Id. at 267 n.29. Courts have generally rejected § 1983 punitive damage awards against municipalities even in egregious circumstances. Morris v. Crow, 825 F.Supp. 295 (M.D. Fla. 1993).

b. Available against Individuals -- Although punitive damages ordinarily remain unavailable against the municipal organization, the individual officers are still vulnerable for any § 1983 violations. City of Newport, 453 U.S. at 267. In order to obtain such damages, plaintiff must establish facts of record that prove that the individuals knowingly and maliciously deprived plaintiffs of their civil rights. Carey v. Piphus, 435 U.S. 247 (1978).

5. Personal Assets May Be at Risk under § 1983

Official may be personally liable for damages for violating the civil rights of state employees when she fired them. Hafer v. Melo, 501 U.S. 1215 (1991).

B. Other Federal Laws and Section 1983

1. Coordinating Sections 1981 and 1983

The express "action at law" under §1983 provides the exclusive damages remedy for the violation of rights guaranteed by other federal laws. See e.g. Jett v. Dallas Independent School District, 491 U.S. 701 (1989), holding that, while a §1981 right was available under §1983, liability of the school district was to be determined by Monell and its progeny. **Respondeat superior liability ordinarily available under §1981 against private sector defendants does not apply to public entity defendants.**

2. Disentangling Remedies

Statutes that provide their own remedies preclude relief under Section 1983 unless there is some other independent statutory or constitutional basis for a Section 1983 claim that would allow companion claims on the same set of facts. See Chapman v. Houston Welfare Rights Organization, 440 U.S. 600, 617 (1979)(stating that "one cannot go into court

and claim a violation of Section 1983- for Section 1983 by itself does not protect anyone against anything").

Although there has been some uncertainty concerning whether the Civil Rights Act of 1991 made Title VII and Section 1981 the exclusive remedies for employment discrimination claims against public employers, the Eleventh and Fourth Circuits have rejected this interpretation of the Civil Rights Act of 1991. See Johnson v. City of Fort Lauderdale, 148 F.3d 1228, 1229 (11th Cir. 1997); Beardsley v. Webb, 30 F.3d 524, 526-527 (4th Cir. 1994).

Thus, in Florida, here is another bramble bush for the trial court to decipher. Implications when concurrent Title VII, Section 1981 and Section 1983 claims are grounded on the same facts and both the entity and individuals are sued:

Government liability under doctrine of *respondeat superior* in Title VII claim.

No government liability under Section 1983 claim under doctrine of *respondeat superior*. See Monell v. Dep't of Social Services, 436 U.S. 658, 691 (1978).

No individual liability under Title VII claim.

Individual liability under Section 1983 claim, but individuals have the defense of qualified immunity, if affirmatively pled.

Section 1981 claim against the public entity is probably dismissable because Section 1983 controls. See Jett v. Dallas Independent School Dist., 491 U.S. 701, 732 (1989).

Individual liability under Section 1981, but the individuals have the defense of qualified immunity, if affirmatively pled.

C. § 1983 Ethical Considerations - - Conflict of Interest - - Multiple Clients

1. Separate Attorneys May Be Required in § 1983 Cases - - Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir. 1984). Civil rights action brought against police officer, his wife, and county when officer assaulted plaintiff after seeing plaintiff and officer's wife together in wife's car. The representation by the county attorney of the officer and the county was a conflict of interest and deprived the officer of a fair trial. The county attorney undermined the officer's good faith immunity defense that the assault occurred within the scope of his employment by instead asserting that the officer was not acting under state law but rather as an "irate husband" in assaulting the plaintiff. The county attorney was held to have committed ethical violation. New trial was required where damages were awarded against officer.

VIII. SECTION 1983 AND STATE COURT LITIGATION

Because state courts are courts of general jurisdiction, except in limited and exceptional circumstances, the Supreme Court has relied on the presumption of concurrent jurisdiction to

hold that state courts must entertain alleged §1983 claims. See e.g. Howett v. Rose, 496 U.S. 356 (1990); National Private Truck Council, Inc. v. Oklahoma Tax Commission, 115 S.Ct. 2351 (1995).

Although §1983 creates no substantive rights and it is a misnomer to refer to a violation of §1983, the same conduct may be actionable under both Florida and federal law, Monroe v. Pape, 365 U.S. 167, 196 (1961).

A. Choice of Forum Considerations

1. Judges as Decisionmakers - - Federal court judges, with lifetime appointments, available law clerks and lighter case loads are often preferred by defendant employers.

2. Juries as Decisionmakers - - In Florida, state court jury verdicts must be unanimous just as they are in the federal district courts. However, jury pools are different. Because of its unanimous jury verdict requirement that in essence tracks federal law, Florida differs substantially from other states that require only a majority verdict.

3. Some Tactical Differences - -

a. Different case management procedures.

b. Different offer of judgment rules.

c. Different summary judgment standards.

4. Federal Law and the Law of the Eleventh Circuit Court of Appeals - - As stated above, Florida falls within the Eleventh Circuit Court of Appeals portion of the federal judicial system. However, although Florida courts must apply federal common law as the substantive law governing federal claims and §1983, Florida state courts may not be obligated to follow the law of the U.S. Court of Appeals for the Eleventh Circuit. Thus, state courts in contrast to their federal district court counterparts may not be required to follow Eleventh Circuit decisional law. See United States Ex. Rel Lawrence v. Woods, 432 F.2d 1072, 1075-1076 (7th Cir. 1970), cert. den. 402 U.S. 983 (1971). Although Florida state courts are not obligated to follow the law of the federal circuit, Florida state courts will customarily look to the Eleventh Circuit Court of Appeals for guidance in construing §1983.

5. Qualified Immunity - - Because federal common law governs §1983 claims, the immunities applicable to a federal court also apply to state courts and federal not state law governs their availability. Martinez v. California, 444 U.S. 277 (1980). The Supreme Court, however, has not addressed the extent to which or even whether states may develop their own policies for the administration of federal immunities and are required to follow the lead of federal courts by limiting discovery, making expanded use of summary judgment, restricting the role of the jury, and expanding the availability of interlocutory appeals.

In Tucker v. Resha, 648 So.2d 1187 (Fla. 1994), the Florida Supreme Court recognized that Florida's rules did not provide for an interlocutory appeal of a denial of a qualified immunity defense, but nonetheless held that "an order denying summary judgment based on a claim of qualified immunity is subject to interlocutory review to the extent that the order turns on an issue of law."

The Florida Rules of Appellate Procedure have now been amended to provide that an interlocutory appeal is now permitted when a party is denied either absolute or qualified immunity as a matter of law. See FRAP Rule 9.130(a)(3)(vii).

Because the doctrine of qualified immunity is intended to shield government officials from liability in all but exceptional cases, Florida appellate courts have allowed certiorari review even in the those instances where the trial court's denial of qualified immunity was based on disputed issues of fact, but constituted a departure from the essential requirements of the law and posed a material injury to the official. See e.g., Gionis v. Headwest, Inc., 799 So.2d 416 (Fla. 5th DCA 2001); Stephens v. Geoghegan, 702 So.2d 517 (Fla. 2d DCA 1997). In short, certiorari may lie when the trial court gauges facts against an improper legal standard. Because, also, qualified immunity is complete protection from the suit itself, and not merely a defense as to liability, there is Florida appellate authority holding that a defendant contending qualified immunity may be entitled to protection against discovery. See e.g., Junior v. Reed, 693 So.2d 586, 590, 592 (Fla. 1st DCA 1997).

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CONSTITUTIONAL LIMITATIONS ON DISCIPLINE AND DISCHARGE OF PUBLIC EMPLOYEES

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I. DISCIPLINE AND DISCHARGE: CONSTITUTIONAL FRAMEWORK

A. Employment at Will — General Rule - - Notwithstanding the numerous protections afforded public employees, there is no case authority holding that public employees may be discharged only for cause, or that public employees may only be discharged if they are given "due process" (written notice of reasons, opportunity to respond, a public evidentiary hearing, etc.). Just as in the private sector, the case authority in the public sector is that an employee may be terminated by the appointing authority that has the power of removal for a good reason, a bad reason, or for no reason at all. DeMarco v. Publix, 360 So. 2d 134 (Fla. 3d DCA 1978), aff'd 384 So. 2d 1253 (Fla. 1980); Pasco County School Bd. v. PERC, 353 So. 2d 108 (Fla. 1st DCA 1977); Bauer v. City of Gulfport, 195 So. 2d 571 (Fla. 2d DCA 1967).

1. Exceptions to the General Rule of Employment at Will - - However, Florida and federal constitutional provisions, protective statutes and other laws create various exceptions to this general rule (e.g., civil rights legislation, whistleblower protection, etc., and local civil service protection prohibiting termination except for cause or for other enumerated grounds). Additionally, contracts prohibit or restrict termination (such as individual employment contracts, and collective bargaining agreements). The focus of this chapter is on constitutional limitations on the right to discipline and discharge public sector employees. Nevertheless, the existing case authority affecting public employers is that, like private employers, public employers are free to terminate undesirable employees for any unprohibited reason.

2. However, two provisions in the Public Employees Relations Act (PERA), when read together, may have abrogated the "at will doctrine" in public employment. In this respect, they have remained unnoticed. Under Section 447.209 of PERA, a public employer is empowered to discipline "for proper cause." And, in Section 447.601 of PERA, the Florida Legislature made it clear that any merit or personnel system remains viable only if its laws, ordinances, rules or regulations do not conflict with PERA's provisions. If the words "for proper cause" are words of limitation, then PERA appears to have extinguished the "at will doctrine" in Florida public employment.

B. Discipline and Discharge: "Due Process" Provisions

1. Fifth Amendment and Employment - - The Fifth Amendment of the United States Constitution provides that no person shall "be deprived of life, liberty or property without due process of law." The Fifth Amendment and Fourteenth Amendment restrain public employers from acting to deprive a person of due process. Buxton v. City of Plant City, 871 F.2d 1037 (11th Cir. 1989).

2. Fourteenth Amendment and Employment - - The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment restrains states from acting to deprive a person of equal protection or due process. Buxton, 871 F.2d at 1040.

a. Procedural Due Process and Employment - - There is a guarantee of fair procedure in connection with any deprivation of life, liberty or property by a state. Collins v. Harker Heights, 503 U.S. 115, 112 S. Ct. 1061 (1992). State action that alters or extinguishes a right or interest previously recognized by state law invokes the procedural protections afforded by the due process clause. Id.

3. Florida Constitution, Article 1, Section 9 and Employment - - "No person shall be deprived of life, liberty or property without due process of law."

II. PROPERTY INTERESTS IN PUBLIC EMPLOYMENT

A. Due Process - - Employment As Property

1. Employment as Property - - Definition - - Public employees may have a protectable interest in their jobs and may not be terminated from those jobs without the protection of procedural due process. Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694 (1972). This interest is defined as a "property interest." Peterson v. Atlanta Housing Auth., 998 F.2d 904 (11th Cir. 1993).

2. Employment as Property - - More Than Unilateral Expectation - - To establish a constitutionally protected property interest, an employee must have something more than a unilateral expectation of continued employment; s/he must have a legitimate claim of entitlement to it. Bd. of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972). The employee must show "a legitimate expectation, based on rules (statutes or regulations) or understandings (contracts, express or implied)" that the employees will continue in their jobs. Piroglu v. Coleman, 25 F.3d 1098, 1104 (D.C. Cir. 1994). Thus, there was no deprivation of a property interest when a police captain was reassigned from a supervisory to a non-supervisory position.

3. Property Rights - - Created By State Not Federal Law - - The federal Constitution does not create property interests; rather, they are derived from and defined by existing rules or understandings that stem from an independent source such as state law. Bd. of Regents v. Roth, above.

4. Property Rights And At-Will Employees - - Employees who serve at the discretion or pleasure of their superiors, i.e., are employed at-will, have no property right in employment and cannot raise constitutional due process requirements. Shelton v. City of Atlanta, 796 F.2d 1391 (11th Cir. 1986).

5. Property Rights And Probationary Employees -- In Florida, the decision to terminate an employee during the probationary period is entirely within the employer's discretion. There is no right to a hearing prior to termination for a probationary employee under Florida law. Hawkeshead v. The County of Sarasota, 738 F. Supp. 470 (M.D. Fla. 1997).

6. Property Rights And Sheriff's Deputies - - Historically, deputies have been viewed as at-will appointees without property interests, even in the face of general orders for disciplinary procedures. Szell v. Lamar, 414 So. 2d 276 (Fla. 5th DCA 1982); Brevard County v.

Miller, 452 So. 2d 1104(Fla. 5th DCA 1984). There is an exception if civil service statutes require cause for discharge. Ison v. Zimmerman, 372 So. 2d 431 (Fla. 1979).

7. Due Process - - Does Not Require Safe Work Place - - The due process clause does not require a municipality to provide a safe work place. Collins v. Harker Heights, 503 U.S. 115, 112 S. Ct. 1061 (1992).

B. Property Rights - - Potential Sources

1. Property Rights - - Civil Service - - A requirement by charter or ordinance of "just cause" or "cause" for discharge creates a property interest.

2. Property Rights - - School Boards - - § 231.36, F.S. Instructional personnel may only be suspended or dismissed for just cause.

3. Property Rights - - Handbook - - In some states, property rights may be created by handbooks providing for termination only for cause. Nicholson v. Gant, 816 F.2d 591 (11th Cir. 1987). A policy manual which stated that "just cause" was required for termination, but which also contained a disclaimer that no employment contract was created by the handbook, was held not to create any property interest in employment. Miller v. Crystal Lake Park Dist., 47 F.3d 865(7th Cir. 1995); see also Strang v. Satz, 884 F. Supp. 504 (S.D. Fla. 1994)(handbook).

Observation: In Florida, an employee handbook alone may be insufficient to create a property right because of well established Florida law holding that language in employee handbooks alone does not alter an employee's at will status. There may be some limited erosion of this principle. See e.g. Falls v. Lawnwood Medical Center, 427 So. 2d. 361 (Fla. 4th DCA 1983).

4. Property Rights - - Faculty Guide - - A guide that expressed the desire that a faculty member "feel" he has permanent tenure "as long as his teaching services are satisfactory," when considered along with policy guidelines defining tenure and requiring adequate cause for dismissal as demonstrated by a fair hearing, established a property right. Perry v. Sindermann, 408 U.S. 593 (1972).

5. Property Rights - - Letter- - A letter stating that a principal would be recommended for reemployment created a property right. Stapp v. Avoyelles Parish School Bd., 545 F.2d 527 (5th Cir. 1977).

6. Property Rights - - Eligibility List - - Where an established policy for placement and rank on list and for maintenance of list for specified period of time was violated, a property right was formed. Stana v. School Dist. of Pittsburgh, 775 F.2d 122 (3d Cir. 1985).

7. Property Rights - - Personnel Rules - - A property right can be formed in personnel rules that state termination will only be for cause. Glenn v. Newman, 614 F.2d 467 (5th Cir. 1980), repudiated on other grounds, Monroe County v. United States Department of Labor, 690 F.2d 1359 (11th Cir. 1982).

8. Property Rights - - Policies/Procedures - - A city personnel policy and procedure manual which defines dismissal as "separation for cause" and enumerates certain "causes" established a property right. Burgess v. Miller, 492 F. Supp. 1284 (N.D. Fla. 1980). On the other hand, a county personnel handbook providing that the county administrator could dismiss department heads when, in

his or her judgment, it was in the best interest of the county, did not create a property right. Warren v. Crawford, 927 F.2d 559 (11th Cir. 1991).

9. Property Rights - - Police, Fire, and Correctional Officers - - The Law Enforcement Officer's Bill of Rights confers rights and privileges on all law enforcement officers and correctional officers employed by or appointed to a law enforcement agency. See FLA. STAT. §§112.531 et al. Section 112.532(4)(a) states that:

> [n]o dismissal, demotion, transfer, reassignment, or other personnel action which might result in loss of pay or benefits or which might otherwise be considered a punitive measure shall be taken against any law enforcement officer or correctional officer unless such law enforcement officer or correctional officer is notified of the action and the reason or reasons thereof prior to the effective date of such action.

FLA. STAT. §112.532(4)(a) (2004). In 1991, the Southern District of Florida held that police officers maintain a property interest in continued employment, subject to demotion only for cause, due to the rights conferred by Paragraph 4 of Section 112.532. See Kamenesh v. City of Miami, 772 F.Supp. 583 (S.D. Fla. 1991). After Kamenesh, other district courts similarly held that the Officer's Bill of Rights created a property interest in continued employment. See Blair v. Martin County Sheriff's Dept., 1993 WL 757478 (S.D. Fla. 1993); Venero v. City of Tampa, 830 F.Supp. 1457 (M.D. Fla. 1993).

In 2003, the Florida Legislature amended Section 112.532 to include a Subsection "b" to Paragraph 4 with specific language stating that "[t]his paragraph shall not be construed to provide law enforcement officers with a property interest or expectancy of continued employment, employment, or appointment as a law enforcement officer." FLA. STAT. §112.532(b) (2004). The amendments to Section 112.532 became effective on July 1, 2003.

10. Property Rights - - No Entitlement to a Specific Position - - There is no entitlement to a specific job description or position unless the governing statute, ordinance or contract provides for it. See, e.g., Petru v. City of Berwyn, 872 F.2d 1359 (7th Cir. 1989)(holding that applicant ranked first on firefighters eligibility list has no property interest in appointment); Maples v. Martin, 858 F.2d 1546, 1550 (11th Cir. 1988)(holding that there is no property interest in not being transferred outside present department); Schneider v. Indian River Community College Foundation, 875 F.2d 1537 (11th Cir. 1989).

11. Property Rights - - No Entitlement to Pay Raise - - Estes v. Tuscaloosa County, 696 F.2d 898 (11th Cir. 1983)(holding that there is no entitlement to pay raise).

C. Revocation of Property Rights

1. Property Rights - - State Legislature Can Terminate - - State legislation that created a property interest by a personnel act restricting discharge "for just cause" can be altered or eliminated by the legislature and the legislative process constitutes all process that the employees are "due." Gattis v. Gravett, 806 F.2d 778 (8th Cir. 1986); State v. Swank, 12 So. 2d 605 (Fla. 1943).

2. Property Rights - - Change Back To At-Will Status - - Movement from at-will employment to for-cause employment and back again, so long as the movement back is with due process (i.e., a hearing), creates no property interest. Betts v. City of Edgewater, 646 F. Supp. 1427 (M.D. Fla. 1986).

3. Property Rights - - Employer Can Change At-Will Status - - Employer may amend employment status of existing employees to at-will employment if the employees are given reasonable notice and opportunity to respond and change can be demonstrated to be in the public interest and not taken as subterfuge merely to single out and discharge particular employees. Peterson v. Atlanta Hous. Auth., 998 F.2d 904 (11th Cir. 1993).

III. PRE-DISCIPLINARY PROCEDURES FOR EMPLOYEES WITH PROPERTY RIGHTS

A. Due Process - - Minimum Requirements Prior to Employment Action - - In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), the U.S. Supreme Court set out the minimum requirements for due process prior to termination of a public employee who could be discharged only for cause and held that:

> the essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

1. Due Process Hearings and Delays - - Lengthy hearing delays of one to two years can violate due process rights; however, this did not require reversal of decision but rather allowed for claim of nominal and actual damages. Metropolitan Dade County v. Sokolowski, 439 So. 2d 932 (Fla. 3d DCA 1983); Metropolitan Dade County v. Caputi, 466 So. 2d 1087 (Fla. 3d DCA 1985).

2. Due Process Hearings and Minimum Standards - - Minimum requirements for procedural due process are determined by federal law. Even if the state law which creates a "property interest," by requiring cause for discharge, also creates procedures for review, federal due process requires "some kind of hearing" prior to discharge — some pre-termination opportunity to respond.

3. Due Process Hearings and Right to Cross Examine - - Due process requires that police officers who are terminated be permitted to cross examine adverse witnesses at either pre-termination or post-termination hearing. Grice v. City of Kissimmee, 697 So. 2d 186 (Fla. 5th DCA 1997)

B. Due Process - - Disciplinary Actions That Require Preaction Due Process

1. Due Process Hearing And Suspensions - - A 5-day suspension requires a due process hearing, but a 2-day suspension has been held too minor. **The safest course is always to provide some kind of a pretermination hearing**. Garraghty v. Jordan, 830 F.2d 1295 (4th Cir. 1987) (holding that 5-day suspension required hearing); Click v. Board of Police Comm'rs, 609 F. Supp 1199 (D. Mo. 1985) (holding that 3-day suspension requires hearing); Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270 (6th Cir. 1985) (holding that 2-day suspension too minor to require hearing).

2. Due Process Hearing and Demotions - - Williams v. City of Seattle, 607 F. Supp. 714 (W.D. Wash. 1985) (holding that hearing required prior to demotion).

3. Due Process Hearing and Suspensions in Florida - - A suspension without pay may be constitutionally permissible, provided the suspension is followed with reasonable diligence by a full hearing and, if the employee is successful, the employee is entitled to immediate reinstatement with back pay. Johnson v. School Bd. of Palm Beach County, 403 So. 2d 520 (Fla. 1st DCA 1981).

C. Due Process Preaction Hearings - - The pre-action hearing is an initial check against mistaken employment decisions to determine if there are reasonable grounds to believe that the charges are true and support the proposed action.

1. Due Process Minimum Hearing Requirements

a. Oral or written notice of the charges (an example of which is contained in the Appendix to this Chapter). Minimum pre-termination due process includes written notice of the reasons for termination and an effective opportunity to rebut. Rebuttal means an opportunity for the employee to respond in writing to the charges and to respond orally before the official charged with the responsibility of making the termination decision. Nicholson v. Gant, 816 F.2d 591, 598 (11th Cir. 1987)(requiring written notice). But in Kelly v. Smith, 764 F.2d 1412, 1414 (11th Cir. 1985), overruled on other grounds, McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1999), a different Eleventh Circuit panel stated that under Loudermill, oral notice and an opportunity to respond orally is sufficient in the pre-termination context.

b. An explanation of the employer's evidence.

c. An opportunity for the employee to present his side of the story prior to discharge or suspension, either in person or in writing, to show why the proposed action should not be taken.

2. Notice of Due Process Hearing To The Employee

a. Notice must be reasonably calculated under all the circumstances to inform the employee of the proposed action. Oral notice and an opportunity to respond orally is sufficient where a supervisor questioned an employee regarding unavailability for standby duty. Notice must be reasonably calculated to inform employees of pendency of action and afford them an opportunity to present their objections. Covey v. Sommers, 351 U.S. 141 (1956); Kelly, 764 F.2d 1412; West v. Board of County Comm'rs, Monroe County, 373 So. 2d 83 (Fla. 3d DCA 1979).

b. Extra-official or causal notice is insufficient. Coe v. Armour Fertilizer Works, 237 U.S. 413 (1914).

c. Notice must contain specific reasons for dismissal or suspension in order to give the employee a reasonable opportunity to respond. But the notice need not be set forth with formal exactness required for court pleadings. Browning v. Odessa, 990 F.2d 842 (5th Cir. 1993); Jacker v. School Bd. of Dade County, 426 So. 2d 1149 (Fla. 3d DCA 1983).

d. Failure to specify rule or regulation violated by employee made notice insufficient (despite the fact that the notice contained alleged misconduct) where the specific rule was necessary for preparation of employee's defense. Bigando v. Heitzman, 590 N.Y.S.2d 553 (App. Div. 1992). There must be a "sufficiently definite warning as to the proscribed conduct when measured by

common understanding and practice." Jordan v. De George, 341 U.S. 223 (1951). Rules prohibiting "improper conduct" are permissible. City of St. Petersburg v. Pinellas County PBA, 414 So. 2d 293 (Fla. 2d DCA 1982).

e. Reasons for termination not included in the notice may not be relied upon at the hearing to support the disciplinary action. Bass v. Albany, 968 F.2d 1067 (11th Cir. 1992).

f. Public employees' right to "fundamental fairness" has been held to give them the right to be notified of the materials in their employment records that may be used in fashioning disciplinary sanctions against them. They also must be given an opportunity to respond in writing to the adverse information. Bigelow v. Board of Trustees of Inc. Village of Gouverneur, 63 N.Y. 2d 470, 472 N.E. 2d 1001 (1984); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

g. Police officers, who are not probationary or at-will employees, have a right to a due process hearing before his or her termination becomes final. Park v. City of West Melbourne, 769 So. 2d 397 (Fla. 5th DCA 2000). In Park, the Fifth District Court of Appeals also held that when the termination is based upon the testimony of witnesses other than the terminated officer, as a matter of constitutional due process, the officer must be permitted to confront and cross-examine the witness. See also Grice v. City of Kissimmee, 697 So. 2d 186 (Fla. 5th DCA 1997).

3. Due Process Hearing Procedures

a. Timing and nature of hearing depends on an appropriate accommodation of competing interests involved, which include (1) the importance of the private interest involved; (2) the length or finality of the disciplinary action taken; (3) the likelihood of the government error; and (4) the magnitude of governmental interests involved. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

b. The hearing must be within a time frame to make the hearing meaningful. In re Scott County Master Docket, 672 F. Supp. 1152 (D. Minn. 1987); Peery v. Brakke, 826 F.2d 740 (8th Cir. 1987) (holding that employee called at 3:45 p.m. and told to resign at 5:00 p.m. or be fired for 7 performance incidents was denied due process).

c. An opportunity to be heard must be afforded to the employee; however, this opportunity must be tailored to the capacities and circumstances of the employee to present his or her side of the story. Goldberg v. Kelly, 397 U.S. 254 (1970).

d. If public employer provides a full post-discipline hearing, then the pre-discipline hearing can be minimal, but still must provide the employee with (1) written or oral notice of charges, (2) an explanation the nature of the evidence against the employee, and (3) afford the employee an opportunity to respond. In Riggins v. Board of Regents, 790 F.2d 707 (8th Cir. 1986), a confrontation soon after incident with a report of the incident and with opportunity to respond followed by suspension and meeting with superior did not violate due process.

e. The hearing must give the employee an opportunity to respond to the propriety of the sanction imposed as well as the merits of the charges. Gour v. Morse, 652 F. Supp. 1166 (D. Vt. 1987).

f. Circumstantial evidence is not hearsay but proof from which ultimate facts may be inferred; hearsay is admissible in an administrative case to supplement or explain other evidence. Lake County Sheriff's Dep't. v. UAC, 478 So. 2d 880 (Fla. 5th DCA 1985).

4. Avoiding The Due Process Hearing

There are two methods by which the need for a pre-discipline hearing may be avoided. First, if the employee is suspended with pay, then there is no deprivation. Bailey v. Board of County Comm'rs of Alachua County, 956 F.2d 1112, 1124 (11th Cir. 1992). Second, in the unusual case, the "necessity of quick action" by the public employer or the "impracticality of providing any meaningful pre-discipline process" and the existence of a post-discipline hearing can satisfy procedural due process. Bailey, 956 F.2d at 1123.

a. For example, where a designated airplane pilot examiner was suspended without a pre-discipline hearing, this was a necessary safety measure and did not violation due process. Greenwood v. FAA, 28 F.3d 971, 975 (9th Cir. 1994).

b. No hearing is required if there are no disputed facts. S.E.C. v. Elliot, 953 F.2d 1560 (11th Cir. 1992.

IV. POST-DISCIPLINARY DUE PROCESS HEARING FOR PROPERTY RIGHTS

A. Timing and Type of Due Process Hearing Required - - If the pre-discipline hearing was minimal, then there must be a full evidentiary hearing "within a reasonable time" after the discipline. Adams v. Sewell, 946 F.2d 757 (11th Cir. 1991)), overruled on other grounds, McKinney v. Pate, 20 F3d 1550 (11th Cir. 1994).

1. Due Process Hearing - - Nine Month Delay - - In Loudermill, a nine-month delay after termination until a civil service decision was not unconstitutionally lengthy.

2. Due Process Hearing - - One Year Delay - - A one-year delay in conducting a post-discharge hearing did not violate an employee's procedural due process rights due to an "administrative bottleneck" created by a change in the public employer's rules and procedures for handling discipline and when a pre-discipline hearing was held. DeVito v. Chicago Park Dist., 972 F.2d 851 (7th Cir. 1992). **However, since such cases turn on the specific facts, the recommended procedure is to conduct the hearing at the earliest practical time.**

B. Subpoena Requirement For Post-Disciplinary Due Process Hearing - - A lack of subpoena power, whereby the employee could require witnesses to attend and testify on the employee's behalf, was a factor which led to the conclusion that the post-discipline hearing was inadequate. Adams, 946 F.2d at 766.

C. Right to Counsel in Post-Disciplinary Due Process Hearing - - The employee has the right to be represented by an attorney at the post-discipline hearing. Langley v. Adams County, 987 F.2d 1473, 1480 (10th Cir. 1993).

D. Confrontation Rights in Post-Disciplinary Due Process Hearing - - The employee must have the opportunity to confront and cross-examine the adverse witnesses in the presence of the decision-maker. Adams, 946 F.2d at 765.

E. Findings of Fact in Post-Disciplinary Due Process Hearing -- Specific findings of fact are necessary, and where omitted, the decision cannot be made by a Board with different membership; rather a new hearing is required. South Trail Area Fire Control Dist. v. Knecht, 400 So. 2d 46 (Fla. 2d DCA 1981); Davis v. Civil Serv. Bd., 501 So. 2d 1336 (Fla. 2d DCA 1987).

1. Untrue Reasons in Post-Disciplinary Due Process Hearing - - Reasons for termination may be found to be pretextual where director was terminated for insubordination and loss of confidence, and real reason was anger over public furor. Barnett v. Housing Auth. of Atlanta, 707 F.2d 1571 (11th Cir. 1983), overruled on other grounds, McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).

F. Due Process Hearing And Union Considerations - - Representation Considerations/"Weingarten" Rights - - The right to union representation upheld where meeting is investigatory (whether or not there is interrogation), employee reasonably expects that meeting will result in disciplinary action, and employee timely requests representation. City of Ft. Lauderdale, 12 FPER ¶ 17167 (PERC 1986).

G. Due Process Hearing Record

1. Tape Recording Due Process Hearing Permitted - - When all parties have given consent, tape recording is permitted. § 934.03, F.S.

2. Court Reporters in Due Process Hearing - - May be used to record testimony.

3. Referral to Law Enforcement After Due Process Hearing - - May be appropriate if there is a violation admitted or established.

4. Informal Recording of Due Process Hearing - - Meeting minutes have been used to record proceedings.

H. Lawsuits On Unlawful Deprivations Of Property Rights - - State court is the proper forum for lawsuit alleging unlawful deprivation of procedural due process. McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994)(en banc).

1. Employment is Not A Fundamental Right - - "Because employment rights are not 'fundamental' rights created by the Constitution, they do not enjoy substantive due process protection."

2. Adequate Due Process Review Procedures - - Florida's procedures for court review by certiorari (or permission) are adequate and "Florida courts indeed have the power to review employment termination cases. Inherent in that power to review is the power to remedy deficiencies and to cure violations of due process."

3. Appropriate Forum to Review Due Process Claim - - Therefore, the appropriate forum for employee due process claims "is not federal court but a Florida state court possessing the ability to remedy the alleged procedural defect; that forum might well have prevented a violation of [Plaintiff's] procedural due process rights and thereby obviated the need for this suit."

4. Plaintiff's Burden in Due Process Cases - - The Court also instructed that a procedural due process plaintiff must allege and prove that available state procedures are inadequate. McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994)(en banc).

V. DUE PROCESS - LIBERTY INTERESTS OF PUBLIC EMPLOYEES

A. Definition of Liberty Interest - - Even at-will employees who have no property rights may still have a protected "liberty interest" in their reputations and may pursue a claim alleging deprivation of procedural due process with regard to that liberty interest. Buxton v. City of Plant City, 871 F.2d 1037 (11th Cir. 1989). **See Comment at the foot of Section V.**

B. Liberty Interest Test - - To prove that a deprivation of a public employee's liberty interest has occurred without due process of law, the employee must show:

1. a false statement

2. of a stigmatizing nature

3. referring to a governmental employee's discharge

4. made public

5. by the employee's government employer

6. without a meaningful opportunity for employee to clear his or her name

7. and, Florida state procedures are inadequate to remedy the alleged violation. Cotton v. Jackson, 216 F.3d 1328 (11th Cir. 2000).

C. Liberty Interest - - "Stigmatizing" as a Result of the Discipline Process - - This means to cast doubt on reputation, damage standing in community and/or foreclose employment opportunities. See Smith v. Town of Golden Beach, 403 So. 2d 1346 (Fla. 3d DCA 1981); Vaughn v. Shannon, 758 F.2d 1535 (11th Cir. 1985).

1. Liberty Interests Incident to Termination - - Alleged defamation in response to request for information on employee who had resigned was not incident to termination of employment and was therefore not a constitutional deprivation. Siegert v. Gilley, 500 U.S. 226 (1991).

2. Liberty Interest if Employee is Excluded from Profession - - Charges must be such as to permanently exclude the employee from his profession. Warren v. Crawford, 927 F.2d 559 (11th Cir. 1991) (holding that termination of department head because department not run efficiently not sufficient); Roley v. Pierce County Fire Protection Dist., 869 F.2d 491 (9th Cir. 1989) (holding that discharge for unsatisfactory performance not sufficient); see also Chabal v. Reagan, 841 F.2d 1216 (3d Cir. 1988) (holding that discharge for following conflicting directives not sufficient); Robinson v. City of Montgomery, 809 F.2d 1355 (8th Cir. 1987) (holding that discharge for dissatisfaction with performance not sufficient).

3. Publication and Liberty Interest - - To make a claim, employee must show they were denied a future employment position based upon a publication of the reasons for their original

firing. Moore v. Mississippi Valley State Univ., 871 F.2d 545 (5th Cir. 1989). No likely publication where disclosure was made in unemployment compensation proceeding that was privileged and exempt from Florida Public Records Act. Smith v. Town of Golden Beach, 403 So. 2d 1346 (Fla. 3d DCA 1981).

D. Liberty Interest - - Denied as Substantially False or Inaccurate - - The combination of a stigma with a factual dispute over the truth of the charges triggers a right to a hearing that "provide[s] the person an opportunity to clear his name." Love v. Sessions, 568 F.2d 357 (5th Cir. 1978) (citing, Board of Regents v. Roth, 408 U.S. at 573).

E. Liberty Interest Requires Information to be Made Public - - A policeman claimed that his "liberty" had been deprived when he was discharged, since the reasons given for his discharge were false. The officer was found to have no "liberty" interest in his employment because the reasons for the discharge had not been made public. Bishop v. Wood, 426 U.S. 341 (1976); See also Smith v. Town of Golden Beach, above, (information must be made available to the general public); Ortwein v. Mackey, 511 F.2d 696 (5th Cir. 1975) (in an official or intentional manner); Vaugh v. Shannon, above. **However, in Buxton v. City of Plant City, 871 F.2d 1037 (11th Cir. 1989), information in an internal affairs report and personnel file was considered sufficient publication due to Florida's public records law. See also Mann v. City of Oakland Park, 581 So. 2d 986 (Fla. 4th DCA 1991). Contra, Johnson v. Martin, 943 F.2d 15 (7th Cir. 1991).**

F. Liberty Interest and Name-Clearing Hearing Requirement

1. Purpose of Name Clearing Hearing - - The hearing is to allow the aggrieved party to "clear his/her name" and need not take place prior to the termination or publication of the information. Campbell v. Pierce County, 741 F.2d 1342 (11th Cir. 1984); Buxton, supra; but see Walker v. U.S., 744 F.2d 67 (10th Cir. 1967)(charge of dishonesty in application required notice of basis of allegation and pre-termination opportunity to respond), overruled on other grounds, Melton v. Oklahoma City, 928 F.2d 920 (10th Cir. 1991).

The process which is due is:

a. a hearing for the employee to "clear his/her name";

b. not a hearing to modify an unjustified termination;

c. and not required to take place prior to termination;

d. must include notice of the right to such a hearing (an example of which is contained in the appendix to this Chapter). **The simple availability of a grievance procedure is insufficient. Buxton v. City of Plant City, 871 F.2d 1037 (11th Cir. 1989).**

2. Public Records Requiring Name Clearing Hearing - - In Buxton, a city was required to provide an opportunity for a post-termination name-clearing hearing when stigmatizing information about a police officer was made part of a public record. The court specifically held that "[n]otice of the right to such a hearing is required." The officer had allegedly assaulted someone during an arrest and was subsequently terminated. The court held that placing such information in a public employee's personnel file or in an internal affairs report, which are public records under §§ 119.01, 119.07, and § 112.433, F.S., constitutes publication, which affords the employee due process rights to

protect his/her liberty interests. "Publication" was held to occur at the time the documents were filed as public records, not when they were later disclosed to others. For an opposite view, see Johnson v. Martin, 943 F.2d 15 (7th Cir. 1991)(existence of information in personnel file is not public disclosure); Buxton, supra.

3. Informal Nature of Name Clearing Hearing - - The employee was afforded the opportunity to cross-examine such witnesses and to present evidence on her behalf. After hearing all of the relevant testimony the Board of Commissioners affirmed its previous decision. The court found that the post-termination hearing was sufficient. It cited as requirements for the liberty interest hearings that the employee be accorded notice of the charges and the opportunity to support his/her allegations by argument, however brief, and if need be by proof, however informal. A claim alleging partiality on the part of the hearing body (the Board of Commissioners which had terminated the employee) was rejected since the purpose for the hearing was name-clearing, not a reevaluation of the termination. Campbell v. Pierce County of Georgia, 741 F.2d 1342 (11th Cir. 1984).

4. Complaint Not Substitute for Name Clearing Hearing - - An employee worked for the Government Printing Office (GPO) and upon notification of his termination, asked for a hearing and also took his complaint, since he was black, to an EEO proceeding. The district court held and was affirmed by the circuit court, that the EEO proceeding that Lyons had as a result of his complaint of racial discrimination did not constitute a name-clearing hearing. The court held that 1) the GPO had the obligation to offer a hearing, 2) the agency had discretion in fashioning procedures, 3) the hearing does not address the correctness of the action, and 4) it expressed no view on the entitlement to cross-examination. Lyons v. Barrett, 851 F.2d 406 (D.C. Cir. 1988).

5. Employee's Rebuttal Must Be Preserved - - Because a name clearing is just that, a record of the employee's rebuttal must be preserved as part of his employment records.

Comment: The Eleventh Circuit Court of Appeals in Atlanta has extended its holding in McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc) to both substantive and procedural due process claims, including an alleged process claim grounded on a liberty interest. Thus, in Florida, unless a plaintiff pleads and proves that Florida state procedures are inadequate to remedy the alleged violation, no federal constitutional claim exists under Section 1983. See, e.g., Cotton v. Jackson, 216 F.3d 1328 (11th Cir. 2000). In evaluating state law remedies, clearly certiorari, mandamus or even the availability of a defamation or declaratory judgment action will suffice to defeat a federal due process claim. Cotton, 1332, 1332 n. 3, 1333. See also, Walton v. Health Care District of Palm Beach County, 862 So. 2d 852 (Fla. 4th DCA 2003).

VI. NEUTRALITY OF POST TERMINATION DECISIONMAKER

A. An impartial decision-maker is a basic component of minimum due process. Megill v. Board of Regents, 541 F.2d 1073, 1079 (5th Cir. 1976). When the head of an agency testifies to a material fact in an administration hearing, review of the hearing officer's proposed order should be undertaken by a neutral disinterested third party. Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So. 2d 322 (Fla. 1990). In Hanley v. GSA, 829 F.2d 23 (Fed. Cir. 1987), at pre-termination stage, no violation of due process was found when proposing and deciding roles are performed by the same person. In Garraghty v. Jordan, 830 F.2d 1295 (4th Cir. 1987), no violation was found where pre-suspension hearing was conducted by supervisor who was sole witness to alleged insubordination and who had instituted suspension. See also Salisbury v. Hous. Auth. of Newport, 615 F. Supp. 1433 (E.D. Ky. 1985). Familiarity with facts is insufficient to establish bias on the part of the

decision-maker. Withrow v. Larkin, 421 U.S. 35 (1975). No disqualification is required for a decision-maker for prior public position on policy issue in absence of showing that decision-maker was not "capable of judging a particular controversy fairly on the basis of its own circumstances." Hortonville J.S.D. No. 1 v. Hortonville Ed., 426 U.S. 482 (1976) (holding that city manager who made conditional decision to terminate employee was not constitutionally precluded from acting as a decision-maker in subsequent post-termination hearing, absent evidence of actual bias.) Morris v. City of Danville, 744 F.2d 1041 (4th Cir. 1984). An employment appeal board composed entirely of the employer's employees did not deprive a former employee of his due process rights. Peel v. Tunnell, Case No. 90-50089/LAC (N.D. Fla. July 26, 1993), aff'd, 28 F.3d 116 (11th Cir. 1994).

VII. DISCIPLINE AND DISCHARGE - FIRST AMENDMENT CONCERNS

A. First Amendment Concerns -- Restrictions On Discipline and Discharge - - The First Amendment states in relevant part: "Congress shall make no law...abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Clearly, the First Amendment protects government employees from restraints on their right of free expression. See Bryson v. City of Waycross, 888 F.2d 1562, 1565 (11th Cir. 1989), Pickering v. Board of Ed., 391 U.S. 563 (1968). Accordingly, a public employer may not discipline or discharge an employee for reasons which violate the employee's First Amendment rights. A public employee's freedom of speech, however, is not absolute. See Rankin v. McPherson, 483 U.S. 378 (1987); Bryson, 888 F.2d at 1565. In the public sector, constitutional interests are limited by the state's need to preserve efficient governmental functions. Thus, a public employee's speech must satisfy three factors to be protected: (1) the speech must be made as a citizen and not as an employee; (2) the speech involved must be a matter of public concern; and (3) the employee's interests in speaking must outweigh the City's legitimate interest in efficient public service. See Garcetti v. Ceballos, ____ U.S. ____, 126 S.Ct. 1951 (2006); Boyce et al. v. Andrew, et al., ____ F.2d ____ (11th Cir. 2007); Pickering v. Board of Ed., 391 U.S. 563 (1968); Beckwith v. City of Daytona Beach Shores, 58 F.3d 1554, 1563-1564 (11th Cir. 1995); Bryson v. City of Waycross, 888 F.2d 1562, 1565-1566 (11th Cir. 1989). The majority of federal circuit courts that have addressed the issue have held that the right to petition must also address a matter of public concern to be protected under the Fourteenth Amendment. See Grigley v. City of Atlanta, 136 F.3d 752 (11th Cir. 1998); but see, San Filippo v. Bongiovanni, 30 F.3d 424 (3d Cir. 1994)(holding that protection of petition rights not limited to matters of public concern).

B. Test to Evaluate Free Speech Claims - - In Bryson v. Waycross, 888 F.2d 1562, 1565-1566 (11th Cir. 1989), the Eleventh Circuit summarized previous U.S. Supreme Court decisions evaluating free speech claims to develop a three part test. See Beckwith v. City of Daytona Beach Shores, 58 F.3d 1554, 1563-1564 (11th Cir. 1995); Kurtz v. Vickrev, 855 F.2d 723 (11th Cir.1988).

1. Part One - - Whether the speech in question constituted protected activity. In order to be constitutionally protected, the speech has to satisfy both prongs of the Pickering Test described above: (1) the speech involved must be a matter of public concern; and (2) the employee's interests in speaking must outweigh the City's legitimate interest in efficient public service. See Pickering v. Board of Ed., 391 U.S. 563 (1968).

a. Public Concern - - Because "[a]n employee's speech will rarely be entirely private or entirely public," the "main thrust" of the employee's speech must be determined. Maggio v. Sipple, 211 F.3d 1346, 1352 (11th Cir. 2000). In making this determination, the court must examine the content, form, and context of the employee's speech, and consider whether the employee

is speaking as a citizen on behalf of the public, or as an employee on matters only of personal interest. See Bryson, 888 F.2d at 1565; Terrell v. University of Texas Sys. Police, 792 F.2d 1360 (5th Cir. 1986)(holding that an employee's speech on matter of general concern is unprotected when it is tied to a personal employment dispute; task is to decide if speech was made "primarily" in role of employee); Noyola v. Texas Dept. of Human Resources, 846 F.2d 1021 (5th Cir. 1988)(holding that speech is unprotected if the employee was speaking "primarily as an employee rather than in his role as a citizen").

(i). Political Speech - - Although public political remarks are often constitutionally protected, not all speech involving politics and political candidates are matters of public concern. See Brochu v. City of Riviera Beach, 304 F.3d 1144 (11th Cir. 2002)(holding that a police officer who was a politically active PBA member, did not engage in speech that was constitutionally protected because his speech went beyond publicly campaigning in favor of particular candidates and involved a "secret plan" to overthrow the existing administration and place himself and his friends in charge of the police department); Hansen v. Soldenwagner, 19 F.3d 573, 577 (11th Cir. 1994)(noting that insulting speech about a public officer "gives the speech an element of personal as opposed to public interest").

(ii). False Speech - - False or recklessly uttered statements are not protected under the First Amendment. See Breaux v. City of Garland, 205 F.3d 150, 156 (5th Cir. 2000)(noting that speech that is either false or reckless as to its disregard for the truth is not constitutionally protected); Gilbrook v. City of Westminster, 177 F.3d 839, 868 (9th Cir. 1999)(stating that determination of whether speech was false or made with reckless disregard of the truth is a factor in resolving whether speech is constitutionally protected), citing to, Moran v. Washington, 147 F.3d 839, 849 (9th Cir. 1998); Reeves v. Claiborne County Bd. of Educ., 828 F.2d 1096, 1100 (5th Cir. 1987)(holding that false or reckless statements lose their status as protected speech); Dooley v. City of Philadelphia, 153 F.Supp.2d 628, 645 n.13 (E.D. Pa. 2001)(noting that the false or reckless nature of speech is a factor in considering its protected status); Libbra v. City of Litchfield, 893 F.Supp. 1370, 1377 (C.D. Ill. 1995), citing to, New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

b. Balancing Test - - Even if the employee's speech is protected, sometimes the governmental interest outweighs the right to free speech. If the speech addresses a matter of public concern, the court then weighs the employee's first amendment interests against "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. (quoting, Pickering v. Board of Educ. of Township High Sch. Dist., 391 U.S. 563, 568 (1968). In Bryson, the court applied the balancing test by addressing "whether the statement impairs discipline by superiors or harmony among co-workers, [or] has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary." Bryson, 888 F.2d at 1565. The employee's interest must outweigh the government's interest in promoting efficient public service by not being unreasonably disruptive even if the speech is on a matter of public concern. Id.

(i). Police Officers - - There is a heightened standard for speech uttered by police officers. See Brochu v. City of Riviera Beach, 304 F.3d 1144, 1159 (11th Cir. 2002)(stating that inflammatory speech on the part of police officers "definitely tip[s] the Pickering balance in favor of the City"); Oladeinde v. City of Birmingham, 230 F.3d 1275, 1293 (11th Cir. 2000)(holding that "there is a heightened need for order, loyalty, morale, and harmony" in police departments that affords "more latitude in responding to the speech of its officers than other

government employees"); Busby v. City of Orlando, 931 F.2d 764, 774 (11th Cir. 1991)(noting the strong interest in maintaining loyalty, discipline, good working relationships among the employees, and the police department's reputation). In a recent unpublished decision in the Southern District of Florida, Diaz v. City of Hialeah (2003), Judge Graham granted summary judgment in favor of the City, holding that certain speech of a police lieutenant was not protected under the First Amendment.

2. Part Two - - If speech was protected activity, whether the speech was a substantial factor in the government's challenged employment decision.

The claimant must establish that the speech played "a substantial role" in the challenged decision. Bryson, 888 F.2d at 1565-1566, citing to, Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

a. Temporal Proximity- - In cases where a claimant provides the timing of the adverse conduct as the only circumstantial evidence to create an inference of causation, courts have consistently held that the gap between the protected activity and the adverse employment action must be temporally close. See Juarez v. Ameritech Mobile Communications, Inc., 746 F. Supp. 798 (N.D. Ill. 1990); aff'd, 957 F.2d 317 (7th Cir. 1992)(holding that almost six months, standing alone, does not support an inference of causation); Parrot v. Cheney, 748 F. Supp. 312 (D. Md. 1989)(holding that less than four months, standing alone, does not support an inference of retaliatory motive), aff'd per curiam, 914 F.2d 248 (4th Cir. 1990). The Supreme Court recently acknowledged that "in cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close." Clark County School District v. Breeden, 532 U.S. 268, 273 (2001), citing to, Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997)(holding that a three month lapse, standing alone, was insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174-1175 (7th Cir. 1992)(holding that a four month lapse, standing alone, was insufficient). In Breeden, the Court concluded that a time lapse of twenty months, without more, "shows no causality at all." Id.

3. Part Three - - If the speech was protected activity and a substantial factor, whether the government would have made the same employment decision in the absence of the protected conduct.

The claimant has to establish that the employer would not have disciplined the employee "but for" the protected speech. Bryson, 888 F.2d at 1565-1566, citing to, Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

C. Courts Do Not Sit As A "Super-Personnel Department" - - A court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency in reaction to the employee's speech relating to a matter of personal interest. Connick v. Myers, 461 U.S. 138 (1983). In evaluating a supervisor's employment decisions, the courts must not "second-guess the business judgment of employers." Combs v. Plantation Patterns, 106 F.3d 1519, 1543 (11th Cir. 1997). The federal courts customarily take a hands-off approach to personnel matters. As this Circuit has repeatedly stated, "[f]ederal courts do not sit as a superpersonnel department that re-examines an entity's business decisions...[r]ather, [the court's] inquiry is limited to whether the employer gave an honest explanation of its behavior." Chapman v. AI Transport, 229 F.3d 1012,1030 (11th Cir. 2000)(en banc), citing to, Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470

(11th Cir. 1991). Under this limited inquiry, it is not the role of a court to judge whether employment decisions are "prudent or unfair." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999).

D. Employer's Investigation - - The Supreme Court, in a four member plurality opinion, has held that courts should accept the employer's reasonable factual conclusions as to the employee's speech or conduct because of the government's interest in efficient employment decision-making. Waters v. Churchill, 513 U.S. 804 (1994).

E. First Amendment Protections Extend to Independent Contractors - - The First Amendment protections also extend to independent contractors employed by public employers. A trash hauler whose independent contract with the county was not renewed after he criticized the board over landfill rates and mishandling of taxpayer dollars held entitled to same First Amendment protections as other public employees. Board of County Comm'rs, Wabaunsee County v. Umbehr, 518 U.S. 668 (1996).

F. Some Fact-Specific Circumstances Related to First Amendment

l. Political Affiliation - - Discipline based on political affiliation is unlawful. Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990); Elrod v. Burns, 427 U.S. 347 (1976).

2. Criticism - - Discharge of a teacher for sending a letter to a local newspaper critical of school board policy is unlawful. Pickering v. Board of Ed., 391 U.S. 563 (1968).

3. Protest - - Discharge of a teacher for wearing a black armband protesting the Vietnam war is unlawful. James v. Board of Ed., 461 F.2d 566 (2d Cir. 1972).

4. Hate Group Membership - - Discharge for membership in the Ku Klux Klan is unlawful. Murray v. Jamison, 333 F.Supp. 1379 (W.D. N.C. 1971).

5. Private Criticism - - Discharge for statements made in private by a teacher to a school principal critical of the school's desegregation program is unlawful. Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979).

6. Union Association - - Termination for exercise of First Amendment right of freedom of association by engaging in union activity is unlawful. Milliron v. Louisville & Jefferson County Metro. Sewer Dist., 867 F.Supp. 559 (W.D. Ky. 1994); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968).

7. Report to FBI - - Demotion for reporting overcharges and duplicate billing to FBI is unlawful. Vasbinder v. Ambach, 926 F.2d 1333 (2nd Cir. 1991).

8. Acting in Film - - Termination of teacher for acting in a film that featured vulgar language and partially undressed actors is unlawful. Rothschild v. Bd. of Ed. of Buffalo, 778 F.Supp. 642 (D.C. N.Y. 1991).

9. Writing Novel - - Termination of an assistant state attorney for writing a novel about the criminal justice system is unlawful. According to the court, "a fictional piece, intended for publication, that may provide insights into the operations of the criminal justice system is a public

document-concerning a matter of intense public concern in our crime-ridden, crime-obsessed society." The court held that the "novel, whether or not it alleges wrongdoing or addresses matters of public import in some world-important sense, presumptively is protected by the First Amendment." Eberhardt v. O'Mallev, 17 F.3d 1023 (7th Cir. 1994).

10. Criticism of Policies and Officials - - Termination of an employee for making private statements critical of city policies and officials is unlawful. The court considered whether the employee's speech was constitutionally protected and balanced the employee's interest in free speech against the city's interest in efficient administration. In balancing the conflicting interests, the court looked at the manner, time and place of the statements criticizing the mayor, the city clerk and certain fire department policies, as well as the context in which the discussion arose. The court held that "a citizen's right to be critical of...government officials lies at the core of the principle of free speech." It held that even though the statements were a matter of public concern, the employee could still have been lawfully terminated if the city had shown that "the statements interfered with a legitimate governmental interest in the operational efficiency of the enterprise." The court found no evidence that the employee's statements affected the city's interest in effective government. Casey v. City of Cabool, 12 F.3d 799 (8th Cir. 1993).

11. Internal Complaints - - Termination of an employee for complaining that his newly appointed supervisor had a criminal record is unlawful. O'Malley v. New York City Transit Auth., 829 F.Supp. 50 (E.D. N.Y. 1993).

12. Offensive Literature - - Discipline for quiet possession, reading and sharing of Playboy and similar magazines is unlawful. Johnson v. Los Angeles County Fire Dept., 865 F.Supp. 1430 (C.D. Cal. 1994).

13. Filing Grievance - - Retaliation for filing grievance violates the right to petition for redress and is unlawful. San Filippo v. Bongiovanni, 30 F.3d 424 (3d Cir. 1994).

14. Religious Proselytizing - - Discipline of "born-again" Christian requiring him to keep his "work environment" free of religious proselytizing, witnessing or counseling did not violate freedom of speech or religion because the employer did not seek to limit the employee's beliefs, but only his conduct. Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995).

15. Refusal to Teach Evolution - - Discipline of teacher for refusing to teach evolution was proper. Peloza v. Capistrano Unified School Dist., 37 F.3d 517 (9th Cir. 1994).

16. Speech Not Related to Work - - Speech not related to work may not be protected by the First Amendment. In City of San Diego v. Roe, the Supreme Court reversed a Ninth Circuit decision holding that a police officer could not be discharged for offering home made, sexually explicit videos for sale on an internet auction site because the officer's non-work-related activities were protected by the First Amendment and could not be grounds for terminating his employment. City of San Diego v. Roe, 125 S.Ct. 521 (2004). The Supreme Court ruled that the officer's behavior fell outside of First Amendment protection and that a governmental employer may impose certain restraints on the speech of its employees, even restraints that would be unconstitutional if applied to the general public. Id. at 523.

VIII. DISCIPLINE AND DISCHARGE - FOURTH AMENDMENT AND PRIVACY CONCERNS

A. Fourth Amendment - - The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Searches and seizures of private property of employees by government employers or supervisors are subject to the restraints of the Fourth Amendment. O'Connor v. Ortega, 480 U.S. 709 (1987).

B. Fourth Amendment Does Not Require Warrant for Searches by Employer - - When the state acts as an employer rather than in a law enforcement capacity, a warrant is often unsuitable. The search of an office by a supervisor, rather than a law enforcement officer, was justified where there were reasonable grounds for suspecting that search would turn up evidence of work-related misconduct or was for work-related purpose such as finding a file. The standard for determining when a search or seizure by a public employer is permissible is a standard of reasonableness. O'Connor v. Ortega, 480 U.S. 709 (1987).

C. Fourth Amendment Balancing Test - - Courts will apply a balancing test to weigh the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. United States v. Place, 462 U.S. 696 (1983); Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967). Generally, any work-related search by an employer satisfies the Fourth Amendment reasonableness requirement. United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973); United States v. Collins, 349 F.2d 863 (2d Cir. 1965); United States v. Bunkers, 521 F.2d 1217 (9th Cir. 1975). In Ortega, the U.S. Supreme Court stated that "requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk or file cabinet for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome." Ortega, 480 U.S. at 722. The U.S. Supreme Court came to a similar conclusion for searches conducted pursuant to an investigation of work-related employee misconduct, stating "[e]ven when employers conduct an investigation, they have an interest substantially different from the normal need for law enforcement." Id. at 724 (internal quotes and citation omitted). The Court agreed that the employee had a reasonable expectation of privacy as to his office, including desk and cabinet, but noted that the intrusion by the government employer involved a relatively limited invasion of an employee's privacy, and that government offices were provided to employees for the sole purpose of facilitating the work of an agency. Additionally, an employee may avoid exposing personal belongings at work by simply leaving them at home.

D. Fourth Amendment--Reasonableness of Search - - The "operational realities of the workplace," such as actual office practices, procedures, or regulations, frequently may undermine employees' privacy expectations. However, the objective component of an employee's professed expectation of privacy must be assessed in the full context of the particular employment relation. Reasonableness is measured on a case-by-case basis and depends upon balancing the public, governmental, and private interests at stake in a given situation. Shields v. Burge, 874 F.2d 1201 (7th Cir. 1989). For example:

l. Video Surveillance - - There is no reasonable expectation of privacy in an unenclosed locker area not sealed from view or provided for any employee's exclusive use. Thompson v. Johnson County Community Coll., 930 F. Supp. 501 (D. Kan. 1996). See also Vega-Rodriguez v. Puerto Rico Tele. Co., 110 F.3d 174 (1st Cir. 1997) (finding no reasonable expectation of privacy to disclosed, soundless video surveillance while at work, and no privacy right under the 14th Amendment or the Due Process Clause).

2. Access by Others - - There is no reasonable expectation of privacy in an unlocked desk and credenza located in an "open, accessible area" of the station. O'Bryan v. KTIV Television, 868 F. Supp. 1146 (N.D. Iowa 1994), aff'd in part, 64 F.2d 1188 (8th Cir. 1995). A city Mayor had his calendars, which showed both his business and personal schedules, boxed and stored in an archive with strictly controlled access. Here the court found that the Mayor did have a reasonable expectation of privacy. The court also found that the calendars had sufficient personal information that they were not public documents. United States v. Mancini, 8 F.3d 104 (1st Cir. 1993).

3. Nature of Employment - - A law clerk had no reasonable expectation of privacy in the chambers' appurtenances, desks, file cabinets, or other work spaces due to the open access of documents between judges and clerks. Sheppard v. Beerman, 18 F.3d 147 (2d Cir. 1994).

4. Notice to Employees - - There is no reasonable expectation of privacy in either office or locked credenza when the engineer, who had a "secret" security clearance and worked with classified materials, knew of the security regimen, including daily office searches. Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991). Here the office regulations placed employees on notice that certain areas were subject to employer intrusions. But see Bateman v. Florida, 513 So. 2d 1101 (Fla. 2d DCA 1987)(holding that the search of a hospital employee's desk was unlawful).

5. Random Locker Inspections - - There is no reasonable expectation of privacy against searches of employees' lockers when the employer had promulgated regulations expressly authorizing random inspections in certain circumstances. American Postal Workers Union v. United States Postal Serv., 871 F.2d 556 (6th Cir. 1989).

6. Criminal Investigation - - The presence of outside law enforcement officials and the possibility of the search leading to criminal charges against the employee did not inevitably convert the search into a criminal search requiring probable cause and a warrant. The employee was a child protective investigator, and state statutes invested the Office of the Inspector General with authority to investigate misconduct, misfeasance, malfeasance, or violations of rules, procedures, or laws by any employee, and the Inspector General was required to notify the State Police of possible criminal violations. Gossmeyer v. McDonald, 128 F.3d 481 (7th Cir. 1997).

7. A Random Look At Applicant And Fitness For Duty Drug Testing In The Public Sector - - Given the presence of drug and substance abuse in society in general, it is naïve to think that it is not equally present in any workforce. To counter this threat, employers, both public and private, have become increasingly more aggressive in implementing drug detection programs.

Union inflexibility aside, unfortunately for the public employer, the federal and Florida Constitutions both pose a distinct impediment to the success of such programs, an impediment not present in the private sector. Among other constitutional challenges, the principal attack has come under the Fourth Amendment of the U.S. Constitution as applied to state and local governments.

The federal government has issued DOT and pipeline regulations calling for random drug testing and they have uniformly withstood constitutional challenge. Following this lead, the Florida legislature has "authorized" the following types of drug tests: applicant testing, reasonable suspicion testing, routine fitness for duty testing, and follow-up testing. **As a result, Florida public employers may have been lulled into a false sense of security regarding the constitutionality of their programs.**

Simply because the four types of tests have been legislatively endorsed does not make them impervious to constitutional challenge. Reasonable suspicion and follow-up testing will most likely survive constitutional challenge, but the former is always vulnerable to as to whether the underlying suspicion was reasonable. "Across the workforce" applicant and "workplace wide" fitness for duty testing are most vulnerable to challenge.

Departing from its decisions in Von Raab, Skinner and Vernonia, the U.S. Supreme Court took a step backward in Chandler v. Miller, 520 U.S. 305 (1997). In Chandler, Georgia required its high state officers, including its judiciary, to have privately collected urine samples certified to be free from five illegal drugs before they could hold office. Despite the fact that the seizure (in drug testing the seizure precedes the search) was hardly intrusive, the U.S. Supreme Court found a Fourth Amendment violation. To be reasonable, the Court said a search must be based on reasonable suspicion unless special needs exist beyond law enforcement. To satisfy a "special need" a context specific inquiry of the competing public and private interests must be undertaken and the special need for drug testing must be substantial.

Rejecting Georgia's justification that high officials and its judiciary are drawn into question if they use illegal drugs and are clearly subject to bribery and blackmail as drug users, the Court found that in the absence of a demonstrated problem of drug abuse, Georgia's program did not constitutionally qualify as a special need. Although the Court specifically excepted fitness for duty testing from its decision, Chief Justice Renquist observed in dissent that a different result for such testing was inconceivable, given the Court's rationale.

Relying on Chandler, Judge Ryskamp, in Baron v. City of Hollywood, 93 F.Supp. 2d 1337 (S.D. Fla. 2000), struck down the City's across its workforce applicant drug testing program. He held that only where the risk to public safety is substantial or genuinely in jeopardy may suspicionless drug testing be permitted. He noted that the City did not identify any high risk safety sensitive job with the potential for immediate injury to others and he found no demonstrated drug abuse problem within its workforce.

In view of Chandler and Baron, applicant and fitness for duty testing will not survive constitutional muster unless a public employer can demonstrate clear special needs consistent with those opinions. Indeed, the special public interest needs to support such tests may not be materially different from those special needs that constitutionally justify random drug testing in the public sector.

IX. DISCIPLINE AND DISCHARGE - FIFTH AMENDMENT CONCERNS

A. Fifth Amendment, United States Constitution - - No person shall be compelled in any criminal case to be a witness against himself. U.S. CONST. amend. V.

1. Fifth Amendment Privilege Against Self-Incrimination - - The Fifth Amendment privilege against self-incrimination can also be asserted in other proceedings, but protects against disclosures in criminal cases.

2. Self-Incrimination on Compelled Responses- Garrity Rights - - Answers which are compelled on threat of termination were coerced and prohibited from use in criminal case. Garrity v. New Jersey, 385 U.S. 493 (1967). Public employers can compel employees to meet and provide truthful answers as long as the employees are granted immunity from criminal prosecution

arising from their responses. Id. Public employers may use information learned during an employee interview as the basis for disciplining the employee. Id.

3. Termination for Refusal to Respond - - Employees were advised that they would be terminated if they refused to testify or asserted the Fifth Amendment, and some were dismissed for asserting the Fifth Amendment to the commissioner of investigations who told them that anything that they said could be used against them in court. Others were dismissed for refusing to sign waivers of immunity before the grand jury. Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation of the City of New York, 392 U.S. 280 (1968). The U.S. Supreme Court held that the employees were not dismissed for refusing to account for their conduct. Instead, the employees were dismissed for invoking and refusing to waive their Fifth Amendment rights. The government was seeking not only an accounting but "testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally." Id. However, if the local government body had demanded that the employees "answer questions specifically, directly and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and they had refused to do so, "they would be subject to dismissal." Id.

4. Fifth Amendment And Internal Investigation - - An Attorney General Opinion has recognized that "a public employee who refuses to testify as to a matter which his employer is entitled to inquire may be discharged for insubordination, but such answers as may be given in such testimony may not be used against him in a subsequent criminal proceeding." AGO 86-26.

5. Procedure in Internal Investigation Implementing Fifth Amendment - - In Hester v. City of Milledgeville, 777 F.2d 1492 (11th Cir. 1986), the Eleventh Circuit Court of Appeals held that answers may be demanded if the employee is not required to waive constitutional rights. The Fifth Amendment is limited to "any criminal case" and does not prevent a governmental unit from taking non-criminal disciplinary action against any employee on the basis of compelled answers. Id. The governmental unit which requires answers may not burden the employee's right to use the Fifth Amendment in a later criminal case by threatening to discipline the employee if he refuses to waive it. The governmental unit's failure to guarantee that answers could not be used against the employee in a criminal case makes no difference. Under the Fifth Amendment, where the employee is compelled to give evidence, that evidence cannot be used in a criminal case. A guarantee by the employer would be duplicative and serve no useful purpose. See D'Acquisto v. Washington, 640 F.Supp. 594 (N.D. Ill. 1984).

6. Fifth Amendment and Pre-disciplinary Due Process - - Due process requires an opportunity to be heard. Giving an employee the choice between his opportunity to be heard and his privilege against self-incrimination has been held permissible because public employees have no absolute right to refuse to account for their actions and due process does not prevent an employer from disciplining while the employee is asserting the Fifth Amendment. D'Acquisto v. Washington, 640 F.Supp. 594 (N.D. Ill. 1984).

7. Termination "Solely" Due to Invocation of Fifth Amendment Rights - - In a lawsuit, the former employee must submit facts upon which a reasonable jury could conclude that he was terminated solely because he remained silent at the disciplinary hearing leading up to his discharge. In that case, the plaintiff-employee was not given Garrity rights (protection from criminal prosecution for answers given during investigation) because he was not compelled to answer questions at the hearing. "The government's mere failure to tender immunity cannot amount to an

attempt to compel waiver of immunity." The choice of admitting, denying or refusing to answer was full vindication of Fifth Amendment privilege. Harrison v. Wille, 132 F.3d 679 (11th Cir. 1998).

B. Polygraph Use - Implications on Fifth Amendment Rights - - Dismissal of police officer for refusing to submit to a polygraph test constituted "an unjust and unlawful job deprivation." Officer otherwise submitted to the investigation and the court emphasized the undemonstrated reliability of the test and found the order to take the test was not lawful or reasonable. Farmer v. City of Fort Lauderdale, 427 So. 2d 187 (Fla. 1983).

l. Administration of Polygraph Subject to Fifth Amendment Restrictions - - There is no constitutional difference between polygraphs testing and other forms of compelled testimony. Accordingly, the city could, without violating the Fifth Amendment privilege, order employees to take a polygraph test so long as: (1) it did not require employees to waive any rights; and (2) the results were not the sole grounds for action against the employees. Hester v. City of Milledgeville, 777 F.2d 1492 (11th Cir. 1986).

2. Polygraph May Raise Due Process Concerns - - The unreliability of polygraph "might" raise due process question on theory of a deprivation of a meaningful opportunity to be heard; however, the court refused to conclude that a local governmental unit must always have evidence of wrongdoing unrelated to a polygraph before disciplining, if circumstances exist showing that information derived from the test is valid. Hester v. City of Milledgeville, 777 F.2d 1492 (11th Cir. 1986).

3. Federal Law On Polygraph Not Applicable - - Congressional actions restricting polygraphs are not applicable to government employers. HR 1212, Employee Polygraph Protection Act of 1988.

X. EQUAL PROTECTION CLAUSE LIMITATIONS ON DISCIPLINE

A. Equal Protection - Three Classifications

1. Rational Basis, Intermediate Scrutiny and Suspect and Strict Scrutiny Classifications - - Traditionally, the Equal Protection Clause of the Fourteenth Amendment required only that the government must not create differences in treatment between groups of individuals "except upon some reasonable differentiation fairly related to the object of regulation." Railway Express Agency v. New York, 336 U.S. 106 (1949). That is, differentiation must only have some "rational basis." In some situations "strict scrutiny" is required in order to ensure that arbitrary classifications do not spoil equality of treatment. "Strict scrutiny" requires that when state action is based upon some "suspect" classification; or impacts upon "fundamental" rights or interests, it must be justified by a "compelling" state interest, or the equal protection clause will be violated.

B. Equal Protection Classifications Found to be "Suspect"

1. Race - - Korematsu v. United States, 323 U.S. 214 (1974).

2. Alienage - - Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

3. Sex is Unclear - - Notably, while sex has been found to constitute a "suspect" classification requiring "strict scrutiny" by some federal district courts, its status as a "suspect classification" is still in question. See Frontiero v. Richardson, 411 U.S. 677 (1973). Because gender has often been the touchstone for pervasive and often subtle discrimination, such classifications must bear a close and substantial relationship to important governmental objectives and require an exceedingly persuasive justification to pass constitutional muster. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979).

4. Sexual Preference - - Jantz v. Muci, 759 F. Supp. 1543 (D.C. 1991), rev'd on other rounds, 976 F.2d 623 (10th Cir. 1992); Buttino v. FBI, 801 F.Supp. 298 (N.D. Cal. 1992).

C. Equal Protection Classifications Found not to be "Suspect"

1. Veterans - - Personnel Administration of Massachusetts v. Feeney, 442 U.S. 256 (1979).

2. Labor Organization Status - - Teachers Local 2032 v. Memphis Bd. of Educ., 534 F.2d 699 (6th Cir. 1976).

3. Wealth - - James v. Valtierra, 402 U.S. 137 (1971).

D. The Contours Of Equal Protection Claims

"The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976) at 239.

Although still debated

> it is widely accepted that the principal aim of the drafters and ratifiers of the Fourteenth Amendment was to eradicate official antebellum discrimination against blacks, particularly the so-called "Black Codes," pursuant to which blacks were treated as a lower or second-class caste.

Angry White Males: The Equal Protection Clause and "Classes of One" 89 Ky.L.J. 69 at p. 71.

The Equal Protection Clause creates a substantive claim that "emphasizes disparity in treatment by a state between classes of individuals **whose situations are arguably indistinguishable."** (Emphasis added) Ross v. Moffitt, 417 U.S. 600, 609 (1974); Lee v. Hutson, 810 F.2d 1030, 1034 (11th Cir. 1987). The Clause applies to all three branches of state and local government. Virginia v. Rives, 100 U.S. 313, 318 (1879).

While the principal thrust of the Equal Protection Clause is to protect vulnerable groups, because the Clause speaks to the protection of "persons," its federal protection extends to even a single person who is arbitrarily treated differently from others who are identically situated in all relevant respects. Village of Willowbrook v. Olech, 120 S.Ct. 1073 (2000) (per curium).

1. Legislation Equal Protection Principles And Their Application to Public Employment

Because the vast percentage of the Supreme Court's equal protection jurisprudence has addressed legislative acts, it is submitted that courts must look to those established principles and consider them in the employment context.[1] For example, a racial classification warrants the strictest scrutiny and, regardless of motivation, is presumptively invalid and thereby will be permitted only when supported by extraordinary justification.

Gender classifications have also been traditionally and often subtly discriminatory, and, thus must bear a close substantial relationship to important governmental objectives. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 271-273 (1979). On the other hand, a legislative classification not involving fundamental rights or proceeding along suspect class lines must be evaluated from the opposite end of the continuum. Such classifications enjoy a strong presumption of validity. Thus, if there is a rational relationship between the different class treatments and some legitimate governmental objective, then the classification passes constitutional muster. Further, the legislature need not articulate its underlying purpose or rationale and the classification must be upheld if there are any reasonably supporting facts that provide a rational basis for its classification.

Legislative choice involving non-suspect classes may also be based on rational speculation and is not to be subjected to subsequent courtroom factfinding. Indeed, one attacking non-suspect classifications must negate every conceivable basis that might support the classification. Heller v. Doe, 509 U.S. 312, 319-321, 113 S.Ct. 2637 (1993).

It is submitted that these fundamental principles are equally, if not more applicable, to decisions involving employee discipline because of the numerous inherent factors involved in disciplinary decisions.

2. The Eleventh Circuit's Equal Protection Analysis

a. Equal Protection and Suspect Classes\

In the vast percentage of equal protection cases decided by the Eleventh Circuit, Title VII race and gender protected public employee plaintiffs have added on an equal protection claim. See, e.g., Pearson v. Macon-Bibb County Hospital Authority, 952 F.2d 1274 (11th Cir. 1992); Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991); Cross v. State of Alabama, State Department of Mental Health and Mental Retardation, 49 F.3d 1490 (11th Cir. 1995); Johnson v. City of Ft. Lauderdale, 114 F.3d 1089 (11th Cir. 1997); Arrington v. Cobb County, 139 F.3d 865 (11th Cir. 1998). In these instances, as to the equal protection claim, the Eleventh Circuit understandably has applied the lenient Title VII nature and allocation of proof model for establishing a *prima facie* case of unlawful discrimination first announced by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973).[2]

[1] In fact, McKinney instructs that constitutional principles evaluating legislative laws be separated from principles applicable to executive acts, typically involving employee terminations. (McKinney, supra, Note 9 at p. 1557 and Note 14 at p. 1558) See, e.g., County of Sacramento v. Lewis, 523 U.S. 833 (1998). In this respect, McKinney suggests that executive acts warrant less constitutional scrutiny.

[2] Title VII protects race, color, sex, religion and national origin. 42 U.S.C. 2000e(5), all of which would trigger either strict or heightened scrutiny if each class was legislatively classified and thereafter challenged under the equal protection clause. It should be noted that, departing from its Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849 (1971) decision, the Supreme

In fact, a review of this Circuit's equal protection authority indicates that the only successful or potentially successful employment related plaintiffs have either been race or gender protected. See, Arrington, supra (gender); Cross, supra (gender); Pearson, supra (gender); and Busby, supra (race). See also, Ziegler v. Jackson, et al., (race) 638 F.2d 776 (5th Cir. Unit B 1981); and Whiting v. Jackson State University, (race) 616 F.2d 116 (5th Cir. 1980)(applying a nature and allocation of proof model different from that applied in Title VII cases.

b. The Eleventh Circuit's Equal Protection Authority for Non-Suspect Class Plaintiffs

In Martin v. Guillot et al., 875 F.2d 839 (11th Cir. 1989), an Eleventh Circuit panel held:

> We find no merit in Martin's allegation that he was subject to unfair treatment in violation of his right to equal protection of the laws in that he was discharged while another employee of UNA, who suffered from alcohol abuse and sought treatment at a rehabilitation center, was not discharged or reprimanded in any way. **Although UNA may not treat similar situated individuals differently in an arbitrary manner, it is the proper entity to make decisions regarding its personnel. Here, the due process committee, president, and board of trustees could rationally conclude that factual differences existed between the two situations that warranted different treatments.**[3]

875 F.2d at 845. (Emphasis added)

Then, three years later in Bass v. City of Albany, 968 F.2d 1067 (11th Cir. 1992), the Court held in a per curiam decision that a terminated non-suspect class plaintiff does not enjoy equal protection unless his termination was based on improper motives. Applying the selective prosecution test, the Court held that a plaintiff must show that his/her termination "was selective, invidious, in bad faith or based on impermissible considerations such as race, religion, or his exercise of constitutional rights." Bass, at 1070.

Equally important, the Bass Court held, as in Martin, that courts must exercise restraint and defer to the decisionmaker. To show that he was disciplined differently from others similarly situated, a plaintiff must prove that he and his comparators were involved in the same incident. In this respect, Bass instructs:

> Bass argues that he was denied equal protection of the law as a result of disparate treatment he received compared to similarly situated officers. There is, however, no constitutional violation merely because Bass was terminated and other officers,

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Court in Washington v. Davis, supra (race) and Feeney, supra (gender), expressly rejected a disparate impact analysis under the equal protection clause holding that the equal protection clause requires that there must be an underlying discriminatory purpose against the protected class behind facially neutral legislative acts. In this respect, the Supreme Court stressed in Washington v. Davis that: "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." 426 U.S. at 239.

[3] By applying the rational basis test in Martin, this Circuit adhered to Supreme Court jurisprudence in non-suspect class legislative act cases, a test that is consistent with Bishop's and, later, McKinney's admonitions that judicial deference is called for in a court's review of public employer's personnel matters.

> totally unrelated to the incident at issue in this case, were reprimanded and not fired. The city manager correctly decided that the other incidents of excessive force had no bearing on Bass' use of excessive force. Meiszer properly stated that "[t]he hearing was not to consider what others had done, the hearing was to consider what Officer Bass did." Simply because few, if any, other officers were terminated for violating the departmental policy, does not mean that the type of excessive force Bass used should not warrant termination.

Bass at 1070.

Finally, Bass also stands for the principle that courts should allow discretion to the decisionmaker and afford the decisionmaker the presumption of correctness.[4]

Recently, in the Southern District, Judge Moore applied Bass in the employment context. In Allen et al. v. Miami-Dade County, 2002 WL 732108 (S.D. Fla. 2002), some 25 plaintiffs in the Miami-Dade County Police Department sued Miami-Dade County claiming that they were denied equal protection when their outside employment with the U.S. Marshall's Service was changed from unregulated "outside employment" to highly regulated "off duty employment," requiring first a permit from their appropriate section. Concluding that their complaint failed to allege the strictures imposed by Bass and could not be corrected; Judge Moore dismissed their complaint.

c. The Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073 (2000) (per curiam) and Its Progeny

Commonly referred to as the "Class of One" decision, Olech simply held that the number of individuals in a class is immaterial for equal protection analysis. Olech, 528 U.S. at 564. Although Olech has not undergone a definitive analysis in the employment context in this Circuit, it has spawned several employment decisions in other circuits.[5]

In Village of Willowbrook v. Olech, the Supreme Court held in a per curium opinion that a homeowner could assert an equal protection claim against the municipality as a "class of one" based on allegations that the municipality intentionally demanded a 33 foot easement as a condition for connecting her property to the municipal water supply, while requiring only a 15 foot easement from similarly situated property owners, and that the municipality's demand was irrational and wholly arbitrary. Id. at 565. The Court noted that the homeowner had been "intentionally treated differently from others similarly situated and that there [was] no rational basis for the difference in treatment." Id. The Court further stated that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." Id.

Because Olech involved a municipal government's conduct as the sovereign rather than its rights as an employer, it is submitted that its Olech holding must be evaluated in conjunction with the Supreme

[4] In this respect the selective prosecution model is consistent with the rational basis test.

[5] See e.g., Wojcik v. Massachusetts State Lottery, 300 F.3d 92 (1st Cir. 2002); Giordano v. City of New York, 274 F.3d 740 (2nd Cir. 2001); Bizzarro v. Miranda, et al., 394 F.3d 82 (2nd Cir. 2005); Compagna v. Massachusetts Department of Environmental Protection, 334 F.3d 150 (1st Cir. 2003); Conlon v. Austin, 2002 WL 31262078 (2nd Cir. 2002) (Summary Order); Neilson v. D'Angelis, et al., 2005 WL 1244795 (2d Cir. 2005). It must be noted that plaintiffs prevailed in none of these appeals.

Court's decisions in Bishop and Waters when employment decisions are at issue. And, reviewing courts must exercise the requisite degree of judicial deference called for by the latter decisions, including the Bishop presumption that the public employer acted correctly. In this respect the rational basis gauge imposed as a public employer is no different from that imposed on a legislative body when suspect classes are not involved. Further still, there is a strong presumption of validity, some nexus between the employment decision and the employer's objectives, the rationale of which need not be articulated and which must be upheld if there are any reasonably supporting facts or reasons that provide a rational basis. Heller v. Doe, 509 U.S. 312, 319-321 (1993).

Obviously the extent to which comparators are similarly situated directly impacts the rational basis for their treatment. In Olech, property owners seeking to connect to the city's water lines were facially identical and comparator evaluation was quite rudimentary. However, it is a quantum leap from city water supply connections to employment discipline. Even two or more employees involved in the same exact event calls into play a myriad of other factors for consideration when invoking discipline, including, among other factors, length of service, current assignment, past assignments, evaluations, attitude, nature of assignments, other performance measurements, training, special exemptions or cooperation, current and past "ownership" as to mistakes including the event at issue, attendance and the employer's need for any special qualifications that each offender might posses. If an employee disciplined more harshly is a member of a suspect class, then these factors must be scrutinized to the same extent that is required in the legislative context. If not, then deference is called for because it is extraordinarily difficult for a court, even with its extensive discovery, to place itself in the position of the employment decisionmaker.

In the Seventh Circuit, to be similarly situated under Olech, plaintiffs must demonstrate that they were treated differently from **"someone who is prima facie identical in all relevant respects."** Purze v. Village of Winthrop Harbor, 286 F.3d 452 (7th Cir. 2002) at p. 455 (emphasis added).

Neilson v. D. Angelis et al., 409 F.3d 100 (2nd Cir. 2005) warrants special mention. In Neilson, a senior court officer was fired because he unholstered his weapon when confronting a cleaning person. He brought an Olech equal protection claim against his supervisors contending that others who committed more serious offenses were not terminated. One of Neilson's comparators appeared drunk at the firing range for his annual weapons qualification. Another engaged in the unauthorized use of a co-worker's credit card and placed six calls from the courthouse to a phone sex line totaling $360.62.

Concluding that these incidents were too remote to be viable comparators, the Second Circuit held that rational decisionmakers could view these incidents differently. The court also noted that his comparators took ownership for their offenses, whereas Neilson did not.

Importantly, the Second Circuit, speaking through Judge Winter, and relying on Purze, supra, articulated the test that must be applied when evaluating an employment discipline Olech claim.

> The similarity and equal protection inquiries are thus virtually one and the same in such a "class of one" case, and the standard for determining whether another person's circumstances are similar to the plaintiff's must be, as *Purze* states, whether they are "*prima facie* identical." 286 F.3d at 455. We deem that test to require a plaintiff in such a "class of one" case to show that: (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and

> difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake. *See Olech*, 528 U.S. at 565, 120 S.Ct. 1073 (Singling out must be "intentional[]."). FN3. We believe that this test is simply an adaptation of the rational review standard applicable to equal protection "class of one" cases. *See Weinstein v. Albright*, 261 F.3d 127, 140 (2d Cir. 2001) (rational basis review applies to equal protection claims not based on plaintiff's membership in a suspect class or on effects of the challenged action on fundamental rights).

Neilson at p. 105.

Lauth v. McCollum, 424 F.3d 631 (7th Cir. 2005) also warrants special consideration. Lauth had been instrumental in bringing a labor union in to represent The Village of Lagrange Park, Illinois police officers. Because Lauth failed to follow department guidelines and statutory requirements for reporting missing persons, Lauth's chief of police McCollum initiated disciplinary proceedings against Lauth before the Village's Board of Police Commissioners and the Board suspended him without pay for 60 days.

Ignoring his right to appeal the Board's action in state court, Lauth brought a § 1983 equal protection claim against his chief under Olech contending that another officer had not been disciplined for handling a missing person complaint and the chief's different treatment of him was motivated by union animus.

Aware that an Olech claim would literally tie the chief's hands because he would lose control over any officer involved in the union movement and with whom the chief may have some conflict on that issue, the Court characterized Olech as the paradigmatic "class of one" case. As one moves away from the paradigmatic case, the need for a federal remedy attenuates to the point where it is "especially thin in public employment." To prevail, an Olech non-suspect or less favored class plaintiff must negate any set of acts or any sound reason that could support his classification. If relying on animus, an Olech plaintiff must meet the threshold that no rational reason or motive imaginable other than animus caused his classification.

In conclusion, the Court stressed that this hypothesis threshold can often be met in advance of discovery.

It is submitted that both Neilson (2d Cir.) and Lauth (7th Cir.) embrace the Bishop[6] presumption of regularity and establish the principle that a non-suspect class employment plaintiff must overcome a stringent application of the rational basis test to successfully assert an equal protection claim.

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[6] In Bishop v. Wood, the Supreme Court announced the presumption of regularity and federal court deference:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways.

Bishop v. Wood, 426 U.S. 341, 350 (1976).

NOTICE OF PRE-DISCIPLINARY HEARING

To:_____ [Name and Title of Employee]

You are hereby given notice that it has come to the attention of _____ [name of supervisor or other official], that you _____ [set forth the specific nature of the charges and evidence]. Such conduct would constitute a violation of _____ [set forth rule].

Prior to any disciplinary action being taken against you, you will have an opportunity to meet with _____ [name of supervisor or other official(s)], and explain your version of these allegations. This pre-disciplinary meeting will be scheduled to take place on _____ [date].

At this meeting you will be given a further explanation of the evidence which supports these charges and you will have an opportunity to present your side of the story and to show why the proposed disciplinary action should not be taken. You may present your responses orally, in writing, or both. You may have witnesses present that you believe have knowledge relevant to your situation. Following our meeting, I will make my determination on the action to be taken.

DATE: _____ _____

[Signed by the supervisor/official]

I acknowledge receipt of this Notice of Pre-Disciplinary Hearing and I ___ Do ___ Do Not request a Pre-Disciplinary Hearing on this matter.

DATE: _____ _____

[Signature of Employee]

NOTICE OF NAME-CLEARING HEARING

[For Use Where There Has Been Publication
of Alleged False Stigmatizing Information]

To: _____ [Name and Title of Employee]

In regard to your [termination/separation/resignation/ nonrenewal] of employment for _____ [set forth charges], you have the opportunity to respond to clear your name and to support your allegations by argument and proof. You may furnish written statements to me or request an opportunity for a hearing to refute any matter which you assert is false or unfounded, or to support your allegations for purposes of name-clearing. The information you provide will be preserved as part of your employment record.

DATE: _____ _____
[Signed by the supervisor/official]

I acknowledge the receipt of this Notice and I ___ Do ___ Do Not request a Name-Clearing Hearing on this matter.

DATE: _____ _____
[Signature of Employee]

Miami:107869.1

MEMORANDUM

TO: William R. Radford

FROM: Kevin D. Smith

DATE: November 17, 2008

RE: Interplay between 42 U.S.C. §§ 1981 and 1983
Brief overlay of 42 U.S.C. §§ 1981 & 1985(3)

I. Case Digest: *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989)

A. Facts:

Jett, a white male, was employed by the Dallas Independent School District (DISD) as a teacher, athletic director, and head football coach at a predominantly black high school (South Oak Cliff High School). Jett repeatedly clashed with Principal Todd, a black man, over school policies and Jett's handling of the football program, including Todd's objecting to statements Jett made, which were reported in a local newspaper, that the majority of players on the South Oak team could not meet proposed NCAA academic requirements. On November 19, 1982, after South Oak lost a football game to Plano High, a predominantly white school, Todd objected to Jett's comments before the game in which he compared South Oak to a professional team, and to the fact that Jett entered the officials' locker room after the game and told two black officials that he would never let them work another South Oak game.

On March 15, 1983, Todd informed Jett that he intended to recommend that Jett be relieved of his duties as athletic director and head football coach at South Oak. On March 17, 1983, Todd recommended Jett's removal based on poor leadership and planning skills, and Jett's comments before and after the football game with Plano High. Jett met with the director of personnel for DISD, who suggested Jett should transfer because Jett's professional relationship with Todd had been severed. Jett then met with the superintendent for DISD and informed the superintendent that he felt Todd's criticisms were unfounded and motivated by racial animus and because Todd wanted to replace Jett with a black coach. The superintendent informed Jett that the difficulties between Jett and Todd may preclude Jett from keeping his position, but assured Jett that another position in DISD would be secured for Jett.

On March 25, 1983, the superintendent met with Todd and other DISD officials and after the meeting, affirmed Todd's recommendation and reassigned Jett to a teaching position at another school, which did not include any coaching duties. Jett's attendance and performance in the new position were poor, and on May 5, 1983, the director of personnel sent a letter to Jett informing Jett that he was reassigned to a temporary position in the DISD security department. Upon receiving the letter, Jett filed this lawsuit and the DISD subsequently offered Jett a position as a teacher and freshman football and track coach at Jefferson High School. Jett refused this position and resigned on August 19, 1983.

B. Jett's claims:

Jett brought claims against DISD and against Todd in his personal and official capacities under 42 U.S.C. §§ 1981 and 1983, alleging due process, First Amendment, and equal protection violations. Jett claimed he had a property interest in his coaching position at South Oak, of which he was deprived without due process of law. Jett's First Amendment claim was based on his allegation that his removal and transfer were taken in retaliation for his statements to the press regarding South Oak's players lack of academic qualifications. Jett's Section 1981 and equal protections claims were based on his allegation that his removal from South Oak was motivated by the fact that he was white, and that Todd, and through him DISD, was responsible for the racially discriminatory reduction in his employment status. Jett also claimed that his resignation was really a constructive discharge, caused by racial harassment and retaliation for Jett's exercise of his First Amendment rights.

C. Holding:

A municipality may not be held liable for its employees' violations of Section 1981 under respondeat superior theory. Further, Section 1981 does not provide an independent federal damages remedy for racial discrimination by local government entities, but instead the specific provisions of Section 1983 control in the context of Section 1981 damages actions against state actors. The Court refused to imply a damages remedy broader than Section 1983 from Section 1981's declaration of rights. To prevail in a Section 1981 case, the plaintiff must show that the violation of his "right to make contracts" was caused by a custom or policy within the meaning of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

D. Reasoning:

In reviewing the legislative history of Section 1981, it was clear to the Court that the Act did not provide for an express damages remedy for any violation of Section 1981. Second, Section 1981 did not create any original federal jurisdiction that could support a federal damages remedy against state actors. Finally, the original penal provision under Section 1981 was designed to punish criminally the person who does the act (i.e., the state official), not the community where the custom prevails.

In contrast, Section 1983 was originally enacted as section 1 of an act to enforce the provisions of the Fourteenth Amendment, and specifically came about in response to widespread acts of violence that were being perpetrated against African-Americans and white citizens by groups such as the Ku Klux Klan. Section 1983 created a new, civil form of liability against state and local officials, and explicitly provided original federal jurisdiction for prosecution of such civil actions. Further, Section 1983 provided the new civil remedy for enforcement of Section 1981 against state actors. The legislative history of Section 1983 again shows that the

statute was aimed at the specific person or persons who violates the law, not against the community (or the lawmakers themselves). This was evidenced by the rejection of the Sherman amendment, which specifically proposed the imposition of a form of vicarious liability on municipal governments. Under the proposed amendment, if a person was injured by mob violence, then the city, county, or parish in which the offenses took place would be liable for fully compensating the injured person.

With the addition of the language "and laws" to Section 1983, the Court also believed that Congress intended for the guarantees contained in Section 1981 to be enforced against state actors through the express remedy for damages contained in Section 1983. Because the legislature has established its own remedial scheme, the Court could not create or imply new remedies, such as an action for respondeat superior. Therefore, the express cause of action for damages created by Section 1983 constitutes the exclusive federal remedy for violation by state governmental units of the rights guaranteed in Section 1981.

Under this standard, the Court determined that Jett must show that the violation of his "right to make contracts" was caused by a custom or policy within the meaning of *Monell*. This would require a determination by the court of whether, pursuant to state law, Todd or the superintendent could be considered policy makers for the school district such that their decisions represented the official policy of the DISD. The Court declined to make this determination, instead leaving the issue to be resolved by the Court of Appeals. The Court of Appeals had greater expertise in interpreting Texas law, and therefore would be in a better position to determine whether the superintendent possessed final policy-making and decision-making authority in the area of employee transfers. If so, then the Court of Appeals would also have to decide whether a new trial would be necessary to determine the responsibility of the school district for the actions of Todd.

II. 42 U.S.C. §§ 1981 & 1983

A. History of Section 1981

- Initially, Section 1981 provided only that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981 (a).

- There was no express damages remedy for any violation of Section 1981, nor did the statute create any original federal jurisdiction that could support a federal damages remedy against state actors.

- Section 1981 was amended in 1991 to add subsections (b) & (c).

B. 1991 Amendment to Section 1981

- In 1991, in light of the Supreme Court's decisions in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) *and Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), Section 1981 was amended in order to provide additional protections against unlawful discrimination in employment.

- Congress believed that the Supreme Court had weakened the scope and effectiveness of Federal civil rights protections. *See* Civil Rights Act of 1991, PL 102-166.

- Specifically, Congress wanted to provide "appropriate remedies for intentional discrimination and unlawful harassment in the workplace," and to expand "the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination. *See* 42 U.S.C. § 1981, note – section 3.

- Subsections (b) & (c) were added - Subsection (b) states that "[f]or purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." Subsection (c) states that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

- Section 1981 now encompasses most of the claims covered by Title VII, including claims of racial discrimination in hiring, promotion, discharge, hostile work environment, and retaliation. *See Jackson v. Motel 6 Multipurpose*, 130 F.3d 999, 1008 & n.17 (11th Cir. 1997).

- Federal district courts have original jurisdiction over claims brought under Section 1981, regardless of the amount in controversy.

- A plaintiff may bring a Section 1981 claim in state court, which has concurrent jurisdiction. *See Dettorney v. Bank of American National Trust & Savings Assn.*, 879 F.2d 459, 463 (9th Cir. 1989).

C. Section 1981 v. Title VII

- Section 1981 does not have any of the administrative remedial prerequisites found in Title VII, and the statute of limitation for Section 1981 claims are governed by state law (4 years in Florida).

- Section 1981 prohibits only discrimination based on race, color, or national origin. It does not cover discrimination claims based on sex, age, or disability.

- Section 1981 also prohibits retaliatory discharge based on race, color, or national origin. *See Webster v. Fulton County*, 283 F.2d 1254, 1256 (11th Cir. 2002); *Andrews v. Lakeshore Rehabilitation Hosp.*, 140 F.3d 1405, 1411 (11th Cir. 1998).

- Section 1981 follows the same framework for assessing discrimination as Title VII, as laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

- The elements of a Section 1981 claim are: (1) that a plaintiff is a member of a racial minority; (2) intent to discriminate on basis of race by defendant; and (3) that discrimination concerned an "enumerated activity." *See Baker v. McDonald's Corp.*, 686 F. Supp. 1474 (S.D. Fla. 1987), *affirmed* 865 F.2d 1272 (1988).

- A prevailing party in a Section 1981 claim may be awarded attorneys' fees.

D. Section 1981 and the Private Sector

- Section 1981 provides a federal remedy against discrimination on the basis of race in private employment.

- Extends to all private employers, regardless of number of employees.

- Private employers liable for acts of discrimination committed by supervisory and non-supervisory employees.

- Private employer even liable when the supervisor's action violates company policy, if the supervisor had the authority to hire, fire and supervise the aggrieved employee.

- Some courts have held that individuals who had direct personal involvement, such as those supervisors who make the employment decisions, are subject to liability under Section 1981. *See Leige v. Capital Chevrolet, Inc.*, 895 F. Supp. 289, 293 (M.D. Ala. 1995); *Vakharia v. Little Co. of Mary Hosp. & Health Ctrs*, 917 F. Supp. 1282, 1293 (N.D. Ill. 1996); *Clark v. City of Macon*, 860 F. Supp. 1545, 1553 (M.D. Ga. 1994).

- Punitive damages are available under Section 1981 claims against private employers; however, the plaintiff must come forward with substantial evidence that the employer acted with actual malice or reckless indifference to his federally protected rights. *See Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1280 (11th Cir. 2002).

E. Section 1981 and the Public Sector

- Section 717 of Title VII provides the exclusive remedy for most federal employees who believe their employer has discriminated them against. *See Brown v. General Services Administration*, 425 U.S. 820, 828-29, 835 (1976) (Congress intended to

create "an exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination").

- In contrast, Section 1981 specifically creates substantive rights for employees of state and local governments, with 42 U.S.C. § 1983 being the exclusive vehicle for enforcing these rights against state employers. *See Jett*, 491 U.S. 701.

- Eleventh Amendment bars any Section 1981 claims for damages against a state agency, unless the state expressly and unambiguously waives this immunity. *See Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304-05 (1990). No bar to Section 1981 claims for damages brought against a state official in his personal capacity.

- Public officials also shielded from Section 1981 claims for damages by doctrine of qualified immunity.

- Section 1981 does not impose respondeat superior liability on municipalities.

- Section 1981 claims must be based on intentional conduct. *See General Building Contractors Ass'n, Inc. v. Pennsylvania United Engineers & Constructors, Inc.*, 458 U.S. 375, 391 (1982). Discriminatory intent can be established through direct or circumstantial evidence.

- Section 1981 claims cannot be based on disparate impact. *See Foster v. Wyrick*, 823 F.2d 218, 222 (8th Cir.1987); *Nash v. Consolidated City of Jacksonville*, 895 F. Supp. 1536 (M.D. Fla. 1995).

- Some courts have held that the 1991 amendment to Section 1981 effectively overrules *Jett*, however the Eleventh Circuit has held that *Jett* still applies and that Section 1983 contains the sole cause of action against state actors for violations of Section 1981. *See Butts v. County of Volusia*, 222 F.3d 891 (11th Cir. 2000).

- Front pay, compensatory damages (including back pay) and equitable relief (including reinstatement), but not punitive damages, are available under Section 1981 claims against public employers.

III. 42 U.S.C. § 1985(3)

- Prohibits conspiracies to impede or obstruct justice with intent to deprive a citizen of the equal protection of the laws.

- Section 1985(3) provides no substantive rights itself; it is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right--to equal protection of the laws or equal privileges and immunities under the laws--is breached

by a conspiracy in the manner defined by the section.

- Applies to public and private conspiracies.

- Statute of limitations on actions brought under Section 1985 are governed by state law (4 year statute of limitations in Florida).

- Section 1985(3) protects two types of classes: (1) "those kinds of classes offered special protection under the equal protection clause, and (2) classes that Congress was trying to protect when it enacted the Ku Klux Klan Act." *Farese v. Scherer*, 342 F.3d 1223, 1229 n.7 (11th Cir. 2003).

- Women are a "class of persons" within the meaning of Section 1985(3), and therefore are protected by that provision from conspiracies against them motivated by sex-based animus. *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1339-40 (11th Cir. 1999).

- Section 1985(3) also applies to conspiracies to discriminate against persons based on religion, ethnicity or political loyalty. *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir.1988).

- Whistleblowers are not a protected class under Section 1985(3). *Childree v. UAP/GA CHEM, Inc.*, 92 F.3d 1140, 1147 (11th Cir. 1996).

- In order to prove a conspiracy in violation of Section 1985(3), a plaintiff must show "(1) that some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action . . . and (2) that the conspiracy aimed at interfering with rights that are protected against private, as well as official, encroachment." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-78 (1993) (citations omitted).

- The intracorporate conspiracy doctrine applies to public entities as a bar to Section 1985(3) claims against defendants who were all acting on behalf of a single public entity. Under the intracorporate conspiracy doctrine, a corporation's employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation. *Dickerson v. Alachua County Com'n*, 200 F.3d 761, 767-68 (11th Cir. 2000).

- Public officials cannot raise a qualified immunity defense to a Section 1985(3) claim because they enjoy an additional protection from such suits that are not available to them under Section 1983 claims. Specifically, public officials are not subject to liability under section 1985(3) unless their actions were motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 794 (11th Cir. 1992).

- Section 1985(3) may not be invoked to redress violations of Title VII. It is true that a Section 1985(3) remedy would not be coextensive with Title VII, since a plaintiff in an action under Section 1985(3) must prove both a conspiracy and a group animus that Title VII does not require. *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378 (1979).

- However, a plaintiff may bring a Title VII and Section 1985(3) claim at the same time, even if they arise out of the same underlying facts, as long as the rights that are the basis of the Section 1985(3) claim are rights created by the Constitution (i.e., equal protection and due process), not by Title VII. *Dickerson*, 200 F.3d at 766.

- Punitive damages are not available under 42 U.S.C. §§ 1985(2) or 1985(3).

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Worker Readjustment Retraining & Notification Act (WARN)

By

Kevin D. Johnson, Tampa

THE WARN ACT

Kevin D. Johnson

I. Introduction to WARN

On August 4, 1988, Congress passed the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109. This law became effective February 4, 1989. Generally, WARN imposes certain penalties on an employer which initiates a "plant closing" or a "mass layoff," as those terms are defined by the Act, without giving affected employees, unions and certain units of state and local government advance notification.

II. WARN Coverage

A. Generally

An "employer" within the meaning of WARN is defined as a business enterprise which employs:

(1) One hundred or more employees, excluding part-time employees; or

(2) One hundred or more employees who in the aggregate work at least 4,000 hours per week (exclusive of overtime).

See 29 U.S.C. § 2101(a)(1)(A)-(B).

B. Which Employees Are Counted for Coverage Purposes

While part-time employees are excluded from consideration under the method of determining employer status described in 29 U.S.C. § 2101(a)(1)(A), the regulations do include part-time employees, in the method described in 29 U.S.C. § 2101(a)(1)(B). See 20 C.F.R. § 639.3(a)(1)(ii). The statute defines a "part-time employee" as an employee who is employed for an average of fewer than 20 hours per week or who has been employed fewer than six of the 12

months preceding the date on which notice is required, including workers who work full-time. See 29 U.S.C. § 2101(a)(8); 20 C.F.R. § 639.3(h). The regulations state that this term may include workers who would traditionally be understood as "seasonal" employees. See 20 C.F.R. § 639.3(h).

The regulations also state that the period to be used for calculating whether a worker has worked "an average of fewer than 20 hours per week" is the shorter of the actual time the worker has been employed or the most recent 90 days. See 20 C.F.R. § 639.3(h). Note that the definition of "part-time" also includes full-time, new employees who have been employed less than six months. Therefore, in determining whether a particular employee is covered by WARN, the regulations state that new full-time employees with less than six months of service are classified as "part-time employees" and are not counted towards the statutory minimum number of employees. See 20 C.F.R. § 639.3(h). See also Solberg v. Inline Corp., 740 F.Supp. 680, 685 (D. Minn. 1990).

In examining coverage, the regulations state that all of the employees at all of a single employer's locations are aggregated in determining WARN's employer coverage. See 20 C.F.R. § 639.3(a)(8).[1] As is apparent from this definition, the Act does not cover smaller employers who do not employ the minimum threshold number of employees. The test of whether the 100-employee threshold is met has been applied on the date notice is due, that is, 60 days prior to the plant closing or mass layoff. See 20 U.S.C. § 639.5(a)(2); Childress v. Darby Lumber, 2001 WL

[1] This does not necessarily mean a particular employment loss will be covered, because the various locations may constitute separate "sites" of employment, as discussed in more detail later in these materials.

25417 (D. Mont. 2001) (applying snapshot date of 60 days prior to mass layoff), *aff'd* 357 F.3d 1000 (9th Cir. 2004); United Elec., Radio and Machine Workers of America v. Maxim Inc., 1990 WL66578 at * 1-2 (D. Mass. 1990). However, the regulations state that this point-in-time assessment is not to be used if "the number of employees employed on that date is clearly unrepresentative of the ordinary or average employment level." See 20 C.F.R. § 639.5(a)(2). In such a circumstance, the regulations state that this coverage of the employer will be based on the average number of employees over a recent period of time or when the number of employees on an alternative date which has more representative employment levels. Id.

Workers who are on temporary layoff or on leave but who have a reasonable expectation of recall would be counted as employees. See 20 C.F.R. § 639.3(a). The regulations explain that an employee "has a reasonable expectation of recall" when he or she "understands, through notification or through industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or a similar job." See 20 C.F.R. § 639.3(a).

For purposes of determining coverage, the regulations provide that workers, other than part-time workers under § 639.3(a)(1)(i), who are exempt from receiving WARN notice are nonetheless counted as employees for purposes of determining coverage. See 20 C.F.R. § 639.3(a)(3). Thus, for example, the regulations state that U.S. workers at foreign sites are counted for coverage even though the sites themselves are not subject to the Act. See 20 C.F.R. § 639.3(h)(i)(7).

C. Who is the Employer

The regulations indicate that the term "employer" includes non-profit organizations of the requisite size, although federal, state, local and federally recognized Indian tribal governments are not covered. See 20 C.F.R. § 639.3(a). The term "employer" does include, however, public and quasi-public entities which engage in business[2] and which are separately organized from the regular government, which have their own governing bodies and which have independent authority to manage their personnel and assets. See 20 C.F.R. § 639.3(a). Some courts have held that the term "employer" does not include individual persons. See, e.g., Cruz v. Robert Abbey Inc., 778 F. Supp. 605, 609 (E.D. N.Y. 1991). See also Williams v. Phillips Petroleum Co., 23 F.3d 930, 933, n.l (5th Cir. 1994), cert. denied, 115 S.Ct. 582 (1994) (suggesting but not deciding unavailability of individual liability). However, at least one court has held that an individual can be held vicariously liable for WARN Act violations based on an alter ego theory. Plasticsource Workers Committee v. Coburn, 283 Fed.Appx. 181, 186 (5th Cir. 2008).

Additionally, independent contractors and subsidiaries which are wholly or partially owned by a parent company may be treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent company. See 20 C.F.R. § 639.3(a)(2). The regulations list the following factors to be considered in making this determination:

(a) Common ownership;

(b) Common directors and/or officers;

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[2] For example, taking part in a commercial or industrial enterprise, supplying a service or good on a mercantile basis, or providing independent management of public assets, raising revenue or

(c) De facto exercise of control;

(d) Unity of personnel policies emanating from a common source;

(e) Dependency of operations.

See 20 C.F.R. § 639.3(a)(2).

Determining what entity is the "employer" for purposes of WARN liability is a common litigation issue which often turns on the specific facts. For example, in Electrical Workers Local 397 v. Midwest Fasteners, Inc., 779 F. Supp. 788 (D. N.J. 1992), a district court held that the parent corporation of Midwest Fasteners, Inc. was potentially liable for its subsidiary's failure to comply with WARN under the single-employer doctrine. The court's decision was based on the common ownership and management as well as the parent corporation's significant involvement in critical labor relations decision of the subsidiary, including the decision to close the plant. But see In Re: APA Transport Corp. Consol. Litig., 541 F.3d 233 (3rd Cir. 2008)(finding that common ownership and common directors were not sufficient to support a holding that a company and a leasing company were a single employer); Milan v. Centennial Communications Corp, et al., 500 F. Supp. 2d 14 (D. Puerto Rico 2007) (holding that employer and company that owned employer were not single employer because there was no evidence of common directors, de facto control, unity of policies, or dependent operations).

In Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1005-1007 (9th Cir. 2004), the court held that a lumber company and its wholly-owned subsidiary constituted a "single employer," and thus the number of employees in both companies had to be combined in determining whether layoffs by both companies implicated WARN. The lumber company and its subsidiary

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making desired investments. See 20 C.F.R. § 639.3(a).

were determined to be a single employer because the companies had common directors and officers; the lumber company exercised de facto control over its subsidiary in that its managers were considered "higher management" to which the subsidiary's management answered; and the subsidiary's operations were dependent on the lumber company.

Although the WARN Act does not explicitly authorize suits against lenders, a lender to a borrower's business is subject to potential liability under WARN if its relationship with the indebted employer meets certain criteria. Pearson v. Component Tech. Corp., 247 F.3d 471, 491-92 (3d Cir. 2001). See also United Automobile Workers Local 155. v. MRC Industrial Group, Inc., 541 F. Supp.2d 902 (E.D. Mich. 2008)(finding that customers of employer who provided financial accommodations and exercised some control over employer's operations following bankruptcy could be liable for WARN act violations). In order to be liable, the lender must have assumed control or have responsibility over the "ordinary operation" of the business. Pearson, 247 F.3d at 497. It is not enough for lender liability if a lender simply has a security interest in the debtor-employer's assets or influences the employer's financial decisions during the delinquency period. Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 (AFL-CIO) v. Weslock Corp., 66 F.3d 241 (9th Cir. 1995). Similarly, an employer's creditor does not incur liability by merely taking over the business for the short term in an effort to recoup some or all of what is owed, as opposed to becoming the de facto owner of an ongoing business. Coppola v. Bear Stearns & Co., Inc., 499 F.3d 144 (2d Cir. 2007). As a general rule, this exception is only available to lenders, as most courts have not been hospitable to attempts by the existing employer to dismiss its employees, enter bankruptcy, and then seek to claim the "liquidating fiduciary" exception. See, e.g. Law v. American Capitol Strategies, Ltd., 2007 WL

221671 (M.D. Tenn. 2007) (holding that "to accept [the employer]'s assertion that it was a liquidating fiduciary would be to allow the liquidating fiduciary exception to swallow the rule.")

On the issue of employer status, the analysis is generally fact specific and results have been varied, with some courts finding parent or alter ego companies potentially liable[3] while other courts have concluded no liability attached to the parent.[4]

III. Actions Requiring Advance Notification

As will be explained below, there are generally two types of actions covered by the statute: plant closings and mass layoffs.

A. Plant Closings

The statute defines a "plant closing" as follows:

> The permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units[5] within a single site or employment, if the shutdown results in an employment loss at the single site of employment during any 30 day period for 50 or more employees excluding any part-time employees.

29 U.S.C. § 2101(a)(2).

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[3] See e.g., Carpenters Dist. Council v. Dillard Dep't Stores, 790 F. Supp. 663 (E.D. La. 1992) (parent company that participated in plant closing decision was responsible employer); aff'd in relevant part, revd. on other grounds, 15 F.3d 1275, 1289-1290 (5th Cir. 1994), cert. denied, 115 S.Ct. 933 (1995); Cruz v. Robert Abbey, Inc., 778 F. Supp. 605, 610-611 (E.D. N.Y. 1991) (alter ego company and its successor may be "employer").

[4] See e.g. Mining Wholesale and Retail Distribution Local 63 v. Sante Fe Terminal Servs., Inc., 826 F.Supp. 326, 335 (C.D. Cal. 1993) (railroad and subsidiary not single employer).

[5] The term "facility" refers to a building or buildings, while the term "operating unit" refers to an organizationally or operationally distinct product, operation or specific work function within or across facilities at the single site. See 20 C.F.R. § 639.3(j).

Before one can determine that a particular action is a plant closing (or a mass layoff) within the meaning of the statute, it must first be determined whether there has been an "employment loss" for 50 or more employees during any 30 day period. The term "employment loss" means:

(1) an employment termination (other than discharge for cause, voluntary departure, or retirement);

(2) a layoff exceeding six months; or

(3) a reduction in hours of work of more than 50% during each month of any six-month period.

See 29 U.S.C. § 2101(a)(6); 20 C.F.R. § 639.3(f).[6] Under this definition, a temporary shutdown of a facility will not be a plant closing unless it results in a sufficient number of terminations, layoffs exceeding six months, or reduction in hours as indicated above.[7] In determining whether there has been an employment loss, courts have looked at whether an actual break in employment has occurred. See, e.g. Martin v. AMR Services Corp, 877 F.Supp. 108 (E.D.N.Y.), aff d, Gonzalez v. AMR Services Corp., 68 F.3d 1529 (2d Cir. 1995) (discussing employment loss distinctions between termination and layoff; ultimately holding no employment loss as to certain laid off and recalled employees); Local 819, International Brotherhood of Teamsters v. Textile Deliveries, Inc., 2000 WL 1357494 (S.D.N.Y.) (distinguishing Martin and holding

[6] The regulations state that where a termination or a layoff is involved, "an employment loss does not occur when an employee is reassigned or transferred to employer-sponsored programs, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination." See 20 C.F.R.§ 639.3(f)(2).

[7] At least one court has rejected a group of employees' efforts to backdoor a layoff of less than six months by classifying it as a "reduction in hours." United Steel v. Ainsworth Engineered (USA), Inc., 2008 WL 4857905 (D. Minn. 2008). The Ainsworth court held that where an employer clearly announces that a layoff is being implemented, a claim of employment loss based on a reduction in hours is unavailable to the employees.

employment loss occurred as to employees hired by new employer under different terms); Alter v. SCM Office Supplies, 906 F.Supp. 1243 (N.D. Ind. 1995) (finding no employment loss as to employees hired by buyer; those employees who did not apply for employment with new employer held to be voluntary employment losses not included in determining if plant closing or mass layoff occurred; Baker v. Washington Group Int'l, 2008 WL 719258 (M.D. Penn. 2008)(finding no termination occurred for employees who were terminated by employer and re-hired by the company that assumed employer's contract with a third party the following day, as those employees did not suffer any "appreciable break in employment and had no practical need to receive such notice).

Notwithstanding the above, however, an employee will not be considered to have experienced an employment loss if the closing or layoff is the result of a relocation or consolidation of part or all the employer's business and, prior to closing or layoff, the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than six months break in service, or the employer offers to transfer the employee to any other site of employment regardless of distance with no more than six month break in service and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later. See 29 U.S.C. § 2101(b)(2); 20 C.F.R. 639.3(f)(3). But see Moore v. Warehouse Club, Inc., 992 F.2d 27, 29 (3d Cir. 1993) (refusing to ignore transfer offers made at the time of plant closing).

WARN also contains a provision that allows layoffs occurring in close proximity to each other to be aggregated in determining whether a plant closing (discussed above) or mass layoff (discussed below) has occurred or will occur. Accordingly, employment losses for two or more

groups of employees at a single site of employment, each of which is less than the minimum number of employees required by statute but which in the aggregate exceed that minimum number, shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of WARN. See 29 U.S.C. § 2102(d); 20 C.F.R. §639.5(a); UAW, Local 1077 v. Shadyside Stamp Corp., 1991 WL 340191 at *4-5 (S.D. Ohio) (aggregating a series of layoffs), aff'd mem., 947 F.2d 946 (6th Cir.1991). Cf. OPEIU v. Sea-Land Serv., Inc., 1991 WL 136036 (S.D.N.Y. 1991) (holding that recall of employees within six months prevented the 50 person threshold from being exceeded). Aggregation has been rejected by several courts where one of the layoffs meets the WARN threshold on its own. See e.g., United Elec. Radio and Machine Workers v. Maxim, Inc. 5 IER Cases (BNA) 629 (D. Mass. 1990); Jones v. Kayser-Roth Hosiery, Inc., 748 F.Supp. 1276, 1284 (E.D. Tenn. 1990). In general, however, since WARN requires notice to be given 60 days prior to a covered employment loss, the purported effect of this provision is that an employer considering an action which would otherwise not be covered must also look both forward and back and consider what actions have occurred or will occur within the next 90 days which might be aggregated with the currently planned action. Manchester v. Main Street Textiles, L.P., 478 F. Supp.2d 120 (D. Mass. 2007).

B. Mass Layoffs

The statute defines a "mass layoff" as a reduction in force which is not the result of a plant closing and results in an employment loss at a single site of employment during any 30 day period for at least 33% of the active employees (excluding part-time employees) and at least 50

employees (excluding part-time employees); or at least 500 employees (excluding part-time employees). See 29 U.S.C. § 2101(a)(3); 20 C.F.R. § 639.3(c). The distinction between a plant closing and a mass layoff, according to the regulations, is that a plant closing involves "employment loss which results from the shutdown of one or more distinct units within a single site or the entire site" while a mass layoff "involves employment loss, regardless of whether one or more units are shut down at the site." See 20 C.F.R. §6 39.3(c)(1).

As with plant closings, the courts will aggregate layoffs which occur over a 90-day period unless the employer can demonstrate that the employment losses from two different groups of employees are the result of separate and distinct actions and are not the result of the employer attempting to evade WARN's requirements.[8] See 29 U.S.C. § 2102(d).

Further, since the definition of "mass layoff" refers to an employment loss, layoffs of less than six months are not included. See 20 C.F.R. § 639.3(f).

Note that, with the exception of part-time employees,[9] workers who are exempt from the notice requirements are nevertheless counted as employees for the purpose determining coverage of a plant closing or mass layoff. For example, the regulations state that if an employee closes a temporary project on which 10 permanent and 40 temporary employees are employed, a covered

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[8] See Allen v. Sybase, Inc., 2006 WL 3020595 (10th Cir. 2006), in which the Tenth Circuit held that an employer had failed to identify sufficient "separate and distinct causes" to justify "disaggregation" of a number of layoffs over a ninety-day period.

[9] Part-time employees are excluded from the calculation of whether an employment loss has occurred. See e.g., United Mine Workers of America, District 2 v. Florence Mining Co., 855 F. Supp. 1466 (W.D. Penn. 1994).

plant closing has occurred, although only the 10 permanent workers are entitled to notice. See 20 C.F.R. § 639.3(b)(2). The closing of a temporary facility will be discussed further herein.

C. Ordered by the Employer

One additional issue that can arise in certain unique situations is whether the layoff or plant closing was in fact ordered by the employer. In a case that reached the Ninth Circuit, several airport screeners sued their former employer, contending that they were owed damages under WARN because the employer had not provided WARN notice prior to their layoffs. Deveraturda v. Globe Aviation Security Services, Inc., 454 F.3d 1043 (9th Cir. 2006). The employer argued that it was not required to do so because the layoffs had been ordered by the government as part of the federalization of airport security following the terrorist attacks of 9/11. The Ninth Circuit agreed with the employer, concluding that "the Act does not apply to [the employer] because the mass layoff was ordered by the federal government, not by the employer itself."[10]

The Third Circuit has held that an employer can avoid liability for the failure to give sufficient WARN notice prior to a mass layoff if it can show that it was operating as a "liquidating fiduciary" rather than as a "business enterprise." In In re United Healthcare Systems, 200 F.3d 170 (3rd Cir. 1999), a hospital employer filed a voluntary Chapter 11 petition and gave its employees notice that they would soon be laid off. The employer planned to continue to pay its employees for the remainder of the sixty-day notice period. However, ten days into the notice period, the Creditors' Committee filed a motion asking the court to order the

[10] Another context in which this question has arisen is the federal takeover of a banking institution. See Buck v. FDIC, 75 F.3d 1285 (8th Cir. 1996).

employer to terminate the employees without paying them for the remainder of the notice period. The court denied the motion, but its decision was reversed by the Third Circuit. The Third Circuit held that the employer had acted "as a business liquidating its affairs" and therefore did not "continue as an 'employer' within the meaning of the WARN Act." However, the court limited the reach of its holding by stating that an employer-fiduciary would continue to have WARN Act obligations if it was operating the business as a going concern during the period leading up to and during the bankruptcy proceeding.

D. Single Site of Employment

To be covered under WARN, a plant closing or mass layoff must affect the requisite number of employees at a "single site of employment." As discussed in the regulations, a single site of employment can refer to either a single location or a group of contiguous locations. See 20 C.F.R. § 639.3(i)(1). Further, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within such a building. See 20 C.F.R. § 639.3(i)(2).

For example, an office building housing 50 different businesses will contain 50 single sites of employment. Id. Also, separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose and share the same staff and equipment. The example given in the regulations is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another. See 20 C.F.R. § 639.3(i)(3).

Note also that the regulations suggest that non-contiguous sites in the same geographic area which do not share the same staff for operational purposes should not be considered a single site of employment. See 20 C.F.R. § 639.3(i)(4). An example would be assembly plants on opposite sides of a town which are managed by a single employer, but which are considered separate sites if they employ different workers. Id. Thus, for example, in International Union, UMW v. Jim Walter Resources, Inc., 6 F.3d 722 (11th Cir. 1991), four nearby mines were determined to be separate sites where each had independent management, did not ordinarily share employees, employees were represented by different union locals, each site considered separate by federal government and union, each mine had separate facilities, and each had independent production of coal. Id. at 726-727. Similarly, contiguous buildings owned by the same employer, which have separate management, produce different products, and have separate work forces are considered separate single sites of employment. See 20 C.F.R. § 639.3(i)(5).

The regulations also contain special provisions for workers whose jobs require travel or work outside of an employment site. More specifically, the regulations provide that for employees whose primary duties require travel from point to point, who are out-stationed or whose primary duties are performed outside any of the employer's regular employment sites, the "single site of employment" for WARN purposes can be the site to which they are assigned as their home base, the site from which their work is assigned, or the site to which they report. See 20 C.F.R. § 639.3(i)(6). See e.g., Meson v. GATX Technology Services Corp., 507 F.3d 803 (4th Cir. 2007)(finding that a traveling sales representative/regional manager's single site of employment was the branch office in Virginia where she reported and where she supervised employees, not the Florida headquarters to which she ultimately reported in her capacity as

regional manager); Badler v. Northern Line Layers, Inc., 503 F.3d 813 (9th Cir. 2007)(remote construction sites were not aggregated for WARN purposes). Wiltz v. M/G Transport Services, Inc., 128 F.3d 957 (6th Cir. 1997) (holding towboats operating over 2,000 mile span of river were single site).

Finally, because of the broad variety of potential organizational structures that might exist, the regulations contain a "catch-all" phrase that the term single site of employment might also apply to "truly unusual organizational situations" where the above criteria do not reasonably apply. See 20 C.F.R. 20 § 639.3(i)(8). The Eighth Circuit has refused a plaintiff's invitation to apply this standard to cover geographically separate sites, holding that two facilities should not be treated as a single site of employment where the "connection between the two sites [was] nothing more than that present in most large corporate organizations." See Rifkin v. McDonnell Douglas Com., 78 F.3d 1277, 1281 (8th Cir. 1996).

IV. Notification Requirements

A. Generally

The statute generally requires that an employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer has served written notice of such a decision to each collective bargaining representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee, and to the state or entity designated by the state and the chief elected official of the unit of local

government where such closing or layoff is to occur.[11] See 29 U.S.C. § 2102(a); 20 C.F.R. § 639.6.

B. Obligation to Continue Pay for 60 Days Following Notice Date

An employer can cease its operations on the same date that it provides WARN notice, so long as it continues to pay its employees throughout the notice period. Thus, although a group of plaintiffs in South Carolina claimed that they had suffered an employment loss when their employer closed its plant and gave notice on the same day, the court denied their claims, holding that the employment loss had not occurred until the employer ceased to pay the employees sixty days later. Long v. Dunlop Sports Group Americas, Inc., 2006 WL 2832984 (D. S.C. 2006). As the Court noted, "[n]othing in the WARN Act requires employees to continue to perform their previous functions throughout the notice period…."

C. Entitlement to Notice

Only those employees who are defined as affected employees are entitled to receive notice under WARN. The statute defines an "affected employee" as an employee who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer. See 29 U.S.C. § 2101(a)(5). The regulations indicate that this includes individually identifiable employees who will likely lose their jobs because of seniority or bumping rights to the extent that such individual workers can be identified at the time notice is required to be given. See 20 C.F.R. §§ 639.3(e) & 639.6(b). Part-time employees

[11] A unit of local government is defined as "any general purpose political subdivision of a State, which has the power to levy taxes and spend funds and which also has general corporate and police powers." See 20 C.F.R. § 639.3(g).

(including full-time employees who have worked less than six months) are entitled to notification if they experience an employment loss even though they were not originally counted towards the requisite minimum number of employees in determining whether a plant closing or mass layoff has occurred. See 20 C.F.R. § 639.6(b). See also Roguet v. Arthur Anderson L.L.P., 2002 WL 1900768 (N.D. 111. Aug. 16, 2002) (holding that part-time employees could experience an "employment loss" and are proper parties in a WARN suit).

The term "affected employees" also includes managerial and supervisory employees, but does not include business partners. Id. The regulations also provide that consultant or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or are self-employed, are not "affected employees" of the business to which they are assigned. See 20 C.F.R. § 639.3(e).

Temporary employees are not entitled to receive WARN notice, though. WARN contains a specific exemption indicating that its provisions shall not apply to a plant closing or mass layoff if the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project undertaken. See 29 U.S.C. § 2103(1). See also New Orleans Clerks & Checkers Union Local No. 1497 v. Ryan-Walsh, 1995 WL 311917 (E.D. Ca. 1995). According to the regulations, the employees must clearly understand at the time of hire that their employment was temporary. See 20 C.F.R. § 639.5(c)(2). Whether such understandings exist will be determined by reference to employment contracts, collective bargaining agreements or employment practices of an industry or locality. Id. Nevertheless, the regulations provide that the burden of proof will lie with the employer to

show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings. See 20 C.F.R. § 639.5(c)(2). Thus, for example, in several cases, courts have held that in some circumstances, the employer of employees who might at first blush appear to be temporary may not qualify for this exemption if the facts indicate a substantial likelihood of continued employment even in the face of seasonal layoffs. See, e.g., Marques v. Telles Ranch, Inc., 867 F.Supp. 1438 (N.D. Ca. 1994), aff'd, 131 F. 3d 1331 (9th Cir. 1997) and aff'd in part, 133 F. 3d 927 (9th Cir. 1997) (Table Decision); Washington v. Aircap Indus., 831 F.Supp. 1292 (D SC 1993).

Strikers are also generally not entitled to WARN notice. WARN contains an exemption providing that WARN does not apply if the closing or layoff constitutes a strike or a lock-out not intended to evade the requirements of WARN, and nothing in WARN requires an employer to serve written notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act. See 29 U.S.C. § 2103(2); 20 C.F.R. § 639.5(d).

D. Timing of Notice

An employer must give notice to affected employees at least 60 days prior to their anticipated employment loss. In the case of a plant closing or a mass layoff that takes place all at once, this is usually a simple calculation.

When layoffs happen in stages, though, the calculation can become more complex. Typically, courts will hold that where the affected employee's layoff date is earlier than the date of the actual plant shutdown, the 60 days notice is to be measured from the date of the the employee's actual layoff. See United Mine Workers of America v. Martinka Coal Company, 202 F. 3d 717 (4th Cir. 2000). However, what happens in the situation where the employer, at

the time of its initial layoffs, did not anticipate that it would end up laying off sufficient additional employees to fall under the requirements of WARN?

In Allen v. Sybase, Inc., 2006 WL 3020595 (10th Cir. 2006), the Tenth Circuit approached this question in the context of calculating damages for employees in the earlier phases of a mass layoff. The employer contended that, because at the time it made these layoffs, it had not yet reached the requisite number of layoffs to constitute a "mass layoff" and because it had in fact not planned to make any further layoffs, it was impossible for it to know that notice was required for these employees. The Court found that there was an issue of fact with respect to whether the employees in question were "affected employees," in particular because their was no clear-cut answer as to whether the employees, at the time of their layoff, could "reasonably [have been] expected to experience an employment loss as a consequence of a proposed . . . mass layoff by their employer." Consequently, the issue was remanded for trial, presumably to determine whether the employer could reasonably have anticipated the need for notice.

E. Sale of Business

In the case of a sale of a portion or all of an employer's business, WARN places the obligation upon the seller to provide notice of any plant closing or mass layoff, up to and including the effective date of the sale. See 20 C.F.R. § 639.4(c); Hotel Employees Restaurant Employees International Union v. Stadium Hotel Partners, 1995 WL 263536, 10 IER Cases 1064 (E.D. Penn. 1995). After that date, the regulations state that the purchaser is responsible for providing notice for any plant closing or mass layoff. See 29 U.S.C. § 2101(b)(1). Thus, notwithstanding any other provision of WARN, the regulations provide that any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale

shall be considered an employee of the purchaser immediately after the effective date of the sale for purposes of the Act. See 20 C.F.R. § 639.6 applying. See also Air Transport Local 504 v. Ogden Aviation Services, 1998 WL 191297 (E.D.N.Y. 1998) (applying the sales exception to hold that Defendant seller had no obligation to provide notice to employees whose employment ceased solely as a result of sale).

If a seller is aware of the buyer's plans to carry out a closing or reduction in force, the seller may give the required notification as an agent of the buyer, if so authorized. See 20 C.F.R. § 639.4(c)(1). The buyer is still responsible if the seller gives notice as the buyer's agent. However, if the seller does not give notice, it is the buyer who will be responsible for giving the notice according to the regulations. The regulations advise that buyers and sellers determine in advance the impact of a sale on workers and arrange between themselves for advance notice to be given to the affected employees or the representatives if a mass layoff or plant closing is planned. See 20 C.F.R. § 639.4(c)(2). While a technical termination of seller's employees may be deemed to have occurred when a sale becomes effective, the regulations state notice is only required when the employees in fact experience a covered employment loss. See 20 C.F.R. § 639.6. Although one court has held that an asset sale alone is not encompassed in the exception, the majority of courts have continued to take a functional approach to sale-of-business situations.[12] For example, in Wilson v. Airtherm Products, Inc., 436 F.3d 906 (8th Cir. 2006), the plaintiffs argued that an employment loss had occurred because the sale of the business was

[12] Compare Oil, Chemical and Atomic International Union v. CIT Group/Capital Equipment Financing, Inc., 898 F.Supp. 451 (S.D. Tex. 1995) with Dingle v. Union City Chair Company, 2000 WL 339120 (W.D. Penn. 2000) and cases cited therein.

accomplished via a sale of assets rather than a stock sale. The Eighth Circuit rejected this contention, noting that despite the fact that the transaction involved a sale of assets, with all the seller's employees being terminated on the day of the sale, the buyer continued to operate the business as a going concern and in fact hired all of the seller's former employees. Thus, no employment losses had occurred and no WARN notice was required.[13]

See also, Wiltz v. M/G Transport Services, 128 F.3d 957 (6th Cir. 1997) (finding that employees who continued or had the opportunity to continue working for buyer did not suffer employment loss); IATSE v. Compact Video Servs Inc., 50 F.3d 1464 (9th Cir.), cert. denied, 116 S.Ct. 514 (1995) (finding no employment loss when nearly all employees transferred from unionized business to non-union buyer at slightly lower pay rates and different benefits); Headrick v. Rockwell International Com., 24 F.3d 1272 (10th Cir. 1994) (treating succession to government contract as sale not resulting in employment loss). But see Phason v. Meridian Rail Corp., 479 F.3d 527 (7th Cir. 2007) (where seller closed operations prior to effective date of asset sales based on a handshake deal that buyer would hire the employees, seller was liable under WARN Act not withstanding buyer's subsequent rehire of employees upon effective date of sale).

V. Form and Recipients of Notification

The regulations indicate that the notices to the various individuals or entities must be specific and, depending on who it is directed to, must contain the following:

[13] See also Smullin v. Mity Enterprises, Inc., 420 F.3d 836, 840-41 (8th Cir. 2005).

A. To the Collective Bargaining Representative

If the affected employees are unionized, notice must be given to the chief elected officer of the exclusive representative or bargaining agent at the time of the notice. According to the regulations, the notice must include:

> (a) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;
>
> (b) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
>
> (c) The expected date[14] of the first separation and the anticipated schedule for separations;
>
> (d) The job titles or positions to be affected and the names of the workers currently holding affected jobs.

See 29 C.F.R. § 639.7(c)(4). The notice may also, but is not required to, include additional information useful to employees such as information on available dislocated worker-assistance, and, if the planned action is expected to be temporary, the estimated duration, if known. See 20 C.F.R. § 639.7(c). The regulations also suggest that if the individual upon whom notice is appropriately served under the statute is not the same as the officer of the local union representing affected employees a copy should also be given to the local union official. See 20 C.F.R. § 639.6(a). In Oil, Chemical and Atomic Workers Intern. Union, Local 7-515 AFL-CIO

[14]The term "date" refers to a specific date or to a 14-day period during which a separation or separations are expected to occur. If separations are planned according to a schedule, the schedule should indicate the specific dates on which or the beginning date of each 14-day period during which any separations are expected to occur. Where a 14-day period is used, notice must be given at least 60 days in advance of the first day of the period. See 20 C.F.R. § 639.7(b).

v. American Home Products, 790 F. Supp. 1441, 1448 (N.D. Ind. 1992), an employer's service of notice of a plant closing on the union local's vice president rather than its president did not make the notice inadequate under WARN where the union president received a copy of the notice on the date it was issued.

It is also clear that a union has standing under WARN to sue an employer for damages on behalf of its employee members. In United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 546 (1996), the Supreme Court held that if an employer fails to give notice as required by WARN, the employees may sue for backpay for each day of the violation, and, in the alternative, the union is ostensibly authorized to sue on their behalf. See also North Star Steel Co. v. Thomas, 515 U.S. 29 (1995).

B. To Non-Union Employees

Notice to affected employees without a collective bargaining agent is to be written in understandable language and is to contain the following:

(a) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(b) The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;

(c) An indication whether or not bumping rights exist;

(d) The name and telephone number of a company official to contact for further information.

See 20 C.F.R. § 639.7(d)(1)-(4).

A separate part of the regulations also suggests that affected employees are entitled to notice regardless of whether a union is in place. See 20 C.F.R. § 639.6(b); 20 C.F.R. § 639.7(c).

C. To Governmental Units

With respect to the notices separately to be provided to the state and to the chief elected official of the unit of local government, these are to contain:

(a) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;

(b) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(c) The expected date of the first separation and the anticipated schedule for making separations;

(d) The job titles or positions to be affected, and the number of affected employees in each job classification;

(e) An indication as to whether or not bumping rights exist;

(f) The name of each union representing affected employees, and the name and address of the chief elected officer of each union.

See 20 C.F.R. § 639.7(e)(1)-(6). If there is more than one such unit of local government, the unit that the employer shall notify is the unit of local government to which the employer paid the highest taxes for the year preceding the year for which the determination is made. See 29 U.S.C. § 2102(a).

As an alternative to the notices to the state and the chief elected official of the unit of local government described above, an employer may give notice to these entities by providing them with a written statement stating the name and address of the employment site where the plant closing or mass layoff will occur, the name and telephone number of a company official to contact for further information, the expected date of the first separation, and the number of

affected employees. See 20 C.F.R. § 639.7(f). If using this alternative, however, the regulations state that the employer is required to maintain the other information listed above at the employment site and readily accessible to the state dislocated worker unit and to the unit of local government. Id. Should this information not be available when requested, the regulations deem it a failure to give the required notice. See 20 C.F.R. § 639.7(f).

The regulations also provide that any reasonable method of delivery to the parties described above which is designed to ensure receipt of notice at least 60 days before separation is acceptable. See 20 C.F.R. § 639.8.

VI. Reduction of Notification Period

The statute provides three circumstances under which the normal 60-day notice period may be reduced. See 29 U.S.C. § 2102(b). Each is discussed below. The regulations state that if one of these exceptions applies, the employer must still give as much notice as is practicable. See 20 C.F.R. § 639.9.

A. Faltering Company

The statute provides that an employer involved in a plant closing (but not a mass layoff) may order the shutdown of a single site of employment before the conclusion of the 60 day notice period if as of the time that notice would have been required, the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown. See 29 U.S.C. § 2102(b)(1). As will be explained in more detail below, in order to qualify for the "faltering company" exception, the regulations state the employer must reasonably and in good faith believe that giving WARN notice would have precluded obtaining the capital or business sought. See 29 U.S.C. § 2102(b)(1).

The regulations list the following requirements for qualifying for reduced notice:

> (a) the employer was actively seeking capital or business at the time notice would have been required;
>
> (b) there must have been a realistic opportunity to obtain the financing or business sought;
>
> (c) the financing or business sought must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown; and
>
> (d) the employer can objectively demonstrate that it reasonably believed that the potential customer or financing source would have been unwilling to provide the new business or capital if notice were given.[15]

See 20 C.F.R. § 639.9(a).

The regulations further note that the actions of an employer relying on the "faltering company" exception will be viewed in a company-wide context and thus, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the single facility, operating unit, or site to be closed. See 20 C.F.R. § 639.9(a)(4). Finally, the regulations specifically note that this exception is to be narrowly construed. See 20 C.F.R. § 639.9(a). In order to qualify, the employer must:

> ... have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business.

See 20 C.F.R. § 639.9(9)(a)(4).

[15] In Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1009 (9th Cir. 2004), the court focused on the employer's failure to show that the bank would have been unwilling to provide financing if proper notice had been given in affirming the district court's ruling that the faltering company exception does not apply.

Some litigation has occurred construing this exception. For example, in Old Electralloy Corp. v. United Steelworkers of America, 9 IER Cases 516 (Bankr. W.D. Pa. 1993), the faltering company exception was applied to an employer that had actively sought capital in the form of loans and investors up until the plant closing, at which point cash reserves had been exhausted. The exception is limited, however, and in Local 397, Intern. Union of Electronic, Elec. Salaried, Machine and Furniture Workers, AFL-CIO v. Midwest Fasteners, Inc., 763 F. Supp. 78 (D. N.J. 1990), the court found that coordination of the sale of a facility could not be equated with "actively seeking capital or business" under WARN. Rather, the exception was limited to seeking capital, such as obtaining loans, issuing bonds or stocks, or securing new business. In Carpenters Dist. Council of New Orleans and Vicinity v. Dillard Dept. Stores Inc., 15 F.3d 1275, 1281 (5th Cir. 1995), cert. denied, 115 S.Ct. 933 (1995), the Fifth Circuit refused to apply the faltering business exception because the layoff was not caused by the employer's failure to obtain sufficient capital. See also, Law v. American Capitol Strategies, Ltd., 2007 WL 221671 (M.D. Tenn. 2007) (exception inapplicable where employer seeks sale of business that would allow another entity to run the business); In re: APA Transport Corp. Consol. Litig., 541 F.3d 233 (3rd Cir. 2008)(finding that exception is inapplicable where employer merely indicated to lender that it would seek additional financing, and refusing to read a foreseeability requirement into the faltering business exception) .

B. Unforeseen Circumstances

A second situation allowing for a reduction in the notification period is if the plant closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that notice would have been required. See 29 U.S.C. § 2102(b)(2)(A). As discussed

in the regulations, an important indicator that a business circumstance is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. Courts have addressed this exemption as a two-prong consideration: first, whether the circumstance caused the layoffs and second, whether the circumstance was unforeseeable. See e.g. Williamson v. United Airlines, Inc., 2008WL4298090 (S.D. Indiana 2008)(finding that the onset (particularly the timing) of the Iraq War was not foreseeable, but reserving for trial the issue of whether the war caused the layoffs in question). Examples given include a principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated dramatic major economic downturn. See 20 C.F.R. § 639.9(b). See also Jones v. Kayser-Roth Hosiery, 748 F. Supp. 1276 (E.D. Tenn. 1990); Chestnut v. Stone Forest industries. Inc., 817 F.Supp. 932 (N.D. Fla. 1993). At least one court has held that the alleged fact that an employer could have but failed to negotiate a customer contract provision providing for a 60-day cancellation clause did not compel a finding that this exception was unavailable. See International Brotherhood of Teamsters v. American Delivery Service, 50 F.3d 770 (9th Cir. 1995).[16] A government-ordered closing of an employment site that occurs without prior notice may qualify, depending on the circumstances, as unforeseeable business circumstance. See e.g., Finkler v. Elsinore Shore Associates, 781 F. Supp. 1060 (D. N.J. 1992).

The test for making this determination focuses on an employer's business judgment. The focus is not on the employer's own subjective assessment of the situation, but whether the

[16]In so holding, the Ninth Circuit declined to follow a contrary position taken by the Second Circuit in Local 217 v. MHV, Inc., 976 F.2d 805 (2d Cir. 1992).

employer exercised such "commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market." See 20 C.F.R. § 639.9(b)(1); Pena v. American Meat Packing Corp., 362 F.3d 418, 421 (7th Cir. 2004). Under WARN, however, the employer is not required to accurately predict general economic conditions that may also affect demand for its products or services. See 20 C.F.R. § 639.9(b). This issue is one which is frequently litigated, with cases both permitting the exception to be used[17] and other rejecting its availability.[18]

A sudden business collapse may also constitute an unforeseen circumstance that provides an exemption from notice. In Roquet v. Arthur Andersen LLP, 398 F.3d 585, 589-91 (7th Cir. 2005), the court held that Arthur Andersen could not reasonably foresee 60 days before the layoffs were made that its business was going to collapse. Arthur Andersen and its clients knew an investigation was going on, but the indictment by the Department of Justice was unusual, and the major loss of business did not occur before that. This sudden business collapse is the type of unforeseen business situation that WARN provides an exception for.

[17] See e.g., Local Union 7107 v. Clinchfield Coal Co., 124 F.3d 639 (4th Cir. 1997), cert. denied, 523 U.S. 1006 (1998) (Employer's failure to obtain acceptable contract for coal qualified for reduced notice); IBT Local 952 v. American Delivery Serv. Co., 50 F.3d 770 (9th Cir. 1995) (holding exception could apply when parent canceled contract with subsidiary with less than 60 days notice and the two were separate employers); Jurcev v. Central Community Hospital, 7 F.3d 618 (7th Cir.), cert. denied, 511 U.S. 1081 (1994) (foundation's decision to cease providing endowment funds to not for profit hospital beyond control of and not reasonably foreseeable by hospital).

[18] See e.g., In re Riker Indus, 151 B.R. 823, 8 IER Cases 519 (Bankr. N.D. Ohio 1993) (holding loss of financing which precipitated plant closing should have been anticipated); Carpenters District Council v. Dillard's Dept. Stores, 15 F.3d 1275 (5th Cir. 1994) (exception not available in merger despite uncertainty on SEC and stockholder approval).

C. Natural Disasters

A reduction of a notification period is allowed if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, drought, etc. See 29 U.S.C. § 2102(b)(2)(B). To qualify for this exception, however, an employer must demonstrate that its plant closing or mass layoff is a direct result of a natural disaster. See 20 C.F.R. § 639.9(c)(2). Further, while a disaster may preclude full advance notice, such notice as is practicable must be given, containing as much of the information as is required and as is available under the circumstances. See 20 C.F.R. § 639.9(c)(3). Finally, the regulations state that when a plant closing or mass layoff occurs as an indirect result of a natural disaster, this exception does not apply, but the "unforeseeable business circumstance" exception described above may be applicable. See 20 C.F.R. § 639.9(c)(4).

VII. Extensions of Layoff Period

As discussed above, when an employer lays off an employee for less than six months, this is not an "employment loss" within the meaning of the statute and no notification is required. However, a layoff of more than six months which, at its outset, was announced to be a layoff of six months or less shall be treated as an employment loss under WARN as of the date the layoff commenced, unless the extension beyond six months is caused by business circumstances not reasonably foreseeable at the time of the initial layoff. See 20 C.F.R. § 639.4(b). But see Kildea v. Electrowire Prods., Ins., 792 F.Supp. 1046 (E.D. Mich. 1992) (holding employees on temporary layoff/leave with reasonable expectation of recall suffer employment loss when advised plant is closed or layoffs have become permanent); Jones v. Kayser-Roth Hosiery, Ins., 748 F.Supp. 1276 (E.D. Tenn. 1990) (finding that employees on

temporary layoff suffered employment loss on date told by employer that plant was to be closed permanently). Notice is to be given at the time it becomes reasonably foreseeable that the extension beyond six months will be required. See 29 U.S.C. § 2102(c); 20 C.F.R. § 639.4(b).

VIII. Extending Notification

As discussed in the regulations, additional notice is required when the date or scheduled dates of a planned plant closing or mass layoff is extended beyond the starting date or the ending date of any 14-day period announced in the original notice. See 20 C.F.R. § 639.10.

If the postponement is for less than 60 days, the regulations state the additional notice should be given as soon as possible and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement. See 20 C.F.R. § 639.10(a). The regulations further state that the notice should be given in a manner which will provide the information to all affected employees. See 20 C.F.R. § 639.10(a). If the postponement is for 60 days or more, the additional notice should be treated as a new notice and provide all the information originally required. See 20 C.F.R. § 630.10(b). The regulations indicate that a "rolling notice" given whether or not a plant closing or mass layoff is pending and with the intent to evade the purpose of WARN rather than give the specific notice as required under the statute is not acceptable. See 20 C.F.R. §639.10(b). In one case interpreting a claim of "rolling notice," a court granted summary judgment to an employer who had provided a series of notices as information became available. See Local 179 of the International Brotherhood of Teamsters v. TSC Enterprises, 1995 WL 144534 (N.D.I11. 1995).

IX. Administration, Enforcement, and Liability

Suits to enforce WARN may be brought in federal court. In general, any individual or entity to whom WARN notice must be given has standing to sue,[19] including unions on behalf of their members. See UFCW Local Union Local 751 v. Brown Group, Inc., 517 U.S. 544 (1996). But see In re: APA Transport Corp. Consol. Litig., 541 F.3d 233 (3rd Cir. 2008)(holding that ERISA funds do not have standing to sue under the WARN Act). Any unit of local government which does not receive the notice required by WARN may also initiate a civil action against an employer, but DOL has no standing to bring an action under WARN. See 20 C.F.R. § 639.1(d). Class actions have, on occasion, been certified under WARN. See e.g., Grimmer v. Lord, Day & Lord, Barrett Smith, 1996 WL 139649 (S.D.N.Y. 1996). WARN Act plaintiffs have also been held to be entitled to a jury trial. See e.g., Bentley v. Arlee Home Fashions, Inc., 861 F.Supp. 65 (E.D. Ark. 1994). The Supreme Court has held that the limitations period for civil actions brought to enforce WARN is provided by state law. See United Steelworkers of America v. Crown Cork and Steel Co., 515 U.S. 29 (1995). Several courts have applied the state statute of limitations for contract actions. See e.g., Frymire v. Ampex Corp., 61 F.3d 757 (10th Cir. 1996), cert. dism., 517 U.S. 1182 (1996); Aaron v. Brown Group, 80 F.3d 1220 (8th Cir. 1986), cert. denied, 519 U.S. 950 (1986). In Brewer v. American Power Source, Inc., 517 F. Supp.2d 881, 887, the Northern District of Mississippi considered whether the statute of limitations was tolled during an anticipated layoff of six months. The Court concluded that the statute of limitations

[19] See 29 U.S.C. § 2104(a)(5).

governing an action for violation of the WARN Act began to run at the point in time when a sufficient number of employees were affected by a layoff to constitute a "mass layoff."

A release agreement can be enforced to bar WARN claims even if the release itself does not expressly reference WARN. The release will be judged under the totality of the circumstances to determine if it is knowing and voluntary. Williams v. Phillips Petroleum Co., 23 F.3d 930, 935 (5th Cir. 1994).

Although WARN Act claims can be released, these releases must be handled with care.[20] In Allen v. Sybase, Inc., 2006 WL 3020595 (10th Cir. 2006), the Tenth Circuit faced a situation in which an employer had conducted several different phases of layoffs over a ninety-day period. Although the employer had not anticipated the possibility of WARN liability with regard to the earlier phases of the layoffs, it had nonetheless offered employees severance payments in exchange for full releases. The Court found that employees who had been laid off in the earlier phases of the layoffs had not waived their WARN claims despite the broad terms of those releases. The Court observed that the releases only applied to claims that were in existence at the time of their execution. Because the layoffs of employees in the first phase did not become part of a "mass layoff" within the meaning of WARN until the subsequent layoffs of additional employees raised the aggregate total of laid-off employees past the fifty-employee threshold, the Court reasoned that the employees who had been laid off in the early phases had not yet accrued

[20] Milan v. Centennial Communication Corp., 500 F. Supp.2d 14 (D. Puerto Rico 2007) (waiver of WARN Act claims upheld finding releases written in simple and clear language; employees had unlimited time to consider releases with advice of counsel; and each received valuable consideration for the release).

any WARN claims at the time they executed their releases and therefore could not have released these claims by signing their severance agreements.[21]

WARN states that an employer who violates the notice requirements is liable for "back pay for each day of violation at a rate of compensation not less than the higher of: (i) the average regular rate received by such employee during the last three years of the employee's employment; or (ii) the final regular rate received by such employee." See 29 U.S.C.§ 2104(a). The amount is subject to reduction based on certain payments by the employer. See 29 U.S.C. § 2104(a)(2).

One problem with determining damages under WARN is in calculating the number of days for which damages must be paid. Often at issue in litigation is the meaning of the phrase "each day of the violation." See Kelly v. Sabretech, 106 F. Supp. 1283, 1285 (S.D. Fla. 1999). Damages can be calculated in two ways. First, damages can be calculated by working days, that is, the number of days an employee would work in the 60-day period where notice should have been given. See id. at 1286. Damages could also be calculated under a calendar days computation where the employee would receive payment for their average hourly wage over the entire 60-day period. See United Steelworkers of America v. North Star Steel, 5 F.3d 39 (3d Cir. 1993).

The majority approach is reflected in the Kelly decision, where the court chose to use working days in its calculation. See e.g., Frymire v. Ampex Corgi, 61 F.3d 757 (10th Cir. 1995); Carpenters District Council v. Dillard's Dept. Stores, 15 F.3d 1275 (5th Cir. 1994); Breedlove v.

[21] A dissenting judge would have looked to the fact that the employees' terminations preceded their execution of the releases and would have held that the releases were effective against any

Earthgrains Baking Companies, Inc., 140 F.3d 797 (8th Cir. 1998); Burns v. Stone Forest Industries, Inc., 147 F.3d 1182 (9th Cir. 1998); Saxion v. Titan-C-Manufacturing, Inc., 86 F.3d 553 (6th Cir. 1996).

The back pay period is a maximum of 60 days or, according to the statute, for no more than one-half of the number of days the employee has been employed. See 29 U.S.C. § 2104(a)(1)(2). Punitive damages have been held unavailable under WARN, although prejudgment interest may be recoverable. See Finnan v. L.F. Rothschild Co., 726 F. Supp. 460 (S.D. N.Y. 1989).

With respect to a suit brought by a unit of local government which did not receive the appropriate notice, the employer may be subject to a civil penalty of not more than $500.00 for each day of such violation unless the employer pays to each employee who suffered economic loss the amounts the employee is entitled to under WARN within three weeks from the date the employer ordered the shutdown or layoff. See 29 U.S.C. § 2104(a)(3). The court may reduce the amount of back pay liability or penalty if the employer provides that it had reasonable grounds for believing that the act or omission was not a violation of WARN and that it had proceeded in good faith. See 29 U.S.C. § 2104(a)(4). See e.g., Kildea v. Electro-Wire Products, 2000 WL 1909383 (6th Cir. 2000) (providing example of reduction of damages to zero and denying attorney's fees).

The remedies provided under WARN are in addition to any other contractual or statutory rights the employee may have. See 29 U.S.C. § 2105. But this provision cannot be used to justify any and all conceivable damage claims, as one court has refused to permit employees to

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claims that arose out the terminations.

add loss of consortium claims on behalf of their spouses. Campbell v. PMI Food Equipment Group, Inc., 2007 WL 4355186 (6th Cir. 2007).

Finally, WARN specifically provides that the court may, in its discretion, allow the prevailing party reasonable attorney's fees as part of the costs. See 29 U.S.C. § 2104(a)(6). However, WARN also specifically states that no federal court shall have the authority to enjoin a plant closing or mass layoff. See 29 U.S.C. § 2104(7). Thus, WARN will not serve to prevent an employer from closing its plant or laying off employees. Rather, WARN merely creates a monetary liability if the closing or layoff is not done in accordance with the Act's requirements.

X. Good Faith Defense

An employer's liability under the WARN Act may be reduced where the employer who has violated the Act "proves to the satisfaction of the Court that the act or omission….was in good faith and the employer had reasonable grounds for believing the act or omission was not a violation of [the act]." Law v. American Capital Strategies, Ltd., 2007 WL 221671, 17 (M.D. Tenn. 2007) citing 29 U.S.C. § 2104(a)(4). The employer bears the burden of proving the good faith defense. "The assessment of [an employer's] subjective belief and whether its actions were objectively reasonable is a question of fact which must be resolved at trial." Law, at 17 citing Saxion v. Titan-C-Manufacturing, Inc., 86 F.3d 553, 561 (6th Cir. 1996).

XI. The Future of the WARN Act

The WARN Act has come under criticism from some legislators for failing to adequately protect workers against unexpected layoffs. These legislators introduced the Forewarn Act of 2007, which seeks to amend the WARN Act to expand the coverage of the Act. Forewarn Act of 2007, H.R. 3662, 110th Cong. (2007); Forewarn Act of 2007, S. 1792, 110th Cong. (2007).

Under the Forewarn Act, the number of employees required to trigger coverage as an "employer" would be reduced from 100 to 50 and the threshold for a "mass layoff" would be reduced from 50 employees to 25 employees. Additionally, Forewarn would require a 90-day notice period (increased from the current 60-day notice period) and would make employers who violate the Act's notice provisions liable for damages equal to double an employee's back pay. Forewarn would also require notification of the Secretary of Labor and would enable the Secretary or the appropriate State Attorney General to pursue claims on behalf of employees.

While the Forewarn Act has not made any significant legislative progress after being referred to committee in the fall of 2007, President Obama has shown significant support for the bill and co-sponsored the legislation before the Senate. See Press Release, Senator Barack Obama, Statement of Senator Barack Obama on HELP Committee Hearing on the WARN Act's 20th Anniversary (May 20, 2008)(available at http://obama.senate.gov/press/080520-statement_of_se_29/). Given President Obama's support of the bill, coupled with his vow to address the economic downturn as his first priority, many speculate that the signing into law of the Forewarn Act could be an immediate priority of the Obama administration.

The information contained in this speech outline is intended as an informational overview on legal developments of general interest. It is not intended to provide a complete analysis or discussion of each subject covered. Moreover, this area of the law is still under substantial development. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of applicable law than can be provided in this format.

Whistleblower Statutes and Workers' Compensation Retaliation Claims

By

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WHISTLEBLOWER STATUTES AND WORKERS' COMPENSATION RETALIATION CLAIMS

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I. Introduction

A. Many state and federal statutes protect against retaliation for whistle blowing or engaging in other protected activity.

1. However, there is no common law cause of action for the tort of retaliatory discharge in Florida. *See Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994); *Scott v. Otis Elevator Co.*, 524 So. 2d 642, 643 (Fla. 1988); *Smith v. Piezo Technology & Professional Administrators*, 427 So. 2d 182, 184 (Fla. 1983).

2. Therefore, the right to recover for a retaliatory discharge in Florida exists only pursuant to statutory authority, or by collective bargaining agreement or other contract.

B. These materials focus on the following statutes:

1. Florida's private sector whistleblower act, FLA.STAT. §§ 448.101-448.105;

2. Florida's Public Sector Whistleblower's Act, FLA.STAT. §§ 112.3187-112.31895;

3. The prohibition on retaliation in the Florida Workers' Compensation Law, FLA.STAT. § 440.205; and

4. The Sarbanes-Oxley Act of 2002. Pub.L. 107-204, July 30, 2002.

C. These materials do not address retaliation claims under:

1. Title VII, the ADEA, the ADA and other federal discrimination statutes;

2. The National Labor Relations Act; or

3. The Florida Civil Rights Act.

II. Florida's Private Sector Whistleblower Act

A. Florida's private sector whistleblower act (referred to in these materials simply as the "Act") prohibits "employers" from taking "any retaliatory personnel action" against an "employee" based on the employee engaging in certain protected activity.

B. Covered Entities

[1] With special thanks to Robert J. Sniffen, Cynthia L. May and Jay P. Lechner.

1. The Act prohibits retaliatory actions only by "employers."

    a. "'Employer' means any private individual, firm, partnership, institution, corporation, or association that employs ten or more persons." FLA.STAT. § 448.101(3).

        1) This definition includes only <u>private</u> employers.

        2) While the statutory definition makes it clear that an individual may be liable for actions taken in his or her capacity as an employer, recent cases have held that there is no liability for actions taken by an individual in his or her capacity as an officer, director or shareholder of a corporation. *Tracey-Meddoff v. J. Altman Hair & Beauty Centre, Inc.*, 899 So. 2d 1167, 1168-69 (Fla. 4th DCA 2005); *Diaz v. Kaplan Univ.*, 567 F. Supp. 2d 1394 (S.D. Fla. 2008); *Greif v. Jupiter Med. Ctr., Inc.*, 2008 WL 2705436 at * 5 (S.D. Fla. July 9, 2008).

    b. An employer may be covered under the Act even though it is also covered by the Public Sector Whistleblower's Act. *Dahl v. Eckerd Family Youth Alternatives, Inc.*, 843 So. 2d 956, 958 (Fla. 2d DCA 2003) (private entity with more than 10 employees covered by the Act, despite fact that it was a "contractor" as defined by the Public Sector Whistleblower's Act and therefore covered by the latter act as well).

    c. The ministerial exemption applies to claims under the Act. *Archdiocese of Miami, Inc. v. Minagorri*, 954 So. 2d 640 (Fla. 3d DCA 2007).

C. Persons Who May Be Protected

    1. The Act bars retaliatory actions only with respect to an "employee."

        a. "'Employee' means a person who performs services for and under the control and direction of an employer for wages or other remuneration. The term does not include an independent contractor." FLA.STAT. § 448.101(2). *See also Morin v. Florida Power & Light Co.*, 963 So. 2d 258 (Fla. 3d DCA 2007) (independent contractors are not covered by the Act).

        b. Note the absence in the statutory definition of any reference to applicants.

D. Protected Conduct

    1. The Act protects three distinct types of conduct:

        a. Disclosing, or threatening to disclose, "to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation," FLA.STAT. § 448.102(1);

b. Providing information to, or testifying before, "any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer," FLA.STAT. § 448.102(2); and

c. "Object[ing] to, or refus[ing] to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." FLA.STAT. § 448.102(3).

2. Limitations on definitions of protected conduct.

a. The employee's disclosure, objection, refusal or other protected activity must concern a "law, rule or regulation."

1) "'Law, rule, or regulation' includes any statute or ordinance or any rule or regulation adopted pursuant to any federal, state, or local statute or ordinance applicable to the employer and pertaining to the business." FLA.STAT. § 448.101(4).

a) "A statute is a form of positive law enacted by the legislative branch of government. Similarly, an ordinance is a form of statutory law enacted by a local governmental body, such as a county commission or city council. A regulation is synonymous to a rule enacted pursuant to the administrative law process; a rule or regulation comes into being as a result of a legislative grant of authority to an executive branch department or agency." *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787, 791 (Fla. 2d DCA 2005).

2) In order to qualify as a "law, rule, or regulation" within the meaning of the Act, the "law, rule, or regulation" must be promulgated by an non-judicial organ of the state or federal government, such as the legislature, executive department or agency, or a municipal body. *Snow*, 896 So. 2d at 791.

a) The Rules Regulating The Florida Bar are not "laws, rules, or regulations" within the meaning of the Act. *Snow*, 896 So. 2d at 791.

b) Because Florida Power and Light's rigging procedure is not a "law, rule or regulation," a complaint about a failure to adhere to the rigging procedure was not a protected activity. *Morin v. Day & Zimmermann NPS, Inc.*, 2008 WL 2543432 at *2 (S.D. Fla. June 25, 2008).

c) The FCC's unadopted news distortion policy -- developed through the adjudicatory process -- is not a "law, rule, or regulation" within the meaning of the Act. *New World Communications of Tampa, Inc. v. Akre*, 866 So. 2d 1231, 1234 (Fla. 2d DCA 2003).

d) An injunction issued by a federal district court is not a "law, rule, or regulation" within the meaning of the Act. *Tyson v. Viacom, Inc.*, 760 So. 2d 276, 277 (Fla. 4th DCA 2000).

e) Evacuation orders issued by the Governor and a county are not laws, rules, or regulations within the meaning of the Act. *Gillyard v. Delta Health Gp., Inc.*, 757 So. 2d 601, 603 (Fla. 5th DCA 2000).

b. There must be an actual violation of a law, rule or regulation.

1) *Moren v. Progress Energy, Inc.*, 2008 WL 3243860 at *9 (M.D. Fla. Aug. 7, 2008); *Johnson v. Stein Mart, Inc.*, 2007 U.S. Dist. LEXIS 44579 (M.D. Fla. June 20, 2007); *Colon v. Total Renal Care, Inc.*, 2007 U.S. Dist. LEXIS 79588 (M.D. Fla. Oct. 25, 2007); *White v. Purdue Pharma, Inc.*, 369 F. Supp. 2d 1335, 1357-59 (M.D. Fla. 2005).

2) However, based on the grammatical construction of the Act, it appears that an alleged violation will suffice where the protected activity consists of providing information or testifying in connection with an investigation by an appropriate agency. *Compare* FLA.STAT. §§ 448.102(1) and (3) (both subsections referring to an activity, policy or practice that (or which) "is" in violation of a law, rule, or regulation) *with* FLA.STAT. § 448.102(2) (referring to providing information or testifying in connection with an investigation, hearing or inquiry into an "alleged" violation).

c. The law, rule or regulation must be "applicable to the employer and pertaining to the business." FLA.STAT. § 448.101(4).

d. The violation must be a violation by the employer.

1) *Sussan v. Nova Southeastern Univ.*, 723 So. 2d 933, 933-34 (Fla. 4th DCA 1999) (reporting theft of university funds by coworkers is not protected activity because, unlike Public Sector Whistleblower Act, the Act does not protect employees who object to wrongful conduct by other employees).

2) *Kelleher v. Pall Aeropower Corp.*, 2001 U.S. Dist. LEXIS 5463 at *20 (M.D. Fla. Feb. 6, 2001) (objecting to harassment by co-workers outside the workplace was not objection to "an activity, policy or practice of the employer").

3. "'Appropriate governmental agency' means any agency of government charged with the enforcement of laws, rules, or regulations governing an activity, policy or practice of an employer." FLA.STAT. § 448.101(1).

4. Requirement of prior written complaint to employer.

a. Subsection 448.102(1), which protects against retaliation for disclosure to a governmental agency of a violation of a law, rule or regulation, expressly states

that it "does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy or practice." FLA.STAT. § 448.102(1).

1) "'Supervisor' means any individual within an employer's organization who has the authority to direct and control the work performance of the affected employee or who has managerial authority to take corrective action regarding the violation of law, rule, or regulation of which the employee complains." FLA.STAT. § 448.101(6).

b. The other two subsections that define protected activity, 448.102(2) and (3), do not state that a written complaint or report is required.

1) However, subsection 448.103(1), which establishes a private right of action for violation of the Act, broadly states, "An employee may not recover in <u>any</u> action brought pursuant to this subsection if he or she failed to notify the employer about the illegal activity, policy, or practice as required by s. 448.102(1) . . . ." FLA.STAT. § 448.103(1)(c) (emphasis added).

2) Because § 448.103(1)(c) is the only subsection that provides for a private right of action, for a time there was uncertainty concerning whether prior written notice was a predicate to a civil action based on retaliation for conduct protected by §§ 448.102(2) and (3), despite the absence of any mention of a notice requirement in those subsections.

3) In 2000, the Florida Supreme Court held that the requirement of prior written notice to the employer applies only to claims under § 448.102(1) -- e.g., to claims based on disclosures or threats to disclose to an appropriate governmental agency -- and not to claims under §§ 448.102(2) or (3). *Golf Channel v. Jenkins,* 752 So. 2d 561, 567-68 (Fla. 2000).

E. Prohibited Actions

1. The Act prohibits "retaliatory personnel actions," which are defined as "the discharge, suspension, or demotion by an employer of an employee or any other adverse employment action taken by an employer against an employee in the terms and conditions of employment." FLA.STAT. § 448.101(6).

a. Courts have adopted as applicable to the Act the United States Supreme Court's recent pronouncements concerning the type of adverse action necessary to establish a prima facie case of retaliation. *See Rutledge v. Suntrust Bank,* 262 Fed. Appx. 956, 958 (11th Cir. Jan. 18, 2008) (second prong of prima facie case is established if plaintiff suffered an adverse action of a type that would dissuade a reasonable employee from engaging in statutorily protected activity) (citing *Burlington Northern & Santa Fe Ry. Co. v. White* , 548 U.S. 53, 67-68 (2006); *accord Luna v. Walgreen Co.,* 575 F. Supp. 2d 1326, 1342 n.13 (S.D. Fla. 2008).

b. *See also Robinson v. Jewish Center Towers, Inc.*, 993 F. Supp. 1475, 1479 (M.D. Fla. 1998) (retaliatory personnel actions may include non-ultimate employment actions such as "harassment, threats of demotion, and reprimand").

c. The law applicable to Title VII will apply to determining whether a plaintiff was constructively discharged, including the requirements that the plaintiff prove that working conditions were so intolerable that a reasonable person would be compelled to resign, that the intolerability resulted from the retaliatory conduct and that the employer was given a sufficient opportunity to remedy the situation. *Luna*, 575 F. Supp. 2d at 1344.

F. Procedures and Proof

1. The Act creates a civil cause of action for an employee who has been subjected to a retaliatory personnel action in violation of the Act. FLA.STAT. § 448.103(1)(a).

2. A civil action may be brought in the county:

   a. In which the alleged retaliatory personnel action occurred;

   b. In which the complainant resides; or

   c. In which the employer has its principal place of business. FLA.STAT. § 448.103(1)(b).

3. The standards of proof applied in Title VII retaliation claims apply to claims brought under the Act. *Rutledge v. SunTrust Bank*, 262 Fed. Appx. 956, 958 (11th Cir. Jan. 18, 2008); *Sierminski v. Transouth Financial Corp*., 216 F.3d 945 (11th Cir. 2000).

   a. Accordingly, the plaintiff must first establish a prima facie case by proving that:

      1) She engaged in protected activity;

      2) She suffered a retaliatory personnel action; and

      3) There was some causal connection between the two events. *Sierminski*, 216 F.3d at 950.

         a) Close temporal proximity between the protected activity and the adverse action is generally sufficient to establish the causal connection necessary for a prima facie case. *Stone v. Geico Gen'l Ins. Co.*, 279 Fed. Appx. 821, 824 (11th Cir. May 28, 2008).

            (1) However, temporal proximity will not suffice to establish a prima facie case in the absence of evidence that the decision maker was aware of the protected activity. *Hamm v. Johnson Bros., Inc.*, 2008 WL 2783366 at *7 (M.D. Fla. July 17, 2008) (citation omitted).

b. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to proffer a legitimate, non-retaliatory reason for the adverse action. *Sierminski*, 216 F.3d at 950.

1) The burden of proof, however, remains with the plaintiff. *Id.*

c. If the defendant proffers a non-retaliatory reason, then the burden shifts back to the plaintiff to show that the proffered reason was not the real reason, and that the real reason was unlawful retaliation. *Id.*

1) A mere temporal relationship will generally be insufficient to establish pretext in the face of the employer's proffer of a legitimate non-retaliatory reason for the retaliatory personnel action. *Reilly v. Novartis Pharmaceuticals Corp.*, 2008 WL 795322 at *14 (M.D. Fla. Mar. 24, 2008) (citations omitted).

4. An agreement to arbitrate claims under the Act is enforceable. *Hospicecare of Southeast Florida, Inc. v. Major*, 968 So. 2d 117, 118 (Fla. 4th DCA 2007) (collecting cases).

G. Affirmative Defenses

1. The Act expressly provides that an employee may not recover "if the retaliatory personnel action was predicated upon a ground other than the employee's exercise of a right protected by" the Act. FLA.STAT. § 448.103(c). However, the statute does not expressly characterize this as an affirmative defense and, given the cases applying Title VII's burden shifting framework to claims under the Act (*see* above), it is not clear that this is a true affirmative defense, i.e., that the defendant carries the burden of proof on this issue.

2. Statute of limitations.

a. A civil action must be commenced within the earlier of:

1) Two years "after discovering that the alleged retaliatory personnel action was taken"; or

2) Four years after the personnel action was taken. FLA.STAT. § 448.103(1).

H. Relief Available:

1. Injunction to restrain continued violations of the Act;

2. Reinstatement to the same or an equivalent position;

3. Reinstatement of fringe benefits and seniority rights;

4. Lost wages;

5. Lost benefits;

6. Other remuneration;

7. "Any other compensatory damages allowable at law." FLA.STAT. § 448.103(2);

8. It appears that punitive damages are not available. *Wells v. Xpedx*, 2007 U.S. Dist. LEXIS 33288 (M.D. Fla. May 7, 2007) (collecting cases); *see also Branche v. Airtran Airways, Inc*., 314 F. Supp. 2d 1194, 1197 (M.D. Fla. 2004) (punitive damages unavailable and stating, in dicta, that other "non-compensatory" damages are unavailable); and

9. A court may award reasonable attorney's fees and costs to the prevailing party. FLA.STAT. § 448.104.

I. Right to Jury Trial

1. There is a right to a jury trial under the private sector Whistleblower Act. *See O'Neal v. Florida A & M Univ. ex rel. Bd. of Trustees for Florida A & M Univ.*, 2008 WL 2276307 at *2 (Fla. 1st DCA June 5, 2008) (discussing the right to a jury trial under both the private sector and public sector whistleblower acts, the court found that "a right to compensation for wages lost on account of wrongful termination of employment is a right 'of the sort traditionally enforceable in an action at law,'" reversed the judgment entered after a non-jury trial, and remanded the matter with directions to the trial court to reinstate the plaintiff's demand for trial by jury). *See also Rodriguez v. Casson-Mark Corp.*, 2008 WL 2949520 (M.D. Fla. July 28, 2008).

J. The Act does not diminish existing rights. FLA.STAT. § 448.105.

K. Preemption

1. The Act is <u>not</u> preempted by civil rights statutes. *Rivera v. Torfino Enterprises*, 914 So. 2d 1087 (Fla. 4th DCA 2005) (plaintiff may bring claim under private sector whistleblower act for conduct that is also actionable under Florida Civil Rights Act ("FCRA")); *Takamatsu v. William Ryan Homes of Fla., Inc.*, 2008 WL 3255602 (M.D. Fla. Aug. 7, 2008) (Title VII claim and claim under Florida's private sector whistleblower act may be maintained simultaneously); *Rodriguez*, 2008 WL 2949520 (claim under the Act not preempted by Title VII, 42 U.S.C. § 1981 or FCRA).

   a. The fact that some of the allegations underlying a claim based on the Act concern conduct which, if proven, would also establish a violation of federal law, is not a sufficient basis for removal. *McGovern v. CBT Direct, LLC*, 2007 WL 3407392 (M.D. Fla. Nov. 13, 2007) (fact that alleged protected activity included complaints about employment discrimination insufficient for removal, case remanded).

2. A claim under the Act based on alleged retaliation for complaining about violations of law by an ERISA plan is preempted by ERISA. *American Maritime Officers Union v. Merriken*, 981 So. 2d 544, 547-49 (Fla. 4th DCA); *rev. denied*, 993 So. 2d 510 (Fla. 2008).

L. The Act is remedial in nature, and therefore is to be liberally construed. *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994); *Martin County v. Edenfield*, 609 So. 2d 27, 29 (Fla. 1992).

III. Florida's Public Sector Whistleblower's Act

A. Florida's Public Sector Whistleblower's Act (referred to in these materials as the "Public Sector FWA") prohibits "agencies" and "independent contractors" from retaliating against "employees" or "persons" who make certain protected disclosures.

B. Covered Entities

1. The Public Sector FWA bars retaliatory conduct by both "agencies" and "independent contractors."

a. The Public Sector FWA does not require that the covered entity have any minimum number of employees.

2. According to the Public Sector FWA:

a. "Agency" means:

1) "[A]ny state, regional, county, local, or municipal government entity, whether executive, judicial, or legislative";

2) "[A]ny official, officer, department, division, bureau, commission, authority, or political subdivision therein"; or

3) "[A]ny public school, community college, or state university." FLA.STAT. § 112.3187(3)(a).

4) A sheriff's department is an "agency" under the Public Sector FWA. *Hutchison v. Prudential Ins. Co. of America, Inc.*, 645 So. 2d 1047 (Fla. 3d DCA 1994).

b. "'Independent contractor' means a person, other than an agency, engaged in any business and who enters into a contract, including a provider agreement, with an agency."

1) An insurance company that entered into a payroll deduction contract with a sheriff's department is an independent contractor under the Public Sector FWA. *Hutchison*, 645 So. 2d 1047.

3. The Public Sector FWA does not provide for suit against persons in their individual capacities. *Costa v. School Board of Broward County*, 701 So. 2d 414 (Fla. 4th DCA 1997); *DeArmas v. Ross*, 680 So. 2d 1130 (Fla. 3d DCA 1996); *Harris v. District Bd. of Trustees of Polk Comm'y College*, 9 F. Supp. 2d 1319 (M.D. Fla. 1998).

C. Persons Who May Be Protected

1. The Public Sector FWA bars retaliatory actions with respect to both "employees" and other "persons."

   a. "'Employee' means a person who performs services for, and under the control and direction of, or contracts with, an agency or independent contractor for wages or other remuneration." FLA.STAT. § 112.3187(3)(b).

   b. "Person" is not defined in the Public Sector FWA.

   c. Recall that the private sector whistleblower act expressly excludes independent contractors from the definition of "employee." FLA.STAT. § 448.101(2). The Public Sector FWA does not include such an exclusion.

D. Protected Conduct

1. The Public Sector FWA protects only those who disclose certain types of information, to certain entities, under certain circumstances.

   a. Types of information about which protected disclosures may be made:

      1) Disclosures about:

         a) Any violation or suspected violation;

         b) Of a federal state or local law, rule, or regulation;

         c) Committed by an employee or agent of an agency or independent contractor;

         d) Which creates and presents a substantial and specific danger to the public's health, safety or welfare. FLA.STAT. § 112.3187(5)(a).

      2) Disclosures about:

         a) Any act or suspected act;

         b) Of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty;

         c) Committed by an employee or agent of an agency or independent contractor. FLA.STAT. § 112.3187(5)(b).

         d) "'Gross mismanagement' means a continuous pattern of managerial abuses, wrongful or arbitrary and capricious actions, or fraudulent or criminal conduct which may have a substantial adverse economic impact." FLA.STAT. § 112.3187(3)(e).

e) "Misfeasance" is the improper doing of an act that a person might lawfully do, and "malfeasance" is the doing of an act that a person ought not to do at all. *Irven v. Department of Health and Rehabilitative Servs.*, 790 So. 2d 403, 407 n.3 (Fla. 2001) (holding that evidence that defendant knowingly misinformed court of material facts was sufficient to establish misfeasance).

3) The following are examples of conduct that has been found to be protected conduct under the Public Sector FWA:

a) Allegations that life insurance policies were being misrepresented as "retirement plans" to members of the sheriff's department. *Hutchison, supra*.

b) Submission of false information to a trial court that was critical to the court's resolution of venue in a child dependency action and failing to correct that misrepresentation constituted an act of "misfeasance" under the Public Sector FWA. *Irven*, 790 So. 2d at 407 (Fla. 2001).

c) Complaints about alleged violations of the Fair Labor Standards Act and alleged sexual harassment. *Saunders v. Hunter*, 980 F. Supp. 1236, 1245 (M.D. Fla. 1997).

4) The following are examples of conduct that has been found not protected under the Public Sector FWA:

a) An employee's complaint that his supervisor distributed a false e-mail about the employee was tantamount to an internal agency dispute and was not a matter of public concern protected by the Public Sector FWA. The employee did not show that he disclosed any suspected violation of law or any gross mismanagement, malfeasance, misfeasance waste of funds or neglect of duty. *Whiddon v. Department of Insurance*, 27 FPER ¶ 32223 (PERC 2001).

b) An employee's complaint regarding his supervisor's intimidating attitude, demeanor, taking credit for employee's work and "defending" black employees does not concern a subject matter listed in § 112.3187(5) and is not protected by the Act. *Casanova v. Department of Corrections*, 23 FPER ¶ 28246 (PERC G.C. Summary Dismissal 1997).

c) A faculty member's complaint that another faculty member was engaged in dual employment in violation of Florida law was not protected by the Act, because the violation did not present a substantial danger to the public's health, safety or welfare. *Laskey v. Florida Board of Regents*, 22 FPER ¶ 27107 (PERC G.C. Summary Dismissal 1996) (where complainant had not alleged that the information disclosed included and gross mismanagement, malfeasance, misfeasance, gross waste of public

funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty).

b. Entities to whom disclosures must be made.

1) For disclosures concerning a local governmental entity, including any regional, county, or municipal entity, special district, community college district, or school district or any political subdivision of any of the foregoing, the information must be disclosed to a chief executive officer as defined in § 447.203(9) or other appropriate local official. FLA.STAT. § 112.3187(6).

a) Section 447.203(9) defines a "chief executive officer" as "the person, whether elected or appointed, who is responsible to the legislative body of the public employer for the administration of the governmental affairs of the public employer."

(1) This would appear to contemplate a city or county manager in the case of a county or municipality.

b) One federal court held that an employee of a criminal justice program at a community college satisfied the requirement of reporting to an "appropriate local official" when he disclosed problems, not to the college, but to the Florida Department of Law Enforcement ("FDLE"). The court found that FDLE was an appropriate local official because FDLE supervised the agency responsible for certifying schools that provide criminal justice instruction. *Harris v. District Bd. of Trustees of Polk Comm'y College*, 9 F. Supp. 2d 1319 (M.D. Fla. 1998).

c) Another federal court found that a supervisor of a sheriff's office could constitute an "appropriate local official" to satisfy the disclosure requirements of § 112.3187(6). *Saunders*, 980 F. Supp. at 1246 (M.D. Fla. 1997).

2) For all disclosures other than those concerning a local governmental entity, the information must be disclosed to any agency or federal government entity having the authority to investigate, police, manage, or otherwise remedy the violation or act. FLA.STAT. § 112.3187(6).

a) This includes, but is not limited to, the Office of the Chief Inspector General, an agency inspector general, the Florida Commission on Human Relations, or the whistleblower hotline created under § 112.3189(1). FLA.STAT. § 112.3187(6).

b) In a case brought by an employee of an independent contractor, the court held that it was not sufficient for the employee to report the agency's alleged wrongdoing to his supervisor who worked for the independent contractor. Rather, the court held that the employee was required to report the alleged wrongdoing to the appropriate agency or federal government

entity described in the statute. *Kelder v. ACT Corp.*, 650 So. 2d 647 (Fla. 5th DCA 1995), *rehearing denied*, *review denied*, 660 So. 2d 713 (Fla. 1995).

c) An employee of a state prison was not protected, because he made his complaints concerning his supervisor's alleged sexual harassment and reporting under the influence to the prison warden rather than to the individuals specified in § 112.3187(6). *Mills v. Department of Corrections*, 28 FPER ¶ 33076 (PERC 2002).

d) An agency employee's complaint to the agency's secretary does not meet mandatory reporting requirements of § 112.3187(6). *Cocaine v. Department of Children and Families*, 24 FPER ¶ 29307 (PERC G.C. Summary Dismissal 1998).

c. Circumstances of disclosure.

1) Employees and persons are engaging in protected activity, assuming other requirements are met, where:

a) They disclose information on their own initiative in a written and signed complaint.

(1) A signed letter suffices as a "written and signed complaint." *Hutchison*, 645 So. 2d at 1050.

(2) Invoices do not qualify as protected disclosures. *Walker v. Florida Dept. of Veterans' Affairs*, 925 So. 2d 1149 (Fla. 4th DCA 2006);

b) They are requested to participate in an investigation, hearing or other inquiry conducted by any agency or federal government entity;

c) They refuse to participate in an adverse action prohibited by § 112.3187;

d) They initiate a complaint through the whistleblower's hotline or the hotline of the Medicaid Fraud Control Unit of the Department of Legal Affairs;

e) They submit a written complaint to their supervisory officials;

f) They file a written complaint to the FCHR; or

g) They make certain other enumerated complaints. FLA.STAT. § 112.3187(7).

2) An email sent to a city commission or a city's mayor can satisfy the requirement of a written complaint. *Scheirich v. Town of Hillsboro Beach*, 2008 U.S. Dist. LEXIS 4090 at *14 (S.D. Fla. Jan. 18, 2008).

2. Exclusions from protected conduct.

    a. The Public Sector FWA does not protect:

        1) A person who committed or intentionally participated in committing the violation or suspected violation. FLA.STAT. § 112.3187(6); or

        2) A person under the care, custody or control of the state correctional system, or after release from same, with respect to circumstances that occurred during any period of incarceration. FLA.STAT. § 112.3187(6).

        3) An employee or person who discloses information he or she knows to be false. FLA.STAT. § 112.3187(4)(c).

E. Prohibited Actions

1. The Public Sector FWA prohibits agencies and independent contractors from:

    a. Dismissing, disciplining or taking "any other adverse personnel action" against an "employee" based on the employee engaging in activity protected by § 112.3187.

    b. Taking any "adverse action that affects the rights or interest of" a "person" in retaliation for the person's disclosure of information pursuant to § 112.3187. FLA.STAT. § 112.3187(4)(a) and (b).

    c. A separate subsection expressly protects job applicants. FLA.STAT. § 112.3187(8)(a).

2. Confidentiality of reporting

    a. FLA.STAT. § 112.3188 provides for the protection of the whistleblower by imposing a confidentiality requirement on those to whom the employee is expected to report suspected violations. FLA.STAT. § 112.3188(2)(b). The Act provides that "any person who willfully and knowingly discloses information or records made confidential under this subsection commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083." FLA.STAT. § 112.3188(2)(c)(4).

F. Procedures and Proof. *See* FLA.STAT. §§ 112.3187(8) and 112.31895.

1. The pre-suit notice requirements of FLA.STAT. § 768.28(6) do not apply to claims filed under the Public Sector FWA. *Florida Dept. of Educ. v. Garrison*, 954 So. 2d 84 (Fla. 1st DCA 2007).

2. Nonetheless, there are procedural steps that must be taken before filing a lawsuit or a complaint with the Public Employee Relations Commission ("PERC") under the Public Sector FWA.

a. The failure to exhaust administrative remedies, where required, bars an action under the Public Sector FWA. *McGregor v. Board of Comm'rs of Palm Beach County*, 674 F. Supp. 858 (S.D. Fla. 1987).

b. A mere assertion that pursuit of administrative remedies would be to no avail is insufficient to avoid the exhaustion requirement. *Fairbanks v. City of Bradenton Beach*, 733 F. Supp. 1447, 1449 (M.D. Fla. 1989).

c. The procedural steps differ depending upon the nature of the employer.

    1) Actions brought by applicants or employees of a state agency.

        a) The individual must file a written complaint with:

            (1) The Office of the Chief Inspector General in the Executive Office of the Governor; or

            (2) The Florida Commission on Human Relations. FLA.STAT. §§ 112.3187(8) and 112.31895(1)(a).

        b) The Complaint must be filed within 60 days after the prohibited personnel action. FLA.STAT. § 112.31895(1)(a).

            (1) The FCHR has attempted to apply its "relation back" regulation, FLA.ADMIN.CODE § 60Y-5.001(4), to allow an otherwise time-barred complaint, if the complaint "relates back" to a timely complaint filed by another employee.

                (a) One court rejected this approach and dismissed a complaint as untimely, holding that the FCHR adopted the relation back rule pursuant to authority granted under the Florida Civil Rights Act and that the Public Sector FWA did not give FCHR any such rule-making authority. *State of Florida, Dept. of Transp. v. Florida Comm'n on Human Relations*, 867 So. 2d 489, 490 (Fla. 1st DCA 2004).

        c) Section 112.31895 describes the FCHR's powers and procedures when investigating whistleblower claims.

            (1) The FCHR must conduct an informal fact-finding to determine whether there are reasonable grounds to believe that a prohibited personnel action has occurred, is occurring, or is about to be taken. FLA.STAT. § 112.31895(2)(a).

            (2) Within 90 days after receiving the complaint, the FCHR is to issue a fact-finding report to the agency and the complainant that may include recommendations or a proposed resolution to the complaint. FLA.STAT. § 112.31895(2)(c).

(3) The FCHR may petition a circuit court for:

(a) Temporary reinstatement under § 112.3187(9)(f), FLA.STAT. §§ 112.31895(3)(a)(3) and (3)(b);

(b) Corrective action or stay of a proposed personnel action for up to 45 days as well as extensions of any such stay, FLA.STAT. §§ 112.3187(3)(a)(10) and (3)(e); and

(c) An award of reasonable attorneys' fees and expenses from a state agency. FLA.STAT. § 112.31895(3)(j).

d) The complainant must obtain from the FCHR a notice of termination of the FCHR's investigation before proceeding further. *Blinn v. Department of Children and Families*, 34 FPER ¶ 130 (PERC 2008) (citing FLA.STAT. § 112.31895(4)).

e) After receiving notice of the FCHR's termination of its investigation, the individual can either:

(1) Elect, within 60 days of receiving the FCHR's notice of termination, to proceed with administrative remedies provided under § 112.31895 by filing a complaint with PERC, FLA.STAT. § 112.31895(4); or

(2) File a civil action within 180 days of receiving the FCHR's notice of termination. FLA.STAT. § 112.3187(8)(a).

f) Election of Remedies, Career Service Employees

(1) For state career service employees, the election of remedies requirement of § 447.401 apply to whistleblower actions. FLA.STAT. § 112.3187(11).

(2) These employees have the option of pursuing their claims through a civil service appeal, an unfair labor practice proceeding, a contractual grievance procedure or under the Public Sector FWA, but cannot make use of more than one of these procedures. *Snyder v. University of South Florida*, 22 FPER ¶ 27095 (PERC G.C. Summary Dismissal 1994).

(3) Thus, a DOT employee was barred from pursuing her whistleblower claim through PERC, because she had already pursued a contractual grievance to its conclusion. *Taylor v. Public Employees Relations Comm'n*, 878 So. 2d 421 (Fla. 4th DCA 2004).

2) Actions brought by employees or applicants of a local government entity that has (1) established by ordinance procedures for determining whistleblower claims or (2) has contracted with the Division of Administrative Hearings to

conduct hearings under the Act.

a) The employee must file a complaint with the local government entity.

b) The employee may then file a civil action within 180 days after the entry of a final decision by the local government authority.

   (1) In *Fox v. City of Pompano Beach*, 984 So. 2d 664, 666-67 (Fla. 4th DCA 2008), the court held that a jury should decide whether the 180 days ran from the date the plaintiff was discharged or from the date he withdrew his appeal before the City's Employees' Board of Appeals, where the City had informed the plaintiff that his discharge would become final upon such withdrawal, and also held that the trial court should not have summarily rejected the plaintiff's claim that the City had waived its statute of limitations defense.

c) For these exhaustion requirements to apply to procedures established by the local government entity, the procedures must:

   (1) Be established by ordinance; and

   (2) Provide for complaints brought under the Act to be heard by impartial persons. FLA.STAT. § 112.3187(8)(b).

      (a) A policy allowing employees to have complaints heard by a grievance resolution board or an administrative and personnel committee was found sufficient to meet this impartiality requirement. *Dinehart v. Town of Palm Beach*, 728 So. 2d 360 (Fla. 4th DCA 1999) (also holding that whether a local government ordinance complies with the requirements of § 112.3187(8)(b) is a question of law).

   (3) A city's civil service board met the requirements of § 112.3187(8)(b) because the board was:

      (a) Established by ordinance;

      (b) Authorized to handle whistleblower complaints;

      (c) Composed of a panel of impartial persons that had authority to consider evidence, compel production of documents and subpoena witnesses; and

      (d) Made findings of fact and conclusions of law so that the local government authority could review the board's final decision. *Pino v. City of Miami*, 315 F. Supp. 2d 1230, 1250-52 (S.D. Fla. 2004); *City of Miami v. Del Rio*, 723 So. 2d 299 (Fla. 3d DCA 1998), *review denied*, 733 So. 2d 515 (Fla. 1999).

(4) A review board will not trigger these exhaustion requirements if the board does not make findings of fact, establish a record, or make recommendations of penalties. *Ujcic v. City of Apopka*, 581 So. 2d 218, 219-20 (Fla. 5th DCA 1991).

(a) One federal court, citing *Ujcic*, held that a claimant was not required to exhaust administrative remedies, either because the review board established by the Sheriff's office did not complete its investigation within the time provided by office policy or because the board's decision was not binding (it is not clear from the decision which of these bases the court relied on, or whether it relied on both). *Saunders v. Hunter*, 980 F. Supp. 1236, 1245 (M.D. Fla. 1997).

3) All other individuals protected by the Act, after exhausting all available contractual or administrative remedies, may bring a civil action within 180 days of the prohibited action. FLA.STAT. § 112.3187(8)(c); *Bridges v. City of Boynton Beach*, 927 So. 2d 1061 (Fla. 4th DCA 2006) (employee required to bring action within 180 days).

a) This applies to complaints by:

(1) Employees or applicants of local governments who have not adopted procedures for handling Public Sector FWA complaints;

(2) Employees or applicants of independent contractors; and

(3) Non-employees (e.g. independent contractors) subjected to adverse action for making disclosures concerning a local government entity.

b) Federal courts applying the 180-day limitations period have reached conflicting decisions regarding when the 180-day period begins to run.

(1) One court held the 180-day period begins to run when the adverse action occurs, not when the employee first learns that he was discharged for whistle blowing reasons. *Alloco v. City of Coral Gables*, 221 F. Supp. 2d 1317 (S.D. Fla. 2002).

(2) Another court held that the 180-day period began to run when discharged employees read a newspaper article that gave then their first indication that they were fired for whistle blowing activity. *Harris*, 9 F. Supp. 2d 1319.

3. The plaintiff must establish that "1) prior to termination the employee made a disclosure protected by the statute; 2) the employee was discharged; and 3) the disclosure was not made in bad faith or for a wrongful purpose, and did not occur after an agency's personnel action against the employee." *Walker v. Florida Dept. of Veterans' Affairs*, 925 So. 2d 1149, 1150 (Fla. 4th DCA 2006) (quoting *State of*

Florida, Dept. of Transp. v. Florida Comm'n on Human Relations, 842 So. 2d 253, 255 (Fla. 1st DCA 2003)).

a. According to one federal court, the plaintiff must specify which writings form the basis of her claim, and with regard to each writing, the nature of the writing, the subject matter and content of what was disclosed, when it was sent, to whom the writing was sent and whether such complaints were signed in the event that they were not sent to a supervisor. *Scheirich v. Town of Hillsboro Beach*, 2008 U.S. Dist. LEXIS 4090 at *14-15 (S.D. Fla. Jan. 18, 2008).

b. In contrast to Title VII, under the Public Sector FWA an employer's proffer of an alternative reason for the adverse action is an affirmative defense which must be proven by the employer. *Martin County v. Edenfield*, 609 So. 2d 27, 29 (Fla. 1992) (under Public Sector FWA, employer may raise as a defense the fact that the adverse action was motivated by a reason other than the act of whistle blowing, the employer has the burden of "establish[ing] that the adverse employment action actually was neutral and nonpretextual"); *Rice-Lamar v. City of Ft. Lauderdale*, 853 So. 2d 1125, 1132 (Fla. 4th DCA 2003) ("the elements necessary to support a claim under the Whistleblower statute are distinct from the elements necessary to support a Title VII discrimination action or a First Amendment protected speech claim . . .").

G. Affirmative Defenses

1. *See* above for discussion of exhaustion of administrative remedies and statute of limitations.

2. Sovereign immunity does not apply to claims brought under the Public Sector FWA. *Department of Health and Rehabilitative Servs. v. Irven*, 724 So. 2d 698 (Fla. 2d DCA 1999).

3. The Public Sector FWA provides an affirmative defense if the adverse action was based on grounds other than the protected activity and would have been taken even in the absence of the alleged protected activity. FLA.STAT. § 112.3187(10); *Edenfield*, 609 So. 2d at 29 (employer may raise as a defense the fact that the adverse action was motivated by a reason other than the act of whistle blowing, the employer has the burden of "establish[ing] that the adverse employment action actually was neutral and nonpretextual").

a. A school bus driver's termination did not violate the Public Sector FWA even though the driver had made statements supporting a co-worker's race discrimination action, where the driver was terminated after accruing a certain number of points under an attendance plan and would have been fired even absent the statements supporting the coworker. *Wallace v. School Bd. of Orange County, Fla.*, 41 F. Supp. 2d 1321 (M.D. Fla. 1998).

b. Lesser discipline meted out to a co-perpetrator of equal or greater culpability, while evidence of violation of the Public Sector FWA, did not conclusively

establish liability, since the employer was entitled to present rebuttal evidence that the adverse employment action was based on matters not protected by the Act. *Edenfield, supra*.

c. Employee could not prevail on alleged whistleblower claim where there was no evidence that persons involved in the decision to discharge the employee knew of the employee's whistle blowing activity before her discharge. *Nelson v. Department of Labor and Employment Security*, 22 FPER ¶ 27093 (PERC 1993).

d. Evidence of reasons for termination that were not listed in the notice of termination was admissible to support the employer's defense to the employee's whistleblower complaint. *City of Hollywood v. Witt*, 789 So. 2d 1130 (Fla. 4th DCA 2001).

H. Relief Available

1. The Act provides that relief "must" include:

a. Reinstatement of the employee to the same position held before the adverse personnel action or to an equivalent position or reasonable front pay as alternative relief;

b. Reinstatement of the employee's full fringe benefits and seniority rights, as appropriate;

c. Compensation, if appropriate, for lost wages, benefits, or other lost remuneration caused by the adverse action;

d. Reasonable costs, including attorney's fees, to a substantially prevailing employee, or to the prevailing employer if the employee filed a frivolous action in bad faith;

e. Issuance of an injunction, if appropriate;[2] and

f. In appropriate cases, temporary reinstatement pending trial. FLA.STAT. § 112.3187(9)(f).

1) Temporary reinstatement is available under the Act if:

a) The employee complains of being discharged in retaliation for a protected disclosure; and

b) If the court or the FCHR (in the case of a state employee) finds that the disclosure was not made:

[2] Irreparable harm is not presumed in cases arising under the Public Sector FWA. *Broward County v. Meiklejohn*, 936 So. 2d 742 (Fla. 4th DCA 2006).

(1) In bad faith or for a wrongful purpose, or

(2) After an agency's initiation of a personnel action against the employee which includes documentation of the employee's violation of a disciplinary standard or performance deficiency.

2) Temporary reinstatement is not available to an employee of a municipality. FLA.STAT. § 112.3187(9)(f).

3) Two court decisions have held that the plain language of § 112.3187(9)(f) limits the temporary reinstatement remedy to employees who claim to have been discharged in violation of the Act.

a) *Metropolitan Dade County v. Milton*, 707 So. 2d 913 (Fla. 3d DCA 1998) held that the temporary reinstatement remedy was not available to a plaintiff who claimed to have been demoted based on a protected disclosure.

b) *Luster v. West Palm Beach Housing Auth.*, 801 So. 2d 122 (Fla. 4th DCA 2001) denied temporary reinstatement because the employee was not "discharged" but, rather, had been transferred or demoted and, ultimately, lost her job only when she turned down the transfer.

4) Section 112.3187(9)(f) provides for temporary reinstatement only when an employee complains of being discharged for a protected disclosure.

a) Section 112.3187(9)(f) does not mention employees who claim to have been discharged for other types of conduct mentioned in § 112.3187(7), for example, participation in an investigation or refusing to participate in adverse action prohibited by the Act.

(1) Public employers may have an argument that temporary reinstatement is not available in those cases.

5) Temporary reinstatement is not available in an action against a municipality. FLA.STAT. § 112.3187(9)(f).

2. An award of attorney's fees may also be made under the offer of judgment statute, FLA.STAT. § 768.79. *Crouch v. Public Serv. Comm'n*, 993 So. 2d 148, 148-49 (Fla. 1st DCA 2008).

3. There is no provision in the statute for compensatory or punitive damages. Consequently, claims for compensatory damages based upon emotional distress, mental pain and suffering, humiliation, embarrassment, loss of reputation and the like are not authorized under the Public Sector FWA. *Polston v. Department of Highway Safety and Motor Vehicles*, 11 Fla. L. Weekly Supp. 633 (Second Judicial Circuit, May 7, 2004).

I. Right to Jury Trial

1. A growing body of case law supports the conclusion that there is a right to a jury trial under the Public Sector FWA.

a. *O'Neal v. Florida A & M Univ. ex rel. Bd. of Trustees for Florida A & M Univ.*, 2008 WL 2276307 at *2 (Fla. 1st DCA June 5, 2008) (discussing the right to a jury trial under both the private sector whistleblower act and the Public Sector FWA, the court found that "a right to compensation for wages lost on account of wrongful termination of employment is a right 'of the sort traditionally enforceable in an action at law,'" reversed the judgment entered after a non-jury trial, and remanded the matter with directions to the trial court to reinstate the plaintiff's demand for trial by jury).

b. *Fox v. City of Pompano Beach*, 984 So. 2d 664, 668 (Fla. 4th DCA 2008) (plaintiff has right to jury trial as long as he or she requested "legal" relief).

c. *See also Irven v. Department of Health and Rehabilitative Servs.*, 790 So. 2d 403 (Fla. 2001) (remanding case brought under the Public Sector FWA for reinstatement of jury verdict, but without expressly addressing right to jury trial); *Guess v. City of Miramar*, 889 So. 2d 840 (Fla. 4th DCA 2005) (trial court properly submitted to the jury issues arising under the Public Sector FWA); *Rosa v. Department of Children & Families*, 915 So. 2d 210 (Fla. 1st DCA 2005) (whether a letter sent by an employee was a protected complaint under the Public Sector FWA was an issue for the jury); *Witt*, 789 So. 2d at 1132 (jury should have been permitted to determine whether employer's reasons were justification for termination).

J. The Act is remedial in nature, and therefore is to be liberally construed. *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994); *Edenfield*, 609 So. 2d at 29.

IV. Retaliation Claims Under Florida's Workers' Compensation Law

A. The statutory proscription on retaliation based on exercise of rights afforded by Florida's Workers' Compensation Law ("§ 440.205") consists of only a single sentence:

1. "No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law." FLA.STAT. § 440.205.

B. Covered Entities

1. "'Employer' means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person." FLA.STAT. § 440.02(15).

2. Individuals are not liable under § 440.205 for actions taken in their individual capacity. *Superior Brands, Inc. v. Rogers*, 646 So. 2d 257 (Fla. 1st DCA 1994).

3. The ministerial exemption applies to claims under the § 440.205. *Malichi v. Archdiocese of Miami*, 945 So. 2d 526 (Fla. 1st DCA 2006).

C. Persons Who May Be Protected

1. "'Employee' means any person engaged in any employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors." FLA.STAT. § 440.02(14)(a).

   a. The term may include officers of corporations, partners and sole proprietors, depending upon circumstances. *See* FLA.STAT. § 440.02(14)(b) and (d).

2. FLA.STAT. § 440.02(14)(d) excludes from the definition of "employee":

   a. Independent contractors;

   b. Real estate salespersons or agents, if working under a written agreement to be compensated solely by commission;

   c. Certain band, orchestra, musical and theatrical performers;

   d. Certain owner-operators of motor vehicles;

   e. Certain "casual" workers;

   f. Certain volunteers;

   g. Certain "exercise riders" (compensated for riding horses on a case-by-case basis);

   h. Certain drivers of vehicles-for-hire; and

   i. Certain sports officials.

D. Protected Conduct: "Valid" claims for compensation.

1. Courts have held that the term "valid," as used in § 440.205, should be construed to include any "meritorious" claim, even if the claim is not a "compensable" claim. Thus, the fact that the worker's claim was denied does not bar a retaliation claim as long as the claim was not frivolous. *Smalbein v. Volusia County Sch. Bd.*, 801 So. 2d 169, 170 (Fla. 5th DCA 2001).

E. Prohibited Actions

1. The statute provides that an employer shall not "discharge, threaten to discharge, intimidate, or coerce" a protected employee.

2. At least one court has held that an employee may have a cause of action for retaliatory "intimidation or coercion" absent a discharge. *Chase v. Walgreen Co.*, 750 So. 2d 93, 94-95 (Fla. 5th DCA 1999) (trial court erred by granting motion to dismiss where plaintiff continued working for defendant, but alleged "'a pattern of retaliatory employment actions' which included: (1) failing to comply with physician ordered work restrictions; (2) reducing scheduled work hours resulting in decreased income and loss of eligibility for employee insurance and other benefits; (3) refusing [plaintiff's] request for transfer to another store located closer to [plaintiff's] residence despite the open positions at that store; (4) making changes to [plaintiff's] work schedule without prior notice 'in an effort to depict [plaintiff] as an absentee'; and (5) berating [plaintiff] in a 'humiliating manner for pretextual violations of company policy or practice.'").

3. "Section 440.205 does not, however, 'provide a blanket prohibition against the discharge of an employee for legitimate business reasons once the employee has filed or pursued a workers' compensation claim, but prohibits only the retaliatory discharge of an employee for the act of filing a workers' compensation claim.'" *Coker v. Morris*, 2008 WL 2856699 at *7 (N.D. Fla. July 22, 2008) (quoting *Musarra v. Vineyards Dev. Corp.*, 2004 WL 2713264 *5 (M.D. Fla. Oct. 20, 2004) (citing *Pericich v. Climatrol, Inc.*, 523 So. 2d 684, 685 (Fla. 3d DCA 1988))).

4. It is unlawful for an employer to retaliate against an employee for filing a valid claim against a prior employer. *Bruner v. GC-GW, Inc.*, 880 So. 2d 1244 (Fla. 1st DCA 2004).

F. Procedures and Proof

1. While § 440.205 does not expressly create a cause of action for retaliation, the Florida Supreme Court has held that such actions may be brought. *Smith v. Piezo Technology & Professional Administrators*, 427 So. 2d 182, 183-84 (Fla. 1983).

2. Because a workers' compensation retaliation claim "sounds in tort" the pre-suit notice requirements of FLA.STAT. § 768.28(6) apply. *Osten v. City of Homestead*, 757 So. 2d 1243 (Fla. 3d DCA 2000); *Kelley v. Jackson County Tax Collector*, 763 So. 2d 1043 (Fla. 1st DCA 1999); *McCoy v. Pinellas County*, 920 So. 2d 1260 (Fla. 2d DCA 2006).

3. Unlike workers' compensation benefit claims, workers' compensation retaliation claims are within the jurisdiction of the Circuit Courts, and are not cognizable before a Judge of Compensation Claims. *Smith v. Piezo Tech. & Prof'l Adm'rs*, 427 So. 2d 182 (Fla. 1983).

4. As with workers' compensation benefit claims, workers' compensation retaliation claims are not removable to federal court. *Reed v. Heil Co.*, 206 F.3d 1055, 1056-57 (11th Cir. 2000) (under Alabama law); *Bender v. Tropic Star Seafood*, 2008 WL 4621073 (N.D. Fla. Oct. 16, 2008) (applying *Reed* to § 440.205 claim); *Johnston v. Morton Plant Mease Healthcare, Inc.*, 2007 WL 570078 (M.D. Fla. Feb. 20, 2007);

Ayes v. H & R of Belle Glade, Inc., 2008 U.S. Dist. LEXIS 33023 (S.D. Fla. Apr. 21, 2008).

a. Although removal of a claim under § 440.205 is improper, the defect may be waived. Accordingly, if there is a separate basis for subject matter jurisdiction (such as pendent jurisdiction), an untimely motion to remand may be denied. *Bender*, 2008 WL 4621073 at *3.

5. The burden shifting standard applied to FCRA retaliation claims applies to claims under § 440.205. *Russell v. KSL Hotel Corp.*, 887 So. 2d 372 (Fla. 3d DCA 2004).

6. A plaintiff does not have to prove that retaliation for engaging in protected activity was the sole motivating factor for the adverse action, but rather only needs to show that it was a substantial motivating factor. *Allan v. SWF Gulf Coast, Inc.*, 535 So. 2d 638 (Fla. 1st DCA 1988).

7. In *Kresse v. City of Hialeah*, 539 So. 2d 534 (Fla. 3d DCA 1989), the Third DCA found that a public employee who claimed a violation of § 440.205 was not required to exhaust administrative remedies provided by a collective bargaining agreement prior to bringing a claim in court, since the cause of action did not involve the interpretation or application of the collective bargaining agreement.

8. An employee's wrongful discharge claim against a former employer is assignable to the employer's workers' compensation insurer. *Notarian v. Plantation AMC Jeep, Inc.*, 567 So. 2d 1034 (Fla. 4th DCA 1990).

G. Affirmative Defenses

1. An action for retaliatory discharge based on § 440.205 is subject to the four-year statute of limitations in FLA. STAT. § 95.11(3)(f). *Scott v. Otis Elevator Co.*, 524 So. 2d 642, 643 (Fla. 1988).

a. Where a lawsuit is filed within four years of the plaintiff's discharge, evidence of retaliatory conduct that occurred more than four years before suit was filed may be admissible as evidence of state of mind. *Rease v. Anheuser-Busch, Inc.*, 644 So. 2d 1383, 1387-88 (Fla. 1st DCA 1994).

H. Relief Available

1. Back pay, *Dix v. United Parcel Serv.*, 2006 U.S. Dist. LEXIS 97082 (S.D. Fla. June 23, 2006);

2. Future lost wages, *Scott v. Otis Elevator Co.*, 572 So. 2d 902, 903 (Fla. 1990);

3. Damages for emotional distress, *Scott* 572 So. 2d at 903; and

4. Punitive damages. *Rease v. Anheuser-Busch, Inc.*, 644 So. 2d 1383, 1386 (Fla. 1st DCA 1994).

I. Right to Jury Trial

1. The Third DCA has held that there is a right to a jury trial under § 440.205. *Flores v. Roof Tile Admin., Inc.*, 887 So. 2d 360 (Fla. 3d DCA 2004).

J. Preemption

1. A retaliatory discharge claim under § 440.205 is not preempted by the Americans with Disabilities Act, or by the National Labor Relations Act. *Mangin v. Westco Security Systems, Inc.*, 922 F. Supp. 563 (M.D. Fla. 1996) (ADA); *Southwest Gulfcoast, Inc. v. Allan*, 513 So. 2d 219 (Fla. 1st DCA 1987) (NLRA).

V. Federal Whistleblower Protection Statutes Administered By OSHA

A. There are many federal statutes that protect whistleblowers.

B. The Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor ("DOL") is responsible for enforcing the whistleblower provisions of seventeen such statutes. There is substantial overlap in the enforcement mechanisms for those seventeen statutes. Because much of the recent litigation of claims within OSHA's purview has arisen under the Sarbanes/Oxley Act, these materials focus on that Act.

1. In addition to Sarbanes/Oxley, other whistleblower protections administered by OSHA include protections under:

a. Section 11(c) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 660;

b. The Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105;

c. The Asbestos Hazard Emergency Response Act of 1986 (AHERA), 15 U.S.C. § 2651;

d. The International Safe Container Act of 1977 (ISCA), 46 App. U.S.C. § 1506;

e. The Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C. § 300j-9(i);

f. The Federal Water Pollution Control Act of 1972 (FWPCA), 33 U.S.C. § 1367;

g. The Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. § 2622;

h. The Solid Waste Disposal Act of 1976 (SWDA), 42 U.S.C. § 7001;

i. The Clean Air Act of 1977 (CAA), 42 U.S.C. § 7622;

j. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610;

k. The Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851;

l. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121;

m. The Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C. § 60129;

n. The Federal Rail Safety Act of 1970 (FRSA), 49 U.S.C. § 20109;

o. The National Transit Systems Security Act of 2007 (NTSSA), 6 U.S.C. § 1142; and

p. The Consumer Product Safety Improvement Act of 2008 (CPSIA), 15 U.S.C. § 2087.

2. Additional information concerning these statues can be found at http://www.osha.gov/dep/oia/whistleblower/index.html

VI. The Sarbanes/Oxley Act of 2002

A. The Sarbanes-Oxley Act, Pub.L. 107-204, July 30, 2002 ("SOX"), was enacted in 2002 to improve corporate responsibility by mandating changes in corporate governance and accounting practices and by providing whistleblower protection to employees of publicly traded companies who report corporate fraud.

1. SOX contains both civil and criminal whistleblower provisions. 18 U.S.C. § 1514A; 18 U.S.C. § 1513(e).

B. Covered Entities

1. SOX applies to publicly traded companies with a class of securities registered under § 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) or that are required to file reports under § 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)) (*e.g.*, required to file forms 10-K and 10-Q). *See* 18 U.S.C. § 1514A(a).

a. Both domestic and foreign companies are covered by SOX. *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 5 (1st Cir.) ("These registration and reporting provisions apply to U.S. and foreign companies listed on U.S. securities exchanges"), *cert. denied*, 548 U.S. 906 (2006).

2. SOX also applies to any officer, employee, contractor, subcontractor, or agent of such companies.

a. This raises questions about whether non-publicly traded subsidiaries of publicly traded companies may be liable under SOX, whether subcontractors and agents of publicly traded companies may be liable for actions they take against their own employees, whether subcontractors and agents of publicly traded companies may

be liable for actions they take against employees of the publicly traded company and whether a person may be liable in his or her individual capacity.

b. Liability of non-publicly traded subsidiaries of publicly traded companies.

1) The Administrative Review Board ("ARB")[3] has ruled that whether non-publicly traded subsidiaries of publicly traded corporations are covered by § 1514A should be determined under common law agency principles. *Klopfenstein v. PCC Flow Technologies Holdings, Inc*., ARB 04-149, 2004-SOX-11 (ARB May 31, 2006) (subsidiary could be liable where executive who decided to terminate the complainant's employment was both the president of the non-publicly traded subsidiary and an executive vice president of the publicly traded parent).

a) A later ALJ decision limited liability under this agency theory to cases where the agency "relate[s] to employment matters." *Savastano v. WPP Group, PLC*, 2007-SOX-34 (ALJ July 18, 2007).

2) *See also Stone v. Instrumentation Laboratory*, 2007-SOX-21 (ALJ Sept. 6, 2007) (non-publicly traded subsidiary could be liable under a joint employer theory).

3) The Solicitor of Labor has proposed application of a four-part "integrated enterprise" test for determining subsidiary coverage under SOX. *See* Brief of the Assistant Secretary of Labor for Occupational Safety and Health, *Ambrose v. U.S. Foodservice, Inc*., ARB 06-096, 2005-SOX-105 (brief filed Sept. 1, 2006).[4]

a) The "integrated employer" test focuses on: (a) interrelation of operations; (b) common management; (c) centralized control of employment decisions; and (d) common ownership or financial control. *Id.*

4) For decisions where non-publicly traded subsidiaries were found not liable under SOX, *see Rao v. DaimlerChrysler Corp*., 2007 U.S. Dist. LEXIS 34922 (E.D. Mich. May 14, 2007); *Ambrose v. U.S. Foodservice, Inc*., 2005-SOX-105 (ALJ Apr. 17, 2006); *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005); *Robinson v. Morgan Stanley*, 2005-SOX-44 (ALJ Mar. 26, 2007) (offering fact that the subsidiary "is not a publicly traded company covered by SOX" as an alternative rationale for dismissing claim against subsidiary).

[3] As explained in more detail below, SOX complaints are first investigated by OSHA, OSHA's initial determinations may be reviewed by an administrative law judge ("ALJ"), the ALJ's decisions may be reviewed by the ARB, and the ARB's decisions may be reviewed by a United States Circuit Court of Appeals. In limited circumstances, a federal district court may also hear a SOX claim.

[4] Amicus brief available at http://www.dol.gov/sol/media/briefs/Ambrose(A)-09-01-2006.htm.

c. Liability of agent or contractor for actions against its own employees

1) Administrative Law Judges have held that employees of non-publicly traded subsidiaries of publicly traded parent corporations are not covered. *See, e.g.*, *Klopfenstein v. PCC Flow Technologies Holdings, Inc*., 2004-SOX-11 at *7-9 (ALJ July 6, 2004) (non-publicly traded subsidiary of publicly traded corporation was not a proper respondent and was not an "agent" of the parent under SOX).

a) However, employees of non-publicly traded subsidiaries may still be covered under SOX if the parent and subsidiary possess sufficient commonality of management and purpose. *Id.*

d. Liability of agent or contractor for actions against employee of publicly traded company

1) A privately held entity acting as an agent or contractor of a publicly traded company may be liable under § 1514A. However, the scope of contractor or agent coverage has generally been limited to cases where the contractor or agent is acting in the role of agent with respect to the complainant's employment relationship.

2) "Agent" Coverage

a) In *Kalkunte v. DVI Financial Servs. Inc*., 2004-SOX-56 (ALJ July 18, 2005), a non-publicly traded "turnaround specialist" company, which was hired to manage a publicly traded company through bankruptcy and dissolution, was held liable for the termination of complainant, an employee/attorney of the publicly traded company. The ALJ concluded that the turnaround specialist was acting as an agent of the publicly traded company because its main principal acted as CEO of the public entity, had the power to affect the complainant's employment, and made the decision to fire the complainant.

b) In contrast, in *Brady v. Calyon Securities (USA)*, 406 F. Supp. 2d 307 (S.D.N.Y. 2005), the court dismissed a SOX whistleblower complaint, rejecting an argument that the employer, a non-publicly traded company, should be liable as an "agent" because it acted as underwriter for publicly traded companies. The court concluded that "[t]he mere fact that defendants may have acted as an agent for certain public companies in certain limited financial contexts related to their investment banking relationship does not bring the agency under the employment protection provisions of Sarbanes-Oxley." The court explained that an agent of a publicly traded company may be held liable under § 1514A only if it was an agent with respect to the complainant's employment relationship.

c) A union may be deemed an "agent" subject to § 1514A. In *Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)*,

ARB No. 04-111, ALJ No. 2004-AIR-19 (ARB Aug. 31, 2007), the complainant alleged that in retaliation for filing an OSHA complaint the union failed to provide her assistance and that the employer colluded by asking the union to not provide assistance. The ALJ dismissed on grounds that she had "no jurisdiction over disputes between a union and its member, including the interpretation of collective bargaining agreements, or a union's duty of representation." The ARB reversed, reasoning the complaint sufficiently alleged that the union not only failed to provide assistance, but also acted as the employer's agent in denying complainant assistance to which she otherwise would have been entitled, in retaliation for activity protected under § 1514A.

3) "Contractor" Coverage

a) Section 1514A does not define the term "contractor."

b) OSHA has indicated that a small accounting firm acting as a contractor of a publicly traded company could be liable for retaliation against an employee who provides information to the SEC regarding a violation of SEC regulations (*e.g.*, accounting irregularities). OSHA Whistleblower Investigations Manual (2003), at 14-1.

c) However, as in cases analyzing "agent" coverage, the scope of contractor coverage has been limited to cases where the contractor is acting on behalf of the publicly traded company with respect to the complainant's employment relationship.

(1) In *Fleszar v. American Medical Association,* 2007-SOX-30 (ALJ June 13, 2007), the ALJ dismissed the complaint because the respondent was not subject to § 1514A. The ALJ rejected the complainant's argument that respondent was covered simply because it had contractual relationships with publicly traded companies.

(2) In *Brady v. Direct Mail Mgmt., Inc.*, 2006-SOX-16 (ALJ Jan. 5, 2006), the ALJ rejected complainant's argument that her employer was covered under § 1514A because it performed direct mail services as a "first tier contractor" to publicly traded companies. The ALJ reasoned that no evidence reflected that the employer acted on behalf of a publicly traded company when it terminated complainant's employment and none of the publicly traded companies with whom her employer did business directed or controlled her employer's employment decisions. *See also Kukucka v. Belfort Instrument Co.*, 2006-SOX-57 (ALJ Apr. 17, 2006); *Judith v. Magnolia Plumbing Co., Inc.*, 2005-SOX-99 & 100 (ALJ Sept. 20, 2005); *Roulett v. American Capital Access*, 2004-SOX-78 (ALJ Dec. 22, 2004).

e. Individual liability

1) Individuals with authority to affect terms and conditions of employment may be liable under SOX. *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, 2004-SOX-11 (ALJ Oct. 13, 2006); *Leznik v. Nektar Therapeutics, Inc.*, 2006-SOX-93 (ALJ Nov. 16, 2007). *See also See* 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004) ("the definition of 'named person' will implement Sarbanes-Oxley's unique statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action").

C. Persons Who May Be Protected

1. SOX protects an "employee," which is defined as "an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.101.[5]

a. This broad language has been interpreted to support a cause of action by an employee of a non-publicly traded subsidiary against a publicly traded parent with the power to affect the employee's terms and conditions of employment. *See Morefield v. Exelon Servs. Inc.*, 2004-SOX-2 (ALJ Jan. 28, 2004) ("employee of publicly traded company . . . includes all employees of every constituent part of the publicly traded company, including, but not limited to, subsidiaries and subsidiaries of subsidiaries which are subject to its internal controls, the oversight of its audit committee, or contribute information, directly or indirectly, to its financial reports"); *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1374 (N.D. Ga. 2004) (where the officers of a publicly traded parent company had the authority to affect the employment of the employees of the subsidiary, an employee of the subsidiary was a "covered employee"); *Neuer v. Bessellieu*, 2006-SOX-132 (ALJ Dec. 5, 2006) (refusing to dismiss complaint alleging that parent approved termination of complainant's employment with subsidiary and had supervisory authority over employment actions of the subsidiary); *Platone v. Atlantic Coast Airlines Holdings Inc.*, 2003-SOX-27 (ALJ Apr. 30, 2004) (employee of a non-publicly traded subsidiary was covered where parent had the ability to affect the complainant's employment), *rev'd on other grounds*, *Platone v. Atlantic Coast Airlines Holdings Inc.*, ARB 04-154, 2003-SOX-17 (ARB Sept. 29, 2006); *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006) (dicta).

b. A publicly traded company may also be liable for actions against employees of its contractors or agents.

1) In an environmental whistleblower case, the ARB held that a government agency could be subject to a discrimination charge filed by the employee of a private-sector government contractor when the agency banned the contractor's

[5] The final regulations setting forth procedures for handling of complaints under § 1514A are located at 29 C.F.R. Part 1980.

employee from entering the government workplace. *Stephenson v. NASA*, ARB 96-080, 94-TSC-5 (ARB Feb. 3, 1997).

a) In its Final Rule, OSHA, citing Stephenson, confirmed that "a respondent may be liable for its contractor's or subcontractor's adverse action against an employee in situations where the respondent acted as an employer with regard to the employee of the contractor or subcontractor by exercising control of the work product or by establishing, modifying or interfering with the terms, conditions, or privileges of employment." Conversely, OSHA stated that "a respondent will not be liable for the adverse action taken against an employee of its contractor or subcontractor where the respondent did not act as an employer with regard to the employee." 69 Fed. Reg. at 52017.

2) Despite *Stephenson* and OSHA's final rule, the scope of contractor or agent coverage as interpreted in ALJ decisions generally has been limited to cases where the complainant was employed by the publicly traded company, *not* by the agent or contractor.

a) For example, in *Goodman v. Decisive Analytics Corp*., 2006-SOX-11 (ALJ Jan. 10, 2006), an ALJ held that an employee of a private contractor or subcontractor of a publicly traded company is not afforded SOX whistleblower protection. The ALJ reasoned that § 1514A's discrimination prohibition refers solely to employees of publicly traded companies, and the terms "contractor" and "subcontractor" merely reference two entities of a publicly traded company that may not adversely affect the terms and conditions of an employee of a publicly traded company.

b) Likewise, in *Minkina v. Affiliated Physician's Group*, 2005-SOX-19 (ALJ Feb. 22, 2005), *appeal dismissed*, ARB 05-074 (ARB July 29, 2005), an ALJ interpreting SOX's "any officer, contractor, subcontractor or agent" language concluded that, although a privately held entity could engage in discrimination prohibited by § 1514A in regard to an employee of a publicly traded company when acting in the capacity as an agent of the publicly traded company, § 1514A does not protect employees of the privately-held contractors, subcontractors and agents from discrimination.

D. Protected Conduct

1. SOX provides protection for two types of employee conduct.

2. First, SOX protects "provid[ing] information, caus[ing] information to be provided, or otherwise assist[ing] in an investigation regarding any conduct which the employee reasonably believes constitutes" securities fraud, bank fraud, wire fraud, or violation of "any rule or regulation of the Securities and Exchange Commission, or any

provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1).

a. The assistance must be provided to or the investigation must be conducted by:

1) "(A) a Federal regulatory or law enforcement agency;

2) "(B) any Member of Congress or any committee of Congress; or

3) "(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)." 18 U.S.C. § 1514A(a)(1)(A)-(C).

3. Second, SOX affords protection to employees who "file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation" of the above fraud statutes or *any* SEC rule or regulation. 18 U.S.C. § 1514A(a)(2).

E. Prohibited Actions

1. Specified adverse actions include "discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing] against an employee in the terms and conditions of employment." 18 U.S.C. § 1514A(a)(1).

F. Procedures and Proof

1. Civil SOX investigations and burdens of proof are governed by the rules and procedures in 49 U.S.C. § 42121, the whistleblower provision protecting employees providing air safety information. 18 U.S.C. § 1541A(b)(2).

a. The complaining employee must first file a complaint with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, within 90 days of the alleged violation of SOX. 18 U.S.C. § 1514A(b)(1)(D); 29 C.F.R. § 1980.103(c) and (d); Secretary's Order 5-2002, 67 Fed. Reg. 65008 (Oct. 22, 2002).

1) OSHA must then investigate the complaint, provided the complainant makes an initial *prima facie* showing that a nexus exists between the protected activity (as a contributing factor) and the adverse action, or that circumstances were sufficient to raise an inference that the protected activity was likely a contributing factor in the adverse action. *Taylor v. Express One Int'l, Inc*., 2001-AIR-2 (ALJ Feb. 15, 2002); 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1980.104.

2) OSHA then issues findings and a preliminary order. 29 C.F.R. § 1980.105(a).

3) The findings and a preliminary order become effective 30 days after receipt by the respondent ("named person"), unless an objection and request for hearing is filed. 29 C.F.R. § 1980.105(c).

4) Any party may file objections and/or a request for hearing within 30 days of receipt by the named person of OSHA's findings and a preliminary order. 29 C.F.R. § 1980.106(a).

5) If no timely objection is made, the findings and preliminary order become final, and are not subject to judicial review. 29 C.F.R. § 1980.106(b)(2).

6) If timely objection is made, all provisions of the preliminary order are stayed, except an interim order of reinstatement. 29 C.F.R. § 1980.106(b)(1).

b. A hearing, if requested, is conducted before an ALJ. The hearing is de novo, the ALJ has broad discretion to limit discovery, and formal rules of evidence do not apply. 29 C.F.R. § 1980.107.

1) The ALJ's findings become the final order of the Secretary unless a petition for review is filed with the ARB within 10 business days. 29 C.F.R. §§ 1980.109(c) and 1980.110(a).

c. The ARB has been delegated authority to act for the Secretary and issue final decisions. 29 C.F.R. § 1980.110(a).

d. Within 60 days after a final order by the ARB, a party may file a petition for review by the United States Court of Appeals where the alleged violation occurred or where the complainant resided on the date of the alleged violation. 29 C.F.R. § 1980.112(a).

e. If the Secretary fails to issue a final decision within 180 days from the filing of the administrative complaint, the complainant can file a *de novo* action in the appropriate United States district court. 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114(a).

1) However, 15 days before filing in district court the complainant must file a notice of his or her intent to do so. 29 C.F.R. § 1980.114(b).

2. The complainant must prove that the adverse action was taken "because of" the protected activity. 18 U.S.C. § 1514A(a).

a. To do so, a complainant must merely prove that his or her protected activity was a "contributing factor" in the adverse personnel action. 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1980.109(a). *See also Harvey v. The Home Depot, Inc*., 2004-SOX-20, at *15 (ALJ May 28, 2004).

1) "Contributing factor" has been interpreted as any factor which, alone or in connection with the other factors, tends to affect in any way the outcome of

the decision. *Davis v. United Airlines, Inc*., 2001-AIR-5 (ARB Apr. 25, 2002) (noting that the "contributing factor" standard was specifically intended to overrule existing case law which required a whistleblower to prove that his protected activity was a "significant," "motivating," "substantial," or "predominant" factor in an employment action). This is a lower standard than under most whistleblower and retaliation statutes.

3. An agreement to arbitrate SOX claims is enforceable. *Guyden v. Aetna, Inc.*, 544 F.3d 376 (2d Cir. 2008).

G. Affirmative Defenses

1. No relief is available to the complainant if the employer proves by clear and convincing evidence that it would have taken the same unfavorable personnel action even in the absence of any protected activity. 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1980.109(a).

2. *See* above regarding exhaustion of administrative remedies and statute of limitations.

H. Relief Available. 18 U.S.C. § 1514A(c).

1. If OSHA determines that there is reasonable cause to believe that a violation has occurred, it may order "interim reinstatement." *See* 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. §§ 1980.104(a)(1) and (c).

   a. Reinstatement orders are immediately effective, and are not stayed pending the resolution of any objections or appeal. *See* 49 U.S.C. § 4212 (b)(2)(A); 29 C.F.R. §§ 1980.104(a)(1) and (c).

2. A prevailing complainant can obtain "all relief necessary to make the employee whole," including:

   a. Reinstatement with the same seniority;

   b. Back pay with interest, *Platone v. Atlantic Coast Airlines Holdings, Inc.*, 2003-SOX-27, at 2 (ALJ July 13, 2004), r*ev'd on other grounds* (ARB Sept. 29, 2006); s*ee also Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15, at 15 (ALJ Feb. 15, 2005), *rev'd on other grounds*, ARB 05-064 (ARB May 31, 2007);

   c. Front pay, *Kalkunte v. DVI Fin. Servs., Inc.*, 2004-SOX-56, at 61 (ALJ July 18, 2005); and

   d. Compensation for any special damages, including litigation costs, expert witness fees, and reasonable attorneys' fees.

   e. It remains unsettled whether the "make whole" remedies available under SOX include damages for non-pecuniary injuries such as emotional distress.

1) *Compare Kalkunte*, 2004-SOX-56, at 62–65 (emotional distress damages are available), and *Jayaraj v. Pro-Pharmaceuticals, Inc.*, 2003-SOX-32, at 32 (ALJ Feb. 11, 2005) (damages for harm to reputation available);

2) *With Murray v. TXU Corp.*, 2005 U.S. Dist. LEXIS 10945 *8–9 (N.D. Tex. June 7, 2005) ("Normally, the term 'compensatory damages' includes non-pecuniary damages such as pain and suffering, mental anguish, and reputational injury. Yet, in this situation, the Act provides that compensatory damages shall include reinstatement, back pay, litigation costs, expert witness and attorney fees. 18 U.S.C. §1514A(c)(2). No mention is made of any type of damage that might be considered non-pecuniary." Therefore, damages for reputational injury are not available.) (citation and internal quote marks omitted).

f. SOX does not provide for punitive damages. *Murray*, 2005 U.S. Dist. LEXIS 10945.

3. While there is no provision in Sarbanes-Oxley for payment of fees or costs to a prevailing defendant, under the provisions of 49 U.S.C. § 42121(b)(3)(C), if the Secretary finds that the complaint is frivolous or was brought in bad faith, the Secretary may award the prevailing employer a reasonable attorney's fee not exceeding $1,000.

I. Jury Trial

1. While there are not many decisions on this topic, it appears that there is no right to a jury trial when a SOX case lands in federal district court. *Murray*, 2005 U.S. Dist. LEXIS 10945; *Walton v. Nova Info. Sys.*, 514 F. Supp. 2d 1031 (E.D. Tenn. 2007).

J. Criminal Liability

1. SOX makes it a felony to knowingly and intentionally retaliate against, or take any action "harmful" to, any person for providing "truthful" information to a law enforcement officer relating to the commission or possible commission of any federal offense. 18 U.S.C. § 1513(e).

a. The information provided must be "truthful," as opposed to the "reasonabl[y] believe[d]" standard for civil liability.

b. Because "persons" generally includes individuals, corporations and other organizations, both business entities and individual officers and employees may be subject to criminal liability.

c. Moreover, there is nothing limiting the criminal provision to the employment relationship.

2. Criminal sanctions include, for individuals, fines of up to $250,000 and imprisonment of up to 10 years and, for organizations, fines of up to $500,000.

VII. Other Federal Whistleblower Laws

A. The False Claims Act, 31 U.S.C. § 3730 ("FCA") prohibits false or fraudulent claims to the federal government. The FCA was enacted in 1863, at President Lincoln's request, in an effort to combat profiteering by Union Army suppliers during the Civil War.

1. The *qui tam* provisions of the FCA authorize a private person with personal knowledge of fraud against the government to bring a civil action as a "relator," acting on behalf of the United States government, and to share in the proceeds for his or her efforts. *See* 31 U.S.C. 3730(b); *Hughes Aircraft Co. v. United States. ex rel. Schumer*, 520 U.S. 939 (1997).

2. The purpose of the *qui tam* provisions is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward. *United States ex rel. Williams v. NEC Corp*., 931 F.2d 1493, 1497 (11th Cir. 1991).

3. In furtherance of this objective, the FCA provides a cause of action for any employee who is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment" as a result of his or her "lawful acts" in furtherance of a *qui tam* action. 31 U.S.C. § 3730(h).

4. The actual filing of *qui tam* litigation is not a necessary prerequisite to whistleblower protection. *Childree v. UAP/GA AG Chem*., 92 F.3d 1140, 1146 (11th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997). Rather, activity is protected where litigation was "a distinct possibility" at the time that the employee made his or her disclosures. *Id.*

5. A claim for retaliation is not dependent upon the success of any related suit. *United States ex rel. Karvelas v. Melrose-Wakefield Hosp*., 360 F.3d 220, 236 (1st Cir. 2004).

6. A prevailing plaintiff is entitled to "all relief necessary to make the employee whole," including two times lost wages, compensation for any special damages, including litigation costs, attorney's fees and reinstatement. 31 U.S.C. § 3730(h).

B. Other federal statues that afford some protection to whistleblowers include:

1. Asbestos School Hazard Detection Act of 1980, 20 U.S.C. § 3601;

2. Department of Defense Authorization Act of 1984, 10 U.S.C. § 1587;

3. Department of Defense Authorization Act of 1987, 10 U.S.C. § 2409;

4. Federal Employers' Liability Act (FELA), 45 U.S.C. § 51;

5. Federal Mine Safety and Health Act (FMSHA), 30 U.S.C. § 801;

6. Hazardous Substances Release Act, 42 U.S.C. § 9601;

7. Jurors’ Employment Protection Act, 28 U.S.C. § 1861;
8. Longshoremen’s & Harbor Workers' Compensation Act, 33 U.S.C. § 901;
9. Migrant Seasonal and Agricultural Worker Protection Act, 29 U.S.C. § 1801;
10. Public Health Service Act, 42 U.S.C. § 201;
11. Railroad Safety Authorization Act of 1978, 45 U.S.C. § 421;
12. Surface Mining Control & Reclamation Act, 30 U.S.C. § 1201; and
13. Whistleblower Protection Act of 1989, Pub.L. No. 101-12, 103 stat. 16.

National Labor Relations Act

By

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THE NATIONAL LABOR RELATIONS ACT IN THE 21ST CENTURY[1]

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I. INTRODUCTION

The National Labor Relations ("NLRA") actually consists of three distinct acts which form the cornerstone of the American system of labor-management relations. These are the Wagner Act of 1935, the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959. Together, these Acts govern our system of labor-management relations from organizing through collective bargaining and into the conduct of internal union affairs and the relationship between unions and their members. Historically, the United States' labor legislation has been primarily reactive to social events or upheavals. As an example, the Wagner Act, which created the National Labor Relations Board and its processes, the employee's "bill of rights" of Section 7, and employer unfair labor practices ("ULPs") was a direct result of the violence which resulted from employees' efforts at organizing and forming or joining labor unions, a movement which was born from the Triangle Shirtwaist Factory in New York City, a "sweatshop" which caught fire and burned taking numerous workers' lives with it; the corruption and unsafe working conditions in the meat packing industry captured in Upton Sinclair's famous novel *The Jungle*, and the Pullman car strike and the labor riot in Haymarket Square. The Taft-Hartley Act came along some 12 years later, adding Section 8(b), and Sections 301, 302 and 303, as a result of union violence during organizational activity and strikes, most notably the one at the Coronado Coal Company where union men allegedly kidnapped and murdered several supervisors. Finally, in 1959, the Landrum-Griffin Act emerged as a method for governing internal union affairs in unions which were allegedly dominated by organized crime and big labor bosses. Together, the three Acts have, as the NLRA, governed union-management relations into a relatively workable scheme which encourages peaceful resolution of disputes and workplace issues through the cornerstone of collective bargaining.

Section 1 of the Act declares that the policy of the United States is to be carried out "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Section 8(d) requires an employer and the

[2] This paper is for the purpose of general information only and is not to be construed as or substituted for legal advice applicable to any particular case or matter.

representative of its employees to meet at reasonable times, to confer in good faith about certain matters, and to put into writing any agreement reached if requested by either party. The parties must confer in good faith with respect to wages, hours, and other terms and conditions of employment, the negotiation of an agreement, or any question arising under an agreement.

The duty to bargain is imposed equally on the employer and the union which represents the employees. It is an unfair labor practice for either party to refuse to bargain collectively with the other. However, the Act does not require that an agreement be reached, nor does it require either party to make concessions to the other.

The NLRA is enforced by the National Labor Relations Board, which is described both as to makeup and function in Section 9. It is both an administratively adjudicative and a prosecutorial agency, and is relatively divided into two "sides"—the Board side and the General Counsel side. The Board side is the administrative division, while the General Counsel side is the prosecutorial side.

II. SECTION 7--THE HEART OF THE ACT

The rights of employees are set forth principally in Section 7, which provides:

> Employees shall have the right to self-organization, to form,, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 7 mandates that in order to be protected, the activity must be engaged in by employees must be concerted. Thus, in the general sense, there must be at least two employees acting together. However, this is not always strictly true. It is also a common misconception that the employees need to be involved in or with a union; that is not the case either. In order to be protected, the activity must be geared toward the "mutual aid and protection" of the employees in the affairs of the workplace.

NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962)—non-union employees have right to strike

NLRB v. City Disposal Systems, Inc., 104 S.Ct. 1505 (1982)—action taken by an individual employee which is designed to enforce rights under the collective bargaining agreement [even if only for the individual complaining] is protected concerted activity within meaning of Section 7

Meyers Industries, Inc., 268 NLRB 493 (1984), rejecting earlier *Alleluia Cushion Co.*, 221 NLRB 999 (1975), which had held that individual employer's actions simply inured to benefit of employee complement, or something that NLRB believed the other employees ought to be concerned about, even though not based on collective bargaining agreement

Endicott Interconnect Techs, Inc. v. NLRB, 453 F.3d 532 (D.C. Cir. 1006), reversing NLRB's 2-1 decision in employee's favor, held that employee who made public statements criticizing recent layoff as well as management's competence not protected by Section 7 because his statements constituted disloyalty under *Jefferson Standard* test

IBM Corp., 341 NLRB No. 148 (2004), overruling *Epilepsy Foundation,* 331 NLRB 676 (2000), holding non-union employees had right to co-worker representation during an interview which might reasonably lead to discipline, vacillating again on application of *NLRB v. Weingarten,* 420 U.S. 21 (1975) to non-union workplaces, reasoning co-workers, unlike union representatives, would not represent the interests of the entire workforce, lack "official status" which would level the playing field, lack unique skills of "knowledgeable" union representative in grievance matters and comparing with employer's duty to investigate certain matters

Impak Bob's, Inc., 2004 WL 813960 (2004), holding employer could not prevent employee from discussing sexual harassment complaint with her co-workers; *see also, In re Phoenix Transit System,* 337 NLRB 510, 170 LRRM 1001 (2002)

Phillips Petroleum Co., 339 NLRB No. 111 (2003), holding employer's interference with employee's Family and Medical Leave Act request, which was initially individual issue, considered unlawful interference with employee's Section 7 rights because it inured to benefit of all

CHEP, USA, 345 NLRB No. 50 (2005), holding that employee who rang break bell at unscheduled time to cause employees to come to break room and discuss his concerns about holiday policy, not engaged in protected activity because he caused unwitting work stoppage by fellow employees

TNT Logistics North America, Inc., 347 NLRB No. 55 (2006), holding that otherwise protected statements about terms and conditions of employment to outside parties may lose protection if maliciously false or publicly disparage employer's product or reputation

Abell Engineering & Mfg., Inc., 338 NLRB No. 42 (2002), holding employee engaged in unprotected disloyal activity for trying to persuade another employee to quit and get position with union-friendly employer in absence of organizing activity or solicitation to improve employment conditions and when effect would be to cripple employer, distinguishing *Arlington Electric*, 332 NLRB 845 (2000), where NLRB held employee was protected by Section 7 while engaged in distributing union flyer advertising union employment elsewhere because he was not trying to induce employee to quit, but rather to demand higher pay from the employer

American Steel Erectors, 339 NLRB No. 152 (2003) held employer did not violate Act in refusing to hire apprenticeship coordinator who used deliberate and outrageous exaggerations and accusations of unsafe practices when employer's certification of its apprenticeship program

Felix Industries, Inc., 339 NLRB No. 32 (2003), holding employee who called supervisor obscene names was not outside protection of Section 7 when employee was provoked by employer's hostility. Factors considered by Board were: 1) location of conduct, such that other employees witnessed incident; 2) subject matter; 3) nature of outburst and whether it exceeded tolerance; and 4) provocation.

III. WHO IS AN EMPLOYEE?

Section 2 of the NLRA provides the definitions of terms of art used in the Act. The most litigated section is 2(11), the supervisory definition. The Congressional intent of Section 2(11) was the exercise of "genuine management prerogatives." S. Rep. No. 195, 80th Cong., 1st Sess. 19 (1947). Section 2(11) specifies 12 indicia of supervision, including the authority to hire, fire, suspend, layoff, recall, promote, discharge, assign, reward, discipline, grant time off, responsible direct employees, adjust grievances, or effectively recommend such actions, which must be performed using the exercise of independent judgment or discretion and being performed in the interest of the employer.

Kentucky River Community Care v. NLRB, 532 U.S. 706 (2001): Supreme Court noted that phrase "independent judgment" was ambiguous with respect to the degree of discretion required for supervisory status, had difficulty with the premise of "responsibly to direct (noting distinction between individuals who direct discrete tasks and individuals who actually direct employees, and rejected the categorical exclusion from supervisory status those employees using ordinary professional or technical judgment in directing less skilled workers according o employer's standards. The Court held that the Board may determine what scope of direction qualifies as "independent judgment" noting that many nominally supervisory functions may be performed without such a degree of judgment or discretion to confer actual supervisory status.

Oakwood Healthcare Trilogy:

Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006): NLRB revised standard for statutory supervisors and changed interpretation of factors

A. Assigning employees: "designating an employee tot a place [such as a location, department, or wing], appointing an employee to a specific time (such as a particular shift or overtime period) or giving significant overall duties or tasks to an employee

Does not include choosing the order in which employees will perform discrete tasks within assignment. Only includes "designation of overall duties to employee, not to *ad hoc* instruction that employee perform discrete task. Example: if charge nurse instructed shift nurse to give medication to specific patient, there is no assignment. However, if charge nurse directs nurse to care for specific group of patients, there is an assignment.

B. Responsibly directing employees: There must be evidence that employer: 1) "delegated to the putative supervisory the authority to direct the work and the authority to take corrective action if necessary" and 2) "there is a prospect of adverse consequences for the putative supervisor" which could arise from putative supervisor's failure properly to direct the workforce.

C. Independent judgment: Must not be dictated or controlled by detailed instructions, whether set forth in company policies or rules, verbal instruction of a higher authority, or provisions of a collective bargaining agreement, although mere existence of policy in and of itself does not necessarily preclude exercise of independent judgment.

Oakwood Healthcare, Inc.: Board held 12 charge nurses were statutory supervisors as they satisfied the above-referenced criteria, but that employees who only occasionally acted as charge nurses were not statutory supervisors.

Beverly Enterprises-Minn., Inc. d/b/a Golden Crest Healthcare Center, 348 NLRB No. 39 (2006) –part-time charge nurses not statutory supervisors because they lacked authority responsibly to direct and/or assign employees

Croft Metals, Inc., 348 NLRB No. 38 (2006)—lead persons who had authority responsibly to direct employees not statutory supervisors because they did not exercise independent judgment

1. EVIDENTIARY GUIDELINES FOR DETERMINING SUPERVISORY STATUS UNDER SECTION 2(11)

A. Responsibly directs with independent judgment

1. Substantial authority to insure unit achieves management's objectives by one "in charge." "In charge" includes:

a. Sole or significant authority over unit and is not closely overseen by superiors

b. Reliance on the individual regarding implementation of policies and rules

c. Secondary indicia:

1. Ratio of supervisors to employees

2. Held accountable for work of others

3. Degree of significant discretion and judgment

A. Measuring degree of judgment

1. Existence of rules and procedures may reduce level of discretionary decision making

2. Discretion is inherent or required in emergencies

3. Discretion is routine and repetitive tasks

4. Conveying superiors' directives

B. Assign with independent judgment

1. Power to assign tasks based on own assessment of employee

a. Does individual have discretion to assign work of differing degrees of difficulty based on own assessment of employees' ability and attitude?

b. Whether work differs significantly in difficulty or desirability

c. Whether choice is based on on-discrete factors; i.e. seniority

C. The RESPECT Act

1. Introduced in March 2007, the Reempowerment of Skilled and Professional Employees and Construction Tradeworkers Act, RESPECT was introduced in both houses of Congress specifically to overturn the *Oakwood Healthcare* trilogy. It portends to amend Section 2(11) by requiring that to qualify as a supervisor, an employee had to perform duties in the interest of the employer for a majority of his/her work time; and that those who assign or responsibly direct employees would no longer be considered supervisors. *See Exhibit 2.*

2. RECENT DECISIONS

Starwood Hotels and Worldwide, Inc., 2006-2007 CCH NLRB ¶ 17,389 (2007) held hotel front desk supervisor lawfully fired for refusing to remove pro-union button

Arlington Masonry Supply, Inc., 339 NLRB No. 99 (2003) held power to assign work to employees with independent judgment is, by itself, primary indicia of supervisory authority

Patagonia Bakery Co., 339 NLRB No. 74 (2003) held directing employees t clean up one area first is routine assignment and direction of discrete task where there is no evidence that the assignments require particular skills or that the abilities of employees differed substantially such that selection of employees for a specific task would require independent judgment

Barnabus Hospital, 334 NLRB 1000 (2001) held supervisory authority must be exercised over employees of same employer

Caveat: Part-time or sporadic supervisors who exercise 2(11) authority on such basis not sufficiently aligned with management unless they exercise such authority on "regular and substantial basis."

3. USER AND SUPPLIER EMPLOYEES (LEASED EMPLOYEES)

Another fertile source of litigation is whether leased employees are eligible to organize, and if so, who their employer is for purposes of collective bargaining.

MB Sturgis, Inc., 331 NLRB 1298 (2000) held that a bargaining unit which included employees employed solely by user and jointly by user and supplier is appropriate since both groups of employees perform similar work for one same employer even if the supplier does not consent to be part of multi-employer bargaining unit

Oakwood Care Center, 343 NLRB No. 76 (2004) overruled *MB Sturgis*, returning to prior precedent of *Greenhoot, Inc.*, 205 NLRB 250 (1973) and *Lee Hospital*, 300 NLRB 1990), concluding that employees employed solely by user employer and those employed jointly by user and supplier employer are in fact not employed by same employer and that if they are to be counted as employees of user employer for inclusion in bargaining unit consent of supplier employer is required because it creates multi-employer bargaining unit

Oakwood Care Center also overruled *Tree of Life d/b/a Gourmet Award Foods*, 336 NLRB 872 (2001), holding, based on *MB Sturgis*, that warehousemen employed by user employer through supplier employer and who worked over 30 days per union security clause are to be included in broadly described bargaining unit of drivers and warehousemen in collective bargaining agreement in absence of specific exclusion to the contrary, since they shared community of interest with the established bargaining unit

4. STUDENTS

Brown University, 342 NLRB No. 42 (2004), holding that graduate students enrolled at college or university and seeking academic degrees were students and not employees within meaning of Section 2(3) of Act, overruling *New York University*, 332 NLRB 1205 (2000), which had held that graduate students enrolled at college or university and seeking graduate degrees who were paid for their teaching functions were employees.

Brown University declined to revisit issue decided in *Boston Medical Center*, 330 NLRB 152 (1999) which held that interns, residents and fellows in non-traditional academic setting, while students, were also employees.

5. AFFILIATIONS WITH NON-COVERED ENTITIES

Management Training Corp., 317 NLRB 1355 (1995) held some affiliation with governmental entities does not necessarily foreclose Board jurisdiction. Board will only consider whether employee meets Act's definition of "employer" and the monetary standards.

San Manuel Indian Bingo and Casino v. NLRB, 475 F.3d 1306, 181 LRRM 2353 D.C. Cir. 2007) held that NLRA, despite ambiguity as to whether or not it applied to Native American tribal commercial interests run by tribal governments, applied to tribal operated 2300-seat BINGO hall with over 1,000 slot machines, as well as live entertainment, which advertised, catered to and employed "significant number" of non-Native Americans although the majority of key positions were held by members of the Tribe.

6. OTHER EXCLUSIONS

- Agricultural laborers
- Domestic servants
- Individuals employed by parents or spouse
- Independent contractors
- Individuals employed by employer subject to Railway Labor Act
- Government employees or individuals employed by any governmental subdivisions
- Managerial employees; i.e. administrative or confidential employees

IV. SELECTION OF BARGAINING REPRESENTATIVE

There are two (2) methods by which a Union can become the bargaining representative of an employer's employees. The first is by voluntary recognition by the employer. If a Union represents to an employer that it represents a majority of the employer's employees, the employer may, if it so chooses, voluntarily acquiesce to such representation. A voluntarily

recognized union need not be certified by the NLRB as the bargaining representative of the employer's employees. Once an employer voluntarily represents a union as the bargaining representative of its employees, the duty to bargain collectively with the union takes effect; however, a union which is voluntarily recognized by the employer does not have the same protections against decertification petitions for a defined time period, or protection against a raiding union during the "certification year."

Currently, however, the most common way that a bargaining relationship becomes established between an employer and the bargaining representative of its employees is through secret ballot election. In order to obtain a secret ballot election, a petition must be filed with the NLRB either by an employee, a group of employees, a union acting on the employees' behalf, or even by the employer. If the petition is filed by or on behalf of employees, it must be accompanied by a substantial showing of interest: that is, evidence that at least 30 % of the employees are interested in being represented for collective bargaining purposes by the purported representative. If filed by an employer, the petition must allege that one or more labor organizations or individuals have made a claim for recognition as the exclusive bargaining representative of the same group of employees.

Typically, unions obtain the "proof" of the required showing of interest by having employees sign what are generally called "union authorization cards." These are cards which an employee fills out and signs which in effect signify that the signatory employee is joining the union and is authorizing the union to act on his or her behalf with respect to bargaining with the employer as the employee's exclusive representative. A union may in fact attempt to bring these authorization cards to the employer as "proof" that it represents a majority of the employer's employees, and ask for voluntary recognition. The employer is under no obligation to look at the cards or otherwise accept the Union's representation: rather, the employer simply can express a "good faith doubt" as to the Union's claimed status, and thus force the Union to seek redress through the NLRB's processes, which is a secret ballot election. *Linden Lumber Co. v. NLRB,* 419 U.S. 301 (1971). If, however, the employer chooses to review the proffered evidence of majority representation, it does so at its peril, as if the evidence turns out to support the union's claim, the employer can no longer claim a good faith doubt.

1. THE QCR

Once a representation petition is filed, the NLRB must investigate the petition to determine whether a question concerning representation in fact exists. A QCR will be found to exist based upon the NLRB's investigation and findings of, among other things, the following:

- Whether the NLRB has jurisdiction to conduct an election
- Whether there has been a sufficient showing of employee interest to justify an election
- Whether a question concerning representation exists
- Whether the election is sought in an appropriate unit of employees
- Whether the purported bargaining representative named in the petition is qualified

- Whether there are any barriers to an election in the form of existing contracts or prior elections

Jurisdiction is determined by interstate commerce and the Board's internal jurisdictional standards. The showing of interest is determined by a check of the evidence by Board agents, usually checking the validity of signatures on the union authorization cards.

A. Appropriate Unit

- A unit of employees is a group of two (2) or more employees who share a community of interest with one another and may be grouped together for purposes of collective bargaining. Section 9(b) of the Act leaves the determination of whether the is sufficient community of interest to the Board, and includes such factors as bargaining history; closeness of work locations of the employees sought to be in the unit; nature of work performed by the employees sought to be in the unit; interaction among the employees sought to be in the unit; similarity in wages, hours and working conditions among the employees sought to be included; the desires of the employees concerned; departmental organization; overlap between job classifications; common terms and conditions of employment including supervisory structure; and the extent to which the employees have been organized, except that this latter factor cannot be given controlling weight according to Section 9(c)(5).

- Section 9(b)(1) prohibits the NLRB from certifying a unit as appropriate which includes both professional and non- professional employees, unless a majority of the professional employees to be included vote in a separate election, called a *Sonotone* election, to be included in such a mixed unit

- Section 9(b)(2) prohibits the Board from holding a proposed craft unit to be inappropriate simply because a different unit was previously approved by the Board, unless a majority of the employees in the proposed craft unit vote in a separate election, called a *Globe* election, against being represented separately

- Section 9(b)(3) prohibits guard employees from being included in a unit that includes non-guard employees. It also prohibits the Board from certifying a union as the representative of a guard unit if the union has members who are non-guard employees or is affiliated with such an organization.

- In the health care industry, the Board is guided by Congressional guidelines to minimize the number of bargaining units and avoid disruption in delivery of health care services. The NLRB has established Rules for the healthcare industry, generally requiring units

to be made up of all physicians, all registered nurses, all skilled maintenance employees and the like, or any combination thereof.

- The Board need not choose the most appropriate unit, only a unit which is appropriate under the circumstances. If the proposed unit in the petition is appropriate, the inquiry goes no further. *Boeing Co.*, 337 NLRB 152 (2001).

- The NLRB will generally seek to certify the smallest unit which contains the employees in the proposed unit. *Bartlett Collins Co.,* 334 NLRB (2001).

B. Accretion

The NLRB follows a restrictive policy regarding accretion because it forecloses employees' basic right to select their bargaining representatives and the Board will not compel a group of employees to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret ballot election. An accretion analysis is ordinarily applied in situations involving consolidation of a represented group with an unrepresented group.

Nott Co., 345 NLRB No. 23 (2005)—NLRB found that no accretion occurred where employer added unrepresented group of employees equal to number of the represented group, and therefore majority status not presumed such that employer could withdraw recognition from union

C. Bars to Election

Even if a QCR is determined to exist, the NLRB will not direct an election in some circumstances.

1. Existence of Valid CBA—Contract Bar Rules

The Board will not direct an election among employees presently covered by a valid collective bargaining agreement except under certain circumstances. **BASIC RULE: Valid CBA for fixed period of 3 years or less will bar election for period covered by the CBA. A CBA for a fixed period of more than 3 years will bar election sought by one of the contracting parties for full duration of contract but will bar election sought by outside party only for first 3 years following effective date. A CBA with no fixed term will not act as a bar at all.**

2. Contracts Which Will Nor Raise Election Bar

- Contract which does not contain substantial terms or conditions of employment sufficient to stabilize bargaining relationship
- CBA can be terminated by either party at any time for any reason
- CBA contains clearly illegal union security clause[3]
- The CBA is not in writing or is not signed
- The CBA has not been ratified by the union members if such is expressly required
- The bargaining unit is not appropriate
- The union which entered into the CBA with the employer has become defunct of is unwilling or unable further to represent the employees
- The CBA is discriminatory between employees by race
- The CBA covers union members only
- The union has undergone or is undergoing a schism, which is a basic internal conflict at the highest levels which so destabilizes a union that confusion is created about its identity
- The employer's operations have changed substantially since the CBA was executed

3. If no CBA exists, an "R" case petition can result in an election if it is filed before a CBA is signed. If the "R" case petition is filed on the same day as a CBA is signed, the CBA will bar an election provided that the CBA is

[3] While the Act has made "closed shops" illegal, "union shops" are permissible and are enforced by union security clauses, which are mandatory subjects of bargaining and are often included in CBAs. Union security clauses require newly hired employees to become members of a union if they are hired into a bargaining unit covered by an extant CBA within a certain number of days after becoming employed. Such union security clauses are illegal in right work states, such as Florida, which has a right to work provision in its Constitution, pursuant to Section 14 of the Act. Regardless of union membership, however, an employee In the bargaining unit is subject to the provisions of the CBA and the union is still that employee's exclusive representative for purposes of collective bargaining.

effective immediately or retroactively and the employer has been informed at the time the CBA is executed that the "R" case petition has been filed.

4. Once a valid CBA is executed and the bar is raised, no petitions will be accepted except during the "window period," which is not more than 90 nor less than 60 days prior to the expiration of the CBA, or, in the case of health care institutions, not more than 120 days nor less than 90 days prior to the expiration. The final 60 days (90 for healthcare institutions) are called the "insulation period" and during this time, the parties to the existing CBA are free to negotiate a new one or extend the old one. If the parties reach agreement during the insulation period, the bar raises again and no new petitions can be filed until the "window period" on the new CBA.

5. The "certification year" is a Board-established Rule which precludes any filing of an "R" petition prior to the end of the one-year period following NLRB certification of a union as the bargaining representative of an appropriate bargaining unit of employees following an election. Assuming that the parties reach a valid CBA during the certification year, the contract bar rules become effective

6. If an election is held and no bargaining representative certified as a result, no election can be held again in that unit for 12 months. However, it will not bar another election in the following 12 months in a larger unit which includes the employees in the smaller original unit.

D. Election Procedure

Under Section 9(C)(1), the NLRB's certification elections are to be held under strict "laboratory conditions" by means of secret ballot. In such elections, the employees vote for representation by one bargaining representative (sometimes more than one union files a petition supported by the requisite showing of interest) or no representative at all. To be certified, a union must win a majority of the votes cast.

1. Consent elections are held when the employer and the union(s) agree as to the composition of the unit, the time and place of the election, the choices to appear on the ballot, and a method to

determine the eligibility of voters. In a consent election, the Regional Director will have the final say as to any unresolved issues.

2. In a stipulated election, the parties essentially agree as they do in a consent election, but the losing party may appeal the Regional Director's decision to the Board in Washington, DC.

3. If the parties cannot reach agreement, the Regional Director will hold a hearing to determine contested issues.

4. *Peerless Plywood* rule

E. Voter Eligibility

1. To be entitled to vote, an employee must have been employed during the eligibility period established by agreement of the parties or by the hearing.

2. The employer must provide the Union with a list of the names and addresses of all employees eligible to vote. This is called the *Excelsior* list. *Excelsior Underwear,* 156 NLRB 1236, 61 LRRM (1966).

3. *Trustees of Columbia University,* 2006-07 CCH NLRB ¶ 17,391 (NLRB held employer did not engage in election misconduct by refusing to provide union with e-mail addresses of employees even though employees worked aboard research vessel that spent most of the pre-election period at sea, when union had long history of representing employees at sea and union agreed to logistical details of election knowing that employees were going to be at sea during most of pre-election period

2. THE EMPLOYEE FREE CHOICE ACT

In January 2007, The Employee Free Choice Act was introduced in the U.S. House of Representatives by George Miller (D) of California and in the U.S. Senate by Hillary Rodham Clinton (D) of New York. Section 2 of the Bill amends Section 9(c) of the Act to add a new paragraph, §9(c)(6), attached hereto as Exhibit A. The new provision provides in relevant part:

> Notwithstanding any other provision of this section, whenever a petition shall have been filed…alleging that a majority of

> employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. **If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).** [emphasis added].

The Bill goes on to add a new subsection 9(c)(7) which requires the Board to develop guidelines and procedures for "the designation by employees of a bargaining representative in the manner described in paragraph (6)." These guidelines and procedures **shall** include: 1) model collective bargaining authorization language which can be used for the purposes of making the designations of paragraph (6); and 2) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.

A. Issues Raised

- What will the Board's investigation entail?
- Will §8(b)(5) need to be expanded?
- How does the *Hollywood Ceramics* standard work in this context?
- What effect will this have on the certification year and the contract bar rules?
- What effect will this "automatic certification" have on decertification?
- What does this do to the balance of power in American industrial relations and the use of offensive and defensive weapons by unions and management?
- Has the Act become punitive in nature rather than remedial?

3. PRE-CERTIFICATION/POST-CERTIFICATION CONDUCT

A. Employer Misconduct

a. SPIT

b. Conduct in "critical period" (date of filing of R petition to date of election) taken more seriously

1. Threats of loss of jobs or benefits by an employer if union is selected

2. Grant of benefits or promises to grant benefits

3. Withholding of regularly scheduled benefits

4. Terminating employee for union activities

5. Incitement of racial or religious prejudices by inflammatory campaign appeals

6. Threats or use of violence.

7. Questioning of employees as to their union sentiments of how they are going to vote or if they signed authorization cards

8. "Bargaining from scratch" statements

9. Threatening to close down if the employees unionize

a. RECENT CASES

Federal Logistics, 340 NLRB No. 36—Employer representative telling employees during critical period that if union were elected, negotiations would start from zero, wages would remain the same during negotiations (despite historical increase), there would be a strike where the plant could shut down and work moved to another facility, and employees would lose their 401(k) benefits constituted threats because made out of context with no assurance that there was a give-and-take process

Noah Bay Area Bagels, LLC, 331 NLRB 188 (2000); *SAIA Motor Freight, Inc.,* 334 NLRB 979 (2001)(unlawful interrogation when supervisor told employee that supervisor knew how employee voted)

Laboratory Corp. of America, 333 NLRB 284 (2001)(solicitation of grievances with promise to remedy them was objectionable)

Grouse Mountain Lodge, 333 NLRB 1322 (2001)(presence of supervisor with pad and pen in employee area on day of election created impression of surveillance)

AP Automotive Systems, 333 NLRB 581 (2001)(unsupported employer predictions that strike will ensue and plant will shut down following union victory held to be unlawfully coercive

Abramson, LLC, 345 NLRB No. 8 (2005)(co-owner's statement that it would be hard to get work if union came in because most general contractors do not want to work with union employees on job site held not based on objective fact and therefore unlawfully coercive

Mid-South Drywall Co., 339 NLRB No. 70 (2003)(leadman as agent of employer expressed opposition to union by telling employees that if it were his business he would close company if union got in held coercive)

Allegheny Ludlum Corp., 333 NLRB 734 (2001) established standards for employers to solicit employees for anti-union video if employee was known to be against union which generally would not be permitted since degree of overt support for or against employer is personal choice of employee without pressure from employer. Factors for allowing use of employees in anti-union campaigning:

a. Employee willfully volunteered

b. After general announcement stating purposes for video

c. Assurances that participation is wholly voluntary

d. Assurance against reprisals if employee chooses not to participate

Chinese Daily News, 353 NLRB No. 66 (2008): Employer violated 8(a)(1) when its defense counsel in FLSA collective action case, while deposing employee who had supported certification petition, asked employee if she had voted for union in the NLRB election. Employer's counsel claimed need for information to establish defenses to FLSA claim: 1) that plaintiffs would not act in best interest of class; and 2) that employees who supported class certification were biased because they supported the union and thus class should not be certified. Applying *Guess?, Inc.*, 339 NLRB 432 (2003) test, Board assumed that counsel's question was relevant to the litigation and that it had no illegal motive. But as to third prong, Board held employee's substantial interest in her Section 7 rights outweighed employer's interest in the information.

B. UNION MISCONDUCT

While not as broad, a union can engage in objectionable conduct which can result in the setting aside of an election..

1. *NLRB v. Savair Mfg Co.*, 414 U. S.270 (1973)—union cannot offer to waive initiation fees for only those employees who support the union prior to an election.

2. Solicitation of union authorization cards by lead workers later determined to be supervisors is inherently coercive and grounds for overturning an election. *SNE Enters, Inc.*, 348 NLRB No. 69 (2006)

3. Similarly, supervisors' in soliciting union authorization cards inherently coercive and sufficient to overturn election. *Harborside Healthcare*, 343 NLRB No. 100 (2004)

4. *Hollywood Ceramics* and the EFCA

C. CONDUCT DURING ELECTION

Observers: Each party is entitled to have an observer sit with the Board agent to observe the election. The main purpose served by the observers is to make sure that only those persons on the *Excelsior* list vote, to challenge ballots of ineligible voters, and to report any interference with the conduct of the election.

Family Service Agency, 331 NLRB 850 (2000): either party's use of a supervisor as an observer is objectionable election conduct

Daimler Chrysler, 338 NLRB No. 148 (2003): NLRB will consider irregularly marked ballot, as NLRB assumes that by casting vote, employee intended to register preference, will give effect to preference wherever possible, and will avoid speculation on stray remarks

Aesthetic Designs, LLC, 339 NLRB No. 55 (2003): failure to use official ballot, using sample ballot instead, held permissible

D. BLOCKING CHARGE RULE: Certain ULPs or employer or union pre-election misconduct resulting in ULP charges can result in the staying of an election. If EFCA passes, serious questions will be raised as to issues of ULPs or misconduct committed between the beginning of the Board's investigation into the QCR and the certification.

E. CHALLENGES TO ELECTION RESULTS

a. Objections

b. Technical 8(a)(5)

V. EMPLOYER RULES

A. Solicitation and Distribution

a. Employers can prohibit employees from soliciting co-workers during working time of either the employee or the solicitor, and prohibit distribution of literature during working time and in working places. Employees may engage in union solicitation during non-work time on employer's premises, unless employer shows that a prohibition is necessary to maintain production and discipline. *Republics Aviation Corp. v. NLRB,* 324 U.S. 793 (1945).

b. *Guardsmark, LLC,* 344 NLRB No. 97 (2005): rule prohibiting all union solicitation while in uniform is overbroad and unlawful because restricts solicitation during non-working time.

1. Working places depend on nature of business:

A. Health care: patient care areas in hospital and places such as patients' family lounges considered work places. *Beth Israel Hosp. v. NLRB,* 437 U.S.483 (1978); *Los Angeles New Hosp.,* 244 NLRB 960 (1979), enf'd 640 F.2d 1017 (9th Cir. 1979).

B. *Brockton Hospital,* 333 NLRB 1367 (2001), enf'd in pertinent part, 294 F.3d 100 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 850 (2003): prohibition of solicitation of employees or distribution of literature in immediate patient care areas are presumptively lawful. However, prohibition of solicitation during non-working time or distribution of literature during non-working time in non-working areas is presumptively unlawful.

2. Overbroad company time language

A. *RCN Corp.,* 333 NLRB 295 (2001): rule against conducting union business on "company time", "on duty on clock", "on clock on premises" is subject to reasonable construction that discussion of union or union related matters at any time, including breaks and non-work periods, is overbroad

B. Ban on union insignias

a. *USF Red Star, Inc.,* 339 NLRB No. 54 (2003): ban on wearing union insignia is unlawful unless justified by special circumstances. Customer displeasure, without more, does not constitute special circumstances, but harm to employer's business may suffice.

b. *Starwood Hotels & Resorts Worldwide, Inc. d/b/a W San Diego,* 348 NLRB No. 24 (2006): ban on wearing of union insignia upheld where room service worker was prohibited from wearing it in the public areas of the hotel because of the atmosphere employer was trying to create, and a cook was lawfully prohibited from wearing union sticker because of evidence that it could fall off and contaminate food

C. Access to Property

a. *Mediatone of Greater Florida, Inc.,* 340 NLRB No.39 (2003): Rule limiting employee access to employer's property unlawful, but rule prohibiting disclosure of proprietary information outside of the employer was lawful

b. *Eagle-Picher Indus.,* 331 NLRB 169 (2000): Rule that prohibited employees from going to employer's other facility without permission and engaging in solicitation of employees outside non-work premises was unlawful

c. *Ark Las Vegas Restaurant Corp.,* 335 NLRB 1284 (2001): Rule denying off-duty employees entry to parking lots, gates and other non-work areas held invalid since there was no legitimate justification presented

d. *First Healthcare Corp d/b/a Hillhaven Highland House,* 336 NLRB 646 (2001): Board, dealing with *ITT Industries, Inc.,* 251 F.2d 995 (D.C. Cir. 2001), a decision vacating and remanding 331 NLRB 4 (2000), and found that it is a violation to maintain and enforce a broad no solicitation/distribution rule for non-employees to off-duty employees engaging in union activities outside a facility other than the one at which they worked.

1. Balancing Test:

A. Offsite employees have a non-derivative and substantial right of access for organizational purposes to their employer's facilities

B. Employer may well have heightened private property right concerns when off-site employees seek access (ITT considered them trespassers and not invitees).

C. On balance, Section 7 organizational rights entitle employees to access to outside, non-working areas, except where justified by business reasons (security, traffic, disruption of patients, clients or customers, violence) and where tailored accordingly. They are not considered "stranger employees" since the employer has a lawful means of exercising control over the offsite employee independent of its property interest.

D. Policy: When an off-site employee seeks to encourage organization of similarly situated employees at another facility, the off-site employee is attempting to further his/her own welfare. Employees seek strength in numbers to increase the power of their union and ultimately improve their working conditions. *Meijer, Inc.,* 329 NLRB 730 (1999).

e. *Farm Fresh, Inc. t/a Nick's,* 326 NLRB 997 (1998): Removal of nonemployee organizers from some outside sidewalks and from indoor snack bars is lawful if the employer had control over the property interest and the union did not meet one of the two exceptions to

access under *Lechmere, i.e.,* 1) union could not reach employees to convey its message using reasonable efforts or 2) employer's access rule is discriminatory.

1. *Best Yet Market,* 339 NLRB No. 104 (2003): Employer violated Section 8(a)(1) by forcing union handbillers off the parking lot of a shopping center and soliciting shopping center owner to call police

2. *US Postal Service, 339* NLRB No. 151 (2003): Denial of property access to off-duty employee was unlawful but non- discriminatory access denied to union representative and off-duty employee of another employer (mail hauler) was lawful

3. *New York New York Hotel & Casino,* 334 NLRB 762 and 772 (2001), enf'd. denied and remanded, 313 F.3d 585 (D.C. Cir. 2002): If employees of a subcontractor work "regularly and exclusively" on a property owner's premises, then the property owner cannot prohibit access. NLRB found that employer must show sufficient business justification, *i.e.,* necessary to maintain production and discipline, to curtail conduct of subcontractors who regularly and exclusively work on employer's premises and who are not trespassers. The Court determined that the Board failed to give adequate rationale for allowing a subcontractor's employees the same access rights as the property owner's employees.

NOTE: *Jean Country,* 291 NLRB 11 (1988) expresses interest in a return to the balancing test of property rights vs. Section 7 rights and to eliminate the "regular and exclusive" standard. Balancing test was established in *Republic Aviation v. NLRB,* 324 U.S. 793 (1945), and called for balancing employee's Section 7 rights and employer's interest in maintaining discipline and that broad ban on employee non-access should be presumptively unlawful absent a showing of special circumstances.

D. Use of Employer Communications Equipment

a. Bulletin Boards

1. *Stevens Graphics, Inc.,* 339 NLRB No. 64 (2003): Employer permitted to prohibit controversial and inflammatory documents on its bulletin board in absence of past practice of permitting a union to post whatever it desires without employer scrutiny and in absence of disparate treatment

2. *Eaton Technologies,* 322 NLRB 848 (1997)("It is well established that there is no statutory right of employees or a union to use an employer's bulletin board.")

3. *Fleming Co.,* 336 NLRB 192 (2001), enf'd. denied, 34336 NLRB 192 (2001), enf'd. denied, 349 F.3d 968 (7th Cir. 2003)(court held that if employer allows employees to use its communications equipment for nonwork related purposes, it may not validly prohibit employee use of communications equipment for Section 7 purposes). In underlying Board proceedings, Board had held that employer violated Section 8(a)(1) by removing union literature

from bulletin board when employer allowed postings for personal purposes such as wedding announcements, birthday cards and sales of personal property such as cars and televisions. There was no evidence that the employer had allowed postings for any outside clubs or organizations. Likewise, in *Guardian Industries*, 313 NLRB 1275 (1994), enf'd. denied, 49 F.3d 317 (7th Cir. 1995), NLRB held employer violated Section 8(a)(1) where it allowed personal "swap and shop" postings but denied permission for union or other group postings, including Red Cross and employee credit union.

The 7th Circuit denied enforcement of both decisions. It began with the proposition that employers may control the activities of their employees and the workplace both as a matter of property rights (ownership of the premises and the equipment) and as a matter of contract (employees agree to abide by work rules as condition of employment). Although employer may not discriminate against Section 7 activity in enforcing work rules, court noted that the concept of discrimination involved the unequal treatment of equals. The court noted that the employers in both cases had never allowed employees to post notices of organizational meetings; rather, the non-work related postings had to do with "swap and shop" items; *i.e.*, personal items for sale. The court then stated: "We must therefore ask in what sense it might be discriminatory to distinguish between for-sale notices and meeting announcements." *Id.* At 319. The court ultimately concluded that since all organizational notices, including those for the Red Cross and pro- and anti-union meetings, could not be considered discriminatory.

b. Company e-mail

1. *The Guard Publishing Co. d/b/a The Register Guard*, __NLRB___(2007): Held: employees have no statutory right to use employer's e-mail for Section 7 purposes. Decision addressed three issues:

A. Whether employer violated Section 8(a)(1) by maintaining policy prohibiting use of company e-mail for all "non-job related solicitations."

B. Whether employer violated Section 8(a)(1) and (3) by, respectively, discriminatorily enforcing policy against union-related e-mails while allowing some personal e-mails, and disciplining employee for sending union-related e-mails.

C. Whether employer violated Section 8(a)(5) and (1) by insisting on an allegedly illegal bargaining proposal that would prohibit use of e-mail for "union business."

The policy, in relevant part, prohibited employees from using the employer's e-mail system for any "non-job related solicitations." Adhering to long-held Board precedent, the Board held that employers have a "basic property right" to "regulate and restrict employee use of company property." *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983). Employer's e-mail system was purchased by employer for use in operating its business, and has legitimate business interest in maintain the efficient operation of that system, as well as in preserving server space,

protecting against viruses, avoiding dissemination of confidential information and avoiding liability for employees' inappropriate e-mails. Although issue of use of e-mail was one of first impression, prior cases held employees had no right to use employer's other types of property, such as bulletin boards, telephones or televisions for Section 7 communications. *Mid-Mountain Foods*, 332 NLRB 229 (2000)(no statutory right to use employer's TV in breakroom to show pro-union video); *Champion Int'l Corp*., 303 NLRB 102 (1991)(employer has basic right to regulate and restrict employee use of company copy machine); *Churchill's Supermarkets*, 285 NLRB 138 (1987), enf'd 857 F.2d 1474 (6th Cir. 1988), *cert. den.* 490 U.S. 1046 (1989)(employer has unquestionable right to restrict employee's personal use of company telephone systems); *Heath Co.*, 196 NLRB 134 (1972)(employer did not engage in unlawful conduct by prohibiting pro-union employees from using company public address system to respond to anti-union broadcasts).

The NLRB recognized that regardless of similarities or differences between e-mail and other forms of communication, use of e-mail has not eliminated the traditional face-to-face communication among employer's employees or reduced such communications to insignificant level. There was no contention or evidence in this case that the employees rarely or never see each other in person or that their sole communication with one another is solely be e-mail. *Compare NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)(solicitation in employer parking lot where union organizers had full access to employees).

The Board adopted the standard enunciated by the 7th Circuit in *Fleming* as the test to be utilized in determining whether a policy prohibiting employee use of the company e-mail system was unlawful; that is, "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section protected status.

In applying the standard to the second issue, the Board noted that the employer allowed e-mail by employees concerning social gatherings, jokes, baby announcements, and occasional sale of personal items such as sporting event tickets. Notably absent, however, was any evidence that the employer permitted employees to use the e-mail to support any group or organization. Therefore, the employer's prohibition of employee's e-mails constituting solicitation of union support was lawful. However, the employee's e-mails simply conveying information about the union could not be prohibited.

As to the third issue, since the employer did not insist on its bargaining proposal prohibiting use of company e-mail for "union business" Board dismissed 8(a)(5) charge.

c. Prohibition of employee discussions of wages

1. *Custom Cut, Inc.*, 340 NLRB No. 17 (2003)(ULP to prohibit employees from discussing wages)

2. *Labinal, Inc.*, 340 NLRB No. 25 (2003)(maintenance of rule prohibiting employee discussion among themselves of wages and compensation unlawful)

d. Confidentiality of sexual harassment investigations

1. *In re Phoenix Transit System*, 337 NLRB 510, 170 LRRM 1001 (2002)(employer prohibition of employees from discussing incidents of sexual harassment violates Section 7 rights [8(a)(1)]

2. *Impak Bob's, Inc.*, 2004 WL 813960 (2004)(ULP to prohibit employee discussions of sexual harassment incidents or charges)

e. Application Process

1. Discriminatory against union members

A. *Mainline Contracting Corp.*, 334 NLRB 922 (2001): Adopting and maintaining a new rule that applicants cannot put concerted protected activities covered under NLRA on their applications was found to violate § 8(a)(3) since it was done to avoid consideration of and hiring of union applicants, and was also found to be inherently destructive of employees' rights under §8(a)(1) even if there is no unlawful motivation and there is a valid business reason

Policy: The Act is not designed to protect employers from discrimination claims. Employees have the right to tell employer if their intent is to organize. Presumably the next logical step for employer would be4 to have a "don't tell" policy which would affect employees if they want to deal with the employer as a group.

Note: This *per se* rule could disadvantage some employees as it would preclude them from listing any union training they may have undertaken

B. *WDDW Commercial Systems and Investments, Inc. d/b/a Aztech Electric Co.*, 335 NLRB No. 25 (2001): Rule or policy held unlawful when employer decided it would not hire or consider for hire applicants who made 30 % more in wages than its current employees

Balancing test: 1) operates to disqualify those making union contract wages and penalizes workers who exercise rights to work in an organized workplace; 2) legitimate reasons considered (higher rete3ntion of employees who are happy with salary); 3) balance of employer's business purpose vs. destructive impact on employees' rights favors the latter

C. *Centex Independent Electrical Contractors Ass'n*, 344 NLRB No. 160 (2005)(Board reviewed hiring policy under disparate impact theory similar to Title VII analysis. Although the case concluded that no "disparate impact" occurred and the NLRB did

not endorse the use of disparate analysis, the case highlights that there has been some consideration of importing Title VII analysis into NLRA

VI. COLLECTIVE BARGAINING

The objective of union organization is ultimately collective bargaining. Section 8(d) requires an employer and the employees' representative to meet at reasonable times, to confer in good faith about certain matters, and to put into writing any agreement reached by the parties if requested by either party. **Parties are not required to reach agreement under the current law, but have only the duty to bargain in good faith.**

A. Mandatory Subjects of Bargaining

1. Wages, hours and terms and conditions of employment: does not include certain managerial decisions (i.e. management rights) including subcontracting work, relocation and other operational changes. Whether a subject is a mandatory subject of bargaining depends on the employer's reason for taking the action, and even of a particular subject is not a mandatory subject of bargaining itself, its effect on the unit employees may be mandatorily subject to bargaining ("effects bargaining"). Non-mandatory subjects of bargaining may be included in negotiations if the parties so desire, but cannot be insisted on by one party over the other's objections and certainly cannot lead to impasse.

2. General Rules

a. *Farina Corp.*, 310 NLRB 320 (1993): During negotiations for a CBA, employer must refrain from unilateral implementation of proposed changes to terms and conditions of employment, absent agreement or impasse on bargaining for agreement as a whole

b. *Washoe Medical Center, Inc*, 337 NLRB 202 (2001): Unilateral setting of wages for newly hired employees without bargaining after union won election held unlawful. Continuation of past practices in effect prior to certification of union does not relieve employer of obligation to bargain with the certified union about subsequent implementation of those practices that entail changes in wages, hours and other terms and conditions of employment.

c. *Vanguard Fire & Security Systems*, 345 NLRB No. 77 (2005): Employer's practice prior to unionization which involved "significant amount of discretion" does not continue into relationship as part of status quo.

3. Economic Exigency Exception

a. *Bottom Line Enterprises*, 302 NLRB 373 (1991): Union tactics to delay bargaining or economic exigencies may compel prompt action without bargaining

b. *Hankins Lumber Co, Inc.*, 316 NLRB 837 (1995): compelling economic considerations are only those extraordinary events which are "an unforeseen occurrence" having a major economic effect requiring immediate action. Business necessity is not the equivalent of compelling considerations excusing bargaining; if it were, any employer

facing gloomy economic outlook could take unilateral action or violate the CBA because it was financially squeezed.

c. *Angelica Healthcare Svcs. Group,* 284 NLRB 844 (1987): Loss of significant contract does not justify implementation without notifying and bargaining with union

d *Health Care Svcs. Group,* 331 NLRB 333 (2000): Failure to give union sufficient authority or knowledge of what occurred in prior negotiations where union was not present indicates lack of good faith bargaining

e. *Mackie Automotive Systems,* 336 NLRB 347 (2001): Absent dire financial emergency, economic events such as loss of significant accounts or contracts, operation at competitive disadvantage or supply shortages, do not justify unilateral action

4 Direct Dealing

a. *Armored Transport, Inc.,* 339 NLRB No. 50 (2003): Employer gave new proposal to employees on the same day that it gave it to union with attached letters telling employees not to blame employer for lack of contract. Board held that employer violated Section 8(a)(1) because its action effectively solicited decertification and failed to afford union opportunity to consider and bargain over the proposal.

b. *Bridgestone/Firestone, Inc.,* 332 NLRB 575 (2000): Direct dealing found when employer required employees to sign release form before it would release home addresses to union

c. *Permanente Medical Group, Inc:* 332 NLRB 143 (2000): Employer may, without directly dealing with employees, can consult with them in formulating its bargaining proposals:

1. Factors:

A. Consultation not for purpose of establishing or changing wages, hours or terms and conditions of employment

B. Not for purpose of undercutting union efforts to negotiate

C. Make clear to employees that employer's discussion with then was only to help yield proposal

D. Keep union informed

5. Refusal to Negotiate

a. *United Steelworkers of America Local 7912 (U.S. Tsubaki, Inc.),* 338 NLRB No. 5 (2002): Union violated Act when it refused employer's request to negotiate a

CBA for a newly clarified unit of relocated employees who had been part of a larger unit under a CBA. When the NLRB finds a group of relocated employees to be a separate appropriate unit, an existing CBA covering those employees in their original unit does not apply, absent explicit agreement by parties that it should apply. Board held that for duration of any extant CBA in the historical unit, the union's view of not negotiating until the extant contract expired denies the relocated employees in newly clarified unit full benefit of separate collective bargaining representation to which they are entitled. There is a rebuttable presumption that the relocated employees constitute a separate appropriate unit in new facility. However, in case of relocation of entire store, employer must continue to apply extant CBA to new facility if operations are substantially the same as at the old location and the transferred employees constitute a substantial percentage of employees at the new location. *King Soopers, Inc.,* 332 NLRB 23 (2000)

b. *Victoria Packing Co.,* 332 NLRB No. 58 (2000): Neither party may refuse to bargain with representative chosen by other party absent unusual circumstances, as each side is entitled to choose its representatives.

6. Unilateral Changes

a. *Litton Financial Printing Div. v. NLRB,* 501 U.S. 190 (1998) confirming *NLRB v. Katz,* 369 U.S. 736 (1962): employer cannot make changes to employees' wages, hours or terms and conditions of employment without bargaining to impasse even after expiration of CBA

b. *King Soopers, Inc.,* 340 NLRB No. 75 (2003): Unilateral implementation of new revised policy regarding use of new technology was ULP since it constituted new work rules which could be grounds for discipline if violated and was thus mandatory subject of bargaining

c. *Regal Cinemas, Inc.,* 334 NLRB 304 (2001): Transferring unit work to managers and hiring other assistant managers to perform unit work was mandatory subject of bargaining since there was no change in operation, just over who would perform the work

d. *Colgate Palmolive Co.,* 323 NLRB 515 (1997): Use of cameras, polygraphs, and drug testing mandatory subjects of bargaining not managerial decision lying at core of entrepreneurial control, so unilateral implementation held unlawful

e. *Quirk Tire,* 340 NLRB No. 33 (2003): Unilateral implementation, after impasse, of broad discretionary wage plan was unlawful since it gave the employer unfettered discretion to make recurring changes in wage rates

7. Permissive Subjects of Bargaining

a. Decisions on commitment of capital and scope of enterprise constitute core entrepreneurial concerns and are primarily about terms and conditions of employment

8. Waiver of Bargaining Rights

a. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983): Union may waive bargaining rights if it has clear notice and does not timely request bargaining

b. *Tri-Tech Services, Inc.,* 340 NLRB No. 97 (2003): Employer unilaterally implemented layoff without bargaining. Held that union had not waived its right to bargain by failing to demand bargaining when it learned of layoff since layoff had already occurred.

c. *Lenz & Riecher,* 340 NLRB No. 21 (2003): No duty to bargain over decision to wind down operations and ultimately close, but effects bargaining, which was appropriate, was waived by union

9. Effects Bargaining

a. *Champion Int'l Corp.,* 339 NLRB No. 80 (2003): Employer's unilateral institution of pre-conditions for severance pay after sale to joint venture; i.e. application for employment with other entity and drug testing, is unlawful refusal to bargain over effects of sale because it did not give any opportunity to union to engage in effects bargaining

b. *McCarty Newspapers, Inc.,* 339 NLRB No. 158 (2003): No bargaining required with new representative over decision to implement computerized employee benefit system and new printing system since the decision about the scope of the business was made prior to union election. However, employer could not unilaterally change unpaid lunch period and shift schedules, even though they were a result of the post-election implementation of the new printing system, since employer had burden to show that not only were the changes a direct result from a permissible decision, but also that there was no possibility of alternative changes warranting bargaining.

A. Policy: Discretionary "effects" of a pre-election decision were not the inevitable consequences of the permissible decision of a printing change. In most situations, employers and unions can explore possibilities to avoid or reduce the scope of the changes without calling into question the underlying decision.

B. Remedy: *Transmarine Navigation Corp.,* 170 NLRB 389 (1968): Traditional remedy when employer fails to bargain over effects is not limited to untimely notice, but also to unilateral pre-conditions. Amount of backpay owed will not be less

than two weeks' pay when there is lost employment, with interest and without deduction of interim earnings. The remedy is not only to compensate employees, but also to restore a union's bargaining leverage that it would have had but for the employer's conduct.

10. Duty to Provide Information

a. *Teamsters 500 (Acme Markets)*, 340 NLRB No. 35 (2003): Union violated Act when it refused to give requested information to employer regarding its CBAs with other contractors and relevant information sought based on proposal for a most favored nations clause

b. *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955 (D.C. Cir. 2003), overturning *Lakeland Bus Lines, Inc.*, 335 NLRB No. 29 (2001), holding that wage and related information is presumptively relevant but other data, such as employer profits and production figures are not, and union must demonstrate relevance before it can obtain such information. Letter from employer to employees that it cannot afford to pay any more than that in employer's final offer and in repeated statements in negotiations about short term business losses and loss of ridership was not statement of inability to pay requiring relevant financial information.

c. In *Metropolitan Edison Co.*, 330 NLRB 107 (1991), employer claimed information requested by union was confidential. Held: claim of confidentiality must be proven and, if proven, bargaining required toward accommodation between union's informational needs and employer's justified interest in confidentiality.

d. *Roseburg Forest Prods. Co.*, 331 NLRB No. 124 (2000): ADA does not preclude employer from disclosing employer from providing requested employee medical information to union since it is relevant and necessary to process grievance over employee's accommodation. Holding is restricted to necessary information, not whole medical file.

11. Successors' Obligations

a. A *Golden State* successor is a successor employer which has undertaken all the obligations of the predecessor employer which, with reasonable diligence knew or should have known of predecessors ULPs and is obligated to remedy the ULPs of predecessor, including returning strikers who commenced strike while employed by predecessor. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *Spruce Up Corp.*, 209 NLRB 194 (1974) defines successor employer as one who retains all predecessor's employees with no substantial change in operations. Such a successor cannot make unilateral changes in wages, hours or terms and conditions of employment without bargaining with incumbent union.

1. *Elf Atochem North America, Inc.*, 339 NLRB No. 93 (2003): *Golden State* successor obligated to bargain as of date that it informed employees that it would

provide employment to loyal employees with seniority recognized and equivalent salaries and equivalent benefits.

A. Factors considered:

a. Announcement of pre-intent to hire or retain

b. Misleading employees into thinking they will all be retained without changes in existing working conditions

c. Close examination of all communications between successor and predecessor's employees, including interviewing/hiring process

d. Scrutiny of advertisements and communications with union as to intent in hiring process

b. *Burns* successor is successor employer which has continuity of majority of work force and continuity of enterprise and has duty to bargain with incumbent union but no obligation to assume extant CBA, and can initially set new terms and conditions of employment. *NLRB v. Burns Int'l Security Svcs.*, 406 U.S. 272 (1972). If a *Burns* successor fails to hire majority of predecessor's employee complement simply to avoid duty to recognize and bargain with union, successor employer is not permitted to implement initial different terms and conditions of employment without consulting with the union.

A. Factors considered

1. Union animus

2. Lack of convincing rationale for refusal to hire

3. Inconsistent hiring practices

4. Overt acts evidencing discriminatory motive

5. Close scrutiny of past practices

6. Business justification

Bayliner Marine Corp., 293 NLRB 669 (1989); *Sherwood Trucking Co.*, 270 NLRB 445 (1984).

B. *U.S. Generating Co.*, 341 NLRB No. 142 (2004): *Burns* successor may modify its rights under *Burns* by agreeing to adhere to terms and conditions of employment contained in CBA or CBA or MOU, *Burns* successor remains free to set new initial terms and conditions of employment not contained in CBAs or MOUs.

C. *FES*, 331 NLRB 9 (2000): supplements *Wright Line* analysis in cases involving discriminatory failure to hire or consider for hire. NLRB held that in discriminatory failure to hire cases,

issue to be resolved is "fundamentally different" from discriminatory discharge cases covered by *Wright Line* as issue is why employer refused to accept applicant into workforce, and applicant, unlike former employee, has no work history with employer and thus, unlike former employee, is not presumptively qualified for job. Thus, applicant has burden to show that he was qualified for job, whereas in *Wright Line* cases, employer has burden to prove discharged employee not qualified. *FES* analysis does not apply in discriminatory failure to hire cases by putative successors, however, for following reasons: 1) in successorship cases, predecessor's employees meet *Wright Line* presumption that employee is qualified for job as employee obviously employed by predecessor; and 2) because successor employer must fill vacant positions, factor of hiring or intent to hire is irrelevant. Thus, *Wright Line* test applies and General Counsel must prove that successor employer was motivated by union animus. *Planned Building Svcs., Inc.*, Cases 2-CA-31245 *et al.* (2006).

D. *MV Transportation*, 337 NLRB 770 (2002), overruling *St. Elizabeth's Manor*, 329 NLRB 341 (1999) returning to well-established doctrine that incumbent union in successorship situation is entitled only to rebuttable presumption of continuing majority status, which will not serve to bar otherwise valid decertification, rival union, or employer petition or other valid challenge to union's continued majority status

c. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987): Successor employer which acquired plant, equipment and inventory from liquidators of predecessor and began operations 9 months later at same location performing same production operations but for slightly differently clientele with small workforce largely composed of predecessor's employees, and while small workforce was still growing, union which had represented predecessor's employees demanded recognition which employer denied. Union filed ULP charges. Board held: although demand for recognition came prior to successor's hiring a "substantial and representative complement" demand had been continuing once that employer was required to accept once requisite-size workforce had been hired. At that time, a majority of the employees were those of the predecessor. The Board rejected the employer's contention that the predecessor's employees became a minority when the full complement was finally hired after that time. Supreme Court upheld NLRB, holding that Board properly could treat demand as continuing and could properly invoke from its representational procedures the settled rule concerning "substantial and representative complement" and accepted the presumption that the union continued to enjoy majority status once that complement had been hired. The Court thus concluded that the employees not only had a need for, but also the right to, representation during the transition of the business. Those considerations had to be balanced against the uncertainty and risks that the Board's formulation would cause for the employer in such situations, but Court recognized that employees' rights favored representation without unnecessary delay. The dissent noted the long hiatus in the company's operations and that the lack of immediate continuity dictated a different result. The dissent further took issue with the Board's use of the "substantial complement" rule and contended that the obligations of the parties should not have been determined until the full complement of employees had been hired.

13. Construction Industry Pre-Hire Agreements

a. Section 8(f) permits execution of pre-hire agreements in construction industry. That essentially permits an employer "primarily engaged in the construction industry" and a bona fide labor organization of construction employees to negotiate a CBA, even though the union's majority status

has not yet been established. A 7 day union shop is established, the parties agree that the employer will hire exclusively employees referred by the union, and employees are hired exclusively on certain objective criteria, including training, seniority, or length of residency. Therefore, an agreement with a minority union is lawful whether it is executed before or after employer has hired a representative complement of employees. *Progressive Constr. Corp.,* 218 NLRB 1368 (1975).

b. *Staunton Fuel & Material, Inc.,* 335 NLRB 717 (2001): Union with 8(f) contract can acquire 9(a) status through specific agreement with the employer if: 1) The agreement's language is unequivocal and indicates that the union has required recognition as majority representative; 2) Employer recognizes union as majority representative; 3) Recognition is based on the union having shown or offering to show majority support

c. *Goodless Electric Co.,* 332 NLRB 1035 (2000): 8(f) agreement with clause for future 9(a) voluntary recognition based on prospective majority showing is lawful

12. Neutrality and Cardcheck Agreements

a. Generally, agreements between employers and unions to either remain neutral during an organizing campaign or to recognize the union based on an independent check of signed authorization cards by an independent entity are valid ways of obtaining recognition. Nevertheless such agreements, depending upon how they are used, can violate the Act.

b. In *Dana Corporation,* 351 NLRB No.28 (2007), the Board modified its recognition-bar doctrine. Prior, under *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), the Board had held that an employer's voluntary recognition of a union based on a showing of the majority status, barred a decertification petition filed by the employees or the petition of a raiding union for a reasonable period of time. In *Dana,* the Board concluded that although the basic justification for providing an insulated period was sound, it nevertheless did not warrant immediate imposition of election bar following voluntary recognition based on an authorization card majority given the uncertainty of such recognition as opposed to certification following an election. The Board thus held that voluntary recognition by union authorization cards, there will be a 45 day election bar so that unit employees can decide whether they prefer a secret ballot election. Under the new policy, employees or a raiding union may file a petition during the 45 day bar period following notice of voluntary recognition. The Board will process any such petition if it is supported by the 30% showing of interest.

c. NLRB considers union demand to negotiate neutrality agreements during contract negotiations to be mandatory subject of bargaining. *Pall Biomedical Products Corp.,* 331 NLRB No. 192 (2000). The courts have generally disagreed. *Pall Biomedical Corp. v. NLRB,* 275 F.3d 116 (D.C. Cir. 2002); *Lone Star Steel Co. v. NLRB,* 693 F.2d 545 (10th Cir.. 1980).

13. Impasse

a. *Taft Broadcasting Co.,* 163 NLRB 475 (1967): Factors for declaration of impasse: 1) Bargaining history; 2) Good faith of parties; 3) Length of negotiations; 4) Importance of issues remaining; 5) Contemporaneous understanding of parties as to state of negotiations

b. *CJC Holdings, Inc.*, 320 NLRB 1041 (1996): Board does not lightly find impasse and burden is upon party asserting impasse

c. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999): Impasse not reached if one party remains flexible on certain demands, even if timetable is not satisfactory to the other party

d. *Cotter & Co.*, 331 NLRB 787 (2000): Impasse not reached even though union refused to take employer's last and final offer to membership for ratification since negative initial reactions may later be reconsidered

e. *Atrium at Princeton, LLC d/b/a Pavilions at Forrestal*, 22-CA-27066 (2008): Impasse reached when bargaining for successor CBA was broken when employer unilaterally implemented new health insurance plan without notice to union and giving union opportunity to bargain and failed and refused to provide union with requested information about new health plan.

1. Impasse does not destroy bargaining relationship, but merely suspends duty to bargain over subject of impasse until changes in circumstances indicate agreement might be possible. *Airflow Research & Mfg. Co.*, 320 NLRB 861 (1996).

2. Anything that creates new possibility of fruitful discussion breaks impasse and revives employer's obligation to bargain over subject of impasse. *Gulf States Mfrs v. NLRB*, 704 F.2d 1390 (5th Cir. 1983).

e. Effect of Employee Free Choice Act: Section 3 of EFCA provides that in the event a certified union and an employer fail to reach agreement by the end of the certification year, the parties must submit the disputed issues to interest arbitration through the Federal Mediation and Conciliation Service.

VII. ECONOMIC WEAPONS

a. Strikes

1. Section 7 gives employees the right to engage in protected concerted activities including the right to strike for purposes of mutual aid and protection without prior notice. *Erie Resistor Corp. v. NLRB*, 337 U.S. 221 (1963).

2. Striking employees must take reasonable precautions to protect employer's facilities, equipment and products. *Vencare Ancillary Services*, 334 NLRB 965 (2001)

3. Special provisions for health care industry: Section 8(g) requires a 10 day notice of the date and time before strike activity in health care industry, and once given, it can be extended by written agreement of both parties. Notice is required for complete walkout or any other concerted refusal to work by a union at a health care institution. Section 501 (2) of the Act defines a strike as a concerted stoppage, slowdown, or interruption intended to put pressure on the employer to change its position.

A. *NYS Nurses Ass'n (Mt. Sinai Hosp.)*, 334 NLRB 798 (2001): RNs who refused to volunteer for overtime at union's request and who refused assigned overtime pursuant to past

practice were engaged in concerted refusal to work and because there was no 10 day notice given to FMCS, union violated Section 8(g).

4. Strike Conduct

A. *Lumber & Sawmill Workers' Union Local No. 2797 (Stolze Land & Lumber Co.,* 156 NLRB 388 (1965): Consideration of all factors of union conduct can establish that union was attempting to use conduct, rather than speech, to induce sympathetic response of employees of neutral, primary, and other contractors to strike or otherwise refuse to perform services, thus violating Section 8(b)(4)(ii)(B)

B. *IBEW Local 501 v. NLRB,* 341 U.S. 694 (1951): Conduct of union agents shouting at neutral employees and veiled threats found to violate Section 8(b)(4)(i)(B) as words used to induce or encourage are broad enough to include every form of influence or persuasion

C. *SEIU Local 525 (General Maintenance Co.),* 329 NLRB 638 (1999): Totality of circumstances considered in determining whether unlawful conduct or protected speech: 1) Presence of mass activity involving crowds that far exceed the number necessary for free speech; 2) Patrolling with signs, including those mounted on trucks; 3) Signs placed at certain areas outside of neutral's entrance; 4) Placards denouncing neutral; 5) Chanting and whistling to confront traffic in front of neutral's premises; 6) Threats to employees; 7) Individuals in rat costumes at neutral's entrances. NOTE: Rats are considered well-known symbols of labor disputes and signal that a labor dispute is present at the site. *Occidental Chemical,* 294 NLRB 623 (2989). The presence of rats can be "signal picketing,"; i.e. union conduct which is not traditional picketing but acts as a signal to neutrals that the union desires sympathetic action and provokes individuals to respond without inquiring into the information being disseminated, just as a conventional picket line does. *Sheet Metal Workers Local 19 (Delcard Assoc.),* 316 NLRB 426 (1995); *IUOE Local 12 (Hensel Phelps);* 284 NLRB 246 (1987).

5. *Laidlaw* Rights and ULP Strikers

a. *Boydson Electric, Inc.,* 331 NLRB 1450 (2000): ULP strike if charged party's conduct constitutes one of the causes of the strike

b. *Fiberboard Paper Prods. Corp. v. NLRB,* 379 U.S. 203 (1964); *American Signature, Inc.,* 334 NLRB 880 (2001): ULP strikers are entitled to reinstatement upon unconditional offer to return to work. Reinstatement of all ULP strikers is required, without delving into circumstances of each individual striker.

c. *Laidlaw* rights must be granted even if employer has hired replacements. *But see Belknap v. Hale,* 463 U.S. 491 (1983)(strike replacements can sue for breach of employment contract if they have been promised permanent employment but then are displaced by returning ULP strikers)

d. Economic strikers are not entitled to immediate *Laidlaw* rights but are given first preference when opening occur

e. Economic strike does not constitute bad faith bargaining by union, just economic pressure, when it initiates strike during bargaining or upon impasse. *Teamsters Local 282 (EG Clemente Contracting)*, 335 NLRB 1253 (2001).

f. Section 8(d)(3) requires on bargaining for an initial agreement following union certification that if dispute arises which could result in strike union must notify the FMCS and any state authority established to mediate or conciliate such disputes within 30 days prior to calling strike after dispute arises. Employee who engages in strike without proper notice will lose employee status. Notice periods are different for health care institutions.

g. Any demand for bargaining upon expiration of extant CBA must be made no later than 90 nor less than 60 days prior to expiration. Section 8(d)(1). Again, notice times are different for health care institutions.

h. A strike which begins as an economic strike may convert retroactively to a ULP strike under certain circumstances. *Road Sprinkler Fitters Union Local 669 v. NLRB*, 681 F.2d 11 (D.C. Cir. (1982)(employer refuses to voluntarily recognize union, union files petition, employer begins to commit serious ULPs).

i. Section 7 also gives employees right to refrain from supporting union, including working in face of a strike, so union violates Act if it coerces employees even if coercion is not directed at the employees themselves. Thus, union's conduct violated Act where union representatives provoked, deliberately confronted, and voiced degrading insults to supervisors, managers and security guards, because it sent clear message to employees that they would be subject to same treatment if they did not support strike. Coercive impact is heightened at a hospital because patients and their families need quiet atmosphere and need not be reminded of tensions of the marketplace. *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773 (1979).

6. Abnormally Dangerous Working Conditions

a. *TNS Inc.*, 329 NLRB 602 (1999): Dangers that are not sudden or readily apparent or self-limited, but rather are insidious during latent period, fall under Section 502. Therefore, work stoppage due to abnormally dangerous working conditions will not be considered unlawful strike. Factors: 1) Employees' good faith belief that working conditions are abnormally dangerous even in absence of immediate physical injury (and conditions are not limited just to radioactive or toxic substances); 2) Belief is contributing cause of work stoppage; 3) Belief is supported by objective evidence; and 4) Perceived danger posed immediate threat of harm to employee health and safety.

b. Lockouts

1. Lockouts used for unlawful or wrongful purposes are clearly illegal. *Flora & Argus Constr. Co.*, 132 NLRB 776 (1961), enf'd, 311 F.2d 310 (10th Cir. 1962)(lockout designed to prevent organizing effort); partial closure of business to avoid organizing or threat to do so, although employer can go totally out of business to avoid union organizing , *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); lockouts intended to undermine employer support for union, *John Weinstein*

Elect. Corp., 152 NLRB 25 (1965); lockout to accomplish transfer of work from union to non-union shop, *Bagel Bakers Council of Greater New York*, 174 NLRB 622 (1969).

2. Justifiable Lockouts

A.. Single Employer Defensive Lockout

Lockouts in response to intermittent work stoppages not violative of Act, *Int'l Shoe Co.*, 93 NLRB 907 (1951); lockouts in anticipation of threatened strike intended solely to avoid severe hardship not attendant to a normal strike, *Stokely Van Camp, Inc.*, 186 NLRB 440 (1970).

Defensive Lockouts: *NLRB* v. *Truck Drivers' Local 49 (Buffalo Linen),* 53 U.S. 87 (19957): For essentially the first time, the Board and the Supreme Court recognized the Board's concerns for the employer in thee collective bargaining relationship to defend itself and utilize self-help to solve economic problems. *Buffalo Linen* is really the first time that the lockout became recognized as a potentially defensive weapon in the bargaining relationship, much as the union utilize strikes. *Buffalo Linen* occurred in the context of a whipsaw strike against an employer member of a multi-employer bargaining unit. The Supreme Court declared that the NLRA did not prohibit lockouts *per se* and stated that a temporary lockout could reasonably be used as a defense to a union strike which threatens destruction of the employer's interest in bargaining on a group basis. The Court recognized that the right to strike does not preclude the use of self-help by an employer when the legitimate interests of employers and employees collide. Thus, the employer was permitted to use the lockout to defend the very existence of the multi-employer group itself, which was threatened by the union's whipsaw strike.

Offensive Lockouts: For many years, the NLRB distinguished between *Buffalo Linen* type defensive lockouts and those lockouts considered offensive; *i.e.,* used to strengthen the employer's position at the bargaining table. In *NLRB v. Insurance Agents,* 361 U.S. 477 (1960), the Supreme Court refused to enforce a Board order which had held an offensive lockout unlawful. To exert pressure during bargaining , the insurance agent employees in the unit refused to solicit new business, held half-day walkouts, and refused to perform various ordinary duties. The Board found all of these actions, which were themselves unprotected by the Act, to be bad faith bargaining by the Union in violation of Section 8(b)(3) despite the union's desire to reach agreement. The Court rejected the Board's analysis, holding that the corresponding provisions in Section 8(a)(5) and 8(b)(3) is to assure that the parties meet and discuss the issues in a good faith attempt to agree, and that Congress did not intend for the Board to intrude on either the substantive terms of the agreement **or** the economic weapons the parties could employ to achieve those terms. The Court viewed the use of economic as part and parcel of the collective bargaining process, and that they equalized the parties' strength in bargaining. The Board could not find bad faith bargaining solely because a party had employed economic pressure during the bargaining.

In *American Ship Building Co. v. NLRB,* 380 U.S. 300 (1965), the Court rejected the Board's *per se* approach to offensive lockouts demonstrated in the *Insurance Agents* case, and declared offensive lockouts legal based on economic justification. The Court distilled the issue down to whether a temporary layoff of employees solely to bring about economic pressure to bear in support of the employer's bargaining position **after an impasse had been reached** violated Sections 8(a)(1) or (3), and

determined that it did not. The Court held that absent union animus, the use of the lockout as economic pressure was not inconsistent with the employees' right to bargain collectively; in fact, the Court just about held that the lockout was the employer's corollary of thee strike, holding that the right to strike did not carry with it the right to determine the time, place or duration of work stoppages.

On the same day, the Court decided *NLRB v. Brown Food Store,* 380 U.S. 278 (1965), which involved a whipsaw strike in a multi-employer bargaining unit, much like *Buffalo Linen*. The union struck on the employers in the unit, and the other employers retaliated by locking out their employees. Unlike in *Buffalo Linen,* however, both the struck and the locking out employers continued to operate with temporary replacements. The Board and the Supreme Court agreed that *Buffalo Linen* controlled this case; the principal difference, of course, was the employers' use of temporary replacement workers. The Board held that the use of replacements took the case out of protecting the integrity of the multi-employer unit and into the realm of inhibiting a lawful strike. The 10th Circuit disagreed, as did the Supreme Court. The Court held that a lockout as a defense against a whipsaw strike and hiring of temporary replacements did not constitute a *per se* violation of the Act. Without evidence of union animus, the Court held that locking out coupled with use of temporary replacements was simply another economic weapon in the employers' arsenal, not more destructive of union or employee rights than the lockout itself. The Court further held that to force the employer to continue to use its bargaining unit employees, even though they were willing to work under the employer's terms, would be to force the employer to aid and abet the whipsaw strike. And finally, while the Court recognized that the use of temporary replacements upped the pressure on the employees, but attributed that to the union's failure effectively to use the whipsaw strike tactic. **THE RULE:** "When the resulting harm to employee rights is …comparatively slight and a substantial and legitimate business end is served, the employer's conduct is prima facie lawful. Under these circumstances the finding of an unfair labor practice under Section 8(a)(3) requires a showing of improper subjective intent." The Court avoided the question of whether the hiring of permanent replacements for the locked out workers would be lawful.

FURTHER EXPLICATION OF THE RULE: *NLRB v. Great Dane Trailers,* 388 U.S. 26 (1967): Employer refused to pay strikers vacation benefits accrued under a terminated CBA while announcing its intent to pay the same benefits to non-strikers. The Supreme Court held:

"First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even of the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on the employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burde3n is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is more accessible to him."

Harter Equipment, 280 NLRB 597 (1986), *aff'd sub nom. Operating Engineers Local 825 v. NLRB,* 829 F.2d 458 (3rd Cir. 1987): NLRB held that absent proof of union animus, employer could keep operating with temporary replacements following lockout of permanent employees without violating Act.

Eads Transfer, 304 NLRB 711(1991), enf'd, 989 F.2d 373 (9th Cir. 1993): Board held that employer's claimed lockout violated 8(a)(3) and (1) because employer failed to notify union that its refusal to reinstate economic strikers who made unconditional offer to return to work was in fact a lockout. If employer wishes to invoke *Harter* and suspend striking workers' *Laidlaw* rights, it had to declare the lockout either before or immediately after strikers make their unconditional offer to return to work

Anchor Concepts, 323 NLRB 742 (1997): NLRB held that employer violated Act when it refused to reinstate strikers who had made unconditional offer of reinstatement and announced that replacement workers it hired were permanent and that strikers would be recalled on preferential list if union so desired. Board held that conduct inconsistent with economic lockout ends lawfulness of lockout and employer's declared use of permanent replacements ended economic nature of lockout.

VIII. OBLIGATIONS FOLLOWING REACHING AGREEMENT

a. Failure to sign agreement: *Teamsters Local 662*, 339 NLRB No. 109 (2003) held union's failure to sign CBA embodying terms of final and binding CBA violated Act. The same Rule applies to employers, and all members of multi-employer bargaining units.

b. Grievance handling

1. *Exxon Chemical Co.*, 340 NLRB No. 51 (2003): Refusal to designate an arbitrator and to arbitrate any grievance regarding severance pay and notice of layoff was unlawful since grievance arose during CBA's life. Even after plant closure, employer has duty to meet with union for limited purpose of completing unfinished business relating to grievance issues that were pending or that arose during life of CBA.

2. *Contract Carriers Corp.*, 339 NLRB No.. 103 (2003): Employer's refusal to attend grievance hearings for over 5 months which occurred in context of related ULPs, was found to have been intended to frustrate operation of the grievance procedure

3. *ASC, LLC*, 345 NLRB No. 87 (2005): Employer's refusal to arbitrate grievance pursuant to exclusionary rules in a collective bargaining agreement violates Section 8(a)(5) only if employer's conduct amounts to unilateral modification or wholesale repudiation of CBA.

c. Union Relationship With Employees

1. Internal union discipline

Office of Professional Employees Int'l Union Local 251 (Sandia Corp.), 331 NLRB 1417 (2000): No violation found when intra-union dispute over disbursement of settlement agreement money led to internal union discipline against elected officers and other members for opposing president, which included removal from union office, suspensions and expulsions from membership.

A. Elements: 1) Impacts upon the members' relationship with employer; 2) Impairs access to the Board's processes; 3) Pertains to unacceptable methods of union coercion, such as threats or violence; and 4) Otherwise impairs policies imbedded in the Act, such as not complying with CBA

B. No employer/employee relationship: 8(b)(1)(A) is not enacted to regulate relationship between unions and their members unless there was some nexus with the employer-employee relationship and a violation of the rights and obligations of employees under the Act. The activity of protesting settlement disbursement was not directed toward the process by which their terms and conditions of employment would be affected, so 8(b)(1)(A) is not implicated.

Assuming *arguendo* that the member's activities did affect the employment relationship, balancing test is used, as potential effect is insufficient.

a. Balancing test: 8(b)(1)(A) issue turns on weighing union's interest in disciplining employee versus policies and prohibitions incorporated in the Act.

b. *SEIU Local 254 (Brandeis University)*, 332 NLRB 1118 (2000): consistent with *Scandia Corp*. balancing test, Board held that removal of employee from appointed union steward position and from position as elected union representative on contractually-created labor-management committee because of his dissident union activity did not violate Act

c. *Teamsters Local 896 (Anheuser Busch, Inc.)*, 339 NLRB No. 91 (2003): union violated 8(b)(1)(A) when it threatened members with internal union discipline if they reported fellow members to management when CBA made it employees' responsibility to report safety and other rule violations to supervisors

d. *IUOE Local No. 3 (Specialty Crushing, Inc.)*, 331 NLRB 369 (2000): Union violated Act when it threatened to and did fine members because they continued to work for non-union employer after an election that union lost

Scofield factors define when union may enforce internal rules that: 1) reflect legitimate union interests; 2) impair no Congressional labor policy; and 3) are usually enforce d against union members who are free to leave union to avoid it.

e. *IBEW Local 494 (Gerald Nell, Inc.)*, 341 NLRB No. 71 (2004): Union did restrain employer in its choice for bargaining representative and grievance processing by preferring and processing internal union charges for union discipline against employee, who was manager and who was told to resign union membership since the union was actively seeking recognition or a bargaining relationship with the employer at the time.

2. Dues

a. *Auto Workers, Local 1853 (Saturn Corp.)*, 333 NLRB 291 (2001): Union's policy causing those who honorably withdrew because they were out of the unit (supervisors) to return as members without having to pay back dues, but causing those who dishonorably withdrew (unit employees who chose to leave) to pay all back dues owed to be members in good standing (so long as back dues were not more than what they would have paid had they remained members) was not violation of Act. **Absence of union security clause makes policy non-coercive since it is legitimate exercise of a union to prescribe its own internal rules.**

b. *Communication Workers v. Beck*, 487 U.S. 735 (1988): Court held that a union cannot collect that portion of dues spent on things other than activities germane to union's role as exclusive bargaining representative, such as support of political candidates, from objecting non-member employees who are "agency" members only under a contractual union security clause.

1. *California Saw & Knife Works*, 320 NLRB 224 (1995), enf'd, 133 F.3rd 1012 (7th Cir. 1998), cert denied *sub nom. Strang v. NLRB*, 525 U.S. 813 (1998): held that union breaches DFR if it fails to inform employees of *Beck* rights and once employee makes objection known, and seeks reduction of such dues, union must apprise employee of percentage of reduction, basis for the calculation, and the right to challenge the union's figures.

2. *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474 (1999), reconsideration denied, 327 NLRB 802 (1999), petition for review dismissed, 1999 WL 325508 (D.C.

Cir. 1999): held that union's expenditure on non-collective bargaining expenses be audited within GAP such that expenditures on legitimate usage for collective bargaining purposes could be independently verified and employee objectors are not required to accept union's representations

3. *UFCW Local 4 (Pamela Barrett)*, 353 NLRB No. 47 (2008): held that *Beck* objector was entitled to information relative to discrepancy in allocation of dues moneys between collective bargaining activities and other activities

3. Hiring Halls

a. Non-Exclusive Hiring Hall

- *Carpenters Local 537 (E.I. DuPont de Nemours & Co.)*, 303 NLRB 419 (1991): A union is permitted to operate a non-exclusive hiring hall solely for the benefit of its members in a non-discriminatory manner

- *Teamsters Local 460 (Superior Asphalt Co.)*, 300 NLRB 441 (1990): No DFR attached to union's operation of non-exclusive hiring hall because duty exists only when union has status of exclusive bargaining representative of employee in specified unit. *Caveat:* The NLRB continues to require that the union refrain from seeking to impair the employment status or opportunity of nonunion employees. *Dockbuilders Local 1456 (Underpinning and Foundation Constr.*, 306 NLRB 492 (1992)(union that operated non-exclusive hiring hall and that expelled employee from membership for reasons other than nonpayment of dues violated the Act when the union officer told the employer that it could not hire employee and employer refused to hire him)

- *Laborers Local 334 (Kvarner Songer)*, 335 NLRB 597 (2001): Non-exclusive hiring halls may operate as an exclusive one if all the parties to the agreement treat it as such in practice

- *Teamsters Local 391 (US Pipeline, Inc.)*, 339 NLRB No.46 (2003): Non-exclusive hiring hall has duty not to discriminate against applicants because of protected activity; *i.e.*, intra-union political activity, but General Counsel has burden to prove protected activities, animus, nexus and harm to individual

b. Exclusive Hiring Hall

A. Fair Representation

- *Denver Stage Employees IATSE Local 7*, 339 NLRB No. 33 (2003): Duty of fair representation requires that objective criteria are used in referring individuals

B. Negligence vs. Intentional Acts

- *Steamfitters Local Union No. 342 (Contra Costa Elect., Inc.*, 336 NLRB No. 44 (2001): On remand, NLRB upheld prior decision finding inadvertent mistakes in hiring hall operations arising from mere negligence do not violate DFR, nor do they violate 8(b)(1(A) or (2),

overruling *Iron Workers Local 118 (California Erectors)*, 309 NLRB 808 (1992), which held that inadvertent errors in hiring hall operations violated DFR and the Act

- *BEW Local 48 (Oregon-Columbia Chapter of NECA*, 342 NLRB No. 10 (2004): Union's deliberate preferential dispatching treatment of salts not necessary to effective to performance of its representative function, and therefore, violated Section 8(b)(1)(A). In addition, union's mistaken departures from its hiring hall rules, which occurred over 200 times in less than 2 years, demonstrated gross negligence in operation of hiring hall and disregard for established procedures sufficient to violate Act.

C. Information Requests

- *Carpenters Local 370 (Eastern Contractors Ass'n)*, 332 NLRB 174 (2000): union with exclusive hiring hall is obligated to provide requ4ewsted relevant information regarding referrals because it has DFR with regard to hiring. Such provision of information is not required in the case of non-exclusive halls because no DFR attaches. However, if union has retaliated against employee seeking referral for employee's having engaged in Section 7 activity, then union will have to provide information

D. Rules

- *Laborers Local 423 (GFC Inc. & Altman Co.)*, 313 NLRB 897 (1994): Union can require adherence to neutral hiring hall rule if applied objectively and fairly. When union removed applicants from their places on referral list to bottom of list pursuant to hiring hall rules was not violative of Act.

- *Plumbers & Pipefitters Local 38 (Mechanical Contractors Ass'n)*, 306 NLRB 511 (1992): Collectively bargained modifications in exclusive hiring hall rules, facially nondiscriminatory and valid, may nonetheless violate Act if timely notice of rule changes is not provided to users of hall

4. Duty of Fair Representation

a. *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf'd. denied, 326 F.2d 172 (3rd Cir. 1963): NLRB held that union's arbitrary impairment of unit employee's seniority status was breach of its DFR in violation of Section 8(b)(1)(a) and 8(b)(2)

b. Breach of DFR is also actionable in conjunction with suit against employer for breach of CBA under Section 301 of the Act. *Vaca v. Sipes*, 386 U.S. 171 (1967).

c. Employee asserting breach of DFR must initially prove that employer breached CBA and that union breached its DFR to employee in grieving the breach. *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976). Such actions are called "hybrid DFR/Section 301 suits.

d. Union breaches DFR to employee when it acts arbitrarily, capriciously or in bad faith. Mere negligence will not suffice

e. *Roadway Express v. Bianchi*, 441 F.3rd 478 (11th Cir. 2006): held that employee alleging hybrid breach of DFR/Section 301 claim could not maintain DFR claim in absence of showing that, since he knew that his union representative was not properly representing him, failed to demand another representative from union

f. *Barrington v. Lockheed Martin*, 257 Fed. Apex. 153 (11th Cir. 2007): On summary judgment, Court held no breach of DFR when union representative refused to permit member to testify or call witnesses at first arbitration where representative did not want her to do so since employer had not met burden to establish case for member's termination under CBA, and upon re-opening of arbitration member did present witnesses and testify

IX. UNION RELATIONSHIP WITH EMPLOYERS

a. Section 8(a)(2)—Sweetheart Unions

A. *Tecumseh Corrugated Box Co.*, 333 NLRB 1 (2001): Successor employer held meeting with employees of predecessor about changes to occur and allowed the union to address the employees in the absence of supervisors, after stating that the choice was up to the employees. After the meeting, based upon a card check, the employer voluntarily recognized the union and no violation was found.

B. *Duane Reade*, 338 NLRB No. 140 (2003): Employer did more than give space to the union on company time and voluntarily recognized union after card check, so Board held employer violated Section 8(a)(2). Factors considered: 1) Employer invited union its stores despite a no solicitation prohibiting such visits; 2) Employer directed its employees to meet with the union on store premises during paid time for purpose of signing authorization cards for only that union to the exclusion of any others; 3) Employer allowed union to hand out employment application forms; 4) Meetings with union held in presence of supervisors and managers; 5) Employer attempted to conceal ownership status from another union; 6) Employer denied access to rival union and threatened to arrest them for trespassing; 7) Favored union submitted written demands for recognition before it even signed up one employee; and 8) Employer submitted request to arbitrator for card check before favored union even met with employees

Note: Not only did employer violate Section 8(a)(2), but union violated Section 8(b)(1)(A) and (2) by accepting the unlawful assistance, and employer and union respectively violated 8(a)(3) and 8(b)(2) when they entered into a CBA which included union security clause, since union did not represent an uncoerced majority of employer's employees

b. Section 8(e)—Hot Cargo Agreements

A. Section 8(e) prohibits agreements between employers and unions requiring employer from refraining from or to cease from doing business with any other person or handling the goods of such other person. Like Section 8(b)(4)(B), Section 8(e) is aimed at preventing the involvement of secondary objectives; *i.e.,* embroiling an otherwise true neutral employer in any business between a union and a particular employer.

1. *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967): held that 8(e) was not violated when union and employer included in CBA a provision stating that employees would not handle pre-fitted doors because the object of this clause was valid work preservation of work traditionally done by unit employees. "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employees vis-à-vis [its] own employees." If the objective of the agreement is to benefit union members generally as opposed to the specific employees in the specific bargaining unit, the clause violates 8(e). If, however, the object of the agreement is legitimate work preservation of the bargaining unit or to otherwise benefit the employees in the specific unit, the clause is presumptively lawful.

2. *Heartland Indus. Partners, LLC*, 348 NLRB No. 72 (2006): Board found no violation of 8(e) in agreement between employer and union which required Heartland to require any company in which it had controlling interest to enter into neutrality/cardcheck agreement at union's request, because it did not require Heartland to cease or refrain from doing business with any other person or entity

c. Secondary Boycott Activities

A. It is a violation of Section 8(b)(4)(i)(B) to encourage or induce employees to withhold services in order to force a neutral employer to cease doing business with a primary employer. It is a violation of Section 8(b)(4)(ii)(B) to threaten, restrain or coerce any person, by picketing or other coercive conduct, where the object of the picketing or other conduct is for the individual who is the object of such conduct to cease doing business with another employer.

1. Primary vs. Secondary: The *Moore Dry Dock* Test

In the seminal case of *Moore Dry Dock*, 92 NLRB 547 (1950), the NLRB attempted to draw guidelines for the determination of whether picketing or other such conduct was primary or secondary. These guidelines were: 1)whether the primary employer was present at the situs; 2) whether the primary employer was engaged in normal business at the situs; 3) whether the picketing was occurring reasonably close to the situs of the primary employer; and 4) whether the picketing clearly identified the primary employer. After a period of rigid application of these standards, the Board, based on numerous interceding court and Board decisions, now uses the *Moore Dry Dock* standards more as a guideline than a hard and fast rule given to mechanistic application.

B. *Teamsters Local No. 122 (August A. Busch Co.),* 334 NLRB 1190 (2001): No evidence of encouragement of employees to strike a secondary employer, but evidence of coercion of prospective customers to cease buying product; *i.e.* a consumer boycott, will result in violation of 8(b)(4)(ii)(B).

1. Publicity Proviso: Truthful communications, other than picketing, that do not interfere with neutral employers, such as with deliveries or that create work stoppage of a neutral's employees, are not prohibited. *NLRB v. Fruit and Vegetable Packers, Local 760 (Tree Fruits),* 377 U.S. 58 (1964)(union picketed retail stores with signs asking public not to purchase apples from certain packing companies in dispute with the union, but since it was only aimed at one product, picketing was

not persuading customers of neutral retail stores to cease trading with the neutral, only to boycott product which was primary to dispute). *Caveat:* If struck product is integral part of neutral's business, then picketing would be tantamount to urging boycott of neutral's entire business in violation of 8(b)(4)(ii)(B). *NLRB v. Retail Clerks Local 1001 (Safeco Ins. Co.),* 447 U.S. 607 (1980).

2. *Cement Masons Union Local 337*, 190 NLRB 261 (1971): Pressure on customers of developer not to purchase homes de to alleged below standard work of subcontractors found to be unlawful

C. Merged Products

1. Where a primary employer's products are integrated or merged into a secondary employer's goods such that the primary employer's goods are no longer segregable or separately merchantable from the secondary's, a consumer boycott of the primary product becomes illegal secondary boycott. *Teamsters Local 327 (American Bread Co.),* 170 NLRB 91, enf'd, 411 F.2d 147 (6th Cir. 1969).

D. Ally Doctrine

1. Employers who either: 1)accept and perform work farmed out to them by a struck employer with which union has primary dispute or 2) have common ownership, control and interrelationship of operations with primary employer are so identified with the primary employer that they are subject to becoming lawfully embroiled in the primary dispute. *NLRB v. Business Machines & Office Appliance Mechanics Conf. Bd. (IUE) Local 459 (Royal Typewriter Co.),* 228 F.2d 553 (2nd Cir. 1955), cert. den. 351 U. S. 962 (1955).

E. Application in the Construction Industry

1. *Electrical Workers (IUE) Local 761 v. NLRB (General Elect. Co.),* 366 U.S. 667 (1961) (reserved gate doctrine—separate gate marked and set apart from other gates; the work done by those using the gate must be unrelated to normal operations of employer; and the work must be of a kind which, if done at a plant, would not necessitate curtailing normal operations

2. *Steelworkers v. NLRB (Carrier Corp.),* 376 U.S. 492 (1964): clarifying reserved gate doctrine to include lawful picketing aimed at neutrals whose work is related to primary employer's normal operations. The test is whether the work is of the type necessary to maintain the primary's operation; however, more than an "ultimate relationship" is required.

F. Handbilling

1. *DeBartolo Corp. v. NLRB,* 485 U.S. 568 (1988): Urging consumer boycott of neutral by handbills only not proscribed since it was non-confrontational, non-coercive conduct intended to educate the public about unsafe working conditions and exploitation of workers

G. Picketing

1. *District 1199, Nat'l Union of Hosp. and Health Care Employees (South Nassau Comm. Hosp.),* 256 NLRB 74 (1981): Union's patrolling of location was aimed at inducing those who approach to decide not to enter without inquiring into the ideas being disseminated. Although picketing usually involves patrolling with placards or signs, presence of traditional picket signs or patrolling is not prerequisite to characterize union's conduct as traditional picketing. However, one

condition of "picketing" is confrontational conduct between union member and employees, customers or suppliers.

H. Confrontational or coercive conduct other than picketing

1. Under *DeBartolo*, inquiry is to determine if union engaged in protected handbilling or proscribed "picketing." Is union using conduct rather than speech to induce a sympathetic response? A mixture of conduct and communication, which does not depend solely upon the persuasive force of the idea being conveyed, but rather on the conduct element, is often the deterrent to third persons about to enter a business establishment. *Ironworkers Local 386 (Warshawsky & Co.),* 325 NLRB 748 (1998). Confrontational conduct to induce or encourage employees to engage in work stoppages violate 8(b)(4)(i)(B) and to coerce neutral employers to cease doing business with the primary employer, such as confronting customers and employees as they enter a neutral's business, violate 8(b)(4)(ii)(B) if it is sufficiently coercive, whether the conduct includes picketing or not.

d. 8(b)(4)(C): It is unlawful for a union to use economic pressure to gain recognition when another union has already been certified

X. SECTION 8(b)(7)—ORGANIZATIONAL AND RECOGNITIONAL PICKETING

a. Only recognitional or organizational picketing prohibited

b. Includes threats to engage in such picketing

c. Unlawful only if picketing unaccompanied by 9(c) petition to be filed within 30 days

d. Confusion with area standards picketing

1. Evidence of recognitional versus informational goals

e. Construction Industry

1. Prior Rule: *Iron Workers Local 103 (Higdon Contracting Co.)*, 216 NLRB 45, *enf'd. denied*, 535 F.2d 87, *rev'd* , 434 U.S. 335 (1978)(union picketing to enforce 8(f) agreement must comply with 8(b)(7)(C).

2. Current Rule: *John Deklawa & Sons,* 282 NLRB 1375 (1987), *enf'd sub nom., Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3rd Cir. 1987), *cert. denied sub nom., Deklawa v. NLRB,* 488 U.S. 889 (1988)(Section 8(f) pre-hire agreements cannot be repudiated at will by employer but must be complied with during entire term, such that union recognitional picketing within time limit of 8(b)(7)(C) for 8(f) recognition is lawful)

f. Recognitional picketing by raiding union unlawful and subject to contract bar rules, including 8(f) agreements and including uncertified but voluntarily recognized unions so long as no QCR exists . Section 8(b)(7)(A).

XI. JURISDICTIONAL DISPUTES AND FEATHERBEDDING

a. Section 8(b)(4)(D) prohibits strikes, picketing, boycotts, threats or coercion with the objective of forcing or requiring any employer to assign particular work to employees in a particular union, trade, craft or class rather than to employees in another union, trade, craft or class. The classic

jurisdictional dispute occurs when two or more unions have CBAs with the same employer and each claims the particular work and engages in 8(b)(4) activity to get it.

b. Section 8(b)(4)(D) does not prohibit action taken for lawful purposes, such as area-standards picketing, recognitional picketing (within the limits of 8(b)(7)), work preservation informational picketing or handbilling, ULP protests, etc.

c. Section 8(b)(4)(D) does not apply to work being transferred out of bargaining unit to another employer and there is no other union at the same location

d. *NLRB v. Broadcast Engineers Local 1212 (Columbia Broadcasting System)*, 364 U.S. 573 (1961) held that there can be no jurisdictional dispute within 8(b)(4)(D) unless there are competing claims to the same work, stressing that the section protects a neutral employer from a dispute between competing groups claiming the same work, not a means to arbitrate a dispute between a single union and an employer. Agreements to jurisdiction between competing unions where employer simply assigns work to wrong unit employees is not jurisdictional dispute.

e. Claims to work by unrepresented employees can spark jurisdictional dispute.

f. Claims to work by union which represents none of the employer's employees can spark jurisdictional dispute

g. Section 8(b)(4)(D) Procedures:

1. File charge with the Board

2. Board promptly notifies all parties and begins immediate investigation

3. 10(k) hearing held within 10 days of notification, similar to R case hearing, but decision is made by Board, not Regional Director

4. Employer which is the object of the jurisdictional dispute is necessary party to 10(k) hearing. *NLRB v. Plasterers & Cement Masons Local 79 (Southwestern Constr. Co.)*, 404 U.S. 116 (1971).

5. Other resolutions are voluntary adjustment by the parties, or disclaimer by one of the disputes

6. Section 10(k) awards are not subject to direct judicial review. *ITT v. IBEW Local 134*, 419 U.S. 428 (1975)

7. *Machinists Lodge 1743 (J.A. Jones Constr.)*, 135 NLRB 1402 (1962) sets forth guidelines to determine jurisdictional disputes: 1) skills and work involved; 2) certification by NLRB; 3)company and industry practice; 4) agreements between unions and between employers and unions; 5) arbitration, joint boards or AFL-CIO awards in same or related cases; 6) assignment made by employer; and 7) efficient operation of employer's business. In *Typographical Union No. 2 (Philadelphia Inquirer)*, 142 NLRB 36 (1963), the Board noted two additional factors: 1) substitution of function; and 2) loss of jobs.

8. At conclusion of 10(k) hearing, Board issues "decision and determination of discipline." Compliance causes dismissal of charge.

h. Featherbedding: Section 8(b)(6)

1. Definition: Practices on the part of union to make work for members through limitation of production, amount of work to be performed or other make-work arrangements. Section 8(b)(6) makes it a ULP for union to cause or attempt to cause employer to pay or deliver any money or other thing of value, in the nature of an exaction, for services that have not been performed or are not to be performed. **Note similarity to Section 302.**

2. Does not apply to work actually performed, even if employer did not want it or did not need it. *American Newspaper Publishers' Ass'n v. NLRB*, 345 U.S. 100 (1053); *NLRB v. Gamble Enterprises*, 345 U.S. 117 (1953).

3. Featherbedding distinguished from work preservation: *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967): held that certain strikes may be proper exercise of union's interest in preserving work traditionally done by unit employees

XI. OBLIGATIONS FOLLOWING EXPIRATION OF CBA

a. Grievance Arbitration

CBC Indus., 311 NLRB 123 (1993): Employer not obligated to carry all grievances forward through arbitration under expired CBA; however, employer is not permitted simply to reject and refuse to utilize the entire grievance and arbitration process simply because CBA has expired

b. Multi-Employer CBA

CTS, Inc., 340 NLRB No. 99 (2003): union which notified employers in multi-employer bargaining group of its intent to negotiate CBAs individually cannot resurrect what it freely ended and force unwanted multi-employer CBA upon individual member of group which correctly believed that it was no longer bound by CBA upon expiration

C. Withdrawal of Recognition from Bargaining Representative

1. Overview

a. Newly certified union enjoys irrebuttable presumption of majority status for one year following certification (the certification year)

b. Newly recognized unions enjoy irrebuttable presumption of majority status for reasonable period of time. *Dana Corp.,supra, at § VI(12).*

c. During the life of a CBA, majority status cannot be challenged up to three years into the contract term since the union enjoys conclusive presumption of majority status during that period. *See Contract Bar Rules, supra.*

2. Withdrawal of Recognition in Absence of ULPs

a. In *Allentown Mack Sales & Service v. NLRB,* 522 U.S. 359 (1998), the Court identified confusion over the NLRB's terminology and held that if the Board continues with "good faith doubt" standard then that must be interpreted to permit the employer to act where it has "reasonable uncertainty" as to union's continued majority status, rejecting Board's argument that required standard is good faith "disbelief" of union's continued majority support.

b. *Levitz Furniture Co.*, 333 NLRB 717 (2001): Board held there is not unitary standard for withdrawal of recognition, RM elections or employee polling. Standard became more stringent as to withdrawal of recognition so that bargaining relationships are given opportunity to succeed without continual baseless challenges so that employee free choice may be protected., Specifically, Board held that employers should not be allowed to withdraw recognition merely because it harbors uncertainty or even disbelief concerning union's majority status. Therefore, employer may unilaterally recognition from incumbent union only where it can prove that the union has actually lost support of majority of unit employees.

1. Evidence to demonstrate actual loss:

A. Anti-union petitions signed and dated by employees

B. First-hand statements by employees as to their opposition to the incumbent union remaining as their representative

Note: Employer must provide business records or witnesses to confirm. If union has rebuttal showing of majority support as of time of withdrawal or recognition, the employer violates the Act even if it didn't have direct knowledge of that evidence until later. However, if a union provides evidence that it enjoyed majority support post withdrawal is not considered unlawful

c. *Rodgers & McDonald*, 342 NLRB No. 63 (2004): Upon remand from the D.C. Circuit, Board concluded that evidence of decline in union membership and dues authorization checkoffs may suggest erosion of support for union and be probative of employer's good-faith reasonable doubt as to continued majority status

3. Withdrawal of Recognition With ULPs

a. *Lee Lumber and Building Material Corp.*, 334 NLRB 399 (2001): Incumbent status cannot be challenged in atmosphere of unremedied ULPs. Presumption is employer's conduct caused disaffection, which can only be rebutted with evidence that the disaffection came after the employer's resumption of recognition of and bargaining with union

1. Evidence of Taint

A. Unremedied ULPs

B. Provoking or coercing employees into signing disaffection petition (UD)

C. Misinforming employees as to what they are signing

D. Forging employee signatures

E. Employee disavowal of disaffection statements

b. *Wyndham Palmas del Mar Resort and Villas n/k/a BPH & Co., Inc.*, 334 NLRB 514 (2001), *enf'd. denied*, 333 F.3d 213 (D.C. Cir. 2003): NLRB found petition tainted since employee signatures were obtained early in the 60-day posting period even through the notice, which was remedying employer assistance and solicitation of employees to decertify the union, was posted pursuant to informal settlement agreement with non-admissions clause, rather than pursuant to Board decision finding ULPs. Here, the remedy required an insulated period for bargaining after an unlawful withdrawal of recognition in an atmosphere of unremedied ULPs for reasonable amount of time. Policy consideration

is that successor employer cannot lawfully withdraw recognition based on evidence of actual loss of majority support for incumbent union if its own conduct contributed to the loss.

1. Insulated period must be for reasonable period of time, which has been determined as no less than 6 months (reasonable time for renewal of bargaining) and no more than 1 year (certification year for newly certified union) before incumbent's majority can be challenged

2. Evidence required for withdrawal of recognition

A. Whether CBA is initial or renewal

B. Complexity of remaining bargaining issues

C. Time elapsed since commencement of bargaining

D. Number of bargaining sessions

E. Progress made in bargaining sessions

F. How close parties are to agreement

G. Whether impasse has been reached

c. *Penn Tank Lines,* 336 NLRB 1066 (2001): Board will infer that ULPs caused disaffection with union based on *Master Slack* factors (271 NLRB 78 (1984)

1. Lapse of time between ULP and withdrawal of recognition

2. Nature of violation and lasting effect

3. Tendency of ULPs to cause disaffection

4. Effect of ULPs on morale, organizational activities, and union membership

4. Staleness of Signatures

a. *Hospital Metropolitano,* 334 NLRB 555 (2001): Employee signatures on withdrawal petition which were 6-7 months old are stale and not reliable indicator of employees' sentiments at the time of withdrawal. Any evidence of union support between time of signatures and withdrawal would bolster union's claim of continued majority support

5. Newly Certified Unions

a. *Saginaw Control and Engineering, Inc.*, 339 NLRB No. 76 (2003): Petition signed during certification year is not allowed to be used as a basis for withdrawing recognition since there is irrebuttable presumption of majority status

b. *Chelsea Industries*, 331 NLRB 1648 (2000), *enf'd*, 285 F.3d 1073 (D.C Cir. 2002): Employer cannot withdraw recognition after certification year based on petition signed during certification year, but a showing of interest collected during certification year can be used to support RM petition, so long as the test of majority status occurs after the certification year.

6. RM Petition Standard (Employer filed for unit clarification)

a. Less stringent standard of reasonable uncertainty; *i.e.*, still allow employees to obtain RM election by demonstrating good faith reasonable uncertainty as to union' majority status, rather than disbelief

1. Effectuates Board policy that secret ballot election is best indicator of support rather than unilateral withdrawal of recognition

2. No 8(a)(2) violation to recognize union while RM petition is pending, even if employer has actual evidence of loss of majority support, since employer assumes risk that the withdrawal may not be lawful, based on anything but the results of the RM election

3. Any CBA reached during pendency of RM petition becomes null and void if, based on the election, there is lack of majority support for union

4. Even if employer has direct evidence of loss of majority support among its employees, if union can rebut that evidence and show that it retained majority support and the employer refuses to consider its evidence, employer's withdrawal of recognition at expiration of CBA is unlawful

Direct evidence of loss of majority status:

- Anti-union petitions signed by employees
- Firsthand statements by employees as to opposition to or dissatisfaction with incumbent union
- Unverified statements of employees regarding other employees' antiunion sentiments

b. *Henry Bierce Co.*, 328 NLRB 646 (1999): Newly hired employees' failure join union and authorize dues checkoff or the union's failure to file grievances, appoint a steward or submit a tentative agreement for ratification held insufficient to show good faith uncertainty

c. *Sceptor Ingot Castings, Inc.*, 331 NLRB 1509 (2000): Employees' statements that they "felt" that the union had no standing and that other employees didn't want the union held too vague to constitute objective evidence because it was speculative

7. Polling Standard

a. *Alcon Fabricators*, 334 NLRB 604 (2001): Five of 15 employees provided direct evidence of express disaffection, with circumstantial evidence of three others, held sufficient for reasonable uncertainty of lack of majority support

b. *Transpersonnel, Inc.*, 336 NLRB 484 (2001): Evidence that 40 % of unit employees were disaffected with union, without more, held insufficient to establish reasonable uncertainty

c. *Heritage Container*, 334 NLRB 455 (2001): Employer held to have unlawfully conducted poll without objectively based uncertainty of majority status (35 % of signatures)

8. Contributions to Union Funds

a. *Cibao Meat Prods. v. NLRB*, Case No. 07-1192-ag (2nd Cir. 2008): Employer committed ULP by unilaterally ceasing contributions to union employee benefits funds following expiration of CBA without impasse

b. *Kingsbridge Heights Rehabilitation & Care Ctr.*, 353 NLRB No. 69 (2008)(employer violates Section 8(a)(1) and (5) in failing to make contributions to union funds)

XII. REMEDIES

a. NLRA is remedial, not punitive [currently, pre-EFCA]

b. Reinstatement and Backpay

1. *Hoffman Plastic Compounds v. NLRB*, 122 S.Ct. 1275 (2002)(after passage of IRCA, undocumented aliens are not eligible for backpay, although they can vote in union election and be counted in *Gissel* bargaining orders).

2. Current Guidelines for Backpay

A. No backpay sought if a discriminate was not legally available to work in the U.S. during the backpay period, regardless of employer knowledge

B. If employer proves that it would not have hired employee had it known of the undocumented status of employee, reinstatement will not be sought

C. General counsel continues to object at merit stage of litigation to employer's questions about undocumented status in order to escape ULP liability

D. No evidence of illegal alien status allowed in R case record, but brief offer of proof will be permitted

3. Calculation of Backpay

A. *St. George Warehouse*, 351 NLRB No. 42 (2007), *aff'd* 353 NLRB No. 50 (2008): Board modified backpay procedures by putting burden on GC to produce evidence concerning discriminatees' efforts to find interim employment following unlawful discharge, since GC burden of proving reasonable amount of backpay. Employer may seek to show that employer did not reasonably mitigate. Under prior Board law, employer bore burden of production and persuasion with respect to mitigation. In *St. George Warehouse*, Board affirmed principle that employer bears ultimate burden of persuasion on mitigation, but once employer demonstrates availability of comparable jobs in geographical area, burden of production shifts to GC to demonstrate by competent evidence that discriminatees took reasonable steps to seek those jobs

4. Remedies in Non-Discharge Cases:

A. Backpay where applicable *i.e.*, discriminatory demotion

B. Notice readings by high level employer representative, especially where discriminatee won't be returning

C. Provision of employees' names and addresses to union, upon request, for reasonable period of time when ULPs shown to have effectively extinguished union support

D. Access to company bulletin boards by union and union meetings at employer's site—generally reserved for extreme cases with recidivist employer

5. Entitlement to reinstatement and backpay tolling

A. *Campbell Elect.*, 340 NLRB No. 93 (2003): Discharged employee who had specific and definite plans to resign before his unlawful termination, not entitled to reinstatement and backpay since it was tolled as of date of planned departure. However, tentative plans or plans tainted by ULPs will not toll backpay

B. *IUOE Local 68 (Ogden Allied Maintenance Corp.),* 326 NLRB 1 (1998): No reduction in backpay due to tolling if an employer's offer to reinstate would not put an individual in the position that he/she would have been entitled to based on seniority

6. Posting of Notices

7. Extraordinary Remedies

A. Available under Board's discretion under Section 10©

B. Reserved for ULPs which are :1) serious and extensive; 2) Pervasive; 3) By high-ranking official; Have long-term coercive effects.

C. *J.P. Stevens & Co.*, 244 NLRB 407 (1979), *enf'd and remanded,* 668 F.2d 767 (4th Cir. 1982 (in case of recidivist ULPs which were severe and pervasive, extraordinary remedies such as reimbursement of NLRB attorneys' fees and union's organizing expenses upheld). This case was subsequently remanded by the Supreme Court in light of its decision in *Summit Valley Indus. V. Carpenters' Local 112*, 456 U.S. 717 (1982)(applying American Rule in Section 303 case).

D. *Gissel* Bargaining Orders

a. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) applies where employer's ULPs are so pervasive and outrageous (extensiveness test) or less pervasive but are severe and likely to recur (likelihood of repetition)

b. Purpose of *Gissel* bargaining order is to counteract effect of severe and pervasive ULPs which could be assumed to have so destroyed the laboratory conditions for holding election that election would not reflect true sentiment of employees

c. *Desert Aggregates*, 340 NLRB No. 38 (2003): Despite "hallmark" violations of long lasting impact, fair election is not impossible. Therefore, *Gissel* bargaining order held not appropriate when conduct included promise of remedying employee grievances and the layoffs of two main union supporters, particularly where there was a history of layoffs and a decline in business

d. *Aqua Cool*, 332 NLRB 95 (2000): *Gissel* order is extraordinary remedy and preferred remedy is traditional one of holding election after atmosphere is sufficiently cleansed of effects of ULPs

E. Injunctive Relief

a. Section 10(j): utilized in cases of continual ULPs which pose danger of creating industrial unrest such that ULPs can be corrected before substantial injury has been

done and to restore *status quo ante* pending ultimate resolution of underlying dispute in order to prevent wrongdoer from accomplishing its unlawful objectives of denying their Section 7 rights and to prevent significant harm to Board's processes by loss of public confidence

b. *Wells v. Brown & Root, Inc.*, 65 F.Supp.2d 1264, 1277 (S.D. Ala. 1999): District courts, when considering 10(j) injunction, do not look to harm of individual employees, but rather consider overall harm to public interest, to the collective bargaining process or to other protected activities if outcome must await Board's order

c. *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367 (11th Cir4. 1992): Eleventh Circuit held that district court could grant 10(j) injunction where there is reasonable cause to believe that the alleged ULPs have occurred, considering evidence in light most favorable to Board and when it is just and proper within circumstances of the case

d. Section 10(l) provides for injunctive relief in cases of union violations of Sections 8(b)(4)(A),(B) or (C), 8(b)(7) or 8(e)

F. EFCA Additional Remedies

a. Applicable to ULPs committed by **employers** during any period while employees are in organizing stage or in negotiations for initial CBA

b. Makes 10(j) injunctions mandatory for 8(a)(3)s and 8(a)(1)s if they significantly interfere with employee rights, as are 10(l) injunctions

c. Treble backpay to 8(a)(3)s

d. Civil penalties of up to $20,000 per violation for employers found willfully or repeatedly to have violated employees' Section 7 rights

XIII. COURT LAWSUITS AND ARBITRATION

a. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983): Board may find prosecution of ongoing lawsuit unlawful if it lacks reasonable basis in fact or law and was brought with retaliatory motive. Further, if a concluded lawsuit resulted in adverse judgment to a plaintiff or if the suit was withdrawn or shown to be without merit, the Board could proceed to find a violation if the suit was filed with retaliatory motive. In determining motive of retaliation due to the exercise of Section 7 rights, the Board could take into account that the suit lacked merit.

1. *Beverly Health and Rehabilitation Svc.*, 331 NLRB 960 (2000): Following *Bill Johnson's*, Board adopted policy of "wait and see" until conclusion of lawsuit and hold ULP litigation in abeyance since to do otherwise would deprive plaintiff of a first amendment right to have a state law question decided by a state court

b. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002): Employer filed lawsuit against union in state court alleging that union deliberately delayed project with picketing, lobbying and other conduct. Board found the lawsuit was retaliatory based on following factors: 1) suit was directed at conduct protected by Section 7 and tended to discourage similar activity; 2) suit attempted to impose liability on unions not engaged in conduct, and 3) certain claims had utter absence of any liability.

Supreme Court held Board's standards to be overly broad. Even though the suit attacked activity ultimately found to be protected, plaintiff enjoys first amendment protection if it reasonably believed that

the conduct was unprotected and illegal. The Court did not address retaliatory motive analysis to baseless suits, so Board did not read decision to alter its power to enjoin baseless lawsuit, nor to affect *Bill Johnson's* holding in footnote 5 as to pre-empted lawsuits

1. *Can Am Plumbing, Inc.*, 335 NLRB 1217 (2002): To file and maintain a pre-empted lawsuit is a violation of 8(a)(1). Hence, Court's baseless and retaliation standard is not applicable to footnote 5 in *Bill Johnson's* as to pre-empted lawsuits. Board may enjoin state suits beyond the state's jurisdiction because of federal law pre-emption. Suit cannot be used to preclude cooperation in an investigation of potential violations of concerted protected activities.

c. *Pyett v. Pennsylvania Building Co.*, 498 F.3d 88 (2nd Cir. 2007), *cert. granted sub nom., 14 Penn Plaza v. Pyett*, 128 S.Ct. 1223 (2008) : Held that night porters/ light duty cleaners covered under CBA with mandatory arbitration clause explicitly covering discrimination claims were not bound to arbitrate such claims under *Gardner-Denver* rather than bound to arbitrate under *Gilmer* as court found distinction between individual employment contracts with mandatory arbitration clauses and CBAs with mandatory arbitration clause, noting that former followed *Gilmer/ Circuit City* line of cases and latter followed *Gardner-Denver* line of cases

d. *Collyer Wire*—pre-arbitral deferral to arbitration by NLRB

e. *Dubo Mfg. Co.*—mid-arbitral deferral to arbitration by NLRB

f. *Spielberg Mfg. Co.*—post-arbitral deferral to arbitration by NLRB

g. Section 303

Calendar No. 66

110TH CONGRESS
1ST SESSION

H. R. 800

IN THE SENATE OF THE UNITED STATES

MARCH 1, 2007
Received and read the first time

MARCH 2, 2007
Read the second time and placed on the calendar

AN ACT

To amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Employee Free Choice Act of 2007''.

SEC. 2. STREAMLINING UNION CERTIFICATION.

(a) IN GENERAL.—Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) is amended by adding at the end the following:

''(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

''(7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining representative in the manner described in paragraph (6). Such guidelines and procedures shall include—

''(A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and

''(B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.''.

(b) CONFORMING AMENDMENTS.—

(1) NATIONAL LABOR RELATIONS BOARD.—Section 3(b) of the National Labor Relations Act (29 U.S.C. 153(b)) is amended, in the second sentence—

(A) by striking ''and to'' and inserting ''to''; and

(B) by striking ''and certify the results thereof,'' and inserting '', and to issue certifications as provided for in that section,''.

(2) UNFAIR LABOR PRACTICES.—Section 8(b) of the National Labor Relations Act (29 U.S.C. 158(b)) is amended—

(A) in paragraph (7)(B) by striking '', or'' and inserting ''or a petition has been filed under section 9(c)(6), or''; and

(B) in paragraph (7)(C) by striking ''when such a petition has been filed'' and inserting ''when such a petition other than a petition under section 9(c)(6) has been filed''.

SEC. 3. FACILITATING INITIAL COLLECTIVE BARGAINING AGREEMENTS.

Section 8 of the National Labor Relations Act (29 U.S.C. 158) is amended by adding at the end the following:

''(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows:

''(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

''(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service

promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

''(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.''.

SEC. 4. STRENGTHENING ENFORCEMENT.

(a) INJUNCTIONS AGAINST UNFAIR LABOR PRACTICES DURING ORGANIZING DRIVES.—

(1) IN GENERAL.—Section 10(l) of the National Labor Relations Act (29 U.S.C. 160(l)) is amended—

(A) in the second sentence, by striking ''If, after such'' and inserting the following:

''(2) If, after such''; and

(B) by striking the first sentence and inserting the following:

''(1) Whenever it is charged—

''(A) that any employer—

''(i) discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of section 8;

''(ii) threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of section 8; or

''(iii) engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7;

while employees of that employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative; or

''(B) that any person has engaged in an unfair labor practice within the meaning of subparagraph (A), (B) or (C) of section 8(b)(4), section 8(e), or section 8(b)(7);

the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.''.

(2) CONFORMING AMENDMENT.—Section 10(m) of the National Labor Relations Act (29 U.S.C. 160(m)) is amended by inserting ''under circumstances not subject to section 10(l)'' after ''section 8''.

(b) REMEDIES FOR VIOLATIONS.—

(1) BACKPAY.—Section 10(c) of the National Labor Relations Act (29 U.S.C. 160(c)) is amended by striking ''*And provided further,*'' and inserting ''*Provided further,* That if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages: *Provided further,*''.

(2) CIVIL PENALTIES.—Section 12 of the National Labor Relations Act (29 U.S.C. 162) is amended—

(A) by striking ''Any'' and inserting ''(a) Any''; and

(B) by adding at the end the following:

''(b) Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed $20,000 for each violation. In determining the amount of any penalty under this section, the Board shall consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on the public interest.''.

Passed the House of Representatives March 1, 2007.

Attest: LORRAINE C. MILLER,

Clerk.

Calendar No. 66

110TH CONGRESS
1ST SESSION

H. R. 800

AN ACT

To amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.

MARCH 2, 2007

Read the second time and placed on the calendar

5.62

I

110TH CONGRESS
1ST SESSION

H. R. 1644

To amend the National Labor Relations Act to clarify the definition of ''supervisor'' for purposes of such Act.

IN THE HOUSE OF REPRESENTATIVES

MARCH 22, 2007

Mr. ANDREWS (for himself, Ms. DELAURO, Mr. ELLISON, Mr. ENGEL, Mr. HOLT, Mr. KILDEE, Mrs. MALONEY of New York, Ms. MATSUI, Mr. GEORGE MILLER of California, Ms. MOORE of Wisconsin, Ms. SCHAKOWSKY, Mr. STARK, Mr. WAXMAN, and Mr. YOUNG of Alaska) introduced the following bill; which was referred to the Committee on Education and Labor

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A BILL

To amend the National Labor Relations Act to clarify the definition of ''supervisor'' for purposes of such Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act''.

SEC. 2. DEFINITION OF SUPERVISOR.

Section 2(11) of the National Labor Relations Act (29 U.S.C. 152(11)) is amended—

(1) by inserting ''and for a majority of the individual's worktime'' after ''interest of the employer'';

(2) by striking ''assign,''; and

(3) by striking ''or responsibility to direct them,''.

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Public Employee Relations Act

By

Deborah C. Brown, Gulfport

2009 LABOR AND EMPLOYMENT CERTIFICATION REVIEW

THE PUBLIC EMPLOYEES RELATIONS ACT

By Deborah C. Brown[1]

I. THE REPRESENTATION PROCESS UNDER PERA

A. Introduction

Until 1974, the State of Florida did not have any statutory law requiring collective bargaining by public employers. In that year, the Florida Legislature enacted the Public Employees Relations Act, Chapter 447, Part II, Florida Statutes, commonly known as PERA. This law established a comprehensive scheme for public employee collective bargaining. PERA was, however, passed not on the Legislature's initiative but because the Florida Supreme Court had threatened that if the Legislature did not act, it (the Court) would. Several years before, in a 1969 case arising in Dade County, the high court had determined that public employees had a state constitutional right to bargain collectively. *See* Dade County Classroom Teachers Association vs. The Legislature, 269 So.2d 684 (Fla. 1972). To enforce that right, several groups asked the court to establish a committee made up of persons experienced in labor law to suggest a law that would give life to the constitutional guarantee, or to order the Legislature to pass such a law. The court refused but said it would consider such action if the Legislature did not act on its own. The Legislature, finally convinced, then enacted PERA.

The Florida law is codified at Chapter 447, Part II, Florida Statutes, and consists of a number of separate sections. Although not delineated as such, the law may be viewed as consisting of three major parts. These are: (1) those sections relating to the establishment of the Public Employees Relations Commission, setting forth its powers and duties and stating generally the rights of public employers and employees; (2) those sections dealing with employee organizations, the election of such organizations as bargaining representatives, collective bargaining, and impasse resolution; and, (3) those sections dealing with enforcement of the law's protections, obligations, and rights through the unfair labor practice procedure. Additionally, a small number of miscellaneous provisions relating to public records and meetings and judicial enforcement are included, each of which is addressed in individual sections. The outline of the law is essentially chronological. That is, the earliest sections deal with policy and the establishment of a Commission and then the law proceeds to establishment of an employee organization, its election, negotiations, and so on to the end of the process.

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B. General Provisions

The law gives the Commission all the power that the Commission deems necessary to carry out its duties. Specifically, the law empowers the Commission to issue subpoenas and hold hearings, as well as to police the behavior of persons who appear before it. *See* §447.207, Fla. Stat. The Commission is empowered, within the limitations of Chapter 120, Florida Statutes, to adopt rules and regulations and the Commission has done so. The rules that are unique to the Commission are contained in the Florida Administrative Code, at Chapter 60CC.[2] The Commission is also governed generally by the provisions of the Administrative Procedure Act, Chapter 120, Florida Statutes, and thus also uses the Model Rules applicable to agencies generally under Chapter 28, Fla. Admin. Code.[3]

PERA does not use the term "union," instead referring to those organizations which represent, or seek to represent, public employees as "employee organizations." *See* §447.203(11), Fla. Stat. However, the latter term may be used interchangeably with the term union, and it neither adds to nor detracts from the word's meaning.

The law also provides specific definitions for such terms as "public employer," "public employee," and attempts to define with precision the terms "managerial employee," "confidential employee," and "professional employee." *See* §447.203, *et seq*., Fla. Stat. These definitions play an important role in the analysis of whether an employee who works for a public entity in some capacity has the ability to organize an employee organization for representation and collective bargaining purposes.

Generally, these definitional terms have remained relatively stable, but subtle changes do occur. For example, effective January 7, 2003, the definitional exclusion as a "public employee" changed for certain student teachers. *See* Laws of Florida, c. 2002-387, § 1006, *eff*. Jan. 7, 2003. Section 447.203(3)(i), Fla. Stat., had provided that the term public employee did not include: "Those persons enrolled as graduate students in the State University System who are employed as graduate assistants, graduate teaching assistants, graduate teaching associates, graduate research assistants, or graduate research associates and those persons enrolled as undergraduate students in the State University System who perform part-time work for the State University System." However, in 1977, the Florida Court of Appeals affirmed the Florida Public Employees Relations Commission ("PERC") certification of graduate assistant units. *See* Board of Regents v. PERC, 368 So.2d 641, 642 (Fla. 1st DCA 1979), *cert. denied*, 379 So. 2d 202 (Fla. 1979). PERC found that graduate teaching and research assistants were employees within the meaning of the Florida statute, §447.203(3)(i), which grants most public employees the right to bargain collectively. *See also*, United Faculty of Florida, Local 1847 v. Board of Regents, State University System, 423 So.2d 429 (Fla. 1st DCA 1982)(Clarifying the statutory exclusion of graduate assistants from definition of public employee to be those who perform part time work). In January 2003, this definition changed to exclude only "Those persons enrolled as undergraduate students in a state university who perform

[2] Available at https://www.flrules.org/gateway/Division.asp?DivID=502

[3] Available at http://doah.state.fl.us/internet/uniform.cfm

part-time work for the state university."

Of more recent interest is the aftermath of a series of decisions expanding the scope of bargaining rights to appointees of constitutional officers, a group previously excluded from the definition of "public employee" under PERA. It began with Service Employees International Union v. Public Employee Relations Commission, 752 So.2d 569 (Fla. 2000), a case in which the Florida Supreme Court was asked to answer the following certified question: "Are deputy clerks, unlike deputy sheriffs, public employees within the contemplation of section 447.203(3), Florida Statutes?" In answering in the affirmative, the Florida Supreme Court brought deputy clerks within the definition of "public employee", casting doubt of the legitimacy of Murphy v. Mack, 358 So. 2d 822 (Fla. 1978), which was the case that excluded deputy sheriffs from bargaining rights as well.[4] Murphy v. Mack was subsequently overruled by Coastal Florida Police Benevolent Association, Inc. v. Williams, 838 So.2d 543 (Fla. 2003), thus sparking a flurry of representational activity among deputy sheriffs throughout Florida.

This set the stage for the current dispute, namely, who is the legislative body for impasse purposes when the employees work for an independent constitutional officer. One of several cases that as of this writing are working their way through the Commission will likely shed light on this issue is Florida State Lodge, Fraternal Order of Police, Inc. v. Sheriff of Clay County v. Clay County Board of County Commissioners, 34 FPER ¶224 2008 (Supp. HORO after remand issued 12/24/08). In Clay County, the Commission remanded an unfair labor practice case filed by the FOP against the Sheriff, alleging a violation by the Sheriff's refusal to submit disputed impasse items to the Clay County Board of County Commissioners for impasse resolution. In its remand, the Commission established a three-part test for determining the appropriate legislative body under section 447.203(10), Florida Statutes. Under this test, the Commission requires an examination of whether the governing body of an instrumentality or unit of government has (1) the authority to appropriate funds, (2) establish policy governing the terms and conditions of employment, and (3) which, as the case may be, is the appropriate legislative body fo the bargaining unit. Balancing these factors, the hearing officer in Clay County has recommended that the County Commission, not the Sheriff, be deemed the legislative body for impasse resolution purposes. More to come as the Commission tackles this important issue.

C. Union Registration Obligation

Any employee organization which wishes to become a certified bargaining agent for public employees must register with the Public Employees Relations Commission (PERC) prior to requesting recognition by a public employer. *See* §447.305, Fla. Stat. Until such time as an employee organization is properly registered, it does not have the right even to attempt to represent employees, or even to modify an existing unit. *See* National Association of Government Employees v. City of Palm Bay, 28 FPER ¶ 33240 (2002). The Commission has held that absent such registration, an employee organization may not take part in an election to determine representative

[4] For more detail on these developments, *see* Leonard J. Dietzen, III, *Deputy Court clerks can now collectively bargain: who's next?*, Fla. Bar Journal at p.75 (June 2000)

status, nor may it request recognition from the public employer, nor may it take part in any other formal proceedings set forth and created by the statute. This includes participation in proceedings to amend certification. *See* In re Petition of Plantation Lodge 42, Fraternal Order of Police to Amend Certification No. 544, 34 FPER ¶122 (2008).

The statute also establishes what must be included in the sworn application and requires a current annual financial statement of the organization and a copy of the current constitution and bylaws of the state and national groups with which the employee organization is affiliated or associated. *See* § 447.305(1)(a)-(h), Fla. Stat. Additionally, a registration must be renewed annually by filing an application for renewal under oath with PERC and the application must reflect any changes in the information provided to the Commission in conjunction with the employee organization's preceding application for registration or previous renewal. § 447.305(2), Fla. Stat. In addition to its registration obligation, the union must also make available upon request union income and expense documents. *See* Clarke v. Transport Union Workers of America, Local 291, 30 FPER ¶ 63 (2004), *affd.*, 889 So. 2d 78 (Fla. 3rd DCA 2004).

One of the central issues in litigating registration issues is typically whether the petition should be allowed to proceed at all when material deficiencies are present. The purpose of the registration is to insure that potential voters have information about an employee organization in order to make an informed choice about union representation. *See* Hillsborough County PBA d/b/a West Central Florida PBA v. City of Zephyrhills, 24 FPER ¶ 29068 (1998) and discussion contained therein. Moreover, as a general rule, where a union registration application contains material financial inconsistencies or is otherwise incomplete, PERC will not ordinarily accept the application for registration. *See* In Re Application For Registration of Dade Teachers Association, 10 FPER ¶ 15144 (PERC 1984). Some of the more commonly litigated areas concerning registration are issues such as:

- the failure to disclose a parent or affiliate under Section 447.305(1)(a), Fla. Stat. The term "affiliated" means "a" organization that has issued a charter to, or whose constitution and by-laws are binding upon, the applicant." IUPA v. State of Florida, 26 FPER ¶ 31078 (2000);
- the failure to file a copy of that parent or affiliate organization's Constitution and By-Laws as required by Section 447.305(1)(h), Fla. Stat.[5];
- the failure to disclose under Section 447.305(1)(c), "[t]he amount of the initiation fee and of the monthly dues which members must pay"; and
- the failure to file current financial statements as required under Section 447.305(1)(d), Fla. Stat.[6]

[5] Note that the statute does state that in lieu of this provision, and upon adoption of a rule by the commission, a state or national affiliate or parent organization of any registering labor organization may annually submit a copy of its current Constitution and By-Laws. PERC presently has no such rule. The former Rule 38D-16.003(6)(a) which allowed this practice has since been repealed, thus leaving only the express statutory requirement.

[6] Instructive in this regard is Marion Essential Support Personnel vs. Marion County School Board, 15 FPER ¶ 20089 (1989), in which the MESP's registration was found to be defective because the financial statement it filed showed it as newly organized and revealed only its financial status as of August 23, 1988. In that case, the

Also of interest is the outcome in the event the registration is found deficient. More often than not, a union will argue it should be allowed the opportunity to amend, thus eliminating the need for dismissal. In support, the union will likely cite to International Union of Police Associations, AFL-CIO v. State of Florida, Department of Management Services v. Florida Police Benevolent Association, Inc., 26 FPER ¶31078 (2000), in which the Commission stated:

> The Commission's policy is to allow a petitioner under certain circumstances an opportunity to amend its registration prior to an election when a material deficiency is present. This procedure is permitted where the cure can be effected sufficiently in advance of the election to provide bargaining unit employees with a reasonable opportunity to inquire about the registration modifications. *See* Sanitation Employees Association, Inc. v. Metropolitan Dade County, 526 So.2d 128 (Fla. 3rd DCA 1988), *rev. dismissed*, 538 So.2d 1255 (1988); cf. Florida Public Employees Council 79, AFSCME v. City of Pensacola, 550 So.2d 132 (Fla. 1st DCA 1989); Hillsborough County Board of County Commissioners v. PERC, 447 So.2d 1371 (Fla. 1st DCA 1984) (dismissal is the appropriate remedy for a material registration deficiency).

Employers often dispute this view, arguing that dismissal in fact is appropriate, and that the Commission's allowance of an amendment is contrary to the express statutory language.

By way of background, the registration requirement under §447.305 has been the subject of some litigation that has proceeded as far as the District Court of Appeal. One of the first reported opinions was Bay County Board of County Commissioners v. Florida Public Employees Relations Commission, 365 So.2d 767 (Fla. 1st DCA 1978), in which an election certifying the union as the exclusive bargaining agent was set aside where the union had failed to file a current financial statement as prescribed by statute. In that case and in the context of ordering a second election after Union misconduct, the County had raised the issue by a motion to dismiss on the day PERC ordered the election. PERC did not act on the motion, but held the election anyway. Factually, the Teamsters had been properly registered but the registration lapsed. PERC denied both the County's election objections and its motion to dismiss on the registration issue, but denied the Teamsters certification until it was properly registered. In setting aside the election and reversing PERC, the First District held that Section 447.305, as then written[7], revealed that it "was obvious the legislature

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hearing officer explained that employee organizations registering with the Commission are required to submit a "current annual financial report," and that "as the term implies, such a document should cover any period of activity up to one year prior to the registration application." Id. at p. 207. *See also*, In Re Application for Renewal of Registration of Pembroke Pines Employees Association, 12 FPER ¶ 17207 at p. 468. (1986)(Renewal requires a detailed financial statement from the preceding fiscal year, thus 1984 financial statement was unacceptable where over one year passed from initial filing and deficiencies were not corrected as of 1986; financial statement at that point was no longer current); In Re Broward County Professional Firefighters, Local 2738, IAFF, 12 FPER ¶ 17343 (1986)(Stating requirement that financial report must be for most current fiscal year).

intended the information required of employee organizations under the statute to be available to interested parties during and preceding the election." *Id.* at 769. Finally, in rejecting PERC's position, the Court went on to explain it disagreed with PERC's suggestion "that it owes a duty only to employees under its jurisdiction." *Id.* To the contrary, the Court explained:

> We observe that just as a prosecuting attorney has the duty and obligation of accomplishing fairness to the citizens he prosecutes as well as to those citizens whose rights he vindicates, so does PERC have the obligation in its functions and orders of being fair not only to employees and employee organizations, but also to the public employer. The public employer, as a public entity, represents the citizens and tax payers of Florida. Their rights are worthy of protection as well.

Id. at 769-770.

The next District Court of Appeal case addressing the registration requirement was North Brevard County Hospital District, Inc. v. Florida PERC, 392 So.2d 556 (Fla. 1st DCA 1980), in which the District Court held that PERC erred in not dismissing the Laborers' petition where the Union, although initially properly registered, allowed its registration to lapse while the petition was pending. The Court held PERC had failed to properly enforce the statutory requirements for registration, and that the Commission should have been dismissed the petition with leave to re-file once the statutory requirements were met. In North Brevard, the Union was not properly registered at the time of the actual hearings conducted. Of great interest in this case was the Court's statement that "Every employee organization seeking recognition must, by the terms of the statute and rules, be prepared to submit full credentials, including financial report, at the time it files its petition and to maintain that registration in a current status throughout the proceedings for recognition." *Id.* at 561.[8]

The Fifth District then adopted the North Brevard rationale in City of Ocoee v. Central Florida Professional Firefighters Association, Local 2 057, 389 So.2d 296 (Fla. 5th DCA 1980), and also held that PERC erred in denying the City's election objections based on the deficient

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[7]It has been amended several times. In 1979, it was re-written to substantially the same form as it presently appears. *See* s. 2, ch. 79-89, Laws of Florida. In 1983, it was amended to add "Employment, and Training" in the division name under subsection (4). *See* s. 34, ch. 83-174, Laws of Florida. In 1995, it was amended to substitute a reference to the Division of Jobs and Benefits for a reference to Division of Labor, Employment and Training. *See* s. 24, ch. 95-345, Laws of Florida. In 2000, it was amended to delete the reference to "Division of Jobs and Benefits of". See s. 134, ch. 2000-165, Laws of Florida. Finally, it was last amended in 2002 to substitute "Business and Professional Regulation" for "Labor and Employment Security". *See* s. 60, ch. 2002-194, Laws of Florida.

[8]The Court distinguished Laborers International Union v. PERC, 336 So. 2d 450 (Fla. 1st DCA 1976) on the basis that that case involved an intervener union, and the Court held that it was improper for the intervener to be ejected without allowing a reasonable time to comply so they could participate in the election. In Laborers, the Court thus drew a distinction between an initiating party who is in control of the proceedings and an intervener who at that time had a very short window of intervention, and who in fact was properly registered by the time of the first PERC meeting to consider their status.

registration. In so holding, the court relied in part on the previously available injunctive relief[9] to enforce registration requirements. As explained in City of Ocoee, the Court stated that "[t]o construe the 1977 statute to allow a non-complying union to petition for an election and then proceed to satisfy the registration requirements would be in direct conflict with the cardinal rule of statutory construction that where the language of a statute is so plain and unambiguous as to fix the legislative intent and leave no room for construction, admitting of one plain meaning, courts may not depart from the plain language employed by the legislature." *Id*. at 300 (additional citations omitted).

Although the statute was thereafter amended in 1979, the next significant decision addressing the registration obligation nonetheless followed the North Brevard holding, finding the amendment was only designed to correct a "Catch 22" as it related to dual registration. Hillsborough County Board of County Commissioners v. PERC, 447 So. 2d 1371, at 1374, and n. 2 (Fla. 1st DCA 1983). Thus, the Court held the registration obligation continued, and further that an RC proceeding was a proper forum for the public employer to challenge the registration. Hillsborough County also stands for the proposition that "[t]o be validly registered, a union must disclose the name and address of any parent organization or organization with which the union is affiliated." *Id.* at 1373.

Since that time, however, the Third District has taken a contrary view, holding that where a petition contains substantial deficiencies which are corrected prior to the election, dismissal is not mandatory. *See* Sanitation Employees Association v. Metropolitan Dade County and Miami Dade Water and Sewer Authority, 526 So.2d 128 (Fla. 3rd DCA 1988)(Baskin, J. dissenting). In so holding, the Fifth District distinguished Hillsborough County as only holding that the failure to disclose required information in a petition cannot be cured after an election, but noted that its view was indeed in conflict with both North Brevard and City of Ocoee. *Id*. at 130 and n. 2. Since that date, the First District has re-affirmed its prior holding, although it was in the context of a mini-PERC. *See* Florida Public Employees Council v. City of Pensacola, 550 So. 2d 132 (Fla. 1st DCA 1989).

The Commission appears to be predominantly following the Sanitation Employees Association view, holding that an RC petition containing material deficiencies which were cured sufficiently before the election would not be dismissed. *See, e.g.*, Florida State Lodge, Fraternal Order of Police v. City of Fort Lauderdale, 27 FPER ¶ 32065 (PERC 2001). The Commission has, however, dismissed petitions as well, but it was under circumstances where amendment was unwarranted based on the evidence regarding finances. *See* Jacksonville Employees Together v. Duval County School District, 25 FPER ¶ 30122 (1999)(Petition dismissed where there were material financial inaccuracies, and sole person in charge of same had inability to obtain or recall necessary data).

[9]At that time and under the 1977 version of the statutes, Section 447.305(6) allowed the prohibition on participation in an election by an unregistered employee organization to be enforced by injunction upon petition of the Commission. *See* City of Ocoee, s*upra* at n. 2. While that did change in 1979, the changes were not deemed to be material as it related to the obligation to register as a condition to participating in an election or before certification. *See* Hillsborough County Board of County Commissioners v. PERC, 447 So. 2d 1371 (Fla. 1st DCA 1983).

D. RA Petitions and Employer Response

Recognition is the act of a public employer entering into a bargaining relationship with an employee organization without first having a secret ballot election to determine the desire of employees. Under PERA, a public employer has the ability to (but is not required to) recognize an employee organization if the employer is satisfied as to:

1. The majority status of the employee organization (i.e., the fact that the organization does in fact represent a majority of employees in the unit which may be demonstrated by signatures on authorization cards, petitions, or the like); and
2. The correctness of the proposed unit.

See §447.307(1)(a), Fla. Stat.

In the event of recognition, the Public Employees Relations Commission is empowered only to review the appropriateness of the unit. If the unit is appropriate, then the Commission has no discretion and it must certify the employee organization as the exclusive bargaining representative of all employees in the unit. If the unit is inappropriate, then the Commission may dismiss the petition. *See* SEIU Local 8 v. Orange County Board of County Commissioners, 33 FPER¶119 (2007), *affd.* 986 So. 2d 619 (Fla. 5th DCA 2008). For example, the Commission's decision to dismiss a petition filed on behalf of the Florida Highway Patrol (FHP) captains and lieutenants was upheld by the First District Court of Appeals in Florida Ass'n of State Troopers v. State, 681 So.2d 920 (Fla. 1st DCA 1996). The First DCA reasoned that the association provided no compelling reason to justify carving out a unit of FHP captains and lieutenants from the more comprehensive unit composed of those supervisory classifications statewide. *Id*.

Additionally, it is worth noting that PERC has the ability to dismiss a petition, without prejudice, where the petition is facially incomplete or fails to comply with some information required to be included on PERC Form 3, which is the Recognition-Acknowledgment Petition that must be filed with PERC. For example, PERC dismissed a petition that failed to include copies of job descriptions of classifications sought to be excluded and included from the bargaining unit. *See* City of Altamonte Springs, 26 FPER¶ 31095 (2000).

E. AC Petitions

When a change of employer occurs, a union may seek to file what is called an "AC" Petition, or Amendment to Certification, in order to continue representation. Such a process has been successfully used when the bargaining unit has remained intact with substantial continuity in the employing enterprise, even though the identity of the employer changed. *See, e.g.*, In re City of Lake Worth, 11 FPER ¶ 16024 (1984); United Faculty of Florida v. University of Florida (Board of Trustees), 31 FPER ¶ 189 (2005). However, an AC Petition is not typically granted where an entirely new bargaining unit is created from the previously existing one. *See, e.g.*, In re Petition of Jacksonville Electric Authority, 23 FPER ¶ 28237 (1997). It is also important to note that even in the absence of a completed AC process, an employer that in fact is a Lake Worth successor can be

found to have engaged in unlawful unilateral changes in violation of the duty to bargain. *See* United Faculty of Florida v. PERC, 898 So. 2d 96 (Fla. 1st DCA 2005), *rev. denied*, 909 So. 2d 863 (Fla. 2005).

The AC process has also been used when one local seeks to substitute for another or to reflect a mere name change by the certified bargaining agent. *See, e.g.*, In re Petition of the Professional Firefighters/Paramedics of Palm Beach County, Local 2928, IAFF, Inc., 30 FPER ¶250 (2004); In Re IAFF, Local 1403, Metro-Dade Fire Fighters, 31 FPER ¶ 183 (2005). To use an AC petition in this fashion, the Commission follows a threshold test for analyzing a petition seeking to amend a certification to reflect a change in the employee organization as follows:

> When an amendment to a certification petition has been filed, the Commission will first consider whether the amendment is a mere name change. If it is, the amendment is allowed so long as it is consistent with the organization's constitution and by-laws. If the change is more than a change in name, the Commission must decide whether a question concerning representation is raised. If so, a representation election is necessary before the amendment can be made. Finally, if the proposed amendment is more than a name change, but does not constitute a question concerning representation, then the amendment will be allowed so long as the procedure used to bring about the change reflects the desires of affected employees. *See* In re Southern States Police Benevolent Association, Inc., to Amend Certification 1079, 23 FPER ¶ 28029 (1996).

See In Re Petition of the United Brotherhood of Carpenters and Joiners to Amend Certification No. 103, 34 FPER ¶77 (2008) citing In re International Union of Painters and Allied Trades, AFL-CIO, Local Union 2301 to Amend Certification 986, 27 FPER ¶ 32129 at 293 (2001).

F. UC Petitions

Another vehicle by which existing bargaining units can be modified is the unit clarification petition ("UC Petition"). It is the petitioner's burden to establish the appropriateness of using the unit clarification process. *See* Manatee County and Municipal Employees, Local 1584, AFSCME v. School Board of Manatee County, 27 FPER ¶32274 (2001), *per cur. affd.*, 826 So.2d 290 (Fla. 1st DCA 2002). Other than an inadvertent omission or misunderstanding as to a classification's unit placement, the Commission considers a unit clarification petition to be an appropriate vehicle for examining the unit placement of only those classifications which have been created or substantially altered after certification. *See* International Brotherhood of Electrical Workers, Local Union 2358 v. JEA v. Northeast Florida Public Employees Local 630, LIUNA, AFL-CIO, 33 FPER ¶ 18 (2007); In re School Maintenance Employees and Associates, Inc., 12 FPER ¶ 17149 (1986); Sarasota County PBA v. City of Sarasota, 7 FPER ¶ 12339 (1981). The Commission will include a classification in a unit using the "inadvertence" standard if the classification was in existence at the time of certification but was omitted from the bargaining unit description due to clerical error or mistake. *See* School Board of Osceola County v. Osceola Classroom Teachers Association, 15 FPER ¶ 20045 (1988); Port Authority Employees, Local 1452 v. Metropolitan Dade County, 13 FPER ¶18040 (1986). As

was explained in Hillsborough County Government Employees Association v. Hillsborough County Aviation Authority, 15 FPER ¶20060 (1989), this process does not extend to a conscious decision a party now regrets. *Id*. citing LIUNA, Public Employees Local 678 v. City of Melbourne, 13 FPER ¶18266 (1987). Moreover, the Commission has stated the purpose of a unit clarification is to determine which employees are actually included or excluded from a bargaining unit, not to reconsider which positions might have been included or excluded. *See* St. Lucie-Ft. Pierce Fire Control District v. Ft. Pierce St. Lucie County Firefighters Association, Local 1377, IAFF, 23 FPER ¶28003 (1996) citing In re: IBF&O, Local 1277, 10 FPER ¶15288 (1984). Thus, for example, where a unit clarification petition failed to demonstrate that petitioned-for cafeteria managers were excluded from bargaining unit inadvertently or through misunderstanding, PERC adopted a hearing officer's supplemental recommended order that the petition be dismissed for failure to meet established criteria for clarification of existing bargaining unit. *See* Manatee County and Municipal Employees, Local 1584, AFSCME, AFL-CIO (Local 1584) v. Manatee County School Board, 27 FPER 32274 (2001), per cur. affd., 826 So.2d 290 (Fla. 1st DCA 2002). There also is a rarely used third standard for invoking UC proceedings, namely a "change in law" standard under which a case by case analysis can be used to determine unit placement. *See* University of Florida Board of Trustees v. United Faculty of Florida, 33 FPER ¶ 108 (2007).

Also on this topic, it has been held that converting a Petitioner's improperly filed unit clarification petition to a representation certification petition is inappropriate. *See* City of Orlando v. Central Florida Police Benevolent Assn, 595 So.2d 1087 (Fla. 5th DCA 1992). In Central Florida PBA, the PBA filed a unit clarification petition seeking to add approximately 93 employees to a bargaining unit composed of 37 employees. Although PERC found that the PBA's petition was deficient and denied the request to enlarge the bargaining unit through that procedure, PERC allowed the denied petition to be treated as a representation certification petition. The Fifth District Court of Appeal reversed holding that the PBA's representation certification petition was barred by contract. The court also held that PERC did not have the authority to convert the PBA's unit clarification petition into a representation certification petition.

Note also that one recent PERC decision reaffirmed that only an employer or certified bargaining agent has standing to file a UC petition. *See* Castner v. City of Longwood, 33 FPER ¶ 94 (2007). This is true even where some members of the bargaining unit are members of the decertified union seeking the clarification. *See* Coastal Florida Police Benevolent Association, Inc. v. City of Melbourne, 33 FPER ¶287 (2007).

G. RC Petitions, Employer Response, and Sufficiency Determination

If an employer refuses to recognize the employee organization, then the organization has no choice but to file a petition with PERC for certification as the bargaining agent. Such a petition must be accompanied by dated statements, signed by at least 30% of the employees in the proposed unit, indicating that these employees desire to be so represented. See §447.307(2), Fla. Stat. The cards comprising the 30% "showing of interest" must be signed and have been obtained within one year prior to the filing of the petition. Once such a petition is filed, any other employee organization may request placement on the ballot to be used in the election to determine the exclusive representative.

Any organization desiring to intervene must present signed and dated statements of at least 10% of the employees in the same unit. Ordinarily, one would assume the showing of interest would need to specifically delineate the name of the employee organization that filed the petition. However, the Third District Court of Appeal recently upheld PERC's determination that interest statements in the name of a parent organization can serve as the showing for a petition submitted by a subsidiary. *See* City of Marathon v. Professional Firefighters of Marathon, Inc., Local 4396, IAFF, 946 So. 2d 1187 (Fla. 3rd DCA 2006) *affg*., 31 FPER ¶ 196 (2005).

F.A.C. Rule 60CC-1.001 provides that any signed statement which is undated or shows that it was obtained more than 1 year prior to the filing of the showing of interest with the Commission will be considered invalid for the purpose of calculating the required percentages. The employee organization is required to complete PERC Form 4, which is the Representation-Certification Petition and care needs to be taken to ensure the petition is completed accurately. In cases where the showing of interest statements are not original signatures, not correctly dated, or contains incorrect information or illegible names are included, the Commission has the ability to dismiss the petition. *See, e.g.*, City of Casselberry, 26 FPER ¶ 31169 (2000); Maria Virguez v. OPEIU, Local 100, Government Supervisors Association of Florida, 31 FPER ¶ 113 (2005).

Previously, when a petition for certification (an "RC Petition") was filed with the Commission, it was investigated for sufficiency. Such an investigation included a request to the employer to provide a list of all employees in the proposed unit. If the petition appeared to be "sufficient", the Commission would provide for an appropriate hearing upon due notice. If the Commission found the petition "insufficient", it had the authority to dismiss the petition. In Professional Ass'n of City Employees, v. City of Jacksonville, 27 FPER ¶ 32061 (2001), the Commission revised its procedures in light of the repeal of the administrative rule governing this procedure. The Commission stated:

> The rule requiring employers to submit an alphabetized list of employees in the proposed unit has been repealed. In the absence of a rule, we recede from the requirement in Seminole County [10 FPER ¶ 15274 at 597 (1984)] requiring an employer to submit a list of employees to the hearing officer. Moreover, in the absence of statutory authority, we recede from the requirement that an employer file a list of employees in the unit recommended by the hearing officer or defined by the Commission. See DeSoto County Teachers Association [7 FPER ¶ 12455 at 1004 (1981)] (the statute does not require a thirty percent showing of interest in the unit defined by the Commission, the purpose of the third showing of interest check by the Commission is for administrative efficiency).
>
> In future cases, the Commission will perform only the initial review of the petitioner's showing of interest statements. If the employer or intervener wishes to challenge the sufficiency of the petitioner's showing of interest in the proposed unit, then either may file an

> appropriate motion to the hearing officer pursuant to Florida Administrative Code Rule 28-106.204 along with an alphabetized list of employees in the proposed unit. If there are allegations that the showing of interest statements were obtained by collusion, coercion, intimidation, or are otherwise invalid, the hearing officer will resolve that dispute by ruling after due consideration pursuant to an appropriate motion filed by a party. *See* § 447.307(2), Fla. Stat. (2000).

If the Commission finds upon the record of the hearing that the petition is sufficient, it will define the proposed bargaining unit, determine which employees are qualified and entitled to vote, identify the employer for the purpose of collective bargaining, and order an election. Note, however, that the showing of interest is tested against the unit proposed by the Petitioner, not the one defined by the Hearing Officer. *See* Local 3158, Destin Professional Firefighters v. Destin Fire Control District, 33 FPER ¶ 116 (2007). The Commission's view is that there is not statutory authority or requirement to further examine the showing of interest once the hearing officer's recommendation has issued. *Id*. at 243-244.

H. Representation Petition Bars

1. Contract Bar

If a valid collective bargaining agreement is in effect covering any of the employees in the proposed unit, then a petition for certification may be filed with the Commission only during the 60-day "window period" extending from 150 days to 90 days immediately preceding the expiration date of said agreement, or at any time subsequent to the expiration date but prior to the effective date of a new agreement. *See* § 447.307(3)(d), Fla. Stat. This is known as the "contract bar".

This provision permits a petition to be filed during a sixty day "window" and forbids the filing during the 90 day "insulated" period. The Commission has consistently construed Section 447.307(3)(d) to insulate the 90 days immediately preceding and including the contract expiration date. *See* Raymond Dwyer v. FOP, Florida Lodge, et al, 31 FPER ¶ 190 (2005); City of Fort Myers, 27 FPER ¶ 32225 (2001); Harris v. United Teachers of Suwannee County, Local 3165, 13 FPER ¶ 18157 (1987).

2. Election/Certification Bar

Once an election is ordered within a given bargaining unit, the costs of the election will be borne equally by the two parties unless the Commission provides otherwise. When an employee organization is selected by a majority of the employees voting in an election, the Commission will certify the employee organization as the exclusive collective bargaining representative of all employees in the unit. Certification is the Commission's official stamp of approval and from it flows the employer's obligation to bargain with the labor organization for a twelve month period free from any challenge to its majority status in order to allow the union time to negotiate a contract. The law

provides that no election may be held within a bargaining unit if an election has been held in the same unit within the preceding twelve month period. This is known as the "election bar". If none of the choices on a ballot receive the vote of the majority of the employees voting, then a runoff election shall be held.

Likewise, if the employee organization is not selected by a majority of the employees voting in an election, an election petition is prohibited from being filed within 1 year "after the date of a Commission order verifying a representation election . . .". *See* § 447.307(3)(d), Fla. Stat. *See* Dade County Police Benevolent Association, Inc. v. City of Pinecrest, 34 FPER ¶147 (2008)(dismissing petition based on both election bar and contract bar). So, a representation certification (RC) petition filed on March 5, 2002, which was similar to a proposed unit where an election was held on March 1, 2001, was prematurely filed because the order verifying the election was not issued by the Commission until March 19, 2001. Accordingly, no petition could be filed until March 20, 2002. *See* Lee County Bd of Commissioners, 28 FPER ¶ 33131 (2002).

I. Challenging the Cards

During this representation or "RC" hearing, an employer may challenge the "showing of interest", claiming that the election authorization cards are invalid. In general, where an authorization card unequivocally states that the person signing the card desired representation by an employee organization for the purpose of collective bargaining, an employee's erroneous belief that something else would occur will not be transformed into an improper act by the union. However, an election card can be deemed invalid where specific evidence shows that an employee was purposefully misled by a union representative. *See* City of Homestead, 23 FPER ¶ 28136 (1997).

If any employer, or employee organization, feels that the employees' signatures required under the law have been obtained by fraud, collusion, coercion, intimidation or misrepresentation, then one may attempt to challenge the cards obtained by the union. While a review of Section 447.307(2) appears to suggest a right to examination of the signatures when there is "sufficient reason to believe any of the employee signatures were obtained by collusion, coercion, intimidation, or misrepresentation", that portion of the statute allowing such access was determined unconstitutional in 1994. *See* National Association of Government Employees v. State of Florida, 28 FPER ¶ 33069 (ND Fla. 1994); Teamsters Local Union No. 385 v. City of Daytona Beach, 20 FPER ¶ 25250 (1994). The practical consequence of the NAGE decision from PERC's perspective is that while no access is generally permitted, parties may still independently litigate a card challenge. *See* District 6, International Union of Industrial Service Transport Employees v. St. Lucie County School Board, 25 FPER ¶ 30075 (1999). One wonders whether the discovery vehicle under Rule 28-106.206 might be a means by which to seek access, although presumably any effort by a party to do so would likely result in the type of scrutiny contemplated in the pre-NAGE case of School Board of Marion County v. PERC, 334 So.2d 582 (Fla.1976).

J. Unit Composition

The system of union representation and collective bargaining established under PERA is

based on the concept of "exclusive representation." In other words, for any one group or "unit" of employees, there should be but one exclusive spokesperson on matters affecting wages, hours, and terms and conditions of employment. The identity of the employee organization which will enjoy this exclusivity of representation is to be determined by majority vote of persons voting in an appropriate group, or unit. Which employees shall comprise such a unit, and the determination as to which employee organization is entitled to represent those employees, are two of the major issues which must be decided under PERA. Resolution of both of these questions is left to the Public Employees Relations Commission.

Section 447.307(1)(a) provides that any employee organization which is either designated or selected by a majority of public employees "in an appropriate unit shall request recognition by the public employer."

Once the Commission has determined that the petition for certification is sufficient, then it will order a hearing. In that hearing, the Commission will take evidence necessary to define the bargaining unit within which an election shall be held and following that determination, the Commission will order a secret ballot election to be held within that unit.

K. Concept of Community of Interest and Factors Considered

In defining an appropriate bargaining unit, the Commission is ordered to take into consideration certain factors. These are:

a. The principles of efficient administration of government;
b. The number of employee organizations with which the employer might have to negotiate;
c. The compatibility of the unit with the joint responsibilities of the public employer and the public employees to represent the public;
d. The power of officials of government at the level of the unit to agree, or make effective recommendations to another administrative authority or to a legislative body, with respective to matters of employment upon which the employees desire to negotiation;
e. The organizational structure of the employer;
f. The community of interest among the employees;
g. The statutory authority of the public employer to administer a classification pay plan; and
h. Such other factors and policies as the Commission may deem appropriate.

See § 447.307(4)(a)-(h), Fla. Stat.

Under this authority, PERC has added three additional unit definition considerations, as follows:

(1) fragmentation of bargaining units (the unit should be as extensive as possible so

as to reduce the number of units);
(2) the possible conflicts of interest between employees in the proposed unit; and
(3) reasonable expectancy of continued employment by employees in the unit.

See FAC Rule 60CC-1.002; *see also*, Florida State Lodge, Fraternal Order of Police, Inc. v. City of Melbourne, Case No. RC 2007 060 (11/29/07)(dismissing petition on over-fragmentation) and SEIU Local 8 v. Orange County Board of County Commissioners, 33 FPER¶119 (2007), *affd.* 986 So.2d 619 (Fla. 5th DCA 2008)(discussing rationale on avoidance of over-fragmentation in context of RA petition).

L. Typical Reasons for Exclusion

1. Supervisory/Other Conflict

An employee is appropriately excluded from a bargaining unit based on supervisory conflict of interest if the evidence indicates that the employee has the authority to make personnel decisions adverse to the interest of his or her subordinates. *See* Industrial and Public Employees, Local 1998 v. Marion County Board of County Commissioners, 13 FPER ¶ 18000 (1986). A supervisory conflict of interest exists where employees exercise effective authority in personnel matters in the areas of hiring, firing, evaluations, promotions, scheduling, resolution of grievances, or discipline. *See* Town of Oakland, 28 ¶ FPER 33086 (2002); FOP v. Village of Pinecrest, 25 ¶ FPER 30065 (1999); Professional Firefighters of Jacksonville Beach, IAFF, Local 2622 v. City of Atlantic Beach, 16 FPER ¶ 21290 (1990); City of Sunrise v. Sunrise Professional Firefighters, Local 2662, 10 FPER ¶ 15093 (1984); IBF&O v. City of Palm Bay, 9 FPER ¶ 14347 (1983); Hallandale Professional Fire Fighters, Local 2248 v. City of Hallandale, 11 FPER ¶ 16071 at 238 (1985), affd., 478 So. 2d 63 (Fla. 4th DCA 1986). The Commission has stated that the most persuasive indicia of supervisory conflict is an employee's role in preparing evaluations which determine the amount of merit raises which bargaining unit members receive. See Professional Fire Fighters of Palm Beach County v. Town of Lantana, 15 FPER ¶ 20167 at 356(1988).

The issue of whether an individual's supervisory role outweighs his or her community of interest with members of the proposed unit is a balancing test. On one side of the scale is the community of interest that the supervisory and subordinate employees share. On the other side of the scale is the actual or potential supervisory conflict of interest between the supervisor and the rank and file employee. *See* Town of Jupiter, 27 FPER ¶ 32237 (2000) (Commission approving Hearing Officer's determination to include police sergeants with rank and file police officers); Florida State Lodge FOP v. Village of Tequesta, 14 FPER ¶ 19111 (1988).

When the Commission attempts to define a separate supervisory bargaining unit, it will generally seek to make this determination as broad as possible to avoid potential over-fragmentation issues occasioned by a subsequent petition to represent a second supervisory unit. Thus, generally the Commission may require that the supervisory unit be inclusive of all supervisors except for those who are managerial or confidential employees. City of Deland, 28 FPER ¶ 33083 (2002); Bd of County Commissioners of Suwannee County, 14 ¶ FPER 19083 (1988).

A decision by the Public Employees Relations Commission in 2002 reiterated the requirements and considerations necessary when defining bargaining units that are appropriate for the purposes of collective bargaining, and is credited with beginning a closer scrutiny on supervisory units. The case, St. Cloud Professional Firefighters, Local 4153 v. City of St. Cloud, 28 FPER ¶ 33258 (2002), began with a representation-certification petition filed by the Union seeking to represent a bargaining unit of rank-and-file firefighter personnel employed by the City of St. Cloud. Shortly after filing the initial petition, the Union filed an amended petition seeking to represent a supervisory unit of firefighter personnel in addition to the rank-and-file unit.

On April 2, 2002 the hearing officer issued a recommended order concluding that it was appropriate to have two units. Unit I was defined as a rank-and-file unit consisting of firefighters, engineers, probationary firefighters, firefighter/EMTs, and firefighter/ engineer/ paramedics. Unit II consisted of fire lieutenants only. Upon review, an issue arose as to the appropriateness of fragmented bargaining units. Accordingly, the issue of appropriate composition of bargaining units was remanded to the hearing officer.

On August 12, 2002 the hearing officer issued his supplemental recommended order, concluding that a supervisory unit consisting of lieutenants and operations commanders was appropriate for the purposes of collective bargaining. In the hearing officer's supplemental recommended order, he noted that the Commission was concerned with the creation of a supervisory unit consisting of only one rank because it presented the potential for a second supervisory unit. This was viewed by many as an indication that the Commission was not likely to approve undue proliferation of bargaining units. The division between rank-and-file and supervisory units was approved in this case. However, the analysis of the composition of the supervisory unit indicates that the Commission will look closely at units that allow for undue proliferation.

In Florida State Lodge, Fraternal Order of Police v. City of Ocala, 15 FPER ¶ 20122 (1989), the Commission discussed the various factors to be considered when excluding an employee on the basis of supervisory conflict. In City of Ocala, the Commission noted that "daily interaction and interchange of responsibilities, common supervision, similar pay plan, and shift work" reflects a possible community of interest which the Commission is required to consider when making unit determinations. *Id.* at 280. In City of Ocala, however, the Commission also stated that § 447.307(4)(h), Florida Statutes, allows the Commission to consider other unit appropriateness factors and policies. One such factor is a possible conflict of interest between employees in the proposed unit. Fla. Admin. Code Rule 60CC-1.002. The Commission therefore explained that . . .

> Interest conflict and community are competing concepts that often become the controlling factors in determining an appropriate unit. If a significant amount of conflict is found to be present between two employee groups, it generally will "outweigh" or defeat even a strong community of interest.

Id. at 280 (*citing* Teamsters Local Union 769 v. City of Okeechobee, 13 FPER ¶ 18051 (1987).

Therefore, after considering the various factors outlined in the City of Ocala, the Commission affirmed the Hearing Officer's exclusion of sergeants in that case from a unit of rank and file employees on the basis that their role in discipline, evaluations for purposes of merit pay, and the organizational structure of the department and the potential result of future attempts to organize the City's supervisory employees, created a supervisory conflict of interest. *Id.* A similar result has been reached in situations involving supervisory fire department personnel. *See, e.g.*, Palm Harbor Fire/Rescue Association, Local 2980 v. City of Oldsmar, 17 FPER ¶ 22253 (1991); Professional Firefighters of Jacksonville Beach, IAFF, Local 2622 v. City of Atlantic Beach, 16 FPER ¶ 21290 (1990); Mary Esther Professional Firefighters Association, Local, 3176 v. City of Mary Esther, 15 FPER ¶ 20156 (1989); Professional Firefighters of Palm Beach County, Local 2928 v. Town of Lantana, 15 FPER ¶ 20167 (1989).

The Commission has also approved exclusions based on internal affairs, staff inspections or other administrative type assignments which cause conflict. *See, e.g.*, Teamsters Local Union 385 v. City of Deland, 25 FPER ¶30189 (1999)(excluding internal affairs based on conflict, and also sergeants based on conflict and administrative responsibilities); Central Florida Police Benevolent Association v. City of St. Cloud, 18 FPER ¶ 23122 (1992)(excluding internal affairs); International Brotherhood of Police Officers v. City of Palm Bay, 9 FPER ¶ 14347 (1983)(excluding internal affairs and staff inspection personnel).

2. Professionals and Non-Professionals in Same Unit

Section 447.203(13), Florida Statutes, defines a professional employee as:

> (a) Any employee engaged in work in two or more of the following categories:
> 1. Work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work;
> 2. Work involving the consistent exercise of discretion and judgment in its performance;
> 3. Work of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
> 4. Work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education, an apprenticeship, or training in the performance of routine mental or physical processes.
> (b) Any employee who:
> 1. Has completed the course of specialized intellectual instruction and study described in subparagraph 4. of paragraph (a); and
> 2. Is performing related work under supervision of a professional person to qualify to become a professional employee as defined in paragraph (a).

Thus, for an employee to be designated as a professional employee, that employee must fill

any two or more of the four enumerated categories in Section 447.203(13)(a) or the two enumerated factors in Section 447.203(13)(b). *See* Local 1749, Amalgamated Transit Union v. Central Fla. Reg. Transportation Auth., 27 FPER ¶ 32272 (2001); City of Safety Harbor v. CWA, 715 So.2d 265 (Fla. 1st DCA 1998).[10]

The significance of a professional designation is that professional employees may not be included into a bargaining unit of non-professional employees without a self-determination election pursuant to § 447.307(4)(h), Fla. Stat. See Local 1749, Amalgamated Transit Union v. Central Fla. Reg. Transportation Auth., 27 FPER ¶ 32272 (2001); Southeast Volusia Hospital District v. National Union of Hospital and Healthcare Employees, 429 So.2d 1232 (Fla. 5th DCA 1983).

3. Managerial Designation

If an employee is excluded on the basis of supervisory conflict, the inquiry will typically end at that point. However, if supervisory conflict is not established, one often turns to possible exclusion of employees as "managerial" or "confidential". The second major issue is the identification of, and therefore potential exclusion of, managerial employees. It is important to remember, however, that a *managerial* designation deprives public employees of their constitutional right to participate in collective bargaining. Therefore, the managerial definition is narrowly construed and applied. See Department of Administration v. PERC, 443 So. 2d 258 (Fla. 1st DCA 1983). The duties of an alleged managerial employee must be viewed from the broad perspective of their actual significance within the organization. Florida Public Employees Council 79 v. State, 9 FPER ¶ 14099 (1983), affd, 443 So. 2d 258 (Fla. 1st DCA 1983); Pensacola Junior College v. PERC, 400 So. 2d 59 (Fla. 1st DCA 1981). The party asserting a claim of managerial status has the burden of establishing that these criteria have been satisfied. Broward County PBA v. City of Miramar, 12 FPER ¶ 17147 (1986), affd, 505 So. 2d 8 (Fla. 1st DCA 1987).

PERA specifically excludes managerial employees from the definition of "public employee." § 447.203(3)(d), Fla. Stat. Whether an employee is managerial is a factual matter to be determined by an examination of the employee's duties and responsibilities and the criteria listed in § 447.203(4), Fla. Stat. Broward County School District, 26 FPER ¶ 31253 (2000); Palm Beach County PBA v. Village of North Palm Beach, 11 FPER ¶ 16295 (1985). Managerial employees are defined as follows employees who:

> (a) Perform jobs that are not of a routine, clerical, or ministerial nature and require the exercise of independent judgment in the performance of such jobs, and to whom

[10]The Commission had long held that a job requirement of completion of a prolonged course of intellectual instruction and study in an institution of higher learning is a threshold criterion for designation of a classification as professional. *See* Florida PBA v. State of Florida, 10 FPER ¶ 15228 (1984). However in 1998, the First District Court of Appeal held that the Commission's long-standing construction of Section 447.203(13)(a) was erroneous. City of Safety Harbor v. CWA, 715 So.2d 265 (Fla. 1st DCA 1998). The court disapproved of the Commission's interpretation of the statute to treat the educational element as a threshold requirement for denomination of a position as professional. Rather, the court held that an employee who satisfied any two of the four criteria of Section 447.203(13)(a) would fall within the definition of "professional employee" pursuant to that section.

one or more of the following applies:

1. They formulate or assist in formulating policies which are applicable to bargaining unit employees.
2. They may reasonably be required on behalf of the employer to assist in the preparation for the conduct of collective bargaining negotiations.
3. They have a role in the administration of agreements resulting from collective bargaining negotiations.
4. They have a significant role in personnel administration.
5. They have a significant role in employee relations.
6. They are included in the definition of administrative personnel contained in § 1012.01(3), Fla. Stat.
7. They have a significant role in the preparation or administration of budgets for any public agency or institution or subdivision thereof.

Police chiefs, fire chiefs and the like are also included within the definition of managerial employees. *See* §447.203(4)(b), Fla. Stat. The statute states the Commission can consider as part of its analysis historic relationships of the employee to the public employer or co-employees. *Id.*

4. Confidential Designation

Section 447.203(5), Florida Statutes, defines confidential employees as "persons who act in a confidential capacity to assist or aid managerial employees...". Inasmuch as a confidential designation deprives an employee of his or her constitutional right to bargain collectively, the Commission narrowly construes the confidential definition by applying the "labor nexus" test. See Polk Education Association v. School Board of Polk County, 10 FPER ¶ 15054 at 93 and ¶ 15156 at 292 (1984), *affd.*, 480 So.2d 1360 (Fla. 1st DCA 1985). In Polk Education Association v. School Board of Polk County, the Commission established its "labor nexus" test for determining when an employee is appropriately designated a confidential employee. Among Polk County's holdings was that employees who regularly have access to confidential information concerning anticipated changes resulting from collective bargaining negotiations are appropriately designated as confidential employees.

In Service Employees Union, AFL-CIO, CLC v. Hillsborough Community College, 24 FPER ¶ 29284 (1998), the Commission explained the requirements for designating an employee as confidential:

> Pursuant to the labor nexus test, an employee will not be designated as confidential unless he or she "aids or assists in a confidential capacity a managerial employee who formulates, determines, and effectuates management policies in the field of labor relations, or who regularly has access to confidential information concerning anticipated changes resulting from collective bargaining negotiations." Broward County Education Support Personnel

> Association v. School Board of Broward County, 8 FPER ¶ 13387 at 687 (1982), *aff'd*., 441 So.2d 640 (Fla. 4th DCA 1983). A labor nexus is established by demonstrating that the employee has access to and works with information that would provide an employee organization with an advantage at the bargaining table or in the administration of the collective bargaining agreement. *See* Duval Teachers United, Local 3326 v. School District of Duval County, 12 FPER ¶ 17194 (1986).
>
> Mere access to confidential information alone, even if it involves labor relations, will not support a confidential designation. Broward County, 8 FPER at 688. The record evidence must demonstrate that the employee for whom a confidential designation is sought actually works with confidential collective bargaining information such that access to those materials is a necessary incident of his or her employment. In re Managerial/Confidential Petition of the School Board of Pinellas County, 7 FPER ¶ 12005 at 6 (1980); In re Managerial/Confidential Petition of the Collier County Board of County Commissioners, 6 FPER ¶ 11128 at 203 (1980); IBEW, Local 1965 v. City of Perry, 6 FPER ¶ 11046 at 76 (1980).

The Commission reaffirmed this standard in Broward County Schools Administrators Association v. School District of Broward County, 26 FPER ¶31253 (2000). Moreover, as recently as 2008, the Commission reaffirmed the *per se* designation of confidential status as applied to secretaries to school principals without regard to the actual duties of incumbents. *See* School District of Pinellas County, Florida v. Pinellas Educational Support Association, 34 FPER ¶ 158 (2008), relying on Duval Teachers United, Local 3326, FEA/United, AFT v. School District of Duval County, 12 FPER ¶ 17194 at 422 (1986) and Broward Educational Support Personnel Association v. School Board of Broward County, 8 FPER ¶ 13387 at 688 (1986), *aff'd.*, 441 So. 2d 2640 (Fla. 4th DCA 1980).

5. Public Safety Personnel/Unique Community of Interest

A unit inclusive of firefighters, firefighters/EMTs and driver engineers is usually appropriate for collective bargaining. All of these employees are required to be certified firefighters within the state of Florida. The major function of the firefighter/EMT is skilled work in fighting fires and in the maintenance of fire equipment, including administering first aid to fire and accident victims. Firefighters and driver engineers are responsible for emergency medical service work with primary responsibilities in the care and treatment of medical emergencies and possible serious or life threatening situations. In similar situations in the past, the Commission has determined that employees who perform duties of this type share a unique community of interest and are appropriate for inclusion in a separate bargaining unit. Professional Firefighters of Palm Beach County, Local 2928, IAFF v. Town of Lantana, 15 FPER ¶ 20167 (1989); Taft Professional Firefighters Association, Local #2410, IAFF v. Taft Fire Control District, 3 FPER 243 (1977).

A similar result has been reached in some instances in the case of a public safety department. In one instance, the Commission defined a unit limited to firefighters, rejecting a City's contention that the most appropriate unit was one including all employees within the public safety department. As explained by the Commission:

> The record reveals that the Respondent has a standardized set of regulations, including employment benefits, covering all employees within the public safety department. In addition, there is evidence of an overlapping and cooperative sharing of duties and responsibilities between the police, fire and building inspection departments in some areas. However, to designate and establish a unit as proposed by the Respondent, would ignore the unique job responsibilities and hazards shared by firefighters recognized by the Commission, and also by the state of Florida, prior to the existence of the Public Employees Relations Act . . . Moreover, the Commission's consistent position has been that police officers, being charged with the duty of law enforcement against the entire citizenry including all public employees, cannot be included in a bargaining unit of public employees because of the inherent conflict between the duties of their position and the relationship with other unit employees.

IAFF Local 2476 v. City of Belle Glade, 3 FPER 149 (1977).

Recently, the Commission again recognized the unique working conditions of firefighters, when considering whether these employees should be placed in a single bargaining unit. In Fla. State Fire Service Ass'n v. State of Fla., 28 FPER ¶ 33089 (2002), the Commission stated it:

> …has consistently recognized the unique characteristics of the work of certified firefighters, including the unusual configuration of their work shifts and the specific dangers that attend fire combat and emergency rescue. E.g., Fire Rescue Professionals of Alachua County, IAFF, AFL-CIO, CLC v. Alachua County, 24 FPER ¶ 29288 (1988) (and cited cases); IAFF, Local 2476 v. City of Belle Glade, 3 FPER 149 (1977) (and cited cases). "The Commission has generally declined to approve units combining fire fighters with non-fire fighting employees (citations omitted)." In re Petition of Spring Hill Fire District, 7 FPER ¶ 12242 at 494 (1981); *cf*. City of Casselberry v. National Association of Government Employees, 23 FPER ¶ 28148 (1997) (fire marshal inappropriate for unit of general employees).

The Commission continued, acknowledging that it has recognized "the uniqueness of the working conditions of firefighters, and the unusual hazards they regularly encounter" concluding that a single firefighter bargaining unit is "is consistent with years of Commission precedent configuring

firefighter bargaining units throughout Florida." *Id.*

6. Part Time Employees

Generally, part-time employees are casual employees in an employment at will relationship. They typically have no civil service protection and do not share in any of the fringe benefits of regular full-time employees. The part time employees may not even be required to meet the same certification standards. Further, part-time employees often work no fixed schedule, but rather fill in on a sporadic "as needed" basis. They are typically not subject to all the rules that the regular full-time employees are subject to and are paid only on an hourly basis for whatever time they do work. Factors such as these have warranted the exclusion of part-time employees in the past. *See, e.g.*, Florida Public Employees Council 79, AFSCME v. City of Jacksonville, 13 FPER ¶ 18273 (1987); Pinellas County Public Employees Association v. City of St. Petersburg, 10 FPER ¶ 15142 (1984). The Commission has included part-time employees in bargaining units with regular employees if their employment can be described as "regular," rather than "temporary" or "casual." IBAT, Local Union 1010 v. City of Deerfield Beach, 14 FPER ¶ 19099 (1988). As the Commission stated in Central Florida Police Benevolent Association v. City of Mount Dora, 13 FPER ¶ 18136 at 344 (1987):

> In determining whether full-time and part-time employees share a community of interest, various factors must be analyzed, including the statutory criteria set forth in Section 447.307(4), Florida Statutes and the factors which have been determined to be appropriate through the evolving case law. One primary factor is whether part-time employees have a reasonable expectation of continuing regular employment. Dade County Teachers Association v. School Board of Dade County, 8 FPER ¶ 13140 at 757 (1982). Other factors to be considered include job duties, working conditions, supervision, method of pay, fringe benefits, work schedules and number of hours. 'The answer to the questions of whether certain part-time employees are regularly employed, have a reasonable expectation of continued employment, and share a community of interest with full-time employees depends very much upon the particular facts of each situation.' In Re School Board of Collier County, 10 FPER ¶ 15169 at 346 (1984).

If the facts of a case demonstrate that the part-time employees are irregularly available for work, work limited schedules and receive none of the benefits paid to full-time employees, it is doubtful that these part-time employees will be included in a bargaining unit with full time employees. Similar facts have led to the exclusion of part-time employees from bargaining units comprised of regular employees. *See* City of Ocoee v. Central Florida Professional Fire Fighters Association, Local 2057, 389 So.2d 296, 298 (Fla. 5th DCA 1980), *aff'g*., 4 FPER ¶ 4339 (1978) (part- time employees who worked irregular, on-call schedule, received none of the fringe benefits paid to full-time employees except worker's compensation and were hired and fired by the assistant fire chief and captain); Coastal Florida Police Benevolent Association v. City of Lake Helen, 14 FPER ¶ 19042 (1988) (part-time reserve police officers who were not obligated to report to work, were authorized to set their own schedules for up to sixteen hours, and who did not receive benefits);

Pinellas County Police Benevolent Association v. City of Belleair Beach, 10 FPER ¶ 15143 (1984) (part-time police officers who did not work with any specific regularity, did not work more than sixteen hours and did not receive benefits received by full-time employees); Hillsborough County Police Benevolent Association v. City of Avon Park, 12 FPER ¶ 17133 (1986) (part-time police officers and dispatchers who worked only when called, had no regularly scheduled work hours, and received no benefits). *See also* Florida Public Employees Council 79, AFSCME v. City of Jacksonville, 13 FPER ¶ 18273 (1987) (irregularly employed trial court clerks and school crossing guards excluded from bargaining unit). Finally, the mere prospect of an additional opportunity for part-time work can be considered insufficient to establish a community of interest between part-time and full-time employees. Professional Fire Fighters of Starke, Local 3120 v. Bradford County, 24 FPER ¶ 29271 (1998).

M. Relevance of Bargaining History/Prior Unit Determinations

The Commission has uniformly held that it will not disrupt an existing bargaining relationship by severing position classifications from a bargaining unit merely because the classifications would not be included in the unit if the Commission were defining it for the first time. *See* Fort Lauderdale Police Lodge 31 v. City of Fort Lauderdale, 19 FPER ¶ 24108 (1983), *affd.*, 639 So.2d 181 (Fla. 4th DCA 1994); Alachua Fire/Rescue Benevolent v. Alachua County, 21 FPER ¶ 26049, *recon. denied*, 21 FPER ¶ 26077 (1995), *affd.*, 683 So.2d 486 (Fla. 1st DCA 1996). Once a bargaining unit has been determined to be appropriate and establishes a bargaining history with an employer, a heavy burden is placed upon the party seeking to change the unit to show that the bargaining unit is unworkable, or "otherwise inappropriate." *See* Florida Police Benevolent Association, Inc. vs. City of Gainesville vs. Gator Lodge 67, Inc., Fraternal Order of Police, 33 FPER ¶292 (2007). The Commission has held that the term "otherwise inappropriate" requires a demonstration of special or compelling circumstances. *See* City of Fort Lauderdale, 19 FPER ¶ 24108 at 231. See also Florida PBA v. State of Florida, 7 FPER ¶ 12430 at 962-63 (1981), *affd.*, 418 So. 2d 1282 (Fla. 1st DCA 1982). This burden is imposed by the application of Section 447.307(4)(f)5, Florida Statutes, which mandates that the Commission consider the "history of employee relations within the organization of the employer . . . and the interests of the employees and the employer in the continuation of a traditional, workable and accepted negotiation relationship" when defining an appropriate bargaining unit. Florida State Lodge, FOP, v. City of Alachua, 24 FPER ¶ 29088 (1998). The Commission has also held that when "the unworkable or otherwise inappropriate standard is used, the Commission gives the traditional unit definition substantial weight pursuant to Section 447.307(4)(f)5., Florida Statutes and less weight to possible conflict of interest factors." *See* Florida Police Benevolent Association, Inc. vs. City of Gainesville vs. Gator Lodge 67, Inc., Fraternal Order of Police, 33 FPER ¶292 (2007).

N. Election Stipulation Agreements

The Commission's policy with regard to stipulations has traditionally been to encourage the parties to agree upon all or some of the issues of fact or law. The Commission's policy in regard to stipulations has been quoted by the court in Manatee County v. PERC, 387 So.2d 446 (Fla. 2nd DCA 1980), wherein the Court re-stated:

> We [the Commission] have long held that this Commission will not reject an agreement or stipulations by the parties unless the agreement or stipulations are repugnant to the language and policies of the act.

Id. at 451, *citing* Hillsborough County Aviation Authority, 2 FPER 54 (1976).

However, it must be remembered that §§ 447.207(6) and 307(4), Fla. Stat. authorize the Commission to define an appropriate bargaining unit after a review of the record. When more than one unit is appropriate, the Commission has held it must exercise its discretion in deciding the unit configuration question. *See, e.g.*, Federation of Public Employees v. Broward County, 5 FPER ¶ 10062 (1979). While the Commission is not bound by the parties' stipulations and might not have configured the unit in the same manner as have the parties if the unit was disputed, it gives significant weight to an agreement on unit configuration by those who will be engaged in the bargaining process. § 447.307(4), Fla. Stat.; *see also* Florida Public Employee Council 79 v. Collier County Bd of County Commissioners, 25 FPER ¶ 30290 (1999); Neptune Beach Labor Council v. City of Neptune Beach, 24 FPER ¶ 29300 (1998); FOP v. City of Edgewater, 21 FPER ¶ 26229 (1995); Hernando County CTA v. School Board of Hernando County, 8 FPER ¶ 13272 (1982).

O. Handling the Election

1. Voter List

The employer is required to file with the Commission and deliver to each party to the election an election eligibility list containing the names and addresses of all eligible voters not later than fifteen (15) days after the date of approval of a Consent Election Agreement, or the date of the Commission order ordering an election. Unless the Commission orders otherwise, the voter list must include all employees employed in the unit as of the date of approval of the Consent Election Agreement, or the date of the Commission order directing an election, whichever date is applicable. *See* Rule 60 CC-2.2002(1), Fla. Admin. Code. Employees hired after the cutoff of eligibility typically cannot vote. *See* International Association of EMTs & Paramedics v. Leon County Board of County Commissioners, 31 FPER ¶ 169 (2005).

The voter eligibility list must be arranged in alphabetical order. In cases where there are to be multiple voting locations, the Commission may require that the employer furnish a separate list (to the Commission and all parties) where the names of the eligible voters are grouped according to each polling site.

In the event that the voter list is deficient in some manner, the objecting party must file timely objections. A failure to object to the form or content of the election eligibility list prior to the commencement of the election will be considered by the Commission to act as a waiver of the objection if the objecting party knew of the defect prior to the election, or through the exercise of reasonable diligence could have known. The Commission will not order a rerun election to cure a defect which could have been resolved by a timely filed petition for relief. *See* Rule 60 CC-2-

2.002(4), Fla. Admin. Code.

2. Election Type (mail v. on site)

The Legislature has authorized the Commission to conduct a secret ballot election to determine whether to certify an employee organization as the representative for a bargaining unit. *See* § 447.307(3), Fla. Stat. The Commission's rules provide that such an election may be conducted by mail, on-site, or by any combined method ordered or approved by the Commission. See Fla. Admin. Code Rule 60CC-2.003(2). The Commission determines whether to conduct a mail ballot or an on-site election on a case-by-case basis. *See, e.g.*, Teamsters Local Union No. 385 v. City of Deland, 28 FPER ¶ 33101 (2002); Teamsters Local Union 385 v. Central Florida Regional Transportation Authority (d/b/a LYNX), 25 FPER ¶ 30269 (1999). The Commission has stated, when considering the validity of mail ballot elections:

> The determination of which type of election best affords eligible voters the opportunity to cast secret ballots depends on the circumstances of each case. *This purely administrative decision* is based on various factors, including: accessibility of voters, economic impact, reliability, and the potential disruptive effect of the election process on the public employer's ability to provide its services during the election. Although the desires of the parties are a consideration, they are not controlling.

Broward Teachers Union, Local 1975 v. School Board of Broward County, 9 FPER ¶ 14266 at 518 (1983) (emphasis added). *See also*, Walton County Educational Ass'n v. Walton County School Board, 28 FPER ¶ 33144 (2002); Florida Police Benevolent Ass'n v. Sarasota County Sheriff's Office, 28 FPER ¶ 33038 (2001).

3. Election Observers

Any party may be represented by not more than two (2) election observers of its own selection at each polling site. The Commission agent will request each observer complete a Proof of Conduct of Election (PERC FORM 12) when the observer's period of observation is concluded. *See* Rule 60CC-2.003(3), Fla. Admin. Code.

One of the functions of the election observer is to challenge, for good cause, the eligibility of voters whom the observer has a doubt as to whether this person's vote should be included in the election. "Any party's observer, or the Commission's agent, may challenge, for good cause, the eligibility of any person to participate in the election. Ballots in on site elections maybe challenged only when cast. Ballots in mail ballot elections may be challenged only at the counting of ballots." *See* Rule 60CC-2.003(5), Fla. Admin. Code.

4. Electioneering Near Polls

To maintain the integrity of the election process, Florida Administrative Code Rule 60CC-2.2003(4) restricts access to the polling site to the Commission's election agents, poll clerks, election observers, and voters. This rule also prohibits any other person from coming within fifteen feet of the entrance to any polling site while the polls are open. The Commission's election agents have interpreted this rule as also prohibiting campaign posters from being within fifteen feet of the entrance to the polling site. District 6, International Union of Industrial Service Transport Health Employees v. St. Lucie County School Board, 25 FPER ¶ 30159 (1999). Additionally, Florida Administrative Code, Rule 60CC-2.2003(4) provides that "The employee organization, public employer, and their respective agents are prohibited from observing or being present when mail ballots are marked, signed, or mailed."

5. Election Objections

The Commission's test for evaluating alleged objectionable election conduct is "whether a particular event or action, when viewed objectively from the perspective of voters, reasonably appears to have interfered with the employees' freedom of choice." Hillsborough County Police Benevolent Association v. City of Temple Terrace, 7 FPER ¶ 12030 (1980). The moving party, must demonstrate that the objectionable conduct was "significant" and the tendency to influence the outcome of the election must be "substantial." *See* Professional Ass'n of City Employees v. City of Jacksonville, 27 FPER ¶ 32187 (2001); District 6, International Union of Industrial Service Transport Health Employees v. St. Lucie County School Board, 25 FPER ¶ 30159 at 334 (1999). PERC can direct a hearing to resolve post-election objections when necessary. *See* International Association of EMTs & Paramedics v. Emergency Medical Services Alliance, 31 FPER ¶ 141 (2005).

P. Revocation of Certification

Employees represented by a union may determine at a later date that they no longer wish to be represented by a certified bargaining agent. In such a circumstance, employees may file a petition to revoke certification. *See* § 447.308, Fla. Stat. Such a petition must be accompanied by dated statements, signed by at least 30% of the employees in the unit, indicating a desire to no longer be represented by the bargaining agent. The rules which apply to petitions for certification ("RC Petitions") and their sufficiency and authenticity apply equally to petitions for decertification (called "RD Petitions"). There is, however, no procedure whereby a majority of employees may achieve voluntary decertification in a manner that such a majority could request voluntary recognition. A petition for decertification must originate with employees, and not the employer.

II. COLLECTIVE BARGAINING AND UNFAIR LABOR PRACTICES

A. Collective Bargaining Generally

In creating the Act, the Legislature contemplated that the Chief Executive Officer of the employer, typically a City Manager or County Administrator, or that person's designee, and the bargaining agent of the public employees, would meet and bargain in good faith. §447.309(1), Fla. Stat. The role of the Chief Executive Officer is defined in Section 447.203(9), Fla. Stat. as the person, elected or appointed, who is responsible to the legislative body of the public employer for the administration of governmental affairs of the public employer. The legislative body is defined as the governing body of the entity in question. §447.203(10), Fla. Stat.

Generally speaking, the Act contemplates that collective bargaining would be done by the chief executive/designee and the bargaining agent representing the interests of the public employees. §447.309(1), Fla. Stat. Under the statute, the chief executive/designee is obligated to consult with, and attempt to represent, the views of the legislative body while at the bargaining table. This consultation is accomplished through the use of an exemption from the Government in the Sunshine Act for discussions and documents relating to collective bargaining. §447.605, Fla. Stat.

Once an agreement is reached by the chief executive on behalf of the employer and the bargaining agent on behalf of the public employees, such an agreement must then be ratified by the bargaining unit and the employer.

More complex rules for the parties come into play, however, if an impasse in negotiations is declared under Section 447.403, Fla. Stat. In such a situation, the employer and the Union may engage in mediation and may request the assistance of a Special Magistrate to resolve the mandatory subjects at impasse. §447.403, Fla. Stat. The parties may also agree to waive the Special Magistrate process and proceed directly to the legislative body. §447.403(2), Fla. Stat. However, while either side can unilaterally refuse to mediate, both parties must agree in writing to waive the Special Magistrate process.

Regardless of the manner in which the parties proceed, it is ultimately the responsibility of the legislative body to take such action as it deems to be in the public interest, including the interest of the public employees involved, to resolve all disputed issues. §447.403(4), Fla. Stat. Therefore, if the parties reach impasse, the legislative body, wearing its "neutral" hat (as opposed to its "employer" hat) ultimately imposes the terms and conditions of employment on mandatory subjects of bargaining which are at impasse upon the public employees.

Further, if the employer and the Union go to impasse, the legislative body becomes limited in its communications with the chief executive/designee regarding negotiations "out of the sunshine". More specifically, once an impasse in negotiations has been declared, the public employer is placed in an "insulated period" during which it cannot communicate in "out of the sunshine" meetings with the chief executive/designee on collective bargaining issues at impasse unless the parties are using the Special Magistrate process. Should the parties elect to use the Special Magistrate process, the

legislative body can consult with chief executive/designee to determine whether to accept or reject the Special Magistrate's recommendation on the impasse issues. Once a decision is made, however, the legislative body is once more in an "insulated period" and must avoid any appearance of impropriety regarding the resolution of impasse issues.

With respect to exactly when the insulated period begins and how long it continues, that issue was addressed by the Commission in Jacksonville Association of Firefighters, IAFF, Local 122 v. City of Jacksonville, 15 FPER ¶20327 (1989), *recons. denied*, 16 FPER ¶21009 (1989). That case set forth the basic parameters describing when the "insulated period" begins for purposes of determining whether any further "out of the sunshine" meetings pursuant to the statutory exemption described above are appropriate. As described by PERC, the Commission's earlier case law had held that the insulated period when parties elected to use the Special Master process was "between the time of rejection of all or any part of the Special Master's recommended decision and convening of the legislative body hearing" to resolve the impasse.[11] The rationale for PERC's holding that the insulated period did not begin until the Special Master's recommendations were rejected was "because it is not until the Special Master's recommendations are rejected that it becomes apparent that the legislative body will have to resolve the impasse."

In City of Jacksonville, the Commission went on to address the circumstance where the Special Master process had been waived, determining it to be "a comparable point in time to the rejection of the Special Master's recommendations, because once the parties waive the Special Master process, it is evident the legislative body will be required to resolve the impasse." *See* City of Jacksonville, supra. Under the statute, both sides must agree to waive the Special Master process, and that agreement must be in writing. Thus, in a later case, the Commission clarified that when the Special Master process is waived, the insulated period commences on the date the agreement to waive is reduced to writing and signed by both parties. *See* Fraternal Order of Police, Lodge 31 v. City of Fort Lauderdale, 19 FPER ¶24255 (1993).

Once the insulated period begins, it continues until the legislative body convenes to resolve the impasse. Note, however, that even if an "insulated period" exists as to one union, but the parties are not at impasse with other unions representing public employees of the public employer, the elected officials can continue to meet in executive session as to those unions that are not at impasse. Moreover, the insulated period restriction can be waived by the union if it is inclined to do so in order to further the negotiations. *See* IAFF, Local 1365 v. City of Orlando, 4 FPER ¶4214 (1978), *affd*., 384 So.2d 941 (Fla. 5th DCA 1980).

The declaration of impasse has no impact on the application of section 447.605(2), Florida Statutes, which requires that all collective bargaining sessions be conducted "in the sunshine." *See* Firefighters of Boca Raton, Local 1560, IAFF, et al., 10 FPER ¶15043 (1983) (Injunction issued to prevent private mediation sessions with both parties present during negotiations.)

[11] *See* IAFF Local 2135 v. City of Ocala, 5 FPER ¶10252 (1979), *affd*., 394 So.2d 1156 (Fla. 1st DCA 1981).

B. Unfair Labor Practices Generally

Another area of jurisdiction for PERC involves its processing of claims of unfair labor practices by employers, employee organizations, or even individuals. Section 447.501 lists, in two sections, the various unfair labor practices prohibited by PERA. The first of these applies to public employers, and states as follows:

> (1) Public employers or their agents or representatives are prohibited from:
> (a) Interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this part.
> (b) Encouraging or discouraging membership in any employee organization by discrimination in regard to hiring, tenure, or other conditions of employment.
> (c) Refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement agreed upon with the certified bargaining agent for the public employees in the bargaining unit.
> (d) Discharging or discriminating against a public employee because he or she has filed charges or given testimony under this part.
> (e) Dominating, interfering with, or assisting in the formation, existence, or administration of, any employee organization or contributing financial support to such an organization.
> (f) Refusing to discuss grievances in good faith pursuant to the terms of the collective bargaining agreement with either the certified bargaining agent for the public employee or the employee involved.

See Section 447.501(1), Fla. Stat.

For employee organizations, the statute provides as follows:

> (2) A public employee organization or anyone acting in its behalf or its officers, representatives, agents, or members are prohibited from:
> (a) Interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this part or interfering with, restraining, or coercing managerial employees by reason of their performance of job duties or other activities undertaken in the interests of the public employer.
> (b) Causing or attempting to cause a public employer to discriminate against an employee because of the employee's membership or nonmembership in an employee organization or attempting to cause the public employer to violate any of the provisions of this part.
> (c) Refusing to bargain collectively or failing to bargain collectively in good faith with a public employer.
> (d) Discriminating against an employee because he or she has signed or filed an affidavit, petition, or complaint or given any information or testimony in any proceedings provided for in this part.
> (e) Participating in a strike against the public employer by instigating or supporting, in any positive manner, a strike. Any violation of this paragraph shall subject the violator to the penalties provided in this part.

> (f) Instigating or advocating support, in any positive manner, for an employee organization's activities from high school or grade school students or students in institutions of higher learning.[12]

Section 447.501(2), Fla. Stat.

This section goes on to provide, however, that "[n]otwithstanding the provisions of subsections (1) and (2), the parties' rights of free speech shall not be infringed, and the expression of any arguments or opinions shall not constitute, or be evidence of, an unfair employment practice or of any other violation of this part, if such expression contains no promise of benefits or threat of reprisal or force." See Section 447.501(3), Fla. Stat.

In the materials that follow, we will review the more common unfair labor practices, namely, those arising out of the bargaining process generally and at the impasse resolution stage, those arising from an alleged unlawful unilateral change, retaliation for protected activity, refusal to discuss grievances, denial of representation, and breach of the duty of fair representation. Finally, we will review various collateral issues related to this topic, including PERC's deferral policy for charges, election of remedies, the statute of limitations, and the standard for an award of attorneys' fees and costs to a prevailing party in PERC unfair labor practice proceedings.

C. Charges Arising out of Bargaining

Chapter 447, Part II, Florida Statutes defines "collective bargaining" as:

> The performance of the mutual obligations of the public employer and the bargaining agent of the employee organization to meet at reasonable times, to negotiate in good faith, and to execute a written contract with respect to agreements reached concerning the terms and conditions of employment, except that neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this part.

§447.203(14), Fla. Stat. (2003).

A public employer and the bargaining agent for a public employee organization have an ongoing duty to "meet at reasonable times and bargain in good faith." Section 447.309(1), Fla. Stat. (2003). The statute specifically states that both parties "*shall* meet at reasonable times and bargain in good faith," thus imposing a legal obligation on the parties to bargain. (emphasis added) *Id*. The Florida Statutes also enumerate what actions or inactions constitute an unfair labor practice. *See* Section 447.501, Fla. Stat.

In discussing the obligation to bargain within the context of Section 447.501, Fla. Stat., the General Counsel has explained:

[12] *But see*, United Faculty of Florida v. Florida Board of Regents, 585 So. 2d 991(Fla. 1st DCA 1991).

> Section 447.501(1)(c) and its counterpart, § 447.501 (2)(c), are enactments intended to insure the performance of the mutual bargaining obligation imposed upon the public employer and the employee's collective bargaining representative. *This duty includes the correlative obligation to bargain with that representative regarding matters arising under the collective bargaining agreement entered into with that representative*.

Taylor and Mansfield v. Columbia County School District, 14 FPER ¶ 19289 (G.C. Sum. Dism. 1988)(emphasis added); *see also* Duarte v. City of Hialeah, 12 FPER ¶ 17091 (G.C. Sum. Dism.1986). In considering whether a party has failed to bargain in good faith, the Commission must consider the total conduct of the parties during the negotiations, as well as any single act which may constitute a *per se* violation. Utility Board of the City of Key West v. Local Union 1990, International Brotherhood of Electrical Workers, 14 FPER ¶ 19040 (1988); School District of Glades County, Fl. v. International Brotherhood of Firemen & Oilers, Local 1227, 13 FPER ¶ 18108 (1987). The Florida Statutes define "good faith bargaining" as:

> "Good faith bargaining" shall mean, but not be limited to, the willingness of both parties to meet at reasonable times and places, as mutually agreed upon, in order to discuss issues which are proper subjects of bargaining, with the intent of reaching a common accord. It shall include an obligation for both parties to participate actively in the negotiations with an open mind and a sincere desire, as well as making a sincere effort, to resolve differences and come to an agreement. In determining whether a party failed to bargain in good faith, the commission shall consider the total conduct of the parties during the negotiations as well as the specific incidents of alleged bad faith. Incidents of alleged bad faith shall include, but not be limited to, the following occurrences:
>
> (a) Failure to meet at reasonable times and places with representatives of the other party for the purpose of negotiations.
> (b) Placing unreasonable restrictions on the other party as a prerequisite to meeting.
> (c) Failure to discuss bargainable issues.
> (d) Refusing, upon reasonable written request, to provide public information, excluding work products as defined in §447.605, Fla. Stat.
> (e) Refusing to negotiate because of an unwanted person on the opposing negotiating team.
> (f) Negotiating directly with employees rather than with their certified bargaining agent.
> (g) Refusing to reduce a total agreement to writing.

§447.203(17), Fla. Stat.

Whether a party bargains in good or bad faith is a factual determination based on the circumstances of the particular case. Utility Board of the City of Key West v. Local Union 1990, International Brotherhood of Electrical Workers, 14 FPER ¶ 19040 (1988) *citing* Duval Teachers United v. Duval County School Board, 353 So.2d 1244 (Fla. 1st DCA 1978). When a party has been charged with failing to bargain in good faith, the overall conduct of the parties throughout the course of negotiations must be considered. Id. Good faith is a matter of intent; it is a state of mind, and usually a party's state of mind can be determined only by inference from the party's conduct. Id.

There are circumstances in which a party's failure to bargain has been excused because of a lack of alleged evidence that the party lacked good faith. For example, in Hillsborough Transit Authority "Hartline" v. Amalgamated Transit Union, Local 1593, the General Counsel stated that the union's desire to postpone the next bargaining session for a week did not constitute bad faith, in light of the parties' year-long reopener negotiations. 20 FPER ¶25089 (G.C. Sum. Dis. 1994) and 20 FPER ¶25132 (G.C. Sum. Dis. 1994). In City of Pembroke Pines, v. Professional Firefighters of Pembroke Pines, Local 2292, IAFF, the Commission refused to find a violation based on a union's failure in not scheduling negotiation meetings during a two month period for various reasons, including illnesses, deaths, and scheduled vacations. However, the Commission limited its opinion to the facts of that case, stating "We do not suggest that all illnesses, deaths, and scheduled vacations are legitimate reasons for delaying negotiations." 21 FPER ¶ 26112 (1995).[13] Similarly, that portion of a fire union's charge which alleged that a city delayed reopener negotiations until after the mayor's budget was submitted to the city council did not state a prima facie violation of a refusal to bargain where there was no evidence that the union proposed negotiating sessions and the city refused to attend those sessions prior to the submission of the mayor's budget. *See* Jacksonville Association of Fire Fighters, IAFF, Local 122 v. City of Jacksonville, 15 FPER ¶ 20097 (G.C. Sum. Part. Dis. 1989).

Other cases, however, provide examples of how a union has demonstrated bad faith in refusing to negotiate. In City of Pembroke Pines, supra, the Commission held that by flatly stating it would not meet for negotiations until completion of its investigation of alleged threats, the fire union committed a per se violation of its duty to bargain in good faith. 21 FPER ¶ 26111 (1995). The Commission also held that a fire fighter's union failed to bargain in good faith by: (1) proposing to meet on the Sunday of a holiday weekend, which the city rejected; (2) proposing to meet seven weeks later; (3) rejecting six meeting dates proposed by the city; and (4) failing to make any additional proposals for meeting dates. *See* City of Riviera Beach v. Riviera Beach Association of Fire Fighters, 7 FPER ¶ 12029 (1980). The Commission also held that a union violated its duty to bargain in good faith by relying on unfounded technical deficiencies in the employer's request to reopen negotiations as the basis for a flat refusal to bargain. *See* Utility Board of the City of Key West v. Local Union 1990, International Brotherhood of Electrical Workers, 14 FPER ¶ 19040.

The Commission has also found bad faith in a refusal to negotiate when a party has failed to explain *why* it cannot meet to negotiate. In Professional Fire Fighters of Margate, IAFF, Local 2497

[13]In that same case, the union was found to have committed a *per se* violation by refusing to meet until they had investigated some alleged threats.

v. City of Margate, FPER ¶ 21148 (1990), the Commission stated:

> We are not concluding that a six month delay in negotiations constitutes a per se refusal to bargain. *Rather, under the facts of this case, the City's conduct is unlawful because the City failed to offer a plausible explanation for failing to acknowledge Local 2497's five requests to negotiate tendered over a six month period.* The City's participation in negotiations with Local 2497 both before and after the six month period of non-negotiations does not cleanse the violation. Accordingly, the City's conduct violated § 447.501.

(emphasis added).

Some examples of other specific charges arising out of the bargaining or impasse resolution process include the following:

1. Premature Declaration of Impasse

By statute, an impasse occurs upon the following:

> If, after a reasonable period of negotiations concerning the terms and conditions of employment to be incorporated in the collective bargaining agreement, a dispute exists between a public employer and a bargaining agent, an impasse shall be deemed to have occurred when one of the parties so declares in writing to the other party and to the Commission.

See §447.403(1), Florida Statutes.

The key phrase with respect to the declaration of impasse is that it must have occurred after "a reasonable period of negotiations." In that regard, the Commission has interpreted Section 447.403(1) to require that prior to the declaration of impasse, the parties must engage in meaningful negotiations on the mandatory subjects of bargaining that have been raised at the bargaining table during contract negotiations. *See* Professional Firefighters Association, District 6, West Palm Beach, Local 2807, IFF v. Southwest Fire District 6, 9 FPER ¶14289 (1983); Hollywood Firefighters Local 1375, IFF AFL-CIO v. City of Hollywood, 8 FPER ¶13333 (1982) *recons. denied*, 8 FPER ¶13372 (1982); International Brotherhood of Police Officers, Local 621 v. City of Hollywood, 8 FPER ¶13334 (1982).

Thus, in order to sustain a charge, the Commission has described the burden as follows:

> In order to show that impasse was prematurely declared, a charging party must establish that a "reasonable period of negotiation" has not transpired. This means that the charging party must allege and demonstrate that the charged party

> refused to meaningfully negotiate mandatory subjects of bargaining by declaring an impasse before negotiating those issues.

See International Association of Firefighters, Local 2416 v. City of Cocoa, 30 FPER ¶295 (2004) citing City of Hollywood, 8 FPER ¶13334 (1982).

Notwithstanding the requirement that the parties must have engaged in meaningful negotiations, the Commission has long distinguished its impasse process from the private sector, holding that Chapter 447 does not require that the parties be deadlocked in negotiations before an impasse is declared. *See* Teamsters Local Union No. 769 v. City of Cocoa Beach, 23 FPER ¶28186 (1997); Dade County Employees, Local 1363, AFSCME v. City of North Miami Beach, 9 FPER ¶14317 (1983); Hollywood Firefighters Local 1375, IFF AFL-CIO v. City of Hollywood, 8 FPER ¶13333 (1982). However, practitioners should be aware that a premature declaration of impasse prior to having engaged in meaningful negotiations on mandatory subjects of bargaining is potentially an unfair labor practice actionable by the other party. *See, e.g.*, Citrus County Professional Paramedics/EMTS Association Local 3521, IAFF v. Citrus County, 21 FPER ¶26057 (1995). Moreover, PERC can stay impasse proceedings pending the outcome of an unfair labor practice charge. *See* IAFF Local 3347, Volusia County Fire Fighters Association v. Volusia County, 31 FPER ¶ 194 (2005). However, PERC also has the discretion to deny a stay based on the nature of the circumstances presented. *See* Manatee County School Board v. Manatee Education Association, Order No. 06SM-237 (12/6/06).

1. Insisting to Impasse on a Waiver of Bargaining Rights

It is well settled that it is an unfair labor practice for a public employer to legislate or impose a waiver of the right to bargain over changes in wages, hours, and terms and conditions of employment of the union or bargaining unit employees. Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 475 So.2d 1221 (Fla. 1985); Professional Firefighters of Ocala, Local 2135 v. City of Ocala, 18 FPER ¶23171 (1992). However, it is not an unfair labor practice for a public employer to impose language which constitutes an accepted managerial right under section 447.209, Florida Statutes. Thus, for example, in Amalgamated Transit Union, Local 1593, the Hillsborough Area Regional Transit Authority, 24 FPER ¶29247 (1998), *affd*., 742 So.2d 380 (Fla. 1st DCA 1999), the Commission held that the public employer, through the resolution of impasse, did not violate its bargaining obligation by imposing a management's rights clause authorizing subcontracting of services.

Note, too that a Union's mere assertion that a waiver is contained in a proposal taken to impasse will typically not be accepted at face value. Rather, the substance of the proposal will be examined to determine if a waiver is actually contained in the proposal. For example, in Florida Nurses Association v. State of Florida, 20 FPER ¶ 25102 (1994), the Commission dismissed a charge claiming the employer had insisted to impasse on a waiver, finding that proceeding to impasse over the specific criteria necessary for wage adjustments of bargaining unit employees was permitted.

D. Charges Arising Out of Unilateral Changes

One of the most common charges against an employer by a union is that of an alleged unilateral change in wages, hours or terms and conditions of employment without meeting its bargaining obligation. This is considered a refusal to bargain under section 447.501(1)(c), Fla. Stat. Typically, only a Union has standing to bring such a charge against an employer. *See, e.g.*, Taylor v. Columbia County School District, 14 FPER ¶ 19289 (G.C. Sum. Dism. 1986), aff'd., 15 FPER ¶ 20048 (1988); Ritcey v School Board of Palm Beach County, 8 FPER ¶ 13282 (1982)(Individual employees have no standing to raise a refusal to bargain charge against public employers).

1. Management Rights Under PERA

In understanding the obligations imposed with respect to bargaining, it is critical to have an understanding of what subjects fall within this bargaining obligation, and under what circumstances the obligation is either non-existent or is negated by action of one or both parties. The starting point is the public employers' management rights listed in section 447.209, Florida Statutes, as follows:

> It is the right of the public employer to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the right of the public employer to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons.

See §447.209, Fla. Stat. A non-exhaustive list of the range of topics which have been designated as managerial prerogatives includes items such as but not limited to the creation, abolition or retitling of bargaining unit positions[14], closure of a work site[15], subcontracting[16], determination of organizational structure[17], creation of job classifications outside the bargaining unit[18], minimum staffing levels[19], or promotion to non-bargaining unit positions.[20]

However, these management rights are limited by section 447.309(1), which requires

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[14] Jacksonville Supervisors Association v. City of Jacksonville, 26 FPER ¶ 31140 (2000); Pensacola Junior College Faculty Association v. Board of Trustees of Pensacola Junior College, 16 FPER ¶ 21268 (1990) *affd.*, 593 So.2d 254 (Fla. 1st DCA 1992); NAGE v. City of Caselberry, 10 FPER ¶ 15205 (1984).

[15] IAFF, Local 1403 v. Metropolitan Dade County, 11 FPER ¶16285 (1985).

[16] ATU, Local 1593 v. Hillsborough Area Regional Transit Authority, 24 FPER ¶ 29247 (1998), *affd.*, 742 So.2d 380 (Fla. 1st DCA 1999).

[17] IBEW, Local 2358 v. Jacksonville Electric Authority, 24 FPER ¶ 29117 (G.C. Sum. Dism. 1998).

[18] LIUNA Public Employees, Local 678 v. City of Orlando, 17 FPER ¶ 22038 (1991); IAFF Local 2577 v. Lehigh Acres Board of Fire Commissioners, 10 FPER ¶ 15166 (1984).

[19] Pinellas County PBA v. City of St. Petersburg, 23 FPER ¶ 28130 (G.C.Sum.Dism. 1997); Hillsborough Classroom Teachers, supra.

[20] City of Orlando v. Orlando Professional Fire Fighters, Local 1363, 442 So.2d 238 (Fla. 5th DCA 1983); City of Orlando v. PERC, 435 So.2d 275 (Fla. 5th DCA 1983), *revg.*, 8 FPER ¶ 13045 (1981).

employers to "bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employees". Specifically, under §447.309(1), public employers are required to bargain with unions over "wages, hours, and terms and conditions of employment" before making any changes to those items. Management rights are further limited by the last sentence of §447.209 itself, which gives rise to "impact bargaining" - - negotiations over the impact of employer changes concerning items the employer is legally entitled to change, but that indirectly affect "wages, hours, and terms and conditions of employment of the public employees".

2. The "Unilateral Change" Limitation on Management Rights - Items Affecting "Wages, Hours, Terms and Conditions of Employees."

Despite the employer rights explained above, Section 447.309(1) gives employees certain rights in relation to their "wages, hours, terms and conditions of employment." *See* §447.309(1), Fla. Stat. Specifically, Section 447.309(1) provides in relevant part:

> After an employee organization has been certified pursuant to the provisions of this part, the bargaining agent for the organization and the chief executive officer of the appropriate public employer or employers, jointly, shall bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employees within the bargaining unit. The chief executive officer or his or her representative and the bargaining agent or its representative shall meet at reasonable times and bargain in good faith.

See §447.309(1), Fla. Stat. This statutory provision has given birth to the so-called doctrine of unilateral change, which prohibits public employers from unilaterally altering the wages, hours, and terms and conditions of employment[21] without first bargaining over those proposed changes. PERC case law summarizes this concept as follows:

> Absent clear and unmistakable waiver, exigent circumstances, or legislative body action after bargaining impasse, changes in the status quo of wages, hours, and terms and conditions of employment, cannot be made by a public employer without providing notice to the employees' bargaining agent, and an opportunity to conduct meaningful negotiations, before implementing the change. *See e.g.*, The Florida School for the Deaf and the Blind Teachers United v. The Florida School for the Deaf and the Blind, 11 FPER ¶ 16080 (1985), *affd.*, 483 So.2d 58 (Fla. 1st DCA 1986). Such unilateral changes constitute a per se violation of Section 447.501(1)(a) and (c), Florida

[21] For a summary of PERC decisions through 2005 detailing the designation of subjects as mandatory or permissive bargaining subjects, see *Scope of Bargaining*, 2nd ed. (PERC Sept. 2005), available at http://perc.myflorida.com/pubs/Scope_of_Bargaining.pdf

Statutes.

School Maintenance Employees v. Duval County School Board, 25 FPER ¶30036 (1998); *see also* School Board v. Indian River County Education Ass'n, 373 So.2d 412 (Fla. 4th DCA 1979); School Board of Orange County v. Palowitch, 367 So.2d 730 (Fla. 4th DCA 1979). This prohibition even applies to situations in which the employer's unilateral change benefits employees. Bradford Education Association v. Bradford County School District, 21 FPER ¶ 26017 (1994)(school district violated its bargaining obligation by unilaterally inserting wage-supplement provision in collective agreement and implementing that provision).

The doctrine of unilateral change is an expansive concept. Originally, the doctrine was limited to a prohibition against employers making unilateral changes in working conditions "during negotiations." Palowitch v. Orange County School Board, 3 FPER 280 (1977), *affd*., 367 So.2d 730 (Fla. 4th DCA 1979). This concept was expanded in 1979 and now arguably prohibits employers from making unilateral changes to virtually any "wages, hours, and terms and conditions of employment." *Id.*; *see also* School Board of Indian River County v. Indian River County Education Association, Local 3617, AFT/FEA United, 373 So.2d 412 (Fla. 4th DCA 1979). In accomplishing this change, PERC reasoned as follows:

> The same policy considerations underlying the prohibition of unilateral changes during negotiations are equally applicable to unilateral changes in subjects not covered by an existing agreement. Terms and conditions not discussed by the parties in negotiations nevertheless continue to be terms and conditions of employment and, by virtue of Section 447.309(1), an employer must negotiate with the certified bargaining agent prior to changing them. The obligation to bargain imposed by Section 447.309(1), extends to all terms and conditions of employment. To conclude that terms and conditions of employment upon which the parties fail to reach agreement lose their status as such and somehow become management prerogatives leads to an absurd and fruitless result.

Palowitch, 3 FPER 280 (1977).

A related issue occasionally arising in unilateral change cases is a funding issue, or a claim of fiscal problems. This issue is discussed in detail in a recent issue of the *PERC News*.[22] In summary, the doctrine of unilateral change does apply, but before 1995, a statutory provision on underfunding allowed it to occur in certain circumstances. *Compare* Sarasota Classified Teachers Association v. Sarasota County School District, 18 FPER ¶ 23069 (1992), *revd*., 614 So. 2d 1143 (Fla. 2d DCA 1993), *rev. dism*., 630 So. 2d 1095 (Fla. 1994) and Martin County Teachers Association v. School Board of Martin County, 18 FPER ¶ 23061 (1992), *revd*., 613

[22] Ruby, Jack, *Fiscal Problems and Unilateral Changes*, PERC News (April 1-June 30, 2007), available at http://perc.myflorida.com/news.aspx

So. 2d 521 (Fla. 4th DCA 1993) with State of Florida v. Florida PBA, 613 So. 2d 415 (Fla. 1992) and Chiles v. United Faculty of Florida, 615 So. 2d 671 (Fla. 1993). In 1995, Section 447.303(2)(b), Fla. Stat. was then amended to limit its application to the State of Florida, and a new Section 447.4095, Fla. Stat. on financial urgency was created. One of the first cases on this new provision is as of this writing working its way through the Commission. See Manatee education Association v. School District of Manatee County, Case No. CA-2008-067 (HORO issued 12/3/08).

3. The "Impact Bargaining" Limitation on Management Rights

The "management rights" section of PERA also contains a limitation that has given birth to the concept of "impact bargaining". After defining "unilateral" management rights, Section 447.209 goes on to provide that "the exercise of such rights shall not preclude employees or their representatives from raising grievances, should decisions of the above matters have the practical consequence of violating the terms and conditions of any collective bargaining agreement in force or any civil or career service regulation." *See* §447.209, Fla. Stat.

The seminal case in which the Commission recognized the obligation to bargain over the "impact" of management's exercise of its rights is Duval Teachers United, FEA-AFT v. Duval County School Board, 3 FPER 96 (1977). In that case, the Commission found that the School Board committed an unfair labor practice by, among other things, refusing to bargain over certain issues the Board asserted were management rights within the meaning of Section 447.209 of PERA. *Id*. at 99. In so holding, the Commission laid a foundation for how it would view future cases surrounding a refusal to bargain over managerial prerogatives, explaining:

> The scope of bargaining defined by the phrase 'terms and conditions of employment" is statutorily broad. The scope of the public employer's rights, as defined by Section 447.209 of the Act, is also statutorily broad. It therefore cannot be categorically stated that the employer's right to "exercise control and discretion over its organization and operations", or its right to "direct its employees" will not at some point conflict with the employer's duty to collectively bargain over "terms and conditions of employment".
> Conceptually, the scope of bargaining can be viewed as a continuum. The management rights of a public employer, pursuant to Section 447.209 of the Act, are at one pole; the bargaining rights of the employees, pursuant to Section 447.309(1) of the Act, are at the other. Each proposed provision for the collective bargaining agreement falls somewhere along that continuum. At some point in the negotiating process it will be determined that the employer has an absolute obligation to negotiate regarding certain proposals. By the same standard, at some point in the negotiating process it will be determined that the employer's discretion in respect of certain proposals is beyond question. However, these determinations cannot

> be made at the threshold of bargaining by the mere categorization of certain "subjects" as "non-negotiable", without further exploration into the impact and exact language of prospective proposals.

Id. at p. 100.

Once this foundation was laid, the Commission explained the employer's specific negotiation obligation as follows:

> In an effort to determine whether a provision is negotiable of right or rather a managerial prerogative, an employer must negotiate the areas of overlap. This is the essence of good faith bargaining. Respondent failed to determine where on the continuum of negotiability DTU's proposals lie. This threshold refusal to discuss these items with an open mind is the focal point of the instant action. By approaching the bargaining table with a fixed and pre-conceived determination as to which issues it would discuss and which it would not, Respondent violated Section 447.501(1)(a) and (c) of the Act.

Id. at p. 100; *see also* Palowitch v. Orange County Classroom Teachers Association, 2 FPER 280 (1977), *affd*, 367 So. 2d 730 (4th DCA 1979)(Holding that although the School Board had the right under Section 447.209 to change from a two semester to a quinmester school year, it nonetheless violated PERA by failing to negotiate impact).

The Commission went on to apply the framework from Duval Teachers, *supra*, a year later in Osceola Classroom Teachers Association v. School Board of Osceola County, 4 FPER ¶ 4066 (1978). In that case, the Commission explained:

> Public employers are not relieved of their obligation to bargain on the bare assertion that proposals presented by the employee organization involve management rights. Rather, employers must come into negotiations with open minds and must discuss the employee organization's proposals. This is not to say that the employers may not ultimately reach the conclusion after discussion, that the proposals touch so closely to inherent management rights that no further bargaining is necessary. "However, these determinations cannot be made at the threshold of bargaining by the mere categorization of certain 'subjects' as 'non-negotiable' without further exploration into the impact and exact languages or prospective proposals."

Id. at p. 148 (additional citation omitted). The Commission ultimately found a violation by the School Board of Osceola County, noting that, although the employer could "decide unilaterally to discontinue an academic or extracurricular program and to terminate or lay-off an employee due to lack of work," the employer nonetheless violated the statute by failing to notify the union of its

proposed actions and "to thereby provide the union an opportunity to bargain over the effect of the action on the unit members." *Id*. at 147 (additional citation omitted).

To summarize management's impact bargaining obligation, although management has the right to take action with respect to the areas mentioned in §447.209, public employers are obligated to negotiate the impact of decisions that have a direct and substantial effect on the wages, hours, terms and conditions of employment. *See* Hillsborough County School Board, 7 FPER ¶ 12411 (1981), *recons. denied*, 8 FPER ¶ 13074 (1982), *affd.*, 423 So.2d 969, 970 (Fla.1st DCA 1982)(affirming PERC ruling that class size and minimum staffing not mandatorily negotiable, but that impact bargaining warranted "when an appropriate showing of negotiable impact has been made").

4. Timing

Although impact bargaining as an obligation has been long established, there had been some debate over the timing of an employer's adoption and implementation of unilateral changes in relation to the employers' duty to negotiate over the impact of those changes. In Duval Teachers United v. School Board of Duval County, 6 FPER ¶ 11271 (1980), the Commission addressed this timing issue as follows:

> In order to determine an employer's duty to bargain regarding a particular policy decision it desires to make, the subject matter of the decision must be categorized in one of two ways. The subject matter may itself be a wage, hour, term or condition of employment; alternatively, the subject matter may be a matter within the managerial prerogative to set standards of service, although its implementation will cause a change in wages, hours, terms or conditions of employment. If the subject matter of the decision is a term or condition of employment, it is a required subject of bargaining and the public employer must notify the certified bargaining representative of its *proposed* decision and afford the certified representative an opportunity to negotiate before the employer takes *any* action to adopt or implement the change. If the subject matter is within the managerial prerogative to set standards of service, the employer may *adopt* the change in policy but may not *implement* its decision until it has afforded the certified representative notice and an opportunity to bargain regarding the impact which the implementation will have on terms and conditions of employment.

Id. at 402-403.

A 2000 PERC decision, Jacksonville Supervisors Association v. City of Jacksonville, 26 FPER ¶ 31140 (2000), *rev'd on other grounds*, City of Jacksonville v. Jacksonville Supervisors Association, 791 So.2d 508 (Fla. 1st DCA 2001), solidified the Commission's position with respect to the timing issue. In summary, JSA alleged an unfair labor practice by the City stemming from the

City's abolishing three job classifications and creating three new job classifications. JSA claimed "it had informed the City of its concern that the elimination or removal of bargaining unit work had an impact, and that it had requested that the City provide documentation to the JSA so it could better understand and evaluate the precise impacts of the elimination of this work."[23] *Id*. at p. 246. The Hearing Officer found a violation, which was upheld by the Commission. On the timing issue, the Commission stated:

> In satisfying this bargaining obligation, an employer need only provide notice and a reasonable opportunity to bargain before implementing its decision. This opportunity does not require the employer to submit to an impasse in negotiations to the statutory resolution process prior to implementation. See § 447.403, Fla. Stat. (199). Indeed, to so require would, as the City contends, effectively eliminate its management right. Of course, any impasse in negotiations occurring before or after implementation of the management right would still be resolved by the legislative impasse negotiation procedure in Section 447.403.

Id. at p. 255.

Since JSA, *supra*, the Commission issued Ormond Beach Firefighters Association, Local 3499 v. City of Ormond Beach, 27 FPER ¶ 32007 (2000). In Ormond Beach, the Commission confirmed that the obligation to negotiate impact does not require the employer to submit impact negotiations to the statutory impasse resolution procedure prior to implementation. Id.

5. How Obligation to Negotiate Impact is Established

Under Commission case law, any of the management rights recognized by the Commission could potentially give rise to an impact bargaining obligation, depending on the specific facts and circumstances, including but not limited to (a) whether the subject has already been negotiated; (b) whether the impact is on the collective interests of the unit; (c) whether an effective demand for bargaining has been made; (d) whether the union has identified the specific negotiable impact (unless a *per se* impact exists); and/or (e) whether the right to negotiate has been waived. While these issues often overlap, some discussion of each of these is contained below.

(a) Whether the Subject Has Already Been Negotiated

The Commission has indicated that where a subject and/or its impact has already been negotiated, no further obligation will be found, even where each and every potential impact was not

[23] The initial charge was dismissed by the General Counsel because the decision to abolish three job classifications and create three new job classifications is the exclusive prerogative of management and because JSA did not allege that it identified for the City a negotiable impact from those City decisions. *See* Jacksonville Supervisors Association v. City of Jacksonville, 25 FPER ¶ 30289 (G.C. Sum. Dism. 1999).

recognized or addressed. For example, in Federation of Public Employees, District 1, MEBA v. City of Sunrise, 20 FPER ¶ 25177 (G.C. Sum. Dism. 1994), the General Counsel dismissed a charge that the City had unlawfully laid off seven employees without notice and the opportunity to bargain impact. Relying on Federation of Public Employees v. City of Pompano Beach, 9 FPER ¶ 14111 (1983), the General Counsel determined that the negotiation and inclusion of a comprehensive layoff and recall provision in the contract eliminated the obligation to bargain further on that issue. *See also*, Florida Public Employees Council 79, AFSCME v. State of Florida, 21 FPER ¶ 26215 (1995)(Where the potential impact of a management decision, such as a layoff, has already been considered in a contract with a zipper clause, no further bargaining required); LIUNA, Public Employees, Local 678 v. City of Melbourne, 19 FPER ¶ 24026 (1992)(same).

However, there remains an obligation to bargain when the agreement contains a reopener clause. In that regard, it has been stated: "It is well established that 'either party may refuse to bargain further with respect to subjects covered by the written terms of a negotiated contract during the contract's life in the absence of a reopener clause.'" *See* Port Everglades Authority v. Port Everglades Firefighters, 11 FPER ¶ 16004 (G.C. Sum. Dism. 1984) citing Orange County PBA v. City of Orlando, 6 FPER ¶ 11016 (1979); *see also* Florida State Lodge, Fraternal Order of Police, Ocala Local 129 v. City of Ocala, 24 FPER ¶ 29335 (1998) (stating: "*Absent a reopener provision* or proof of financial urgency, a union is not obligated to negotiate changes to contractual provisions merely upon a request to do so by the public employer.")(italics added)

(b) Whether the Impact Is on the Collective Interests of the Unit

The duty of impact bargaining only arises when an employer decision affects the collective interests of the bargaining unit, rather than having an impact upon just one employee. For instance, in Manatee Education Association v. Manatee County School Board, 7 FPER ¶ 12017 (1980), the union charged a failure to negotiate a work assignment change for one teacher. In holding that no violation occurred (for a variety of reasons), the Commission explained that the "obligation to bargain [impact] arises only when the impact is upon the *collective* interests of the represented employees."[24] *Id*. at 33 (footnote in original). Thus, "[w]here the impact is confined to an individual employee, there is no duty to bargain. . .". *Id*. at 33. See also, St. Petersburg Association of Fire Fighters, Local 747 v. City of South Pasadena, 20 FPER ¶ 25090 (G.C. Sum. Dism. 1994), *amended charge dismissed,* 20 FPER ¶ 25095 (1994); *dism. affd.*, 20 FPER ¶ 25128 (1994)(Change of single firefighter's work schedule not unfair labor practice); Davie Professional Firefighters, Local 2315 v. Town of Davie, 21 FPER ¶ 26207 (G.C.Sum.Dism. 1995)(Town's recoupment of cancellation fee for missed medical exam ordered by Town did not rise to level of unfair labor practice where no actual or potential impact on employees' collective interests). In Cocoa Beach Professional Fire Fighters, Local 3570 v. City of Cocoa Beach, 23 FPER ¶ 28257 (1997), the Commission upheld the

[24]The questions of whether a duty to bargain exists where the collective impact upon the terms and conditions of employment of unit employees is merely slight, insignificant, or insubstantial is not dispositive to the resolution of this case. However, by use of the term "collective interests," we do not mean to imply that we will find a duty to bargain only where the impact is upon the terms and conditions of employment of each and every unit employee.

dismissal of a charge by the General Counsel alleging in part a refusal to "effects" bargain over the discharge of a single employee who tested positive for drugs. *See also*, Laborers' International Union of North America v. Greater Orlando Aviation Authority, 869 So. 2d 608 (Fla. 5th DCA 2004)(no showing of impact beyond a single employee).

(c) Effectiveness of Demand to Bargain

Over the years, a number of charges alleging a refusal to bargain have been dismissed by the General Counsel for PERC because the union failed to make an effective demand for bargaining. In seeking to negotiate impact, the Commission has been clear in stating that, in order to constitute an effective demand for impact bargaining, a union must advise the employer "in clear terms that the union is seeking to bargain over the impact of a management right, and not the management right itself." *See* Laborers' International Union of North America v. Greater Orlando Aviation Authority, 869 So. 2d 608 (Fla. 5th DCA 2004)(union has duty to request impact bargaining); Fraternal Order of Police Florida Lodge 10 v. City of Clearwater, 24 FPER ¶ 29006 (1997); Laborers' International Union, Local 1101 v. Alachua County, 22 FPER ¶ 27018 (1995)(No violation found where evidence showed union sought to negotiate only over decision and not its impact and further failed to identify negotiable impact).

Illustrative regarding the effectiveness of the demand to bargain is AFSCME, Local 1363 v. Miami-Dade County, 24 FPER ¶ 29093 (1998), wherein the union claimed a refusal to bargain, in part based on implementation of revised work standards without providing to the union notice and an opportunity to bargain. The General Counsel dismissed the charge, noting first that the right to set standards of service to be offered to the public is a management right. **Id**. at 152. Regarding the potential impact bargaining obligation, the General Counsel determined that the union president's letter to the employer "to see if we can resolve the issue" of the new work standards was not "a demand which effectively create[d] a duty on the part of the County to bargain over the related effects of the decision to change work standards." *Id*. at 152. Rather, "the impact of a management decision upon employees' wages, hours, and terms and conditions of employment is negotiable to the extent that a union is able to identify such effects in its demand to bargain." *Id*. at 152. *See also*, Florida State Lodge, Fraternal Order of Police v. Town of Indian Shores, 17 FPER ¶ 22179 (1991)(Charge dismissed where union merely "advised" Town that new schedule would constitute "unilateral change"; mere protest is not sufficient demand to bargain); Leon County PBA, Inc. v. City of Tallahassee, 8 FPER ¶ 13400, *affd. per curiam*, 445 So.2d 604 (Fla. 1st DCA 1984)(Union waives right to bargain when, after notice of proposed charge given, fails to make effective bargaining demand); AFSCME, Local 1363 v. Miami-Dade County, 24 FPER ¶ 29094 (G. C. Sum. Dis.1998)(Charge dismissed where right to set work standards a managerial prerogative and union failed to make effective impact bargaining demand).

(d) Showing of Negotiable Impact

The General Counsel for PERC has also dismissed a number of charges for an insufficient showing of negotiable impact. *See, e.g.*, International Brotherhood of Firemen and Oilers, Local

1227 v. Palm Beach County School Distract, 20 FPER ¶ 25243 (G. C. Sum. Dis. 1994)(Charge dismissed where right to change job descriptions and create second shift were management rights and union failed to show it identified to School Board direct and substantial effects of decision); Florida Public Employees Council 79, AFSCME v. State of Florida, 21 FPER ¶ 26215 (G.C. Sum. Dis. 1995)(Charge dismissed where union, although having made an effective bargaining demand by claiming layoffs created unsafe environment, nonetheless failed to identify specific impact of layoffs or issues over which it would seek to negotiate to reduce safety concerns); Transport Workers Union of North America, Local 291 v. Metropolitan Dade County, 21 FPER ¶ 26082 (G.C. Sum.Dism. 1995)(Charge dismissed where union failed to allege specific impact of addition of double side busses to fleet).

Regarding the failure to allege or prove negotiable impact, the General Counsel recently restated the standard in Government Supervisors Association of Florida, OPEIU, Local 100 v. Broward County, 26 FPER ¶ 31267 (2000), *affd. on other grounds*, 26 FPER ¶ 32028 (2000), wherein a charge alleging an unlawful failure to impact bargain over the reclassification of vacant bargaining unit positions was dismissed. In dismissing the charge, the General Counsel reiterated the showing to be made, explaining:

> In order to show a negotiable impact, a union must show direct and substantial effects upon existing wages, hours, terms and conditions of employment caused by and forseeably resulting from the implementation of the change at issue. It must do this, not only in its allegations before the Commission, but also in its initial demand for impact bargaining with the public employer. Absent a *per se* impact upon the bargaining unit, a failure to disclose the impact of a matter within management's discretion constitutes a waiver of impact bargaining.

Id. at 562 (citing FOP Florida Lodge No. 10 v. City of Clearwater, 24 FPER ¶ 29006 (1997) and cases cited therein). In other similar circumstances, no violation has been found where, for example, the employer reclassified a position within the unit that was predominantly performing non-unit work. *See* LIUNA Public Employees, Local 678 v. City of Orlando, 17 FPER ¶ 22038 (1991).

It should also be noted that no obligation to bargain has been found where the impact of the action is speculative and uncertain, *de minimus* or otherwise not a term or condition of employment. *See* LIUNA Public Employees, Local 678 v. City of Orlando, 17 FPER ¶ 22038 (1991)(Where impact of reclassification of bargaining unit employee to outside unit on promotional opportunities was too remote, no violation found); ATU, Local 1579 v. Gainesville Regional Transit System, 18 FPER ¶ 23231 (1992)(Charge partially dismissed on alleged change in time, place of filing grievances where effect is *de minimus*); District 2A, TTWISEU, MEBA v. Port Everglades Authority, 17 FPER ¶ 22132 (1991)(Implementation of new method of monitoring compliance with existing residency requirement not change in term or condition requiring bargaining); Federation of Public Employees v. Broward County School District, 14 FPER ¶ 19159, recons. denied, 14 FPER ¶ 19222 (1988)(Installation of time clocks to monitor attendance did not constitute change in term or

condition); Southwest Florida Professional Firefighters Local 1826 v. Lee County Port Authority, 18 FPER ¶ 23240 (1992)(Charge dismissed where fire fighters assigned new tasks within scope of basic job duties; no impact bargaining obligation for additional wages where change in duties not material or substantial).

(e) Whether a Waiver of Bargaining Has Occurred

Waivers of bargaining rights are frequently sought by management in negotiations to avoid undue delay in the exercise of managerial prerogatives. Such waivers "must be clear and unmistakable." *See* Palowitch v. Orange County Classroom Teachers Association, 2 FPER 280, 282 at n. 14 (1977). Due to some inconsistencies that developed over the years in the application of this standard, the Commission took the opportunity to clarify it in 1985 in FOP, Miami Lodge 20 v. City of Miami, 12 FPER ¶ 17029 (1985). In that case, the Commission stated that "a 'clear and unmistakable' contractual waiver must be one that explicitly and expressly delineates specific working conditions which an employer can unilaterally change." *Id*. at p. 40 (additional citation omitted).

As a general rule, waivers via generalized contact language alone are rare. *See, e.g.*, Southwest Florida Professional Fire Fighters, Local 1826 v. Ft. Myers Beach Fire Control District, 23 FPER ¶ 28209 (1997). As was explained in Hillsborough County PBA v. City of Tampa, 6 FPER ¶ 11033 (1980):

> It is now axiomatic in Florida that neither a generalized managements rights clause nor a "zipper clause" in a collective bargaining agreement grants an employer plenary authority to unilaterally alter any and all working conditions which are not explicitly delineated in the agreement. Nor will a labor organization's agreement of such generalized contract language, without more, be construed as a waiver of the right to negotiate concerning subsequent alterations of existing terms and conditions of employment.

Id. at p. 50.

Thus, employers often seek clearly defined waivers in securing a contractual provision. However, litigation naturally ensued over how far a public employer could go in trying to negotiate away its obligation to bargain impact. This was resolved by the Florida Supreme Court in 1985 in Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 475 So. 2d 1221 (Fla. 1985). In that case, the Court upheld a prior PERC[25] and then First District Court of Appeal decision[26] that it was an unfair labor practice to insist to the point of impasse on a waiver of a union's right to negotiate the impact of managerial decisions. *Id*. at 1227. The underlying decision of the First District Court of Appeal was particularly instructive in this regard, holding that

[25]7 FPER ¶ 12300 (1981).
[26]425 So.2d 133 (Fla. 1st DCA 1982).

the statutory right to bargain impact, in advance of implementation of decision, was, in light of the statutory prohibition against strikes, an essential element in the legislative scheme to permit meaningful collective bargaining. 425 So.2d at 137-139.

In applying these principles, the Commission has held that it is an unfair labor practice to insist to impasse on broad language stating that the contract "supersedes any past practice or prior agreement, verbal or written. . .that are not now provided for or contained in this agreement." *See* Hillsborough Area Regional Transit Authority, 24 FPER ¶ 29247 (1998), *affd*., 742 So.2d 380 (Fla. 1st DCA 1999). Under this same case, however, the Commission also held that it is not an unfair labor practice to insist to impasse on including the right to subcontract in its management rights clause. *Id*. at p. 397. Should the right be exercised, however, the employer would need to provide notice and an opportunity to bargain impact. *Id*. at p. 397.

Typical situations in which a waiver might be found are through express contract language (either stand alone or in conjunction with past practice) or by inaction. Illustrative regarding a waiver via contract language is Volusia County Firefighters Association, Local 3574 v. Volusia County, 22 FPER 27066 (1996), in which the Commission affirmed the General Counsel's dismissal of a charge.[27] In so holding, the Commission determined that the employer was contractually privileged to unilaterally implement shift transfers under language contained in an expired collective bargaining agreement. Moreover, no obligation to bargain the effects existed based on the zipper clause language in the contract. *Id*. at 113. *See also*, Miami-Dade County v. Government Supervisors Association of Florida, OPEIU, AFL-CIO, Local 100, 907 So. 2d 591 (Fla. 3rd DCA 2005), rev. denied, 926 So.2d 1269 (Fla. 2006), **revg**. 29 FPER 265 (2003); State of Florida, 12 FPER ¶ 17017, 472 So. 2d 1184 (Fla. 1985).

Illustrative regarding a waiver by inaction is Orange County Classroom Teachers Association v. School Board of Orange County, 22 FPER ¶ 27022 (G.C.Sum.Dism. 1995). In this case, the union sought to bargain over the impact of abolishing a unit classification and replacing it with a non-unit classification. In dismissing the charge, the General Counsel explained that "an employee organization may waive its right to bargaining by inaction where, after appropriate notice of a proposed change, it fails to make an effective demand to bargain." *Id.* at 33 citing Leon County PBA, Inc. v. City of Tallahassee, 8 FPER ¶ 13400, *affd. per curium*, 445 So. 2d 604 (Fla. 1st DCA 1984). Thus, dismissal was appropriate where the union, while not receiving formal notice, had actual notice of the intended change and failed to request negotiations for some two months. Id. at 33.

E. Coercion and Retaliation for Protected Activity

Under Section 447.501(1)(a), Florida Statutes (2007), a public employer is prohibited from interfering with, restraining or coercing public employees in collective bargaining or other protected concerted activities guaranteed by Chapter 447, Part II, Florida Statutes. A recent District Court of Appeal decision has modified the historical analytical framework used by the Commission in determining whether a Section 501(1)(a) has occurred. Specifically, the Third

[27] 22 FPER ¶ 27009 (G.C. Sum. Dism. 1995).

District Court of Appeal reversed the Commission's decision in City of Coral Gables v. Coral GablesWalter F. Strathers Memorial Lodge 7, FOP, 976 So.2d 57 (Fla. 3d DCA (2008), *rev. denied*, 994 So. 2d 304 (2008), *revg*. 32 FPER ¶ 173 (2006). Factually, the Commission had determined that the City violated Section 501(1)(a) by threatening future wage freezes and recoupment "one way or another" concerning a grievance settlement in an unfair labor practice charge filed by the union. The basis for the Commission's decision was that the comments would have the foreseeable effect of instilling in employees a reasonable belief that further protected activities, specifically filing and pursuing collective bargaining grievances, may result in adverse employment consequences. In reversing, the Third DCA relied on School Board of Lee County v. Lee County School Board Employees Local 780, AFSCME, 512 So. 2d 238 (Fla. 1st DCA 1987), which held that a finding of unlawful motive is a requirement for an alleged threat to be a violation of Section 447.501(1)(a). Therefore, in the absence of proof and such a finding that the protected conduct motivated the employer to make the alleged threatening or coercive remark, no violation would be found.[28]

For retaliation claims, the Commission applies the Pasco County test to determine whether a charge alleging an unfair labor practice alleging retaliation for protected activity is sustained by the evidence. *See* Pasco County School Board v. Florida Public Employees Relations Commission, 353 So. 2d 108 (Fla. 1st DCA 1977). The first prong of the test requires the claimant to prove by a preponderance of the evidence that his conduct was protected and his conduct was a substantial or motivating factor in the decision taken against him by the employer. *Id.* at 117. The second prong requires that if the claimant satisfies his or her burden, the burden then shifts to the employer to show by a preponderance of the evidence that notwithstanding the existence of factors relating to protected activity, it would have made the same decision affecting the employee anyway. *Id.*

PERC has recognized that an otherwise protected activity may lose its protection if it creates a threat of disruption of the workplace. United Faculty of Palm Beach Junior College v. District Board of Trustees of Palm Beach Junior College, 11 FPER ¶16101 (1985). For instance, an employee's threatening, intimidating actions toward a supervisor was determined not to be protected conduct in ATU Local 1579 v. City of Gainesville, 19 FPER ¶ 24083 (1993). Also, in Skeen, Butts, Clark and Panaway v. Suwannee County, 26 FPER ¶ 31165 (2000) an employee's threatening manner stripped his solicitation of signatures on a memorandum about workplace issues of its protected status.

F. Refusal to Discuss Grievances

Section 447.501(1)(f), Florida Statutes, prohibits a public employer from refusing to discuss a grievance "in good faith pursuant to the terms of the collective bargaining agreement with either the certified bargaining agent for the public employee or the employee involved." The Commission has determined that such a charge requires the charging party to establish that: (1) the grievance at issue

[28] For more detail regarding the Coral Gables decision, *see* Ruby, Jack E., *Alleged Coercive Remarks Must Have Unlawful Motivation to Constitute Unfair Labor Practice*, Vol. 8 PERC News No. 1 (Jan.-March 2008), available at http://perc.myflorida.com/news/PERC_News_Jan_-_Mar_2008.pdf

arguably involves the interpretation or application of a collective bargaining contract; and (2) the manner in which the employer handled the grievance, usually at the arbitral step, prohibited the employee from fully utilizing the contractual grievance procedure. *See* Westfall v. Orange County Board of County Commissioners, 8 FPER ¶ 13367 (1982). "Since Westfall, the Commission has interpreted the words 'fully utilizing' to mean that an employer fails to act in good faith only if its conduct prohibits a grievant from advancing to arbitration." *See* LIUNA, Local 678 v. City of Melbourne, 22 FPER ¶ 27143 at 254 (1996); Cyr v. Indian River County School Board, 31 FPER ¶ 134 (2005), *dism. affd*., 31 FPER ¶ 156 (2005). Note, however, that an employer's refusal to arbitrate a grievance submitted by an individual was found not to be unlawful where the certified union with exclusive control over the arbitration of grievances declined to arbitrate the particular grievance. *See* Joe Coppola v. Broward County, 31 FPER ¶ 120 (2005).

G. Denial of Representation

The Commission has held that a public employee is entitled to union representation, if requested, in an investigatory interview if the employee has a reasonable belief that disciplinary action may result from the interview. *See* Bacchus v. Metropolitan Dade County, 11 FPER ¶ 16250 (1985); Lewis v. City of Clearwater, 6 FPER ¶ 11222 (1980), aff'd., 404 So. 2d 1156 (Fla. 2d DCA 1981). This right to representation is commonly called a "Weingarten right" after the seminal United States Supreme Court case of NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). By violating an employee's Weingarten rights, a public employer violates Section 447.501(1)(a), Florida Statutes. Note, however, that a request for "legal representation" does not establish that an employee sought union representation. *See* Diez v. City of North Miami Beach, 29 FPER ¶ 304 (2003) citing Nordquist v. Department of Corrections, 17 FPER ¶ 22125 (G.C. Sum. Dism.1991), TCC Center Companies, 275 NLRB 604, 119 LRRM 1195 (NLRB 1983); Calvo v. Department of Health and Rehabilitative Services, 16 FPER ¶ 21244 (G.C. Sum. Dism.1990), and Consolidated Casinos Corp., 266 NLRB 988 (NLRB 1983) (a public employer does not violate an employee's Weingarten right by refusing a request to postpone or adjourn a disciplinary meeting to allow the employee to consult an attorney).

Further, where a meeting may involve discipline, but it is not called for the purpose of questioning an employee concerning disciplinary matters, there is no Weingarten violation in an employer's refusal to grant an employee's request that he have a union representative present during the meeting. *See* UFF v. Florida Board of Regents, 24 FPER ¶ 29204 (G.C. Sum.Dism.1998); Sarasota Professional Firefighters, Local 2546 v. Sarasota-Manatee Airport Authority, 14 FPER ¶ 19064 (1988)(ruling that employer did not act unlawfully by refusing request for union representation at meeting where employee is simply told he is to be discharged and no employee questioning takes place). *See also*, Campe v. Hillsborough Area Regional Transit, 21 FPER ¶ 26142 (G.C. Summary Dismissal 1995) (concluding that the removal of a union representative from a meeting with employees that was not shown to be investigatory does not violate an employee's Weingarten rights); CWA Local 3178 v. City of Miami Beach, 31 FPER ¶ 162 (2005)(Employee's reasonable but mistaken belief that he might be disciplined does not convert meeting from its stated purpose of resolving grievance, so no Weingarten violation found).

Practitioners must remember that employers can be charged with independent violations of Section 447.501(1)(a) if they improperly interfere with an employee's representation rights. *See*, *e.g.*, Raven v. School District of Manatee County, Florida, 34 FPER ¶125 (2008) and Professional Law Enforcement Association of Miami-Dade County v. Miami-Dade County Board of County Commissioners, 34 FPER ¶211 (2008).

H. Breach of the Duty of Fair Representation

One of the more common charges brought against an employee organization revolves around its representation obligation. A certified employee organization has the duty to fairly represent all bargaining unit employees. *See* Lemon v. United Teachers of Dade, FEA-United/AFL-CIO, 9 FPER ¶ 14255 (1983); Gow v. AFSCME, Local 1363, 4 FPER ¶ 4168 (1978). This duty arises as a result of the organization having the exclusive right to serve as the collective bargaining representative for purposes of determining wages, hours, and terms and conditions of employment for all unit employees. *See* Heath v. School Board of Orange County, 5 FPER ¶ 10074 (1979). Thus, this duty exists only to those matters over which the bargaining representative has exclusive control, such as negotiating a collective bargaining agreement or enforcing the agreement through the grievance procedure. See Commarota v. Communication Workers of America, 30 FPER ¶232 (2004). A breach of the duty of fair representation with respect to the processing of an employee's grievance must be based upon a showing that the subject matter of the grievance is arguably covered by a collective bargaining agreement and that the bargaining representative's processing of the grievance was arbitrary, discriminatory, or in bad faith. *See* Kallon v. United Faculty of Florida, 15 FPER ¶20047 (1988), *recon. denied*, 15 FPER ¶ 20079 (1989), *aff'd.*, 555 So. 2d 859 (Fla. 1st DCA 1989).

In the context of a union's duty of fair representation, the Commission has defined arbitrary conduct as action taken without a rational or proper basis. Jones v. Duval Teachers United, 30 FPER ¶249 (2004) citing Kallon v. United Faculty of Florida, 15 FPER ¶20047 (1988), *recon. denied*, 15 FPER ¶ 20079 (1989), *aff'd.*, 555 So. 2d 859 (Fla. 1st DCA 1989). When a union's judgment is at issue, the union's actions are reviewed to ascertain whether they fall within the "wide range of reasonableness" granted bargaining agents by the courts. Pearn v. FOP Lodge 10, 28 FPER 33236 (2002); Gow v. AFSCME, Local 1363, 4 FPER ¶ 4168 at 325 (1978), quoting Ford Motor Company v. Huffman, 345 U.S. 330, 338; 73 S.Ct. 681 (1953); *see also* Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967) (union's ability to screen meritless grievances from arbitration process must not be impaired); Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985)(scope of duty of fair representation construed narrowly to preserve union's discretion to decide how to balance collective and individual interests it represents). In order to prevail, an employee must show more than a mere disagreement over the manner in which the union representative processed the grievance in order to substantiate a claim that the duty of fair representation has been breached. *See* Wooden v. Florida Police Benevolent Association, 22 FPER ¶27227 (1996); Wolfe v. AFSCME, Local 1363, 20 FPER ¶25223 (1994); Fewquay v. AFSCME, Local 2862, 17 FPER ¶22184 (1991). Further, mere negligence by a union in its representation of a union member does not constitute a breach of the duty of fair representation. *See, e.g.*, De Grio v. American Federation of Government Employees, 484 So. 2d 1 (Fla. 1980). A union's alleged misconduct must be "something more than simple negligence." Weaver v. Leon CTA, 680 So. 2d 478, 480 (Fla. 1st DCA 1996); *cf.* Browning v.

Brody, 796 So. 2d 1191 (Fla. 5th DCA 2001). A union breaches its duty of fair representation if its unjustifiable conduct extinguishes a significant member right. Finnegan v. Amalgamated Transit Union, 20 FPER ¶ 25120 (1994). This usually arises when a union undertakes a grievance and then causes it to fail because of missed time limits.

When a claim of the breach of duty fair representation has been made, the union may defend by claiming "that it did not breach its duty of fair representation for the purpose of the relief sought by the grievant, because even if the grievance was arbitrated, it would not prevail on the merits." *See* Kallon v. United Faculty of Florida, supra. This constitutes an affirmative defense on the part of the union, with the union having the obligation to prove that the grievant would not have prevailed on the merits due to either a "perceived weakness in the case or due to an application of the employee organization's policy." See Kallon, supra. The burden is seen by many as being fairly light, with the Commission holding that they "will not second guess the discretionary decisions of lay union representatives about whether a grievance has merit in the absence of actual proof that the decision was malicious, intentionally discriminatory or so unreasonable as to be arbitrary." *See* Nolasco v. Fderation of Public Employees, 33 FPER ¶246 (2007); Pearn v. Fraternal Order of Police, Lodge 10, 28 FPER ¶33236 (2002); Perrin v. Hollywood Municipal Employees, AFSCME, Local 2432, 25 FPER ¶30058 (1999).

Due to the application of §447.401, Florida Statutes, an anomaly exists with respect to the ability of employee organizations in the public sector to decline to represent employees who are non-members. While an employee organization has an obligation to fairly represent all of the bargaining unit employees, the Commission has held that under §447.401, non-union members are permitted to pursue the grievance process independently all the way to arbitration if the union declines to represent the non-member based on non-membership. *See* Galbreath v. School Board of Broward County, 446 So.2d 1045 (Fla. 1984); Zitnick v. City of Pembroke Pines, 28 FPER ¶33216 (2002). However, when the union declines to proceed to arbitration on some other basis, exclusivity language can preclude an employee from seeking arbitration on his or own. See Rand v. Broward County, 31 FPER ¶ 86 (2005) and Rand v. Government Supervisors, Local 100, 31 FPER ¶ 176 (2005). For example, a union legitimately declined to refuse to file a contractual grievance when the employee and employer had signed a last change settlement agreement precluding challenge to the employee's dismissal. *See* Ramirez v. Amalgamated Transit Union, Local 1577, 33 FPER ¶228 (2007). In addition, in a recent declaratory statement, PERC clarified that while a collective bargaining agreement in which a union agrees to use only non-attorney representatives at pre-arbitral steps is lawful, such a clause cannot be imposed on employees the union declines to represent based on non-membership. *See* In Re Petition for Declaratory Statement of Palm Beach County Classroom Teachers Association, 31 FPER ¶ 54 (2005). Moreover, it was determined that a union did not commit an unfair labor practice by failing to send a union representative to an investigatory interview of a unit and union member where the union had a dual representation policy that stated it would not represent members represented by private counsel. *See* Daniels v. Manatee Education Association, 34 FPER ¶113 (2007).

On a related issue, the Third District Court of Appeal granted a writ of prohibition precluding a circuit court from entertaining a claim of legal malpractice by the attorney hired by the union to

represent a union member on the basis that the matter was a claim of breach of the duty of fair representation and therefore within PERC's jurisdiction. *See* Florida Education Association v. Wojcicki, 930 So. 2d 812 (Fla. 3rd DCA 2006).

I. Duty to Supply Information

It is well settled that an employer has the obligation to provide a union with relevant information for the purposes of collective bargaining, and that a refusal to do so is an unfair labor practice. *See* §447.203(17)(d), Fla. Stat. Moreover, for many years PERC held that the employer could charge only the actual cost, plus an hourly labor cost if copying required more than an hour. See Communication Workers of America, Local 3178 v. City of Miami Beach, 31 FPER ¶ 213 (2005), aff'g Hollywood Firefighters, Local 3175 v. City of Hollywood, 8 FPER ¶ 13324 (1982). This position was reversed by the Third District Court of Appeal in City of Miami Beach v. PERC, 937 So. 2d 226 (Fla. 3rd DCA 2006). In that case, the Third DCA held that the union was not exempt from the provisions of the Public records Act, and that the City could lawfully charge the amounts permitted by Chapter 119 for the production of records and documents.

J. Other Collateral Issues

1. PERC's Deferral Policy

Over the years, a practice has developed by the Commission regarding the deferral of charges of unfair labor practice to binding arbitration. In 1987, PERC's use of this doctrine was approved in Florida. *See* City of Miami v. Fraternal Order of Police, Miami Lodge 20, 511 So.2d 549 (Fla. 1987). Notwithstanding the 1996 and 1999 changes to the APA, the doctrine has thus far not been overruled by a court. Under this practice, and at the request of a party, PERC may hold an unfair labor practice charge in abeyance pending arbitration if PERC determines the following conditions are met:

(1) Will the interests of the affected employees be adequately protected in arbitration?
(2) Does the parties' relationship reflect labor stability?
(3) Is the Respondent willing to proceed unconditionally to arbitration?
(4) Does the unfair labor practice charge center primarily upon a dispute over the interpretation or application of a collective bargaining agreement?

In applying these criteria, PERC has deferred various cases to arbitration, such as alleged unilateral changes in past practice. *See, e.g.*, Teamsters Local Union No. 769 v. City of Ft. Pierce, 17FPER ¶22129 (1991); ATU v. City of Gainesville, 15 FPER ¶20000 (1988) PERC has declined to defer in some instances where the allegations involve alleged interference with employee rights embodied in PERA. *See* Florida Public Employees Council 79, AFSCME v. Metropolitan Dade County, 15 FPER ¶20254 (1989); Williard v. State of Florida, 14 FPER ¶19060 (1988). PERC will typically retain jurisdiction in the event a party claims the proceedings were not conducted fairly and regularly, the dispute was not resolved by arbitration, or the result was repugnant to PERA. *See* Teamsters, *supra*. Note, however, that one recent case held that it is PERC's decision whether to

defer, and holding further that the vacating of an arbitration award was appropriate where the dispute was one within PERC's exclusive jurisdiction. See State of Florida v. IUPA, 927 So. 2d 946 (Fla. 1st DCA 2006), *rev. denied*, 944 So.2d 345 (Fla. 2006)

2. Election of Remedies Defense

In addition to other potentially applicable defenses, Section 447.401, Fla. Stat., states that "[a]" career service employee shall have the option of utilizing the civil service appeal procedure, an unfair labor practice procedure, or a grievance procedure established under this section, but such employee is precluded from availing himself or herself to more than one of these procedures." Thus, when an employee has elected to process a complaint over discipline alleged to have resulted from an impermissible motive, such as anti-union animus or in retaliation for the filing of grievances, pursuant to some type of grievance or civil service procedure, unfair labor practice charges have been routinely dismissed based on the employee's election of remedies. *See* Hallandale Professional Fire Fighters, Local 2238 v. City of Hallandale, 777 So. 2d. 435 (Fla. 4th DCA 2001)(relying on Metropolitan Dade County v. Dade County Association of Firefighters, Local 1403, 575 So. 2d 289 (Fla. 3rd DCA 1991) to hold that Union could not pursue arbitration of discipline after having filed unfair labor practice charge on same issue); Bass v. Department of Transportation, 516 So. 2d. 972 (Fla. 1st DCA 1988)(career service public employee who had previously sought relief from discipline using a grievance procedure established by a collective bargaining agreement could not also prosecute a civil service appeal).

Today, the law seems clear that a grievant may not elect a civil service or grievance procedure and then elect an unfair labor practice procedure. *See* Taylor v. Public Employees Relations Commission, 878 So.2d 421 (Fla. 4th DCA 2004). In this case, Taylor's collective bargaining representative filed a grievance on her behalf as a result of a reprimand from her employer, and Taylor subsequently filed a whistle-blower complaint with the Florida Commission on Human Relations concerning the same reprimand. PERC was held to have properly dismissed her whistleblower's complaint on the basis that she previously filed a grievance. See also, Bythwood v. Department of Corrections, 25 FPER ¶ 30169 (G.C. Sum. Dism. 1999) and 25 FPER ¶30188 (G.C. Sum. Dism. 1999)(Resort to career service appeal precluded subsequent unfair labor practice charge over dismissal); Welborn v. Department of Corrections, 18 FPER ¶ 23158 (G.C. Sum. Dism. 1992) (Employee, having previously pursued grievance under collective bargaining agreement, was precluded from filing unfair labor practice charge over same dispute due to application of Section 447.401); McClintock v. State University System of Florida, 25 FPER ¶ 30200 (G.C. Sum. Dism. 1999)(General Counsel dismissed an unfair labor practice charge alleging retaliatory suspension because the employee had previously grieved the same personnel action); *Cf.*, Abou-Khalil v. Department of Children and Families, 26 FPER ¶ 31254 (2000)(holding PERC lacked jurisdiction to hear the portion of an employee's complaint alleging retaliation for filing a whistle-blower complaint when the employee had previously filed a career service appeal on the same personnel action and was seeking the same relief in the PERC action as he was in his career service appeal).

At times, a Charging Party will seek to have the Commission exercise jurisdiction based on a theory similar to that opined in City of Bartow v. Public Employees Relations Commission, 382 So.

2d 311 (Fla. 2nd DCA 1979), in which it had been held that a civil service board finding of just cause did not bar a grievant from filing an unfair labor practice on the basis of res judicata. In City of Bartow, the City had argued PERC was without jurisdiction to hear an unfair labor practice charge alleging retaliation for union activity resulting in discharge. *Id*. at 313. The Court disagreed, explaining that:

> ...the issue before the Civil Service Board was whether Ott was insubordinate and not whether the City was guilty of an unfair labor practice in terminating his employment. Therefore, while the principle of estoppel by judgment applied to the Board's determination that Ott was insubordinate, it did not apply to PERC's contention that the City had committed an unfair labor practice.

Id. at 313.

City of Bartow, however, is no longer a viable basis for the Commission's exercise of such jurisdiction since it was decided nine years before Section 447.101 was amended to include unfair labor practices as one of the choices in the election of remedies. See Laws of Florida 1988, c. 88-290, eff. July 6, 1988. *See* Meaton v. City of St. Petersburg, 30 FPER ¶62 (2004).

Note, however, that the seemingly clear language of Fla. Stat. § 447.401 has resulted in some variation as applied in other circumstances, some still to be resolved at a future date. Chief among those is the issue of independent union standing in retaliation cases under a theory of organizational as opposed to individual rights. This theory was pursued in Zephyrhills Professional Firefighters, Local 3884, IAFF v. City of Zephyrhills,[29] a case in which an employee filed a grievance pursuant to a collective bargaining agreement after he was given a written reprimand for his conduct during negotiations.[30] The grievance was denied by the City and an unfair labor practice charge was filed alleging the City violated Fla. Stat. § 447.501(1)(a).[31] The General Counsel summarily dismissed the unfair labor practice charge, finding that pursuant to Fla. Stat. § 447.401, there was an election of remedies because a contractual grievance was filed and processed concerning the employee's reprimand.[32] Subsequent to the above decision, the charging party amended the unfair labor practice charge and alleged violations of Fla. Stat. § 447.501 (1)(b) and (c), in addition to the prior Fla. Stat. § 447.501(1)(a) allegation.[33]

The General Counsel noted that the only change to the charge, with respect to the individual employee who had been reprimanded, was that it now alleged that Fla. Stat. § 447.501(1)(b) was

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[29] Zephyrhills Professional Firefighters, Local 3884, IAFF v. City of Zephyrhills, 27 FPER ¶¶ 32132 and 32165 (G.C. 2001), *revd. in part*, 27 FPER ¶ 32193 (2001).

[30] 27 FPER ¶ 32132 (G.C. 2001).

[31] *Id.*

[32] *Id.*

[33] As explained in Zephyrhills Professional Firefighters, Local 3884, IAFF v. City of Zephyrhills, 27 FPER ¶ 32165 (G.C. 2001), Fla. Stat. § 447.501(1)(a) prohibits discrimination for union activities while Fla. Stat. § 447.501(1)(b) prohibits discrimination for both union and concerted activities. *Id*. at p. 401. The third charge under Fla. Stat. § 447.501(1)(c) was a refusal to bargain claim. *Id*. at p. 401.

also violated.[34] The General Counsel found that the addition to the amended charge was a distinction without a difference and that there had been a binding election of remedies.[35] Consequently, the General Counsel dismissed the amended charge with respect to the alleged Fla. Stat. § 447.501 (1)(a) and (b) violations.[36] The refusal to bargain charge under Fla. Stat. § 447.501(1)(c) was also dismissed on several grounds, one of which was a suggestion by the General Counsel that the bargaining dispute did not appear valid given the sole remedy sought related back to the disputed discipline.[37] However, on appeal, the General Counsel was reversed in part, with the Commission concluding "that this charge is sufficient to proceed to hearing" and that "[t]he assigned hearing officer is directed to develop a factual record and to resolve all issues presented in the charge, including whether the charge is appropriately dismissed pursuant to the election of remedies provision in Section 447.401, Florida Statutes."[38] The charge in that case was, however, limited to the union's allegation that the City refused to bargain in good faith pursuant to Fla. Stat. § 447.501(1)(c) by allegedly disciplining the employee for his statement during a collective bargaining meeting.[39] Since that case later settled, no final order ever issued on the application of Fla. Stat. § 447.401 in the context of an independent union challenge under a refusal to bargain theory.[40] Caution should be exercised, though, because in a subsequent case, the Commission, did order a notice posting and partial attorney fee award in a Fla. Stat. § 447.501(1)(a) case where the underlying discipline claims had been determined barred by an election of remedies.[41]

Another exception was carved out in Broward Teachers Union v. Broward County School Board.[42] In Broward, the union grieved a School Board decision to change the school schedule without initiating a waiver process.[43] The union later filed an unfair labor practice against the School Board alleging refusal to bargain.[44] PERC reasoned that the portion of the unfair labor charge relating to the change in the school schedule was not barred by election of remedies because the facts were distinguishable from other cases involving individual discipline.[45] Additionally, PERC noted that the collective interest of the union to impact bargain could not be resolved in a civil service appeal or grievance procedure. Rather, PERC determined impact bargaining obligations to be within

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[34] *Id*. at p.401.

[35] *Id*. at p. 401.

[36] *Id*. at p. 401.

[37] *Id*. at p. 403.

[38] *See* Zephyrhills Professional Firefighters, Local 3884, IAFF v. City of Zephyrhills, 27 FPER ¶ 32193 (2001), *revg. in part,* 27 FPER ¶ 32165 (G.C. Sum. Dism. 2001).

[39] *Id.*

[40] *See* Manatee County and Municipal Employees, Local 1584, AFSCME, AFL-CIO and Timothy Foor v. School Board of Manatee County, 29 FPER ¶ 72 at p. 163 (2003) (citing to an unpublished order issued January 28, 2002 in Zephryhills Professional Firefighters, Local 3884 v. City of Zephyrhills, Case No. CA-2001-020 which closed the case).

[41] S*ee* Federation of Public Employees v. School Board of Broward County, 31 FPER ¶ 84 (2005) and 31 FPER ¶ 135 (2005).

[42] 27 FPER ¶ 32107 (2001).

[43] *Id*. at p. 238.

[44] *Id*. at p. 237.

[45] *Id.* at p. 240-241.

its exclusive jurisdiction.[46]

Yet other variations may still be under development. One recent appellate decision, DePaola v. Town of Davie,[47] denied the election of remedies defense at the initial pleading stage where a grievance had apparently been elected but then not processed by the employer. In DePaola, the court held that Fla. Stat. § 447.401 would not bar the action because although a local grievance procedure was apparently available, the Town did not process the grievance at all (as distinguished from a rejection on the merits). Prior court decisions applying the election of remedies to bar such an action were found inapplicable on the basis that those decisions all involved "situations where the claimant elected to pursue relief through one mechanism, the procedures took place, and after not getting the relief sought, the claimant sought to pursue the alternative avenue."[48]

In another recent case, a court rejected an employer's effort to apply the elections provision where the employee had originally elected a civil service appeal over a suspension, but the suspension was withdrawn pending further investigation.[49] When the employee was terminated, the City attempted to bind the employee to the original civil service election, arguing that by virtue of the prior election, the employee had waived his right to arbitration.[50] The court disagreed, viewing the two actions as distinct and agreeing with the employee that his original attempt to appeal via civil service a suspension later withdrawn (and thus non-appealable) did not waive his subsequent right to arbitration.[51]

Today, the law seems clear that a grievant may not both elect a civil service or grievance procedure and also elect an unfair labor practice procedure.[52] The same holds true for whistleblower actions under Chapter 112, Florida Statutes.[53] Practitioners are urged to monitor its

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[46] *Id*. at p. 241.

[47] 872 So. 2d 377 (Fla. 4th DCA 2004).

[48] *Id*. at 382.

[49] *See* City of Jacksonville v. Cowen, 973 So.2d 503 (Fla. 1st DCA 2007).

[50] *Id*.

[51] *Id*.

[52] *See* Broughton v. School District of Escambia County, 33 FPER ¶ 189 (G.C. Sum. Dism. 2007)(dismissing charge, among other reasons, where employee filed grievance challenging dismissal); Brown v. Sheriff of Columbia County, 33 FPER ¶ 32 (2007)(same); Miron v. Hillsborough Area Regional Transit Authority, 33 FPER ¶ 33 (G.C. Sum. Dism. 2007) (same); Korniluk v. City of Clermont, 32 FPER ¶ 166 (G.C. Sum. Dism. 2006) (same); Bythwood v. Department of Corrections, 25 FPER ¶ 30169 (G.C. Sum. Dism. 1999) and 25 FPER ¶ 30188 (G.C. Sum. Dism. 1999) (providing that resort to career service appeal is precluded subsequent an unfair labor practice charge over dismissal); McClintock v. State University System of Florida, 25 FPER ¶ 30200 (G.C. Sum. Dism. 1999) (dismissing an unfair labor practice charge alleging retaliatory suspension because the employee had previously grieved the same personnel action); Welborn v. Department of Corrections, 18 FPER ¶ 23158 (G.C. Sum. Dism. 1992)(precluding employee, having previously pursued grievance under collective bargaining agreement, from filing unfair labor practice charge over same dispute due to application of Fla. Stat. § 447.401).

[53] *See* Abou-Khalil v. Department of Children and Families, 26 FPER ¶ 31254 (2000)(holding PERC lacked jurisdiction to hear the portion of an employee's complaint alleging retaliation for filing a whistleblower complaint when the employee had previously filed a career service appeal on the same personnel action and was seeking the same relief under the PERC action as in his career service appeal); Snyder v. University of South Florida, 22 FPER ¶ 27095 (G.C.Sum.Dism. 1994)(providing that because employee filed grievance over personnel action and it was acted upon by the employer, subsequent whistleblower action could not be maintained).

development as it continues to evolve.

3. The Statute of Limitations

The statute of limitations under Section 447.503(6)(b) is six months, and is considered jurisdictional. See United Teachers of Dade, Local 1974, FEA/United v. Dade County School District, 17 FPER ¶ 22111 (1991). In applying the statute, PERC typically focuses on the date of the act at issue, rather than any after effects. See Fawcett v. Port of Palm Beach, 27 FPER ¶32074 (GC Sum. Dis. 2001)(Charge filed six months and one day after employee present at meeting on application for promotion/reclassification application at which threats were allegedly made is untimely); Bythwood v. Department of Corrections, 25 FPER ¶ 30169 (G.C. Sum. Dism. 1999)(Six month statute begins to run when the Charging Party knew or should have known of the alleged unlawful conduct). It matters not that the actions determined on that date were later implemented. See Chillag v. Broward Community College, 12 FPER ¶ 17050 (G.C. Sum. Dis. 1986); accord, Postal Service Marina Center, 271 NLRB 397 (1984)(NLRB held that henceforth it would focus on the date of unequivocal notice of an allegedly unlawful act, rather than on the date the act's consequences became effective, in deciding whether the period for filing a charge under Section 10(b) of the Act has expired.).[54] As was explained in Postal Service Marina Center, supra:

> Where a final adverse employment decision is made and communicated to an employee - whether that decision is nonrenewal of an employment contract, termination, or other alleged discrimination - the employee is in a position to file an unfair labor practice charge and must do so within 6 months of that time rather than wait until the consequences of the act become most painful.[55]

Id. at 400 (footnote in original).

It is when the Charging Party had notice of the action by one with the apparent authority to take such action rather than its effective date which controls. *Id.; see also*, Rice v. Ocean City-Wright Fire Department, 14 FPER ¶ 19151 (D.G.C. Sum. Dism.1988)(Where employee at meeting and thus had personal knowledge at time events occurred which he claimed violated the law, statute began to run as of that date, and charge filed more than six months later dismissed as untimely).

[54]In so holding, the Board overruled several of its earlier decisions, which held that the analogous Section 10(b) period under the NLRA began running on the date the decision became effective, California School of Professional Psychology, 227 NLRB at 1657 n.1; and Roman Catholic Diocese of Brooklyn, 222 NLRB 1052 (1976), *enf. denied in relevant part sub nom*. Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977), or that the Board could choose between the date of notice or the date of the discharge, Mack Trucks, 230 NLRB at 993. The Board based its reasoning on two Supreme Court cases, finding that in employment discrimination litigation under Title VII, 42 U.S.C. § 1981, and 42 U.S.C. § 1983, the limitations period begins to run at the time of the discriminatory act, not the point at which the consequences become painful. Postal Service, 271 NLRB at 399 (citing Delaware State College v. Ricks, 605 F.2d at 712; Chardon v. Fernandez, 454 U.S. 6, 8 (1981) (per curiam)).

[55]Delaware State College v. Ricks, *supra*, 449 U.S. at 258; Chardon v. Fernandez, *supra*, 454 U.S. at 8.

Moreover, the statute of limitations is not tolled by the fact of an employee pursing internal grievances in another forum. *See* Perry v. Florida Public Employees Council, 28 FPER ¶ 33049 (G.C. Sum. Dism. 2001)(Time limitation under Section 447.503(6)(b) not tolled by a charging party's pursuit of a remedy in another forum).

In the context of bargaining, in order to be an effective demand (or at least to be potentially actionable by the Union), the alleged change giving rise to the potential bargaining obligation must have occurred within the last six (6) months, the PERC statute of limitations. *See* Central Florida PBA v. City of Casselberry, 25 FPER ¶ 30305 (1999). In City of Casselberry, the Commission dismissed a charge alleging an unlawful unilateral change in the promotional process and refusal to bargain impact. In so holding, the Commission held that, by failing to timely challenge the change, which the Union knew or should have known about, the change had now become the "status quo" and no impact bargaining obligation remained. Id. at 634.

4. Attorney Fee Issues

The Commission is authorized to award attorney's fees to the prevailing party pursuant to Section 447.503(6)(c), Florida Statutes. A prevailing charging party is entitled to an award of attorney's fees and costs when the unsuccessful respondent knew or should have known that its conduct was violative of Chapter 447, Part II. *See* §447.503(6)(c), Fla. Stat. (2003); City of Pembroke Pines v. Professional Firefighters of Pembroke Pines, Local 2292, 21 FPER ¶ 26112 (1995); Professional Fire Fighters of Margate, IAFF, Local 2497 v. City of Margate, 16 FPER ¶ 21148 (1990). Knowledge of violations can be gained through published Commission decisions. *See* City of Pembroke Pines, 21 FPER ¶ 26112 (1995), citing Leon County PBA v. City of Tallahassee, 8 FPER ¶13400 (1982), *affd.*, 445 So.2d 605 (Fla. 1st DCA 1984).

A prevailing respondent is entitled to attorney's fees where the charge is frivolous, unreasonable, or groundless when filed or when the charging party continues to litigate the matter after this becomes apparent. *See* Pittman v. Southeast Volusia Hospital District, 8 FPER ¶ 13419 (1982), *affd. sub. nom*, National Union of Hospital and Healthcare Employees v. Southeast Volusia Hospital District and PERC, 436 So.2d 294 (Fla. 1st DCA 1983). It is not appropriate to award attorney's fees or costs when a case involves a novel issue which the Commission has never addressed. *See, e.g.*, Ormond Beach Firefighters Association v. City of Ormond Beach, 27 FPER ¶ 32007 (2000).

In terms of what is recoverable in addition to the actual attorneys fees themselves, the Commission has determined fees for litigating the fee issue are not typically available. *See* City of Jacksonville v. Professional Association of City Employees, Inc., 30 FPER ¶94 (2004). Mileage expenses have been disallowed in the past. See Sarasota-Manatee Professional Firefighters and Paramedics, Local 2546, IAFF v. City of Bradenton, 22 FPER ¶27068 (1996). Moreover, travel time to Commission proceedings has been held compensable at two-thirds of an attorney's regular hourly rate. *See* Ewing v. School District of Santa Rosa County, 14 FPER ¶19063 (1988). Reasonable copying costs are recoverable. *See* Ewing v. School District of Santa Rosa County, 14 FPER ¶19063 (1988)(so long as total photocopying costs are reasonable, there is no requirement to delineate each

document, how many copies, or the individual cost). The same is true for the express mail service. Ewing, *supra.*

The views expressed herein are those of the author only. The information contained in these materials is intended as an informational report on legal issues and developments of general interest. It is not intended to provide a complete analysis or discussion of each subject covered. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of applicable law than can be provided in this format.

Index

3. The "Impact Bargaining" Limitation on Management Rights
4. Timing
5. How Obligation to Negotiate Impact is Established
    (a) Whether the Subject Has Already Been Negotiated
    (b) Whether the Impact Is on the Collective Interests of the Unit
    (d) Effectiveness of Demand to Bargain
    (d) Showing of Negotiable Impact
    (e) Whether a Waiver of Bargaining Has Occurred

E. Coercion and Retaliation for Protected Activity
F. Refusal to Discuss Grievances
G. Denial of Representation
H. Breach of the Duty of Fair Representation
I. Duty to Supply Information
J. Other Collateral Issues

1. PERC's Deferral Policy
2. Election of Remedies Defense
3. The Statute of Limitations
4. Attorney Fee Issues

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9th Annual Labor & Employment Law Certification Review

- Volume II -

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THE FLORIDA BAR

PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

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LECTURE PROGRAM

Thursday, February 26, 2009

8:00 a.m. – 8:30 a.m.	**Opening Remarks** *David E. Block, Jackson Lewis LLP, Miami – Program Co-Chair* *Susan L. Dolin, Susan L. Dolin P.A., Pembroke Pines – Program Co-Chair*
8:30 a.m. – 9:20 a.m.	**Family & Medical Leave Act** *David E. Block, Jackson Lewis LLP, Miami*
9:20 a.m. – 10:20 a.m.	**Constitutional Employment Claims** *William R. Radford, Ford & Harrison LLP, Miami*
10:20 a.m. – 10:50 a.m.	**Worker Readjustment Retraining & Notification Act (WARN)** *Kevin D. Johnson, Thompson Sizemore Gonzalez & Hearing P.A., Tampa*
10:50 a.m. – 11:00 a.m.	**Break**
11:00 a.m. – 12:00 noon	**Whistleblower Statutes and Workers' Compensation Retaliation Claims** *Shane Muñoz, Greenberg Traurig P.A., Tampa*
12:00 noon – 1:00 p.m.	**Lunch (included in registration fee)**
1:00 p.m. – 2:30 p.m.	**National Labor Relations Act** *Susan L. Dolin, Susan L. Dolin P.A., Pembroke Pines*
2:30 p.m. – 4:00 p.m.	**Public Employee Relations Act** *Deborah C. Brown, Stetson University College of Law, Gulfport*
4:00 p.m. – 4:10 p.m.	**Break**
4:10 p.m. – 5:00 p.m.	**Common Law Employment Claims** *Jill Schwartz, Jill S. Schwartz & Associates, P.A., Winter Park*
5:00 p.m. – 6:00 p.m.	**Labor & Employment Law Section Executive Council Meeting (all invited)**
6:00 p.m. – 7:30 p.m.	**Reception (included in registration fee)**

Friday, February 27, 2009

8:25 a.m. – 8:30 a.m.	**Opening Remarks** *David E. Block, Jackson Lewis LLP, Miami – Program Co-Chair* *Susan L. Dolin, Susan L. Dolin P.A., Pembroke Pines – Program Co-Chair*
8:30 a.m. – 9:30 a.m.	**Employee Retirement Income Security Act of 1974/COBRA** *Frank Brown, Macfarlane Ferguson & McMullen, Tampa*
9:30 a.m. – 10:00 a.m.	**Polygraph Protection Act/Fair Credit Reporting Act** *Don Spero, Palm Beach Gardens*
10:00 a.m. – 10:30 a.m.	**Drug Testing Statutes** *Christopher C. Sharp, Sharp Law Firm, P.A., Plantation*
10:30 a.m. – 10:40 a.m.	**Break**
10:40 a.m. – 11:15 a.m.	**USERRA** *Bernie Mazaheri, Mazaheri & Gadd P.A., Clearwater*
11:15 a.m. – 12:00 noon	**OSHA** *Pat Tyson, Constangy Brooks & Smith, LLC, Atlanta, GA*
12:00 noon – 1:00 p.m.	**Lunch (included in registration fee)**
1:00 p.m. – 2:00 p.m.	**EEO Substantive Law** *Mary Ruth Houston, Shutts & Bowen LLP, Orlando*
2:00 p.m. – 3:00 p.m.	**EEO Laws – Administrative Procedures** *F. Damon Kitchen, Constangy Brooks & Smith LLC, Jacksonville*
3:00 p.m. – 3:30 p.m.	**Unemployment Appeals** *Hon. Alan O. Forst, Palm City*
3:30 p.m. – 3:40 p.m.	**Break**
3:40 p.m. – 4:40 p.m.	**Fair Labor Standards Act** *David H. Spalter, Jill S. Schwartz & Associates, P.A., Winter Park*
4:40 p.m. – 5:15 p.m.	**Statutory and Common Law Protection of Business Interests** *Daniel R. Levine, Shapiro Blasi Wasserman & Gora, P.A., Boca Raton*

TABLE OF CONTENTS

National Labor Relations Act
Susan L. Dolin, Susan L. Dolin P.A., Pembroke Pines

Public Employee Relations Act
Deborah C. Brown, Stetson University College of Law, Gulfport

Common Law Employment Claims
Jill Schwartz, Jill S. Schwartz & Associates, P.A., Winter Park

Polygraph Protection Act/Fair Credit Reporting Act
Don Spero, Palm Beach Gardens

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Unemployment Appeals
Hon. Alan O. Forst, Palm City

Fair Labor Standards Act
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STATUTORY AND COMMON LAW PROTECTION OF BUSINESS INTERESTS
Daniel R. Levine, Shapiro Blasi Wasserman & Gora, P.A., Boca Raton

AUTHORS/LECTURERS

DAVID E. BLOCK is a partner of the Miami office of Jackson Lewis LLP. He is a graduate of Cornell University's School of Industrial and Labor Relations and received his law degree from the University of Pennsylvania. Mr. Block has practiced exclusively in the area of labor and employment law for the past 22 years. He is the office's senior litigator, having extensive federal and state court trial experience. Internally, Mr. Block is one of the Firm's experts on reductions in force, releases, the FMLA and alternative dispute resolution. Mr. Block, for example, wrote an amicus brief, on behalf of the Society of Human Resource Management, to the United States Supreme Court urging enforcement of arbitration agreements.

DEBORAH C. BROWN is the Associate Vice President for Legal Affairs and Human Resources at Stetson University College of Law. She is a graduate of Florida State University (B.A.) and Stetson College of Law (J.D.), and was admitted to practice law in 1988. Before joining Stetson in 2005, she was a shareholder and then managing partner at a Tampa law firm. From 1996-2000, she was employed first as a Manager and then Director of Employee Relations for Walt Disney World Co. in Orlando, Florida. She has chaired various Bar committees over the years, including the Labor & Employment Law Committee of the Hillsborough County Bar Association, the Labor and Employment Law Section of The Florida Bar, The Florida Bar Continuing Legal Education Committee, and The Florida Bar Certification Committee for Labor and Employment Law. She is Board certified in Labor and Employment Law and also is certified as a Senior Professional in Human Resources (SPHR). She is a member of The Florida Bar Education Law Committee, the Web Page and Legal Resources Committee for NACUA and the Board of Directors for the Tampa Lighthouse for the Blind. She serves as an adjunct professor at Stetson University College of Law, and is a frequent speaker on various legal topics. In 2004 through 2008, she was selected as one of "Florida's Legal Elite" by *Florida Trend* magazine. She was also named by *Florida Super Lawyers* magazine as one of Florida's top attorneys for 2008. Publications include *Employment Issues in Higher Education: A Legal Compendium* (NACUA, April 2008)(Editor), *Understanding and Applying the Public Employees Relations Commission's Election of Remedies Provision*, Florida Education Law Journal, Volume 6, Issue 2 (January 2008)(Author), *Legal Issues in Distance Education* (NACUA 2007)(Co-editor), *Federal Age Discrimination Litigation*, Florida Bar Journal (December, 1989)(Co-author), *Where They Smoke, They May Get Fired: An Overview of Significant Workplace Smoking Issues*, Florida Bar Journal (October 1994)(Co-author), and *Work Structures of the 21st Century: Implications for the Employment Law Practitioner*, 52 Lab. L. J. 245 (2001).

FRANK E. BROWN's practice areas include labor and employment law litigation, civil rights litigation and business litigation. He received his J.D., with honors, from Florida State University College of Law in 1987. He is a member of The Florida Bar City, County and Local Government Section; Federal Court Practice Committee; Labor & Employment Law Section (Executive Council 2002 - ; Co-Chair of Publications Subcommittee 2003 - ; Chair of Employee Benefits Committee 2000-2003); Trial Lawyers Section; the American Bar Association (Labor & Employment Law Section); and Hillsborough County Bar Association (Labor & Employment Law Section). Mr. Brown was recognized in "The Best Lawyers in America" (2009, 2008) and selected by his peers as a "Florida Super Lawyer" (2007).

SUSAN L. DOLIN has been practicing labor and employment law since 1978, when she joined the National Labor Relations Board, Division of Enforcement Litigation, Appellate Court Branch in Washington, DC, as a trial attorney. Her duties and responsibilities included representing the NLRB in enforcement and review proceedings before every United States Court of Appeals and participating in appeals to the United States Supreme Court. She was the NLRB staff attorney who worked on the seminal case of *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984). Ms. Dolin also worked in the Special Litigation and Contempt Divisions, as well as Region 5 in Baltimore, Maryland, where she conducted union elections and representation and unfair labor practice investigations, hearings and appeals. While still with the NLRB, Ms. Dolin served as an adjunct professor of labor law at George Mason University's School of Law in Arlington, Virginia. Upon leaving the NLRB in 1984, Ms. Dolin relocated to Ft. Lauderdale, Florida, where she spent three years as an assistant professor of law at Nova Southeastern University College of Law, developing and teaching a labor law curriculum for the Law School. She then entered private practice in 1987 with the Ft. Lauderdale law firm of Conrad, Scherer and James, and in 1992 went of counsel to the Hollywood law firm of Litman, Muchnick, Wasserman & Hartman. That firm became Muchnick, Wasserman & Dolin in 1994, and Ms. Dolin remained in practice with that firm, which ultimately became Muchnick, Wasserman, Dolin, Jaffe and Levine, until 2002, when, along with Stuart Rosenfeldt, Scott Rothstein and Michael Pancier, she helped form Rothstein, Rosenfeldt, Dolin & Pancier which eventually morphed into the current Rothstein Rosenfeldt Adler, which has grown into one of Ft. Lauderdale's largest and most prestigious multi-practice Firms. In October 2007, Ms. Dolin left Rothstein Rosenfeldt Adler and formed her own practice nearer to her home, hoping to "slow things down" and start on the road to retirement. In the meantime, Ms. Dolin has enjoyed a notable career as a well recognized and award winning labor and employment lawyer. She served on The Florida Bar's Labor and Employment Section's Executive Counsel for eight years before becoming Chair of the Section in 2003-2004. She served on The Florida Bar's Board of Legal Specialization and Education's Labor and Employment Certification Committee from its inception in 2001, when she served as vice-chair, until 2007, and has been Board Certified in Labor and Employment Law since Board certification was recognized in this field. In 2003-2004, she was named as a top labor and employment attorney in Florida by the Chambers USA Client Guide to America's Leading Business Lawyers. She has been named as one of the top labor and employment attorneys in South Florida by the Miami Metro Magazine's Legal Guide every year since 2003, and a Florida Super Lawyer (top 100 lawyers in Florida) every year since 2006. In 2007, she won the South Florida Business Journal's Key Partner Award, recognizing top attorneys and accountants, for Legal Labor and Employment Law. While Ms. Dolin represents primarily employers, she also does some work on behalf of deserving employees, including obtaining a $20 million settlement in an overtime misclassification case which became a nationwide collective action. She frequently lectures on labor and employment law at CLE seminars, as well as to management groups. Her articles on traditional labor law topics have appeared in national legal periodicals as well as in local publications. Ms. Dolin received her BA degree from Miami University in Oxford, Ohio in 1975; her JD degree *cum laude* from Cleveland State University, Cleveland-Marshall College of Law in 1978, and her LL.M.-Labor from Georgetown University Law Center in 1982. Ms. Dolin is active with no-kill animal rescue associations and enjoys spending time with her family, which includes rescued pit bull Molly and recovered p*aso fino* Stormy. She hopes to retire to either northern Arizona or southern Utah and do *pro bono* work on behalf of animal rights.

HONORABLE ALAN ORANTES FORST was appointed by Governor Jeb Bush to the position of Chairman of the Florida Unemployment Appeals Commission in July 2001 and reappointed him in August 2005 for a second four-year term. On both occasions, the appointment was confirmed by the Florida State Senate. The Unemployment Appeals Commission is an independent commission that conducts appellate review of contested unemployment compensation claims, issues final orders and, if necessary, defends those orders before the district courts of appeal. As Chairman of the Commission, Chairman Forst is the chief executive and chief administrative officer of the Commission, and one of three Commissioners (the Chairman is the only full-time Commissioner) who vote on the final disposition of appeals to the Commission. Before his appointment, Chairman Forst was an associate and partner at Crary, Buchanan, Bowdish, Bovie, Beres, Roby, Negron & Thomas, with offices in Stuart and Port St. Lucie, Florida. Chairman Forst represented both employers and employees in employment law matters. Prior to joining Crary, Buchanan, Chairman Forst spent over two decades in Washington, D.C. A graduate of the Georgetown University School of Foreign Service and the Columbus School of Law of the Catholic University of America, Chairman Forst served under Presidents Reagan, Bush, and Clinton in front office positions at the Departments of Justice and Labor (special assistant to the Administrators of OFCCP and the Wage and Hour Division), as counsel to the Vice Chair/Member of the Merit Systems Protection Board, and as special assistant/counsel to Chairman Clarence Thomas at the Equal Employment Opportunity Commission. He also worked as an employment law litigator at the Department of Commerce. Earlier in his career, Chairman Forst served as an intern on the staffs of Senators S.I. Hayakawa and Richard Stone, authored a newsletter for the National Legal Center for the Public Interest, served in the front offices of the Commission on Civil Rights and the Legal Services Corporation, and taught a class in employment law at the Northern Virginia Law School. And coached a lot of youth soccer teams. Chairman Forst is the immediate past President of the Martin County Bar Association (officer 2004-09) and the current Chair of The Florida Bar's Labor and Employment Law Section (he has been on the Section's executive council since 2000 and has been one of the six officers since 2002). He was appointed by the President of The Florida Bar to serve (2006-09) on the Bar's Voluntary Bar Liaison Committee (VBLC) and is also presently serving on The Florida Bar's Council on Sections (CoS). In fact, he spoke at leadership seminars hosted by both the VBLC and the CoS in 2008. Chairman Forst is a Vice President of the Federalist Society's Labor and Employment Law Practice Section (2000-present) and the Society's Tallahassee chapter (2001-present), and is the host of the Federalist Society's annual reception at The Florida Bar's Annual Meeting (in his capacity as the self-appointed Grand High Exalted Mystic Ruler). Chairman Forst organized and participated on the Labor and Employment Law Section panel that presented one of the Bar President's Showcase CLE Seminars at the 2008 Florida Bar Annual Meeting. Before becoming "Chairman Forst," mere mortal Alan Forst authored a feature article in the March 1999 Florida Bar Journal and was honored with the 2000 Schoonover Professional of the Year Award by the Martin County Human Resources Management Association. He is an active Justice Teaching volunteer and is the originator and chair (2005-present) of the Martin County Bar Association's Constitution Week program (which predates Justice Teaching, thank you very much), which sends attorneys and judges to every school in Martin County to lecture about the Constitution during Constitution Week. Most significantly, Chairman Forst is the co-director of Alan&Diana Forst

Enterprises, responsible for the production and direction of four outstanding high school students (three of their own, plus a foreign exchange student from Argentina).

MARY RUTH HOUSTON's problem-solving approach helps clients stay focused on their core business. Her legal skills are based on over 20 years of litigation experience in handling complex disputes. But it's her understanding of business issues outside of the courtroom that adds a valuable perspective for clients. She uses this understanding to help companies avoid litigation, minimize its effects or, when litigation is required, handle it efficiently and effectively. As a partner in the Litigation Department and a member of Orlando's Labor & Employment Law Practice Group, Ms. Houston focuses on both business and employment-related disputes. She is named in Best Lawyers in America Guide in the area of Labor and Employment. Ms. Houston helps companies throughout Central Florida with legal challenges that may permanently affect their businesses. Corporations of all sizes turn to Ms. Houston for her experience in pretrial, trial (jury and non-jury) and appellate work. Ms. Houston defends employers and management in a broad range of labor and employment issues. These involve employee discharge and discrimination cases, including age, sex, race, national origin, religion and disability claims, as well as cases involving restrictive covenants and wage-hour matters. She also has extensive experience in negotiating and drafting complex employment and severance agreements. As a lawyer with wide knowledge of labor and employment law, Ms. Houston teaches the subject in the Master of Human Resources Program at Rollins College. She also speaks frequently at seminars on employment related matters and conducts training on employment issues for businesses. Ms. Houston's litigation practice also encompasses a wide variety of commercial, contract, and business tort disputes. Before joining Shutts & Bowen, Ms. Houston was a litigation associate at a national law firm in New York City, where she worked on a wide variety of litigation matters. She is a 1986 graduate of Harvard Law School.

KEVIN D. JOHNSON is a partner in Thompson, Sizemore, Gonzalez & Hearing, P.A. He is AV rated and Board Certified in Labor and Employment Law by The Florida Bar. He received his J.D., with honors, from the University of Florida in 1994. He is admitted to practice in Florida, the U.S. District Court, Northern, Middle and Southern Districts of Florida, and the U.S. Court of Appeals, Eleventh Circuit. He is a member of The Florida Bar, Civil Procedure Rules Committee, 2007, Practice Management and Development Section, Executive Council Member 2001-06, General Practice, Solo and Small Firm Section, Executive Council Member 2007, and the Federal Bar Association, Tampa Bay Chapter, Board of Directors, 2006-07. Mr. Johnson is a contributor to the 2006 Cumulative Supplement to the ABA/BNA treatise The Fair Labor Standards Act, listed in Florida Trend's Florida Legal Elite 2006 – 2008, and listed in Florida SuperLawyers, 2008.

F. DAMON KITCHEN has successfully defended cases in all areas of labor and employment law, including, but not limited to: claims of unlawful discrimination, sexual harassment, retaliatory discharge, equal pay violations, wage and hour violations, employment-related freedom of speech, due process and equal protection claims arising under both the federal and state constitutions, as well as cases involving claims of defamation, invasion of privacy, negligent hiring, retention and supervision, intentional infliction of emotional distress, fraud, and breach of contract. Damon also has experience in representing clients in traditional labor law matters, such as defending unfair labor practice charges, grievance arbitrations, opposing union

organizing campaigns and serving as chief negotiator in collective bargaining negotiations. Damon assists employers in problem prevention and legal analysis of complex employment issues. Damon is a frequent lecturer and presenter and addresses human resource directors, managers and small business owners regarding labor and employment law issues several times throughout each year. Before joining Constangy, Damon was a Partner in the law firm of Malfitano Campbell & Dickinson. Damon Kitchen has been recognized in the publication, Best Lawyers In America, Chambers USA Guide, and Florida Super Lawyers. He is a member of: Member, The Florida Bar (1990 to present), Member, Executive Council of the Labor and Employment Law Section (1996 to 2001 and 2008 to present), Secretary/Treasurer of the Labor and Employment Law Section (2001 to 2003), Legal Education Chair of the Labor and Employment Law Section (2004), Chair Elect of the Labor and Employment Law Section (2005), Chair of the Labor and Employment Law Section (2006), Immediate Past Chair of the Labor and Employment Law Section (2007). He has been board certified in Labor and Employment Law by The Florida Bar since 2001. He is a member of: State Bar of Georgia, Labor & Employment Section (1990 - present); American Bar Association, Labor & Employment Section (1990 - present); Federal Bar Association, Jacksonville Chapter (1990 - present) - President (2000-2001), Officer (1995-2000); Jacksonville Bar Association, Labor & Employment Section (1990 - present), Vice Chair (2002 - 2003); Society for Human Resource Management, Jacksonville Chapter (1996 to present); Northeast Florida League of Cities (1990 to present); North Florida Manufacturers Association (2006 to present). Damon is married and the proud father of two boys. He enjoys spending time with his family, reading, and fishing. Damon is also an avid fan of NASCAR.

DANIEL R. LEVINE is Board-Certified in Labor and Employment Law by The Florida Bar, concentrating his practice on the litigation of labor and employment law disputes, as well as on preventive labor relations, including employment training and drafting of employee handbooks. Mr. Levine was named a "Top Up and Comer" by the South Florida Legal Guide 2008. Mr. Levine received his Bachelor of Arts degree from the University of Florida and his Juris Doctor, cum laude, from the University of Miami School of Law. Mr. Levine is admitted to practice before all state courts in Florida, as well as the United States Supreme Court, the United States Court of Appeals, Eleventh Circuit, and the United States District Court, Southern and Middle Districts of Florida. In May 1996, The Florida Bar Journal published Mr. Levine's article on Florida's private Whistleblower's Act. Mr. Levine frequently lectures on labor and employment law matters. Most recently, Mr. Levine spoke on the subject of non-compete agreements as part of The Florida Bar Labor and Employment Section's Certification Review Course Seminar. Recently Mr. Levine was named to the Executive Committee of the Labor and Employment Law Section of The Florida Bar. Mr. Levine also is a past President of the Federal Bar Association, Broward County Chapter, and currently serves on the Chapter's Executive Board. Mr. Levine is active in the community, having served as 2003-04 Chair of Leadership Boca for the Greater Boca Raton Chamber of Commerce. Mr. Levine also is a Florida Supreme Court Certified Mediator, as well as a Federal Court Certified Mediator.

BERNIE MAZAHERI was born on May 27, 1979 in Tehran, Iran. Mr Mazaheri grew up in Auburn, Alababma where he obtained his Bachelor of Arts in Geography in August of 2000. Mr Mazaheri graduated from Loyola Law School in New Orleans in May of 2002. As a third year law student, Mr Mazaheri prosecuted over two dozen trials and/or motions at the Orleans

Parish District Attorney's Office. Upon graduation, Mr Mazaheri became an assistant public defender for the Office of Marion Moorman, Tenth Judicial Circuit in Bartow, Florida where he handled thousands of criminal law cases and tried over two dozen jury trials. In January of 2004, Mr Mazaheri joined the law firm of Smith, Feddeler, Smith & Miles, P.A. in Lakeland, Florida where he primarily represented injured workers. In April of 2005, Mr Mazaheri joined Mr Gadd in zealously advocating for the rights of employees and immigrants. Mr Mazaheri is a member of National Employment Lawyers Association (NELA), The Florida Bar Labor & Employment Law Section, the American Bar Association (ABA), the ABA Labor & Employment Law Division and its Fair Labor Standards Sub-Committe, Florida Employment Law Association (FL NELA) and the Hillsborough County Bar Association (HCBA). Mr Mazaheri primarily focuses on wage and hour violations, representing employees under the Fair Labor Standards Act (FLSA), as well as various State law causes of action for unfair labor practices.

SHANE MUÑOZ has an active civil trial and client counseling practice, with an emphasis on labor and employment law. Throughout his 18-year career, Shane has successfully represented business organizations in a wide range of labor and employment matters, including employment discrimination, whistleblower, harassment, restrictive covenants, wage and hour, and other complex litigation. In addition, Shane is frequently retained to represent clients in federal, state, and local investigations. He also has wide-ranging experience in representing clients in internal investigations involving alleged harassment, disparate treatment and other employee misconduct. Shane has substantial experience in helping clients develop and implement employment policies and procedures designed to foster positive employee relations and to minimize legal risks. Shane lectures and writes on a regular basis on wage and hour law, the Americans with Disabilities Act, family and medical leave, discrimination, harassment and other issues, including presentations for clients, The Florida Bar, the National Business Institute, the Council on Education in Management and Lorman Educational Services.

WILLIAM R. RADFORD, the Managing Partner in Ford & Harrison LLP's Miami office, grew up in a small town in Ohio. Bill graduated with honors from Wittenberg University and earned his J.D. from the University of Michigan in Ann Arbor. Having practiced traditional labor law and employment law solely on behalf of management for more than 40 years, Bill has successfully represented employers in over 150 union representation campaigns in Michigan, Ohio, West Virginia, Texas, Alabama, Maryland and Florida. Bill has successfully defended employers in numerous unfair labor practice and discrimination charges and has obtained favorable decisions for employers in a number of cutting edge decisions before federal appellate courts, including a recent major class action. Bill has successfully defended a major U.S. retailer in limiting a nationwide subpoena brought by the Equal Employment Opportunity Commission and received the Navy Commendation Medal for his defense of the United States Navy in a class action. Bill provides counseling to employers on compliance with federal and state employment laws, including preparation of various internal policies and programs for clients and development of strategies for defense of various charges of employment discrimination and their operational impact. He also provides defense and advice to employers covered by the National Labor Relations Act regarding their rights and obligations, and union avoidance programs. In addition, Bill conducts collective bargaining for and provides contract administration to employers in their relationships with labor unions. He also counsels public employers concerning their

constitutional rights and obligations, as well as their rights and obligations under employment-related statutes and is a co-editor of Ford & Harrison's 2006 Public Employer Source Book. Bill is admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Fifth, Sixth, Eleventh and D.C. Circuits and state courts in Ohio and Florida. Active in professional organizations, Bill is a past contributor to the Development of Law under the National Labor Relations Act, a publication of the American Bar Association's Labor and Employment Law Section and a member of the ABA's Litigation Section. He also is a member of the Florida and Dade County Bar Associations, The Florida Academy of Management Attorneys, and a Charter Fellow of the Litigation Counsel of America. Board certified by The Florida Bar in Labor and Employment Law, Bill is a frequent speaker on law and employment topics before trade and professional groups. He was a Chinese linguist in the military and is a Commander in the United States Naval Reserve, retired. Bill was honored by Florida Trend as a member of its 2004 and 2005 Legal Elite in labor and employment law and was selected by Best Lawyers in America in its 2005, 2006, 2007 and 2008 editions in labor and employment law.

JILL S. SCHWARTZ graduated Phi Beta Kappa from Rutgers University and received her Juris Doctor degree from the University of Maryland School of Law. After completing a Judicial Clerkship in Maryland, Ms. Schwartz was hired by the Special Litigation Division of the United States Department of Labor in Washington, D.C. Ms. Schwartz is listed in the Martindale-Hubbell Bar Register of Preeminent Lawyers. Ms. Schwartz has been active in the litigation of employment discrimination cases in various federal and state courts, and has significant experience in all aspects of the practice of employment law. She has handled employment litigation under the Florida Civil Rights Acts, Title VII, the Americans with Disabilities Act, the Pregnancy Discrimination Act, the Age Discrimination in Employment Act, the Family Medical Leave Act, as well as whistleblower actions, employment-related torts and civil rights matters. Additionally, she is an author and a frequent lecturer on employment law topics for The Florida Bar, the American Bar Association, the Orange County Bar Association, the National Employment Lawyers Association and the Florida Dispute Resolution Center. She was selected as the monthly columnist for a national magazine, *Venture Woman,* regarding workplace issues and has appeared in *Smart Money*, The Wall Street Journal Magazine of Personal Business, and has been quoted in the Wall Street Journal, The Orlando Sentinel and The Orlando Business Journal. From July 2004 until July 2005, Ms Schwartz was a monthly columnist in the "Ask The Legal Professional" section of The Orlando Business Journal. As a certified mediator, Ms. Schwartz concentrates on resolving employment litigation matters. She is also certified by the Fifth District Court of Appeal as an appellate mediator. She has continued to attend and conduct seminars on alternative dispute resolution. Ms. Schwartz mediates litigation pending in the United States District Courts and Florida State Courts. She also conducts pre-suit mediation. Additionally, Ms. Schwartz was selected by the Equal Employment Opportunity Commission and the United States Postal Service to mediate employment matters for these agencies. Ms. Schwartz is a certified arbitrator and has served as an instructor for the Supreme Court of Florida Dispute Resolution Center, Arbitration Certification Training. Ms. Schwartz is admitted to practice law in state and federal courts in Florida and in Maryland, before the United States Court of Appeals for the Seventh and Eleventh Circuits, as well as The United States Supreme Court. She has been selected by her peers for inclusion in the "Law and Leading Attorneys" publication as a leading American Attorney in the areas of Employment Law and Alternative Dispute Resolution. She has also been selected for membership in "Foxington's Who's Who." Since 2002, each year the firm has been selected as *The Orlando Sentinel*'s Top 100 Companies

for Working Families. In 2007, the firm received the prestigious Community Service Award from *The Orlando Sentinel*. In 2002, Ms. Schwartz was selected as Small Business Person of the Year by the Seminole County Lake Mary Chamber of Commerce. Additionally, Ms. Schwartz was named "Best Of The Bar" (Top 5%) by *The Orlando Business Journal* and one of Florida's Legal Elite (Top 1.6%) by *Florida Trend* magazine. Ms. Schwartz has also been named one of the "Best Lawyers in Central Florida" and "Orlando's Best Lawyers" by *Orlando Magazine* and included in "Florida Super Lawyers" and "Florida Super Lawyers Top 50 Women." In 2005, Ms. Schwartz was inducted into The College of Labor and Employment Lawyers, Inc., which is the highest recognition by her colleagues of sustained outstanding performance in her profession, exemplifying integrity, dedication and excellence. Mrs. Schwartz was the first woman in the State of Florida to be inducted into the College. In 2004, Ms. Schwartz was appointed by Governor Jeb Bush to a four-year term on the Fifth District Court of Appeals Judicial Nominating Commission, and served as its Chair. Also in 2004, she was appointed to sever on the Executive Council of The Florida Bar Labor and Employment Law Section and is currently serving as the Chair of the Continuing Legal Education Committee. In December, 2004, Ms. Schwartz was appointed to serve on the Merit Selection Panel to reconsider the appointment of U.S. Magistrate Judge Karla R. Spaulding. Ms. Schwartz is the immediate past-President of the Orlando Chapter of the Federal Bar Association. She currently serves as National Delegate of the Federal Bar Association. Ms. Schwartz also serves as a Vice-Chair for The Florida Bar Foundation Life Fellows Program. In 2000 - 2001, she served as President of the Florida Chapter of the National Employment Lawyers Association. In 2000 - 2001, she was also selected to be Chairperson of the Orange County Bar Association Labor and Employment Law Committee. In 2000, Ms. Schwartz was appointed to serve a two year term on the Orange County Bar Foundation, Inc. She was appointed by the Board of Governors of The Florida Bar to a three-year term on the Ninth Judicial Circuit Grievance Committee, which was completed in 1998. Ms. Schwartz also serves on the Board of Directors of Hospice of the Comforter.

CHRISTOPHER SHARP is the sole shareholder of The Sharp Law Firm, located in Plantation Florida. Mr. Sharp has been Board Certified in Labor and Employment Law since 2001, and his practice currently focuses on FLSA claims on behalf of both employees and employers, as well as public sector employment issues and federal employees' rights. Following his 1993 graduation from Temple Law School in Philadelphia, Mr. Sharp relocated to South Florida, where he initially worked for the plaintiffs' employment law firm of Amlong & Amlong, P.A., focusing on Title VII and sexual harassment claims exclusively on behalf of employees. Mr. Sharp had his own firm, Christopher C. Sharp, P.A., from 1997 through 2004, where he developed expertise in the area of federal employees' rights. In 2004, he became an associate in the employment law department of Rothstein Rosenfeldt Adler, located in Fort Lauderdale. At Rothstein Rosenfedlt Adler, Mr. Sharp advised and represented both employees and employers, before he left to resume his solo practice in June 2007. Mr. Sharp is an active member of the National Employment Lawyers Association and the Florida Employment Lawyers Association, and volunteers much of his free time to motorcyclists' rights issues and various animal rescue groups.

DAVID H. SPALTER is presenting the FLSA portion of the Certification Review for the sixth consecutive year. Since 1992, Mr. Spalter has concentrated his practice in the field of labor and employment law, representing both employers and employees. In 2006, he joined the law firm

of Jill S. Schwartz & Associates, P.A. in Winter Park, Florida. Mr. Spalter has represented a wide variety of clients, from Fortune 500 companies to individuals employed in numerous industries and professions within the private and public sectors. Mr. Spalter has litigated throughout the State of Florida, and is a member of the United States District Courts for the Southern and Middle Districts of Florida, the Eleventh Circuit Court of Appeals and the U.S. Supreme Court. Mr. Spalter is Board Certified by The Florida Bar in Labor and Employment Law and is rated "AV" by Martindale Hubbell. In 2006, he was listed as a "Florida Super Lawyer" by the Law & Politics publication. Mr. Spalter is a member of The Florida Bar Labor and Employment Law Section, and formerly served as Vice President of Florida Chapter of the National Employment Lawyers Association. Mr. Spalter devotes a substantial portion of his practice to matters relating to the Fair Labor Standards Act and other unpaid wage claims. In addition to litigating these claims, Mr. Spalter regularly conducts compliance audits and represents clients during Department of Labor investigations. Mr. Spalter lectures frequently on the FLSA in seminars presented by The Florida Bar, Florida NELA and human resources educational programs. Mr. Spalter also co-authored a publication for G.Neil, titled *Wage and Hour Law Understood, an Employer's Guide to the Fair Labor Standards Act* and is currently on the Editorial Advisory Board of the Thompson Publishing Group's wage & hour series, including the *Employer's Guide to the Fair Labor Standards Act.* Mr. Spalter graduated, cum laude, from the University of Miami School of Law in 1992, and received his undergraduate degree from Tufts University in 1989.

DONALD J. SPERO is a graduate of the University of Michigan Law School who has practiced labor and employment law for over 35 years, both in private practice and as in-house counsel for Sears, Roebuck and Co. from which he retired as Senior Employment Counsel. He is Board Certified by the Florida Bar in Labor and Employment Law and a Fellow of The College of Labor and Employment Lawyers. He now devotes his time to serving as a mediator and an arbitrator as well as frequently speaking and writing articles on employment law subjects. He is on labor arbitration panel of the Federal Mediation and Conciliation Service, the panels of employment and labor law arbitrators of the American Arbitration Association and the arbitration and mediation panels of FINRA as well as the mediation panels of the United States District Courts for the Southern and Middle Districts of Florida. He is a member of the Labor and Employment Law Sections of the Florida and the American Bar Associations. He is also a member of the Chicago and Illinois Bar Associations.

PATRICK R. TYSON is a partner with Constangy, Brooks & Smith, a law firm representing management, exclusively, in labor and employment law matters since 1946. Pat is based out of the firm's Atlanta office, one of 18 offices across twelve states. Since joining the firm as head of the OSHA practice group, Mr. Tyson has continued his extensive involvement in the field of safety and health after being appointed Acting Assistant Secretary for OSHA under the Reagan Administration. In addition to representing clients on a wide range of safety and health issues, he is the former Chairman of the Board of Directors of the National Safety Council, and Counsel to the Voluntary Protection Programs Participants' Association. He is a member of the Virginia State Bar and the American Bar Association's Committee on Occupational Safety and Health Law.

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Common Law Employment Claims

By

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COMMON LAW EMPLOYMENT CLAIMS

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I. DEFAMATION

A. Section 626.9541, *Florida Statutes*, defines defamation as "Knowingly making, publishing, disseminating, or circulating of, any oral or written statement, or any pamphlet, circular, article, or literature, which is false or maliciously critical of, or derogatory to, any person and which is calculated to injure such person."

1. Libel: written

2. Slander: spoken

B. Elements: [See generally Miami Herald Publishing Co. v. Ane, 423 So. 2d 376 (Fla. 3d DCA 1982), aff'd 458 So. 2d 239 (Fla. 1984)]:

1. Publication to a third party:

a. Plaintiff must prove that a third party heard or read the statement. The statement may be made in the presence of others who overheard it, or it may have been written on a postcard or an unsealed envelope.

b. Where a manager made a defamatory statement to two employees, simultaneously but in private, in order to elicit an explanation concerning their joint action in stealing company property, the making of the statement was not a publication. Smith v. Anheuser-Busch Brewing Co., 346 So. 2d 125 (Fla. 1st DCA 1977) rev. denied, 355 So. 2d 517 (Fla. 1978).

c. Defamatory statements made by an agent do not bind the principal as a publication unless the agent, in making the statement, was acting within the scope of his or her agency or employment. Schreidell v. Shoter, 500 So. 2d 228 (Fla. 3d DCA 1986), rev. denied, 511 So. 2d 299 (Fla. 1987).

2. False and defamatory statement concerning the plaintiff that tended to expose the plaintiff to hatred, ridicule, or contempt, or tended to inure him in his business, reputation, or occupation, or charged that the claimant committed a crime. Florida Standard Jury Instructions/SJI: Defamation, 575 So. 2d 194 (1991).

a. Under the substantial truth doctrine, a statement does not have to be perfectly accurate if the "gist" or "sting" of the statement is true. Cape Publications, Inc. v. Reakes, 840 So. 2d 277 (Fla. 5th DCA 2003).

3. Malice: See generally Harte-Hanks v. Connaughton, 491 U.S. 657 (1989).

a. Public figures or officials must show actual malice:

(i) Actual knowledge of the falsity of the statement,

(ii) or reckless disregard for the truth of the statement, and

(iii) *Florida Statutes* §768.095, as applied in Linafelt, *supra*.: "Clear and convincing evidence" is required to show that the defendant knew that the statement made was false, or that he had serious doubts about its truth. SJI: Defamation, 575 So. 2d 194 (1991).

b. Limited purpose public figure -- one who has thrown himself in the forefront of a particular public controversy to influence its resolution—must also show actual malice in order to obtain punitive damages. *See* Wolf v. Rasey, 253 F. Supp. 2d 1323 (N.D.Ga. 2003). Limited purpose public figure status requires:

(i) A public controversy;

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(ii) A plaintiff who played a sufficient role in that controversy; and

(iii) The alleged defamation must be germane to the controversy.

c. In order to recover punitive damages, a private individual need only show that defendant was negligent, which is defined as failure to use reasonable care, or the degree of care which a reasonable person would use under like circumstances, SJI: Defamation, 575 So. 2d 194 (1991). Della Donna v. Gore Newspapers Co., 489 So. 2d 72 (Fla. 4th DCA 1986), rev. denied 494 So. 2d 1150 (Fla. 1986), cert. denied, 479 U.S. 1088 (1987).

C. Slander/Libel Per Se: The false publication is so injurious on its face that no extrinsic evidence is required. Wolf v. Rasey, 253 F. Supp. 2d 1323 (N.D.Ga. 2003).

1. Elements:

a. Imputes to another a criminal offense amounting a felony or involving moral turpitude. Miami Herald Publishing Co., v. Ane, 423 So. 2d 376 (Fla. 3d DCA 1982); Spears v. Albertson's, Inc., 848 So. 2d 1176 (Fla. 1st DCA 2003).

b. Imputes to another conduct, characteristics, or conditions incompatible with the proper exercise of one's lawful business, trade, profession, or office. The statement must relate to the person's professional competence, impute incapacity or unfitness for the job, or impute dishonesty or fraud.

c. Subject another to hatred, distrust, ridicule, contempt, or disgrace, such as imputing fraud or dishonesty to another.

2. Malice and actual damages are conclusively presumed.

3. Defenses to "per se" claims:

a. Consent.

b. Justification (statement is true and made with good motive).

D. Defenses to Defamation:

1. Pure opinion, based on facts known or available to the public.

2. Truth.

a. Truth is not a complete defense unless accompanied by good motives. Florida has generally applied this defense when the case involves a private claimant and a non-media defendant, with or without a qualified privilege, and if the statement made by the defendant was substantially true.

b. The "good motive" requirement is derived from the Florida Constitution, article I, § 4, which states that in any civil action for defamation, the party accused shall be exonerated if the matter charged as defamatory is true and was published with good motives. Erskine v. Boeing Co., 2002 U.S. Dist. LEXIS 21819.

3. Absolute Immunity.

a. Statements made in judicial proceeding are protected provided that they are "judicial acts" and the court has jurisdiction over the cause of action. Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992); Florida Evergreen Foliage v. Chang, 135 F. Supp. 2d 1271 (S.D. Fla. 2001).

(i) Elements to determine if an act is a "judicial act"[See generally, Kalmanson v. Lockett, 848 So. 2d 374 (Fla. 5th DCA 2003)]:

(a) Whether the precise conduct was in performance of a normal judicial function;

(b) Whether the event occurred in the courtroom or in the judge's chambers;

(c) Whether the controversy centered around a case pending before the judge; and

(d) Whether the confrontation directly or indirectly or immediately out of a visit to the judge in his judicial capacity.

(ii) In Kalmonson, *supra*, the Court determined that a judge's verbal orders to law enforcement officers to enjoin a litigant in a dissolution of a marriage case from access to the property being divided was a "judicial act" and thus protected activity, notwithstanding the fact that the telephone call was initiated from his home.

b. Statements by witnesses in legislative proceedings are protected provided that the statements are relevant to the proceedings and the speakers are appearing pursuant to a legal subpoena. Otherwise, a qualified privilege attaches. Farish v. Wakeman, 385 So. 2d 2 (Fla. 4th DCA 1980), appeal dismissed, 394 So. 2d 1151 (Fla. 1980).

c. Statements made in Labor grievances procedures provided they are relevant to the grievance and are made during the course of the grievance proceedings. {The privilege is waived if the statements are circulated to persons outside the grievance process.} Hope v. National Alliance of Postal and Federal Employees, 649 So. 2d 897 (Fla. 1st DCA 1995). Relevancy is broadly defined to include any statement that has "some relation" to the grievance proceeding. Brown v. Comair, Inc., 803 So. 2d 896 (Fla. 5th DCA 2002).

d. Public official's acts in the scope of employment.

e. Religious organizational matters, provided that adjudication of such claims would cause excessive government entanglement. The First Amendment to the Constitution prohibits Courts from resolving doctrinal disputes or determining whether a religious organization acted in accordance with its canons and bylaws. Kond v. Mudryk, 769 So. 2d 1073 (Fla. 4th DCA 2000).

4. Qualified privilege [See generally Ane, supra]:

a. Elements:

(i) Good faith

(ii) An interest in the subject by the speaker or a subject in which the speaker has a duty to speak:

(a) The nature of the duty can be legal, moral, social, judicial or political.

(b) The nature of the interest can be public, private, or personal.

(iii) A corresponding interest or duty in the listener or the reader;

(iv) A proper occasion; and

(v) Publication in a proper manner.

b. The statement must be made without malice. It is the Plaintiff's burden to show that the statement was made with malice in order to overcome the qualified privilege defense. Cape Publications, Inc. v. Reakes, 840 So. 2d 277 (Fla. 5th DCA 2003).

c. Applies to communications made for *bona fide* commercial purposes, provided that the communication seeks to protect the interests of the recipient or both parties have a corresponding interest in the subject matter. John Hancock Mutual Life Ins. Co. v. Zalay, 581 So. 2d 178 (Fla. 2d DCA 1991), rev. denied, 591 So. 2d 185 (Fla. 1991).

(i) Extends to the reasonable use of clerical personnel in the transmission of the privileged communication. Schreidell, *supra*.

(ii) Encompasses incidental publication to employees of either party where the incidental publication is reasonably necessary and is made in the usual course of business. *See* id.

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(iii) Includes employment and character references made in good faith by one having a duty in the matter to one having an interest in the matter. Thomas v. Tampa Bay Downs, Inc., 761 So. 2d 401 (Fla. 2nd DCA 2000).

d. Applies to the statements and publications made in connection with the various activities of a labor union or other organizations. Loeb v. Geronemus, 66 So. 2d 241 (Fla. 1953); Rosenberg v. American Bowling Congress, 589 F. Supp. 547 (M.D. Fla. 1984).

e. Examples:

(i) Statements by a principal officer of a company regarding an employee's competency and honesty as a comptroller, when made to lower echelon employees with no corresponding interest in the subject matter, are not protected. Arison Shipping Co. v. Smith, 311 So. 2d 739 (Fla. 3d DCA 1975), rev. denied, 327 So. 2d 31 (Fla. 1976).

(ii) A statement by a supervisor to a group of employees that a particular employee had been discharged for theft of company property tended to serve the employer's particular interests and, thus, was not protected. Drennen v. Westinghouse Elec. Corp., 328 So. 2d 52 (Fla. 1st DCA 1976).

(iii) Statements by a supervisor to employees, the plant manager, and the police, accusing a particular employee of being intoxicated while at work, were not protected. Glynn v. City of Kissimmee, 383 So. 2d 774 (Fla. 5th DCA 1980).

5. There is a legislative good faith presumption for employer comments about job performance regarding former or current employees, unless:

a. The information was disclosed was knowingly false, or

b. The information disclosed violated any civil right of the former or current employee under the Florida Civil Rights Act. [*See* Section 768.095, *Florida Statutes; and* Linafelt v. Beverly Enterprises – Florida, Inc., 745 So. 2d 386 (Fla. 1st DCA 1999), wherein a technically true negative job reference did not give rise to a cause of action in defamation]. Employees can overcome the good faith presumption if intention to injure (malice) is shown by clear and convincing evidence. Thomas v. Tampa Bay Downs, Inc., 761 So. 2d 401 (Fla. 2nd DCA 2000).

E. Damages: Plaintiff must show that the defamatory statements proximately caused damages. Cape Publications, Inc. v. Reakes, 840 So. 2d 277 (Fla. 5th DCA 2003).

1. Nominal damages.

2. Actual damages (past and future).

3. Compensatory damages (past and future):

a. Pecuniary loss (direct or indirect) or special damages.

b. Mental anguish and suffering.

c. Injury to reputation and/or standing in the community.

4. Punitive damages:

a. Matters of public concern: Allowable upon a showing that defendant knew the statement was false, and/or had serious doubts as to its truth (express malice as defined by Florida law), and if the primary purpose of making the statement was to express ill will, hostility, and intent to harm (actual malice). Hunt v. Liberty Lobby, 720 F. 2d 631 (11th Cir. 1983).

b. Matters not of public concern: Allowable upon a showing that the defendant's primary purpose of making the statement was to express ill will, hostility, and intent to harm.

5. Mitigation

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a. Full and fair correction, retraction, or apology – only actual damages recoverable (statutory exception, applicable only to the media).

b. Prior publication.

c. Good faith, reasonable belief as to the truth of the statement.

6. Where defamatory conduct was unforeseen, model's defamation claim against insurance company with whom he had a contractual relationship for the use of his likeness in advertisements was not barred by the economic loss doctrine. Facchina v. Mutual Benefits Corp., 735 So. 2d 499 (Fla. 4th DCA 1999).

F. JURISDICTION

1. In order to commit defamation (or any tortious act) under Florida's long-arm statute, a defendant's physical presence is not required. *Florida Statutes*, Ch. 48.193 (1)(b)(1999), Acquadro v. Bergeron, 851 So. 2d 665 (Fla. 2003).

2. The commission of a tortious act can occur through a nonresident's telephonic, electronic, or written communication. Pursuant to Florida's long-arm statute, an internet chat room moderator is liable for posting defamatory statements about a physician, targeting Florida residents, that injured his reputation and business. Becker v. Hooshmand, 841 So. 2d 561 (Fla. 4th DCA 2003).

II. INVASION OF PRIVACY

A. The tort of invasion of privacy encompasses the four categories recognized by Prosser in Law of Torts, p. 804-14 (4th edition 1971) [See generally Cason v. Baskin, 20 So. 2d 243 (Fla. 1944).]

1. Intrusion: Invasion or trespassing on an individual's physical solitude or seclusion. Guinn v. City of Riviera Beach, 388 So. 2d 604 (Fla. 4th DCA 1980); Armstrong v. H & C Communications, Inc., 575 So. 2d 280 (Fla. 5th DCA 1991); Allstate Insurance Company v. Ginsberg, 863 So. 2d 156 (Fla. 2003);

a. Intrusion may be physical or electronic. Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1252 n. 20 (Fla. 1996);

b. The intrusion to which this tort refers is to a private place where there is a reasonable expectation of privacy. If an individual is in a public place, such as a workplace, there is usually no reasonable expectation of privacy. Benn v. Florida East Coast Railway Company, 1999 U.S. Dist. LEXIS 14314.

(i) A cause if action exists when an employee looks up a co-worker's skirt. Vernon v. Medical Management, 912 F. Supp. 1549 (S.D. Fla. 1996).

(ii) A cause of action exists when an employee enters the ladies' room and commits battery upon a co-worker. Stockett v. Tolin, 791 F. Supp. 1536 (S.D. Fla. 1992).

c. The type of intrusion contemplated by this tort causes outrage or mental suffering, shame, or humiliation to a person of ordinary sensibilities, not a hypersensitive individual. State Farm Fire and Casualty Co., Inc. v. Compupay, 654 So. 2d 944 (Fla. 3d DCA 1995) rev. denied, 662 So. 2d 341 (Fla. 1995).

The "impact rule," requiring physical injury, does not apply. Gracey v. Eaker, 747 So. 2d 475 (Fla. App. 1999).

Intrusion of a body part is *not* protected by this tort.

(i) Unwelcome sexual touching and sexually offensive comments do not state a cause of action. Allstate Insurance Company v. Ginsberg, 863 So. 2d 156 (Fla. 2003). The Florida Supreme Court rejected language in Stoddard v. Wohlfahrt, 573 So. 2d 1060 (Fla. 5th DCA 1991) and Stockett v. Tolin, 791 F. Supp. 1536 (S.D.

Fla. 1992) stating that unwarranted touching *can be* invasion of privacy, because it was without any analysis or authority.

2. **Public Disclosure of private facts. Allstate Insurance Company v. Ginsberg, 863 So. 2d 156 (Fla. 2003).**

   a. **The dissemination of truthful private information that a reasonable person would find objectionable. Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1252 n. 20 (Fla. 1996).**

   b. **Publication to the public at large of a private fact of which there is no legitimate public interest, where the publisher knew or should have known that the publication would be highly offensive to a reasonable person. State Farm Fire and Casualty Co., Inc. v. Compupay, 654 So. 2d 944 (Fla. 3d DCA 1995) rev. denied, 662 So. 2d 341(Fla. 1995); Woodward v. Sunbeam Television Corp., 616 So. 2d 501 (Fla. 3d DCA 1993).**

   c. **Defenses;**

      (i) Truth

      (ii) Privilege

3. **False light in the public eye, which is analogous to defamation. Allstate Insurance Company v. Ginsberg, 863 So. 2d 156 (Fla. 2003).**

   (i) Publication of facts which place the person in a false light even though the facts themselves many not be defamatory. Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1252 n. 20 (Fla. 1996);

(ii) Requires showing malice by clear and convincing evidence. Armstrong v. H & C Communications, Inc., 575 So. 2d 280 (Fla. 5th DCA 1991).

4. Appropriation, or the unauthorized commercial exploitation of the property value of one's name or likeness. Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1252 n. 20 (Fla. 1996); Allstate Insurance Company v. Ginsberg, 863 So. 2d 156 (Fla. 2003). {See also Fla. Stat. §540.08 for commercial exploitation.}

B. Public Sector Considerations [See generally Fosberg v. Housing Authority of Miami Beach, 455 So. 2d 373, 376 (Fla. 1984).]

1. Fourth Amendment prohibition of unreasonable searches and seizures.

2. Fourteenth Amendment prohibition of the denial of liberty without due process.

C. Damages:

1. Nominal

2. Actual and compensatory (past and future)

3. Mental anguish and suffering.

4. Punitive-requires a showing of malice.

5. Absence of malice may be considered for assessing damages.

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. Elements [See generally Dependable Life Insurance Co., Inc. v. Harris, 510 So. 2d 985 (Fla. 5th DCA 1987).], Nims v. Harrison, 768 So. 2d 1198 (Fla. 1st DCA 2000); Perez v. Pavex Corp., 2002 U.S. Dist. LEXIS 21871.

1. Deliberate or reckless infliction of mental suffering.

2. Outrageous conduct--high standard:

a. "So outrageous in character, so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Life Insurance Co. v. McCarson, 467 So. 2d 277 (Fla. 1985); Perez v. Pavex Corp., 2002 U.S. Dist. LEXIS 21871. Outrageousness is more likely to be found to exist where the defendant has actual or apparent authority over another or the power to affect his interests. McAlpin v. Sokolay and Flagler Hospital, 596 So. 2d 1266 (Fla. App. 1992).

b. Whether an act is "outrageous" is a question of law for the court. Vance v. Southern Bell, 983 F. 2d 1573 (11th Cir. 1993), cert. denied 513 U.S. 1155 (1995); Johnson v. Thigpen, 788 So. 2d 410, 413 (Fla. 1st DCA 2001).

c. Objective--not subjective—test of whether the misconduct is atrocious, and utterly intolerable in a civilized community. Perez v. Pavex, 2002 U.S. Dist. LEXIS 21871.

3. Conduct causes emotional distress.

4. Emotional distress must be severe.

B. Florida and federal courts have been reluctant to recognize a cause of action for intentional infliction of emotional distress in an employment setting. Scelta v. Delicatessen Support Services, Inc., 57 F. Supp. 2d 1327 (M.D. Fla. 1999); Watson v. Bally Manufacturing Corp., 844 F. Supp. 1533 (S.D. Fla. 1993), aff'd 84 F.3d 438 (11th Cir. 1996).

1. No cause of action where an employer hung a rope "noose" over the plaintiff's workstation, forced the plaintiff into physical altercation with an employee, sabotaged her work, and constructively discharged her. Vance v. Southern Bell, 983 F. 2d 1573 (11th Cir. 1993), cert. denied 513 U.S. 1155 (1995).

2. **Verbal abuse and disparate treatment do not rise to the level of outrageousness that was required by law in a claim for intentional infliction of emotional distress in an n employment context. De La Campa v. Grifols America, Inc., et al., 819 So. 2d 940 (Fla. 3d DCA 2002).**

3. **No cause of action where the employer attempted to induce the employee to join him in a sexual liaison. Martin v. Baer, 928 F. 2d 1067 (11th Cir. 1990). [*But see* Uroquiola v. Linen Supermarket, Inc., 1995 U.S. Dist. LEXIS 9902, 1995 WL 266582 (M.D. Fla. 1995), and Perez v. Pavex Corp., 2002 U.S. Dist. LEXIS 21871, wherein the Courts recognized causes of action when employer misconduct went beyond mere harassment or verbal abuse and evidenced a relentless campaign of verbal abuse, curses, ridicule, racial slurs as well as physical threats and abuse].**

4. **Cause of action failed when a female Port Authority Deputy Director wrote an "ode," referring to a female employee as a "a "hooker" and a "bimbo," and sent it to the Commissioner. Ford v. Rowland, 562 So. 2d 731, 733-34 (Fla. 5th DCA 1990).**

5. **An employer's failure to investigate an employee's complaint did not rise to the level of outrageous conduct. Martin v. Baer, 928 F.2d 1067 (11th Cir. 1991).**

6. **An employee failed to satisfy the "outrageous conduct" requirement in a case wherein after termination, she filed a sexual discrimination action alleging that her supervisor replaced her with a subordinate who was involved in a sexual relationship with the supervisor. Elger v. Martin Memorial, 6 F. Supp. 2d 1351 (S.D. Fla. 1998).**

7. **Racial slurs, racial violence, and demotion motivated by discrimination did not rise to the level of relentless physical and verbal harassment necessary to state a claim for intentional infliction of emotional distress. Vamper v. United Parcel Service, 14 F. Supp. 2d 1301 (S.D. Fla. 1998).**

IV. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

A. Impact Rule: Physical impact is an essential requirement.

1. **Although controversial, the impact doctrine remains the law in Florida. Gracey v. Eaker, 747 So. 2d 475 (Fla. 5th DCA 1999).**

   a. **Emotional injuries alone are not sufficient. Zell v. Meek, 665 So. 2d 1048, 1049 (Fla. 1995).**

   b. **The psychological distress caused by a workplace robbery, which could have been prevented by adequate security, does not give rise to a cause of action for negligent infliction of emotional distress. Rivers v. Grimsley Oil Co., Inc., 842 So. 2d 975, (Fla. 2d DCA 2003).**

B. Limited Exceptions:

1. **No impact need be shown where psychological trauma causes a demonstrable physical injury. Zell v. Meeks, 665 So. 2d 1048 (Fla. 1995); also see, Gracey v. Eaker, 837 So. 2d 348 (Fla. 2002). (The impact rule is inapplicable in cases in which a psychotherapist has created a fiduciary relationship and has breached a statutory duty of confidentiality to his or her patient).**

C. Damages:

1. **Nominal.**

2. **Actual and compensatory (past and future).**

3. **Mental anguish and suffering.**

4. **Punitive.**

V. NEGLIGENT HIRING AND SUPERVISION

A. Liability is grounded on negligence when an employer knowingly keeps a dangerous servant on the premises, which the employer knew or should have known, was dangerous and liable to do harm. In Florida, negligent hiring encompasses negligent hiring as well as negligent supervision. A *prima facie* case for negligent hiring requires: [*See* Garcia v. Duffy, 492 So. 2d 435, 438 (Fla. 2d DCA 1986); Malicki, et al. v. Doe, et al., 814 So. 2d 347 (Fla. 2002).]

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1. **Employer was required to make an appropriate investigation of the employee and failed to do so.**

2. **An appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and**

3. **It was unreasonable, under the reasonable man test, for the employer to hire the employee in light of the information he knew or should have known. Tallahassee Furniture Company v. Harrison, 583 So. 2d 744 (Fla. 1st DCA 1991).**

B The core for imposing liability is foreseeability. The inquiry focuses on whether the specific menace that ultimately manifested itself (assault and battery) could have reasonably been foreseen at the time of hiring. *See* Malicki, et al. v. Doe, et al., 814 So. 2d 347 (Fla. 2002), wherein the church defendants failed to make inquiries into Malicki's background, qualifications, work history, and/or criminal record prior to his hire.

VI. NEGLIGENT RETENTION

A. Elements: [See generally Garcia v. Duffy, 492 So.2d 435 (Fla. 2d DCA 1986); Malicki, et al. v. Doe, et al., 814 So. 2d 347 (Fla. 2002)]:

1. **Actual or constructive notice of an employee's unfitness. Tallahassee Furniture Company v. Harrison, 583 So. 2d 744 (Fla. 1st DCA 1991), a deliveryman brutally attacked a customer in her home. The First District Court of Appeals ruled that there is sufficient evidence for a finding of negligent hiring and retention, because the employer knew of the deliveryman's past criminal record, and should have been aware of his unsuitability for a customer contact position.**

2. **Failure to take prompt remedial action, such as to investigate, reassign, or discharge, after the employer becomes aware, or should have become aware, of employee problems that indicate unfitness. Scelta v. Delicatessen Support Services, 57 F. Supp. 2d 1327 (M.D. Fla. 1999); Perez v. Pavex, 2002 U.S. Dist. LEXIS 21871; Tallahassee Furniture Company v. Harrison, 583 So. 2d 744 (Fla. 1st DCA 1991).**

a. The type of work done by the employee determines whether the employer has a responsibility of investigate the employee. Kelleher v. Pall Aeropower Corp., 2001 U.S. Dist. LEXIS 5463 (M.D. Fla. 2001); Perez v. Pavex, 2002 U.S. Dist. LEXIS 21871.

b. An employer must use the reasonably prudent man standard in choosing or retaining an employee for the particular duties to be performed. Kelleher v. Pall Aeropower Corp., 2001 U.S. Dist. LEXIS 5463 (M.D. Fla. 2001);

3. Emotional distress suffered flowed from injuries sustained in a physical impact. R.J. v. Humana of Fla., 652 So. 2d 360 (Fla. 1995); Zell v. Meeks, 665 So. 2d 1048 (Fla. 1995); Perez v. Pavex, 2002 U.S. Dist. LEXIS 21871.

4. Underlying wrong must be a recognized tort. Scelta v. Delicatessen Support Services, 57 F. Supp. 2d 1327 (M.D. Fla. 1999).

B. Employer's Liability to Third Parties. Malicki, et al. v. Doe, et al., 814 So. 2d 347 (Fla. 2002), aff'd 814 So. 2d 347 (Fla. 1992).

1. A legal duty arising out of relationship between the employment in question and the plaintiff; and

2. The plaintiff is within the zone of foreseeable risks created by the employment.

a. An employer who learns of an employee's conviction for petty theft cannot be deemed liable for that employee's subsequent rape of a customer. Garcia, *supra.*

3. The plaintiff and the offending employee must be in a place that both has the right to be at the time the wrongful act occurs, but does not necessarily have to be on the employer's premises.

a. In Tallahassee Furniture Company v. Harrison, 583 So. 2d 744 (Fla. 1st DCA 1991), the employer was held liable for the negligent hiring and retention where its employee, a furniture deliveryman, brutally attacked a customer in her home. Prior to hiring, the employer had not interviewed the employee, obtained a written employment application from him, or conducted any background investigation whatsoever. During the course of employment, the employer learned

that the employee had been arrested for a violation of probation for grand theft and that he did not have a driver's license, but failed to investigate the employee's background further. The employer also knew that the employee used drugs and alcohol while working, and that he had a prior psychiatric hospitalization. The First District Court of Appeals ruled that there is sufficient evidence for a finding of negligent hiring and retention, because the employer knew of the deliveryman's past criminal record, and should have been aware of his unsuitability for a customer contact position.

b. The employer was held not to be liable when a sexual assault victim did not claim that the assault occurred during working hours or on the employer's premises, or that the employer had any connection with the victim coming into contact with the employee. Hardy v. A-1 Ken Phillips Economy Auto Sales, 656 So. 2d 931 (Fla. 4th DCA 1995).

4. Employer's liability may also extend to wrongful acts by former employees. In Abbott v. Payne, 457 So. 2d 1156 (Fla. 4th DCA 1984), the employer was held liable where a former pest control technician broke into a customer's house and assaulted the customer shortly after the employment relationship ended. *See also* Tallahassee Furniture Company v. Harrison, 583 So. 2d 744, (Fla. 1st DCA 1991), in which the court recognized that as a matter of law, there can be a casual connection between an employment-related contact in the home by an unfit or dangerous employee and an injury inflicted upon the occupant in a later, non-employment entry to the home.

VII. ASSAULT & BATTERY

A. Elements of Assault: Colony Insurance Co. v. Barnes, etc., et al., 410 F. Supp. 2d 1137 (N.D. Fla. 2005), aff'd 2006 U.S. App. LEXIS 17977 (11th Cir. Fla., July 18, 2006), *citing* Doe v. Evans, 814 So. 2d 370, 379-80 (Fla. 2002).

1. An assault is defined as "the apprehension of immediate harmful or offensive contact with the plaintiff's person, caused by acts intended to result in such contacts, or the apprehension of them, directed at the plaintiff or a third person"… William L. Prosser, *Hornbook of the Law of Torts*, §§ 9-10 (1941).

B. Elements of Battery: Colony Insurance Co. v. Barnes, etc., et al., 410 F. Supp. 2d 1137 (N.D. Fla. 2005), aff'd 2006 U.S. App. LEXIS 17977 (11th Cir. Fla., July 18, 2006), *citing* Doe v. Evans, 814 So. 2d 370, 379-80 (Fla. 2002).

1. A battery is defined as "unpermitted, unprivileged contact [] with [the plaintiff's] person, caused by acts intended to result in such contact []…directed at the [plaintiff's person] or a third person." William L. Prosser, *Hornbook of the Law of Torts*, §§ 9-10 (1941).

VIII. FALSE IMPRISONMENT

A. Elements: Montejo v. Martin Memorial Medical Ctr., Inc., 935 So. 2d 1266 (Fla. 4th DCA 2006).

1. The unlawful detention and deprivation of liberty of a person;

2. Against that person's will;

3. Without legal authority or "color of authority"; and

4. Which is unreasonable and unwarranted under the circumstances.

B. Employment Law Context

1. Resley v. The Ritz-Carlton Hotel Company, etc., 989 F. Supp. 1442, 1448 (M.D. Fla. 1997). (In this case, the Plaintiff alleged that a "security manager" who was employed by the Defendant, "took her into a small room [in the security office], locked the door and accused her of stealing from the hotel." She also alleged that when she tried to exit the room, she could not leave because the door was locked. The court found that reasonable person would conclude that the Plaintiff was restrained against her will, and that this restraint was "unreasonable and unwarranted under the circumstances.")

IX. TORTIOUS INTERFERENCE

A. Elements: Magre v. Charles, 729 So. 2d 440, 443-44 (Fla. 5th DCA 1999).

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1. **The existence of a business relationship, not necessarily evidenced by an enforceable contract;**

2. **Knowledge of the relationship on the part of the defendant;**

3. **An intentional and unjustified interference with that relationship by the defendant; and**

4. **Damage to the plaintiff as a result of the breach of the relationship.**

B. Employment Law Context

1. **Rudnick v. Sears, Roebuck and Co., et al., 358 F. Supp. 2d 1201, 1206-7 (S.D. Fla. 2005). (The Court found that the Defendants failed to meet their burden of showing that there was no cause of action against Defendant Parker for tortious interference. This was based on the Plaintiff's allegations including that "Parker intentionally and maliciously interfered with that employment relationship by inducing the discharge of Plaintiff's employment with Defendant and acted with improper motives for personal benefit based on her personal discriminatory malice.")**

X. Fraud in the Inducement

A. Elements: Mettler, Inc., v. Ellen Tracy, Inc. & Ellen Tracy Inc. of Ellenton, Inc., 648 So. 2d 253-54 (Fla. 2d DCA 1994).

1. **A false statement concerning a material fact;**

2. **Knowledge by the person making the statement that the representation is false;**

3. **Intent by the person making the statement that the representation will induce another act upon it; and**

4. **Reliance on the representation to the injury of the other party.**

B. Bankers Mutual Capital Corp., v. United States Fidelity & Guaranty Co., et al., 784 So. 2d 485, 490 (Fla. 4th DCA 2001).

1. **In order for a claim for fraud in the inducement to survive a motion to dismiss, it must "allege fraud with the requisite particularity required by *Florida Rule of Civil Procedure 1.120(b)"*, including**

   a. **Who made the false statement;**

   b. **The substance of the false statement;**

   c. **The time frame in which it was made; and**

   d. **The context in which the statement was made.**

C. Employment Law Context

1. **J.R.D Management Corp. v. Dulin, 883 So. 2d 314, 319 (Fla. 4th DCA 2004). (The Court found that the Plaintiff's employment had been fraudulently induced and disagreed with the Defendant's argument that "fraud in the inducement cannot lie when employment is at will and terminable at any time.")**

Polygraph Protection Act/Fair Credit Reporting Act

By

Don Spero, Palm Beach Gardens

THE LEGAL HAZARDS OF POLYGRAPH TESTING
WHAT IS REQUIRED, PERMITTED AND NOT PERMITTED

By Donald J. Spero

Employers who are engaged in commerce, affect commerce or manufacture goods for commerce are strictly limited in their use of lie detector tests by the federal Employee Polygraph Protection Act of 1988 (the "EPPA").[1] The EPPA restricts the use not only of polygraphs but of lie detectors generally, including a "...deceptograph, voice stress analyzer, psychological stress evaluator or any other similar device (whether mechanical or electrical) that is used, or the results of which are used for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual."[2] Polygraphs are defined as instruments that record "...visually, permanently, and simultaneously, changes in cardiovascular, respiratory, and electro dermal patterns as minimum instrumentation standards." and which are used to diagnose "the honesty or dishonesty of an individual."[3]

The Secretary of Labor (the "Secretary") is given responsibility for enforcement of the EPPA.[4] The Secretary is required to issue rules and regulations, as well to make investigations to ensure compliance. The statute gives subpoena power to the Secretary.[5] Covered employers are required to post notices of the provisions of the act which are prepared by the Secretary.[6] The Secretary is empowered to bring suits to enjoin violations of the act.[7] Additionally individuals may bring actions in which an employer can be required to hire, reinstate or promote them.[8] They may also recover lost wages.[9]

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1 29 U.S.C.§2002 et seq.

2 29 U.S.C.§2002(3)

3 29 U.S.C.§2002(4)(A) & (B)

4 29 U.S.C.§2004.

5 29 U.S.C.§2004(a) & (b)

6 29 U.S.C.§2003

7 29 U.S.C.§2005(b)

8 29 U.S.C.§2005(c)(1)

9 29 U.S.C.§2005(c)(1)

Employers who violate the EPPA may be subject to a civil penalty in an amount up to $10,000.[10] In a suit to enforce the statute the Secretary of Labor may obtain injunctive relief in addition to "... such legal or equitable relief incident thereto as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits."[11]

An individual may bring a private civil action against an employer for violating the individual's rights under the EPPA. In such an action the individual may obtain "...such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits."[12] In *Mennen v. Easter Stores*[13] the court held that an employee can recover damages for emotional distress under the EPPA. The *Mennen* court did not reach the question of whether punitive damages were available, finding that the employer's acts did not justify such damages even if they are recoverable under the act. Although it is not clear whether punitive damages can be recovered, in *Deetjan v. V.I.P., Inc.*[14] the court indicated that exemplary damages are available.

Private employers are prohibited from requiring or even suggesting that an employee or applicant take a lie detector test.[15] (42 U.S.C. § 2002 which contains the prohibitions of the EPPA is set out in its entirety in Appendix B of this article.) Doing so is a violation of the EPPA "… even where the test is not ultimately administered and no adverse employment action is taken as a consequence."[16] They may not use, refer to, inquire or even accept the results of a lie detector test in making employment decisions. They may not discharge or otherwise discipline an employee or decline to hire an applicant who refuses to take a lie detector test. They are also prohibited to act adversely with respect to an employee or applicant on the basis of a lie detector test.[17] The act also prohibits retaliation against one who has complained or taken any action or

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10 29 U.S.C. § 2005(a)(1)

11 29 U.S.C. § 2005(b)

12 29 U.S.C. § 2005(c)(1)

13 951 F. Supp. 838, 865-66 (N.D. Iowa 1997)

14 No. 03-119-P-H (D. Me. October 31, 2003)

15 29 U.S.C.§2002(1)

16 *Polkey v. Transtecs Corporation*, 404 F.3d 1264, 1268 (11th Cir. 2005).

17 29 U.S.C.§2002(3)(A) & (B)

supported any action against the employer for or testified in any action relating to the act.[18]

The Appellate Court for the Fourth Circuit considered the interpretation of two of the provisions under which an employer can incur civil liability in *Worden v. SunTrust Banks, Inc*.[19] The plaintiff was discharged by SunTrust Banks after he failed two polygraph examinations administered by the police without any suggestion from or participation in by employer although the emplloyer was informed of the results. The incident in question was a telephone call to the bank by the plaintiff, a bank employee, in which he claimed he was being held for ransom. 29 U.S.C. § 2002(3) bars an employer from discharging an employee " … on the basis of the results of any lie detector test." The court held that the plaintiff does not need to prove that the test was the sole basis for the discharge. If it was considered along with other information the statute has been violated. " … the plaintiff is only required to show that the results of the polygraph were a factor in the termination of employment as part of establishing a prima facie case under § 2002(3)."[20] However the Worden court found for the employer using the *Price Waterhouse* same decision analyses.[21] It ruled that SunTrust had enough incriminating information other than the polygraph test results from the police investigatory file that it would have dismissed Worden even if had been unaware of the test.

The W*orden* court also partially affirmed the district court's application of 29 U.S.C. § 2002(2) which makes it a violation of the Act "… to use, accept, refer to or inquire concerning the results of any lie detector test." It agreed with the lower court that an employer's merely knowing the results of a lie detector test does not by itself show that it has accepted the test. It overruled Department of Labor Regulation 29 C.F.R. § 801(4)(c) under which the mere receipt by the employer of the test results violates § 2002(2). Nevertheless the court reversed and remanded the case because the district court had reasoned that the § 2002(2) claim was moot since SunTrust would have discharged Worden in any case based on other information. The Fourth Circuit ruled that ' … a § 2002(2) claim is not dependent on an employer's liability under § 2002(3). Rather a § 2002(2) claim constitutes an independent basis for asserting the liability of an employer."[22] The court further observed that under § 2002(2) employee is not required to show that there was an adverse action. The employee needs only to show that the employer "used" or "referred" to the test.[23]

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[18] 29 U.S.C.§2002(4)(A),(B) &(C)

[19] U.S.D.C. 4h Cir. Docket No. 07 – 1354

[20] *Worden* slip opinion p. 10.

[21] *Price Waterhouse v.Hopkins*, 490 U.S. 228 (1989)

[22] Slip opinion at p, 20.

[23] *Id,*

The broad definition of the term "lie detector" in the EPPA suggests caution in using auxiliary aids to conduct investigations. In *Veazey v. Communications & Cable of Chicago, Inc.*[24] the plaintiff alleged that the use of a tape recorder by the employer was prohibited by the EPPA. The plaintiff was suspected of leaving a threatening message on a coworker's voice mail. He was discharged after he declined his employer's demand that he provide a tape recording of the same message to allow comparison of the voice samples. The court pointed out that a tape recorder used by itself does not fulfill the EPPA definition of a lie detector. The decision admonished that use of a tape recorder in conjunction with a device that is employed to render an opinion as to honesty, such as a voice stress analyzer, would be prohibited by the EPPA.

In *Pluskota v. Roadrunner Freight Systems*[25] the court considered a challenge to the use of a "Compu-Screen Risk Analysis Interview" under a section of the Wisconsin Fair Employment Act that is worded similarly to the EPPA.[26] An employee was required to take the test in the investigation of a theft. The test consisted of 107 tape recorded multiple choice questions. Four seconds were allowed for each questions. The plaintiff was dismissed after taking the test. The court upheld the employer's argument that the Compu-Screen, being a written test, was not a prohibited unfair honesty test, since it did not measure physiological changes in the subject as the test is being administered.

The EPPA contains a number of exemptions. It exempts the federal government as well as state and local governments along with political subdivisions of state and local governments.[27] There is a limited exemption that permits employers to use lie detectors for ongoing investigations of losses or damage to the employer's business due to theft or employee defalcation, industrial espionage or sabotage.[28] Polygraph tests are also permitted for certain prospective employees of security, armored car and security alarm services, the operations of which have a significant impact on the health or safety of a state or political subdivision of a state or the national security of the United States. This exemption applies only to those prospective employees actually engaged in protective operations.[29] There is also a limited exemption allowing polygraph tests

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24 194 F. 3d 850 (7th Cir. 1999)

25 524 N.W. 2d 904 (Wis. Apps. Dist 1 1994)

26 § 111.37(1)(a), STATS, (1989-90)

27 29 U.S.C.§2006(a)

28 29 U.S.C.§2006(d)(1)

29 29 U.S.C. § 2006(e)

for certain prospective employees of employers engaged in the manufacture, distribution or dispensation of controlled substances.[30]

Where employers are investigating a theft or series of thefts they may want to make use of the exemption for ongoing investigations. The EPPA sets out rigid rules applicable to the use of this exemption in 29 U.S.C. § 2006 (d). The exemption is available only if:

> (2) The employee had access to the property that is the subject of the investigation;
>
> (3) the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation; [31] and
>
> (4) the employer executes a statement , provided to the examinee before the test, that -
>
> (A) sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees,
>
> (B) is signed by a person (other than a polygraph examiner) authorized to legally bind the employer,
>
> (C) is retained by the employer for at least three years, and
>
> (D) contains at a minimum -
>
> (i) an identification of the specific economic loss or injury to the business of the employer,
>
> (ii) a statement indicating that the employee had access to the property that is the subject of the investigation, and
>
> (iii) a statement describing the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.

The need to scrupulously adhere to the requirements of the act relating to the exemption is demonstrated in *Mennen v. Easter Stores*, *supra*. There an employer who

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30 29 U.S.C. § 2006(f)

31 See *Campbell v. Woodword Photographics, Inc.*, 2006 U.S. Dist Lexis 2006 (June 7, 2006) where the employer was in violation because it did not have a reasonable suspicion of the plaintiff at the time a that the employees were told that in the course of the investigation of a theft all of the employees might be asked to take a polygraph examination.

otherwise might have made use of the ongoing investigation exemption was not able to invoke it due to its failure to provide the safeguards required by the statute.

Polygraph test results obtained under the exemptions may not be used to the detriment of an employee unless the test results are supported by additional evidence.[32] The evidence required by section 2006(d) may fulfill the requirement of additional supporting evidence. Further employers must be aware of the need to maintain the confidentiality of information obtained relating to a polygraph examination. Disclosure of such information may be made by the examiner only to the examinee, the employer or persons designated in writing by the examinee.[33] Disclosure may also be made pursuant to the order of a court of competent jurisdiction to a government agency, mediator or arbitrator.[34] Employers are under like restrictions regarding the disclosure of such information. However they may only make disclosures to a government agency where there is an admission of criminal conduct.[35] In *Long v. Mango's Tropical Café.*[36] the court found that the employer did not violate the prohibition against disclosing information where it discussed the matter with co-workers after the employee had filed suit alleging violation of the EPPA. The court considered that the employee's name had not been mentioned and the discussion took place after the filing of a public complaint.

Where employees are polygraph tested under any of the exemptions strict rules must be observed. The failure of the employer to adhere to the rules will result in the loss of the exemption. Employees are permitted to terminate the test at any time, they are not to be questioned in a degrading manner and they may not be questioned about matters relating to religious beliefs, matters relating to sexual behavior, political affiliations, racial matters or lawful union activities.[37] Prior to the test the employee must receive reasonable written notice of the time and place of the test, the right to legal counsel during the test, the nature of the test, the instruments to be used and any monitoring or recording of the test that will take place.[38] The examiner must have a

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32 29 U.S.C. § 2007(a)(1)

33 29 U.S.C. § 2008(b) (1) & (2)

34 29 U.S.C. § 2008(b)(3)

35 29 U.S.C. § 2008(c)(1) & (2)

36 972 F. Supp. 655 (S.D. FL 1997)

37 29 U.S.C. § 2007(b)

38 29 U.S.C. § 2007(b)(2)(A)

license from the state in which the examination is taking place and must post a $50,000 bond.[39]

Appendix C is the notice that must be given before administering a test. It must be signed by the employee. It contains the statutory disclosure requirements including that the employee can not be required to take the examination as a condition of employment, that statements made during the examination may constitute the basis for adverse employment action, and a statement of the employer's legal rights under the EPPA. The employee must be provided with all questions to be asked during the examination prior to the administering of the lie detector test.[40] Examiners are required to render their opinions in writing based only on the polygraph test chart. The report may not contain recommendations as to the individual's employment. The examiner must retain the test information for at least three years.[41] An examiner is prohibited from administering more than five tests in one calender day.[42] No test may take less than 90 minutes.

Before taking adverse action based on a lie detector test an employer must interview the employee regarding the test results, provide the employee with the written opinion resulting from the test along with the questions, answers and charted responses.[43]

There are few decisions interpreting the EPPA but some of those that have been reported provide helpful guidance. In *Mennen v. Easter Stores*, *supra*, the police investigating a cash theft asked the employer's permission to administer a polygraph test. The employer gave its assent. Without that permission the police would not have made use of the test. The court found that such passive cooperation with the police

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39 29 U.S.C. § 2007(c)(1)(A) & (B)

40 29 U.S.C. § 2007(b)(2)(E)

41 29 U.S.C. § 2007(c)(2)

42 29 U.S.C. § 2007(b)(5)

43 29 U.S.C. § 2007(b)(4)

investigation did not violate the prohibition against requiring or suggesting that an employee submit to a lie detector test. The court considered the applicable regulation issued by the Secretary of Labor. That regulation provides in part:

> Allowing a test on the employer's premises, releasing an employee during working hours to take a test at police headquarters, and other similar types of cooperation at the request of the police authorities would not be construed as 'requiring, requesting, suggesting, or causing, directly or indirectly any employee ... to take or submit to a lie detector test." Cooperation of this type must be distinguished from actual participation in the testing of employees suspected of wrongdoing, either through the administration of the test by the authorities, or through employer reimbursement of tests administered by police authorities to employees.
>
> 29 C.F.R. § 801.4(b).

In *Calbillo v. Cavender Oldsmobile, Inc.*[44] the court considered the circumstances under which a polygraph examiner might be held to be an employer and thereby subject to an employer's liabilities under the EPPA. The court applied the "economic realities" test. This test deals with the degree of control the examiner has over the individual's employment. Among the points the court considered pertinent were whether it was the examiner who decided that a lie detector test would be administered and what employees would be subjected to the test, whether the examiner advised the employer of the legal requirements of the EPPA and whether the examiner decided that the employee should be disciplined.

Appendix A

NOTICE TO EMPLOYEES AND JOB APPLICANTS

(a) One time only, prior to testing, an employer shall give all employees and job applicants for employment a written policy statement which contains:

1. A general statement of the employer's policy on employee drug use, which must identify:

a. The types of drug testing an employee or job applicant may be required to submit to, including reasonable-suspicion drug testing or drug testing conducted on any other basis.

b. The actions the employer may take against an employee or job applicant on the basis of a positive confirmed drug test result.

2. A statement advising the employee or job applicant of the existence of this section.

3. A general statement concerning confidentiality.

4. Procedures for employees and job applicants to confidentially report to a medical review officer the use of prescription or nonprescription medications to a medical review officer both before and after being tested.

5. A list of the most common medications, by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. A list of such medications as developed by the Agency for Health Care Administration shall be available to employers through the Division of Workers' Compensation of the Department of Labor and Employment Security.

6. The consequences of refusing to submit to a drug test.

7. A representative sampling of names, addresses, and telephone numbers of employee assistance programs and local drug rehabilitation programs.

8. A statement that an employee or job applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within 5 working days after receiving written notification of the test result; that if an employee's or job applicant's explanation or challenge is unsatisfactory to the medical review officer, the medical review officer shall report a positive test result back to the employer; and that a person may contest the drug test result pursuant to law or to rules adopted by the Agency for Health Care Administration.

9. A statement informing the employee or job applicant of his or her responsibility to notify the laboratory of any administrative or civil action brought pursuant to this section.

10. A list of all drugs for which the employer will test, described by brand name or common name, as applicable, as well as by chemical name.

11. A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the Public Employees Relations Commission or applicable court.

12. A statement notifying employees and job applicants of their right to consult with a medical review officer for technical information regarding prescription or nonprescription medication.

(b) An employer not having a drug-testing program shall ensure that at least 60 days elapse between a general one-time notice to all employees that a drug-testing program is being implemented and the beginning of actual drug testing. An employer having a drug-testing program in place prior to July 1, 1990, is not required to provide a 60-day notice period.

(c) An employer shall include notice of drug testing on vacancy announcements for positions for which drug testing is required. A notice of the employer's drug-testing policy must also be posted in an appropriate and conspicuous location on the employer's premises, and copies of the policy must be made available for inspection by the employees or job applicants of the employer during regular business hours in the employer's personnel office or other suitable locations.

Appendix B

29 U.S.C. § 2002 Prohibitions on lie detector use

Except as provided in sections 2006 and 2007 of this title, it is unlawful for any employer engaged in or effecting commerce or in the production of goods for commerce -

(1) directly or indirectly, to require, request, suggest**,** or cause any employee or prospective employee to take or submit to any lie detector test;

(2) to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;

(3) to discharge, discipline, discriminate against in any manner, or deny employment to, or threaten to take any such action against -

(A) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test; or

(B) any employee or prospective employee on the basis of any lie detector test; or

(4) to discharge, discipline, discriminate in any manner, or deny employment or promotion to, or threaten to take any such action against, any employee or prospective employee because -

(A) such employee or prospective employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter,

(B) such employee or prospective employee has testified or is about to testify in any such proceeding, or

(C) the exercise by such employee or prospective employee, on behalf of such employee or another person, of any right afforded by this chapter.

Appendix C

Notice to Examinee

Section 8(b) of the Employee Polygraph Protection Act, and Department of Labor regulations (29 CFR 801.22, 801.23, 801.24, and 801.25) require that you be given the following information before taking a polygraph examination:

1. (a) The polygraph examination area [does] [does not] contain a two-way mirror, a camera, or other device through which you may be observed.

(b) Another device, such as those used in conversation or recording, [will] [will not] be used during the examination.

(c) Both you and the employer have the right, with the other's knowledge, to record electronically the entire examination.

2. (a) You have the right to terminate the test at any time.

(b) You have the right, and will be given the opportunity, to review all questions to be asked during the test.

(c) You may not be asked questions in a manner which degrades, or needlessly intrudes.

(d) You may not be asked any questions concerning: Religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual preference or behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations.

(e) The test may not be conducted if there is sufficient written evidence by a physician that you are suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination.

(**f**) You have the right to consult with legal counsel or other representative before each phase of the test, although the legal counsel or other representative may be excluded from the room where the test is administered during the actual testing phase.

3. (a) The test is not and cannot be required as a condition of employment.

(b) The employer may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against you based on the analysis of a polygraph test, or based on your refusal to take such a test without additional evidence which would support such action.

(c)(1) In connection with an ongoing investigation, the additional evidence required for an employer to take adverse action against you, including termination, may be (A) evidence that you had access to the property that is the subject of the investigation, together with (B) the evidence supporting the employer's reasonable suspicion that you were involved in the incident or activity under investigation.

(2) Any statement made by you before or during the test may serve as additional supporting evidence for an adverse employment action, as described in 3(b) above, and any admission of criminal conduct by you may be transmitted to an appropriate government law enforcement agency.

4. (a) Information acquired from a polygraph test may be disclosed by the examiner or by the employer only:

(1) To you or any other person specifically designated in writing by you to receive such information;

(2) To the employer that requested the test;

(3) To a court, governmental agency, arbitrator, or mediator that obtains a court order;

(4) To a U.S. Department of Labor official when specifically designated in writing by you to receive such information.

(b) Information acquired from a polygraph test may be disclosed by the employer to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

5. If any of your rights or protections under the law are violated, you have the right to file a complaint with the Wage and Hour Division of the U.S. Department of Labor, or to take action in court against the employer. Employers who violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees. The Secretary of Labor may also bring action to restrain violations of the Act, or may assess civil money penalties against the employer.

6. Your rights under the Act may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or[[Page 773]]

complaint under the Act, and agreed to and signed by the parties.

I acknowledge that I have received a copy of the above notice, and that it has been read to me.

_____

(Date)

_____

(Signature)

THE CONSUMER CREDIT PROTECTION ACT AS APPLIED TO THE EMPLOYER/EMPLOYEE RELATIONSHIP 2008-09

By Donald J. Spero

There are two aspects of the Consumer Credit Protection Act, 15 U.S.C. § 1671 *et seq.* (the "Act ") that commonly bear on the employment relationship. The portion of the statute most likely to be encountered by employers are the restrictions the Act places on the amounts that can be withheld from an employee's paycheck pursuant to a wage deduction order. This aspect also limits an employer's right to take adverse employment action when wages have been garnished. The other aspect of the Act of which employers must be aware are its limitations on gathering background information on applicants or employees through means that are classified as "consumer reports" under the portion of the Act known as the Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. § 1681a *et seq.*

When Congress enacted the Consumer Credit Protection Act, it noted at 15 U.S.C. § 1671(a)(1) that " The unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit." Congress further observed that "The application of garnishment as a creditor's remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and constitutes a substantial burden on interstate commerce." 15 U.S.C. § 1501(a)(2). Congress also found that the variations in the garnishment laws of the several states "... destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many parts of the country." 15 U.S.C. § 1501(a)(3).

Garnishments are defined as "... any legal or equitable proceeding through which any earnings of any individual are required to be withheld for payment of any debt." 15 U.S. C. § 1672(c). A support order voluntarily entered into by a party whose earnings are sought by a judgment creditor is a garnishment within the meaning of the Act.[1]

Restrictions on Garnishment Withholdings

The maximum amount that can be withheld from an employee's "aggregate disposable earnings ... in any workweek" through garnishment is the lesser of: "25 per centum of his disposable earnings for that week" 15 U.S.C. § 1673(a)(1), or "the amount by which his disposable earnings exceed thirty times the Federal Minimum hourly wage..." required by the Fair Labor Standards Act in 29 U.S.C. § 206(a)(1). 15 U.S.C. § 1673(a)(2). Earnings consist of "... compensation payable for personal services, whether denominated as wages, salary, commissions, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." 15 U.S.C. § 1672(a). "Disposable earnings" are those amounts of an individual's earnings "...

[1] *Voss Products, Inc. v. Hamilton County Municipal Court*, 147 F. Supp. 892 (E.D. Tenn 2001).

remaining after the deduction from those earnings of any amounts required by law to be withheld." 15 U.S.C. § 1672(b).

There is a different limitation on the amount of deduction permitted for any workweek pursuant to a wage deduction order that is "... for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by state law, which affords substantial due process, and which is subject to judicial review." 15 U.S.C. § 1673(b)(1)(A):

> 1. Where the garnishee is supporting a spouse or dependant child the limit is 50 percent of disposable earnings for that week if the support order is for a spouse or dependent child other than those who the garnishee is supporting. 15 U.S.C. § 1673(b)(2)(A).
>
> 2. If the garnishee is not supporting another spouse or dependant child the limit is 60 percent of disposable earnings for that week. 15 U.S.C. § 1673(b)(2)(B).

When payments under a support order are overdue by more than twelve weeks the 50 percent limit for those supporting another spouse or dependant child is raised to 55 percent. In such a case the 60 percent limit for those not supporting another spouse or child is raised to 65 percent.

If there is more than one garnishment the Act does not provide for the order in which they are to be satisfied. The order of priority is therefore determined under state law or any other applicable federal law. 29 C.F.R. § 870.11(a)(2). Where there are both judgment creditor and support order garnishments the total amount that may be deducted is not cumulative. *i.e.* 25% plus 50%. If the support order has priority and takes up as much as the permissible 50% or more, there will be nothing left for the judgment creditor.[2]

Garnishments on debts due for state or Federal taxes are not restricted. 15 U.S.C. § 1673(b)(1)(C). Neither are there restrictions on garnishment orders of a federal court under a Chapter 13 bankruptcy case. 15 U.S.C. § 1673(b)(1)(B). State and federal courts are prohibited from entering orders that violate the foregoing restrictions on the amounts that may be garnished. 15 U.S.C. § 1673(c).

The Secretary of Labor is charged with enforcing the Act. 15 U.S.C. § 1676. The Secretary, through the Wage and Hour Division, may bring actions to enjoin a creditor, a court or an employer from violating the garnishment restrictions. Under present authority no private right of action is available to an individual whose rights are violated under this chapter of the Act.[3] However a garnishee may intervene in a garnishment

[2] *Long Island Trust Co. v. U.S. Postal Service* 647 F.2d 336 (2nd Cir. 1981)

[3] *Follette v. Vitanza*, 658 F. Supp. 492 (N.D.N.Y. 1987)

action to assert a defense as to portions of his or her wages that are exempt from garnishment.[4] A court that violates the Act may be sued by the Secretary of Labor if it withholds more than is permitted even if the employee does not appear and object.[5] The same liability attaches to an employer that makes excessive withholdings.

The Wage and Hour Division of the Department of Labor may exempt from the provisions of the Act states with garnishment restrictions "substantially similar" to those provided in the federal law. 15 U.S.C. § 1675. However the Act does not preempt state statutes that are more restrictive than the federal law. 15 U.S.C. § 1677.

Limitations on Adverse Actions Against Employees Whose Wages Have Been Garnished

The Act prohibits employers from discharging an employee for having been garnished on one indebtedness. 15 U.S.C. § 1674(a). Thus an employee may not be discharged for being garnished multiple times on a single debt. A "willful" violation of this prohibition may subject an employer to a fine of no more than $1000 or imprisonment. However the prohibition does not apply if the employee is garnished, even once, on a second indebtedness.

An attempted garnishment for which there are no available disposable earnings to satisfy the wage deduction order is not a garnishment for the purposes of this section according to the Seventh Circuit in *Brennan v. The Kroger Company*.[6] Thus the employer violated this section in dismissing an employee because of a wage deduction order served by a second creditor after a prior creditor had already garnished 25% of his disposable earnings. The Court reasoned that the employee's earnings had not been subjected to garnishment by virtue of the second order as it did not bind the employer to withhold funds.

The majority view is that only the Secretary of Labor may seek relief for an employee under this section.[7] It does not create a private right of Action for wrongful discharge.

Restrictions on Employee Background Checks 2008-09

Certain background investigations of employees or prospective employees may be classified as "consumer reports" as defined by the the "FCRA." A consumer is

[4] *Voss Products, Inc. v. Hamilton County Municipal Court, supra*

[5] *Donovan v. Hamilton County Municipal Court,* 580 F. Supp. 554 (S.D. Ohio 1984

[6] 513 F.2d 961 (7th Cir. 1975)

[7] *McCabe v. City of Eureka, Mo.*, 664 F.2d 680 (8th Cir. 1981); *Smith v. Cotton Brothers Baking Co.*, 609 F2d 738 (5th Cir. 1980). But see *Stewart v. Travelers Corporation,* 503 F.2d 10 (9th Cir. 1974) for a contrary view.

defined as "an individual." 15 U.S.C. § 1681(c). A consumer report is broadly defined as:

> ... any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for:
>
> > (A) credit or insurance to be used primarily for personal, family, or household purposes;
> >
> > (B) employment purposes; -
> >
> > (C) any other purpose authorized under section 1681b of this title.[8]
> >
> > 15 U.S.C. § 1681a(d)

The term "employment purposes" relates to the use of a consumer report for evaluation for "... employment, promotion, reassignment or retention as an employee." 15 U.S.C. § 1681(h).

There are restrictions on a "consumer reporting agency" in furnishing consumer reports. Where the report is to be used for employment purposes the person obtaining the report must certify to the agency that it will not be used in violation "... of any applicable Federal or State equal employment opportunity law or regulation." 15 U.S.C. § 1681(b)(1)(A)(ii). The person must also certify that he or it has complied with the FCRA's disclosure and authorization requirements. It must be disclosed to the subject individual before the report is obtained that such a report may be obtained for employment purposes. 15 U.S.C. § 1681b(b)(2)(A)(i). Further it is necessary to have written authorization from the individual to obtain the report. 15 U.S.C. § 1681b(b)(2)(A)(ii).

The FCRA does not bar an employer from dismissing an employee who refuses to sign a blanket authorization to permit it to obtain investigative consumer reports in the future according to *Kelchner v. Sycamore Manor Health Center.*[9] The court pointed to the certification that an employer must make to a reporting agency if it seeks a report for

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[8] Section 1681b(a) permits a consumer reporting agency to furnish consumer reports under certain listed circumstances and "... no other." The listed circumstances include in response to a court order; in response to the written instructions of the consumer to whom the report relates; to one who intends to use the report for employment purposes; and to one " ... who otherwise has a legitimate business need for the information - (i) in connection with a business transaction; or (ii) to review an account to determine whether the consumer continues to meet the terms of the account." 1681b(a)(iii)(f).

[9] No:CV -02–0324 (M.D.Pa 2004)

employment purposes. Section 1681b(b)(2)(A) requires the employer to certify that it has made "a clear and conspicuous disclosure ... in writing to the consumer *at any time* before the report is procured or caused to be procured ..." (Emphasis supplied.). The court reasoned that the employer need not obtain the authorization immediately before obtaining the report but may do so at any time before obtaining the report.

A consumer reporting agency is a:

> ... person which for monetary fees, dues or on a cooperative nonprofit basis, regularly engages, in whole or in part, in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports. 15 U.S.C. § 1681(d)(1)(B) (f).

Before taking an adverse employment based even in part on a consumer report the individual who is the subject of the report must be given a copy of the report as well as a description of the individual's rights as set forth in 15 U.S.C. § 1681g(c)(1) & (2). See 15 U.S.C. § 1681b(b)(3)(A)(1) & (2). That description may be in the form of the summary of rights prepared by the Federal Trade Commission pursuant to 15 U.S.C. § 1681g(c)(3). The summary is attached as the Appendix hereto. Adverse action for the purpose of employment is defined as "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." 15 U.S.C. 1681(k)(1)(B)(iii).

The FCRA provides for a private right of action against one who violates it. Where the violation is wilful actual damages may be recovered by a consumer or damages between $100.00 and $1,000.00. Where a natural person has willfully obtained a consumer report "... under false pretenses or knowingly without a permissible purpose" recovery of the greater of actual damages or $1000.00 is available. 15 U.S.C. § 1681n(a)(1). The plaintiff may also recover attorney's fees. 15 U.S.C. § 1681n(a)(3). In such an action punitive damages may be awarded. 15 U.S.C. § 1681n(a)(2).

If a violation of this chapter is negligent actual damages may be recovered along with costs and attorney' fees. 15 U.S.C. § 1681o. Attorneys fees under this section may be awarded for the cost of defense of an action or motion filed for harassment or in bad faith. 15 U.S.C. § 1681o(b).

In *Orabueki v. International Business Machine Corp.*[10] the court found that a letter advising an applicant of the company's intention to withdraw an offer of employment on the basis of a consumer report was not an adverse action within the meaning of the section. With the letter the employer supplied the applicant with the

[10] 145 F.Supp. 2d 371 (S.D.N.Y. 2001)

consumer report and notification of his rights under the FCRA. The court found that the letter was merely notification that an internal decision had been made. An internal decision is not an adverse action. The adverse action did not take place until the actual withdrawal of the offer. Therefore the employer met the requirements of this section as it furnished the report and notification of the applicant's rights before it had taken the adverse action.

In *Zamora v. Valley Federal Savings and Loan Association*[11] the court upheld a jury verdict against an employer in an action brought by the spouse of an employee. The employee was being considered for a security sensitive position. The employer obtained a consumer report on the spouse as part of its background investigation of the employee. The court held that this was not a permissible use of the report for employment purposes.

There are special rules relating to obtaining and using an "investigative consumer report." An investigative consumer report is a consumer report in which an individual's "... character, general reputation, personal characteristics or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge of such information." 15 U.S.C. § 1681a(e). An investigative consumer report is not permitted to include facts about the individual's credit record obtained directly from the individual's creditors or which a consumer reporting agency obtained either directly from the consumer or from the consumer's creditors. *Id.*

Before obtaining an investigative consumer report or causing one to be prepared it must be disclosed to the consumer that the report may be made. 15 U.S.C. § 1681d(a)(1)(a) & (b). The nature of the report must be disclosed. *i.e.* that the report may include "... information as to his character, general reputation, personal characteristics, and mode of living" to the extent that any of these are applicable. *id.* This information must be supplied in writing within three days after the report was ordered. The writing must include the information as to the rights of the consumer. This can be accomplished in the form set out in the Appendix.

One who has obtained an investigative consumer report or caused one to be prepared must, when requested in writing by the subject of the report, "... make a complete and accurate disclosure of the nature and scope of the investigation requested." 15 U.S.C. § 1681d(b). The disclosure must be in writing. It must be mailed or delivered to the consumer within the later of five days after receipt of the request for the disclosure or the date the report was first requested. *Id.*

The Fair and Accurate Credit Transactions Act

A new dimension was added to the handling of information by consumer reporting agencies with the passage of the Fair and Accurate Credit Transactions Act

[11] 811 F.2d 1368 (10th Cir. 1987)

(the "FACT ACT") in 2003. One purpose of the FACT ACT is to help prevent identity theft. The regulation written as authorized by 15 U.S.C. 1681w requires "Any person who maintains or otherwise possesses consumer information for a business purpose must properly dispose of such information by taking reasonable measures to protect against unauthorized disclosure or use of the information in connection with its disposal." 16 CFR § 682.3(a). The regulation further requires due diligence before:

> … entering into and monitoring compliance with a contract with another party engaged in the business of record destruction to dispose of material, specifically identified as consumer information, in a manner consistent with this rule.

16 CFR § 682.3(b).

Significantly the regulation expands the regulation of protected information to persons other than credit reporting agencies. Employers also have information that comes within the purview of the act and must therefore dispose of such information in a manner consistent with it.

Questions Relating to What is a Consumer Report

There are occasions on which an employer may wish to gather information about an employee or a prospective employee where the information obtained may fall within the FCRA definition of a consumer report. Obviously if the information is obtained for employment related purpose it falls within a specific provision of the act. The information may be sought to determine if the individual is a suitable candidate for hiring or promotion. It may be sought to learn whether a Workers Compensation claimant is malingering. It may be requested in connection with other employment related litigation. Thus it is necessary to consider what makes up a consumer report within the meaning of 15 U.S.C.A. § 1681a(d).

The Federal Appellate Court for the Tenth Circuit found that employment history information maintained by motor carriers about terminated employees was excluded from the definition of a consumer report in *Owner-Operator Independent Drivers Association, Inc. v. USIS Commercial Services, Inc.*[12]The employment histories were forwarded to the defendant organization which supplied them to subscribing motor carrier members who sought information about prospective hires. The motor carriers needed the information as the Department of Transportation requires motor carriers to investigate individuals' driving records and employment histories before hiring them as drivers.[13] An exclusion from the definition of a consumer report is provided by 15 U.S.C.A. § 1681a(d)(2)(A)(i) which applies to a " … report containing information solely as to transactions or experiences between the consumer and the person making the

[12] 2000 U.S. App. LEXIS 17635

[13] *See* 49 C.F.R. § 391(2008)

report." The court rejected the plaintiff's argument that the information in the history relates to transactions between the drivers and people other than the employer. The court held that the exclusion does not require that the information be based entirely on experiences between the employer and the employee.[14]

As set out in that section the elements of a consumer report are:

> 1. It must contain information relating to the individual's "...credit standing, credit capacity, character, general reputation, personal characteristics or mode of living."
>
> 2. It must be communicated by a consumer reporting agency.
>
> 3. It must be "... used, expected to be used or collected in whole or part for the purpose of serving as a factor in establishing the consumer's eligibility for" personal or family credit or insurance; for employment purposes or for one of the purposes listed in section 1681b.[15]

Thus employers seeking information that may constitute a consumer report must consider these factors to determine whether the nature of the request requires compliance with the FCRA.

In cases involving the issue of whether a consumer report has been ordered or furnished by a consumer reporting agency courts must, of course, first determine whether the information requested or furnished is in fact a consumer report. Courts have wrestled with this question. The principal issue dividing the courts is whether the information in a report is to be used in connection with a purpose listed in the FCRA.

The court in *Belshaw v. Credit Bureau of Prescott*[16] broadly construed the purpose of the FCRA to afford consumers a considerable measure of privacy. The court rejected the argument of the defendant that the report in question was not a consumer report as it was not used for any of the purposes of consumer reports enumerated in sections 1681a or 1681b. The court reasoned that it was not the use for which the report was obtained that governed. It was the use that could be made of the

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[14] The court further rejected the plaintiff's claim that the defendant consumer reporting agency violated 15 U.S.A. § 1681e(b) which requires such agencies to " … follow reasonable procedures to assure maximum possible accuracy of the information concerning the information concerning the individual about whom the report relates." It found that evidence of how the industry uses the information was admissible to show that the imprecise categories in which the information was presented was to meet the needs of the motor carriers who used it to know what further investigation to make. Bus *see Cassara v. DAC Services*, 276 F.3d 1210 (10th Cir. 2002), also a claim against an agency reporting truck drivers' histories. The Fourth Circuit held that there were fact issues whether DAC's reporting certain episodes as accidents accurately so characterized the incidents and whether DAC followed reasonable procedures to assure the accuracy of the reporting of accidents.

[15] *See* note 8

[16] 392 F. Supp. 1356 (D. Arizona 1975)

report. This of course would depend on the information contained in the report. If based on that information the report is susceptible of being used for one of the enumerated permissible purposes the FCRA comes into play.

The Ninth Circuit found it to be a violation of the FCRA to obtain a consumer report for any purposes not enumerated in the statute in *Mone v. Dranow*.[17]

A contrary result was reached in *Heath v. Credit Bureau of Sheridan, Inc.*[18] The plaintiff complained that a credit bureau supplied a report to his union showing his bankruptcies. The union wished to use the information to embarrass and humiliate him because of his reform seeking activities. The court focused on the language "...used or expected to be used collected in whole or in part for the purpose of serving as a factor" in one of the transactions listed in section 1681a(d)(1). The court found that the motives of the credit bureau in gathering the information must be examined. If the agency gathered the information expecting it to be used for a covered purpose it is a consumer report within the meaning of the FCRA. The motive of the agency in gathering the information was a question of fact.

In *Ley v. Boron Oil Co.*[19] the court held that a report is not a consumer report within the meaning of the FCRA unless it was requested for one of the enumerated purposes. There the court found that the question turns on both the content of the report and the intent with which it is obtained. The defendant obtained a report with some basic background information to establish the identity of one who was representing himself to be an attorney in a claim in connection with a real estate transaction. It contained no credit information.

The court reasoned similarly in *Henry v.* Forbes[20] in which a background report on the plaintiff had been obtained from a consumer reporting agency. The only purpose for which the report was requested given in the opinion is to find out who employed her. It is, however, clear that the defendants had no actual or prospective business or employment relationship with the plaintiff, who was the subject of the report. The court found that a report is only a consumer report if requested for one of the purposes enumerated in section 1681a and section 1681b.

The Eleventh Circuit applied like reasoning in *Hovater v. Equifax, Inc.*[21] in which the defendant reporting agency furnished a report to an insurance company. The report was a background investigation on a claimant under a fire insurance policy. It was requested to assist in evaluating the claim. The court held that the report was not a

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[17] 945 F.2d 306 (9th Cir. 1991)

[18] 618 F.2d 693 (10th Cir. 1980

[19] 419 F. Supp. 1240 (W.D. Pa. 1976)

[20] 433 F. Supp. 5 (D. Minn. 1976)

[21] 823 F.2d 413 (11th Cir. 1987)

consumer report as it was not obtained for any of the purposes set forth in sections 1681a(d) or 1681d. The court rejected the contrary holding in *Beresh v. Retail Credit Co.*[22]in which the court found that a report generated solely for the purpose of evaluating insurance claims is a consumer report and thereby is governed by the act.

The Eleventh Circuit distinguished its holding in *Hovater* in *Yang v. Government Employees Insurance Company.* *Yang*, 146 F. 2d 1320 (11th Cir. 1998) the defendant obtained a report from a reporting agency to evaluate an individual who was making a bodily injury claim. In finding the report to be a consumer report and thereby subject to the FCRA the court applied reasoning like that in *Heath, supra.* It looked at the language in the statute "...used or expected to be used collected in whole or in part for the purpose of serving as a factor" in one of the transactions enumerated in section 1681a(d)(1). The court found that the agency collected the information for a purpose listed in that section namely credit related purposes. Additionally it expected it to be used for such. Therefore even though the report had not been ordered for one of those purposes the court found it to be a consumer report on the basis of the purpose for which the information in it was acquired by the consumer reporting agency.

The Third Circuit found that a report obtained by an insurance company which was prepared for the defense of a personal injury claim was not an investigative consumer report in *Houghton v. New Jersey Manufacturers Insurance Company.*[21] In so determining the court reasoned that there had been no request for an investigative consumer report by the insurance company. It had merely asked the credit bureau for a "special activities check" containing general financial information and activities since the occurrence of the accident. The court further found that nothing in the report alerted the company that it was an investigative consumer report. The fact that the report indicated that credit files were checked revealing no financial irregularities was not sufficient notice to the company that the report might be an investigative consumer report.

In *Hall v. Harleyville Insurance Co.*[22] the court distinguished *Houghton*. It held that a credit report obtained as part of the investigation of an employee in connection with a workers compensation claim was a consumer report. It was therefore subject to the requirements of the FCRA. The crucial factor in the decision as that there was a specific request for a "credit report" which contained information collected for purposes listed in the Act.

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[22] 358 F. Supp. 260 (C.D. Cal. 1973)

[21] 795 F.2d 1144 (3rd Cir. 1986)

[22] 896 F. Supp. 478 (E. D. Pa. 1995)

Conclusion

The Consumer Credit Protection Act is one more consideration in the cornucopia of laws and doctrines governing the employment relationship that employers must observe at their peril. They must take all due precautions to make certain that garnishment withholdings are no greater than permitted. Adverse action against an employee requires caution where garnishment is in the picture. In obtaining background checks from an entity that might fall within the definition of a consumer reporting agency careful consideration must be given to whether the request brings the notice requirements of the FCRA into play. To avoid this taking place it should not be a request for credit information or for information routinely collected for purposes enumerated in the FCRA.

1/4/2009

Appendix

A Summary of Your Rights Under the Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) is designed to promote accuracy, fairness, and privacy of information in the files of every "consumer reporting agency" (CRA). Most CRAs are credit bureaus that gather and sell information about you -- such as where you work and live, if you pay your bills on time, and whether you've been sued, arrested, or filed for bankruptcy -- to creditors, employers, and other businesses. The FCRA gives you specific rights in dealing with CRAs, and requires them to provide you with a summary of these rights as listed below. You can find the complete text of the FCRA, 15 U.S.C. 1681 et seq., at the Federal Trade Commission's web site (*http://www.ftc.gov*).

You must be told if information in your file has been used against you. Anyone who uses information from a CRA to take action against you -- such as denying an application for credit, insurance, or employment -- must give you the name, address, and phone number of the CRA that provided the report.

You can find out what is in your file. A CRA must give you all the information in your file, and a list of everyone who has requested it recently. However, you are not entitled to a "risk score" or a "credit score" that is based on information in your file. There is no charge for the report if your application was denied because of information supplied by the CRA, and if you request the report within 60 days of receiving the denial notice. You are also entitled to one free report a year if you certify that (1) you are unemployed and plan to seek employment within 60 days, (2) you are on welfare, or (3) your report is inaccurate due to fraud. Otherwise, a CRA may charge you a fee of up to eight dollars.

You can dispute inaccurate information with the CRA. If you tell a CRA that your file contains inaccurate information, the CRA must reinvestigate the items (usually within 30 days) unless your dispute is frivolous. The CRA must pass along to its source all relevant information you provided. The CRA also must supply you with written results of the investigation and a copy of your report, if it has changed. If an item is altered or deleted because you dispute it, the CRA cannot place it back in your file unless the source of the information verifies its accuracy and completeness, and the CRA provides you a written notice that includes the name, address and phone number of the source.

Inaccurate information must be deleted. A CRA must remove inaccurate information from its files, usually within 30 days after you dispute its accuracy. The largest credit bureaus must notify other national CRAs if items are altered or deleted. **However, the CRA is not required to remove data from your file that is accurate unless it is outdated or cannot be verified.**

You can dispute inaccurate items with the source of the information. If you tell anyone -- such as a creditor who reports to a CRA -- that you dispute an item,

they may not then report the information to a CRA without including a notice of your dispute. In addition, once you've notified the source of the error in writing, they may not continue to report it if it is in fact an error.

Outdated information may not be reported. In most cases, a CRA may not report negative information that is more than seven years old; ten years for bankruptcies.

Access to your file is limited. A CRA may provide information about you only to those who have a need recognized by the FCRA -- usually to consider an application you have submitted to a creditor, insurer, employer, landlord, or other business.

Your consent is required for reports that are provided to employers or that contain medical information. A CRA may not report to your employer, or prospective employer, about you without your written consent. A CRA may not divulge medical information about you without your permission.

You can stop a CRA from including you on lists for unsolicited credit and insurance offers. Creditors and insurers may use file information as the basis for sending you unsolicited offers of credit or insurance. Such offers must include a toll-free number for you to call and tell the CRA if you want your name and address excluded from future lists or offers. If you notify the CRA through the toll-free number, it must keep you off the lists for two years. If you request and complete the CRA form provided for this purpose, you can have your name and address removed indefinitely.

You may seek damages from violators. You may sue a CRA or other party in state or federal court for violations of the FCRA. If you win, the defendant may have to pay damages and reimburse you for attorney fees. If you lose and the court specifically finds you sued in bad faith, you or your attorney may have to pay the defendant's fees.

You may have additional rights under state law. You may wish to contact a state or local consumer protection agency or a state attorney general to learn those rights.

If you have questions or believe your file contains errors, call our toll-free number.

The FCRA gives several different federal agencies authority to enforce the FCRA:

FOR QUESTIONS OR CONCERNS REGARDING: PLEASE CONTACT:

CRAs, creditors and others not listed below	Federal Trade Commission Bureau of Consumer Protection - FCRA Washington, DC 20580 * 202-326-xxxx

National banks, federal branches/agencies of foreign banks (word "National" or initials "N.A." appear in or after bank's name)	Office of the Comptroller of the Currency Compliance anagement, Mail Stop 6-6 Washington, DC 20219 * 800-613-6743
Federal Reserve System member banks (except national banks, and federal branches/agencies of foreign banks)	Federal Reserve Board Division of Consumer & Community Affairs Washington, DC 20551 * 202-452-3693
Savings associations and federally chartered savings banks (word "Federal" or initials "F.S.B." appear in federal institution's name)	Office of Thrift Supervision Consumer Programs Washington, DC 20552 * 800-842-6929
Federal credit unions (words "Federal Credit Union" appear in institution's name)	National Credit Union Administration 1775 Duke Street Alexandria, VA 22314 * 703-518-6360
Banks that are state-chartered	

Drug Testing Statutes

By

Christopher C. Sharp, Plantation

DRUG TESTING STATUTES

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I. Florida Drug Free Workplace Act, 440.101 and 102, Fla. Stat. (2004)

A. Overview

1. Florida's Drug-Free Workplace Act, Chapter §§ 440.101 and 102, Fla. Stat., (the "Act") was passed in 1991 and became effective January 1, 1992.

2. The Act is administered by the Florida Agency for Health Care Administration (AHCA). § 440.101(2).

3. The purpose of the Act is to discourage drug use and promote drug-free workplaces "in order that employers in the state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees."

4. The Act was amended effective January 7, 2003 as follows:

    a. Clarifying that an employer is required to implement drug testing of employees and job applicants in order to qualify as having a drug free workplace, and

    b. Requiring construction, electrical and alarm system contractors to implement drug-free workplace programs in order to qualify for contracts with the State of Florida.

5. In 1998, the Florida Legislature passed a law wherein the Department of Insurance must give "specific identifiable consideration" to those employers who either implement a drug free workplace program. § 440.102(7)(b).

6. If an employer implements a drug-free workplace in accordance with the Act, which includes notice, education, and procedural requirements for testing for drugs and alcohol pursuant to law or to rules developed by AHCA, employees may be required to submit to drug testing under prescribed circumstances. If a drug or alcohol is found to be present in the employee's system, the employee may be terminated and forfeits his or her eligibility for medical and indemnity benefits. § 440.101(2).

7. The adoption of the Act by employers is optional, § 440.102(2), but the Act establishes an incentive in the form of a workers compensation premium credit provision for employers certified as providing a drug-free workplace. This means that employers may receive a discount on workers compensation premiums and may deny workers compensation and medical benefits to any employee who refuses to submit to a drug or alcohol test, or who tests positive for drugs or alcohol. § 440.101(2), § 440.102(2). *See also* § 627.0195, Fla. Stat..

8. If an employer fails to maintain a drug-free workplace program in accordance with the standards and procedures established in § 440.102, the employer will not be eligible for the discounts provided under Fla. Stat. § 627.0915. However, because Florida is an at-will employment state, it is not necessary for an employer to adopt the Act's drug-free workplace program before testing an employee suspected of drug abuse after a workplace injury.

B. Drug Testing Under the Act

1. The Act does not require random testing, but employers may conduct random testing if they so choose. § 440.102(4)(b).

2. The Act permits testing for numerous categories of drugs and alcohol, and the administrative regulations require urine samples for drug tests and blood samples for alcohol tests. "Drugs" include "alcohol, including a distilled spirit, wine, a malt beverage, or an intoxicating liquor; an amphetamine; a cannabinoid; cocaine; phencyclidine (PCP); a hallucinogen; methaqualone; an opiate; a barbiturate; a benzodiazepine; a synthetic narcotic; a designer drug; or a metabolite of any of the substances listed in this paragraph. An employer may test an individual for any or all of such drugs." § 440.102(1)(c).

3. Chapter 440.102(4) of the Act requires four types of testing:

   a. Job applicants;

   b. Routine fitness-for-duty tests;

   c. Follow up tests at least once a year for two years for employees who have completed a drug treatment program;

   d. Reasonable suspicion, i.e., tests based on a belief, founded on specific objective and articulable facts and reasonable inferences from those facts in light of experience, that an employee is using or has used drugs in violation of the employer's policy. The Act

further provides a non-exhaustive list of factors upon which reasonable suspicion testing may be based.

e. Reasonable suspicion factors include: observable phenomena at work; abnormal or erratic behavior while at work; significant deterioration in work performance; a report of drug use from a reliable or credible source; evidence of tampering with a drug test; involvement in an accident in the workplace; or evidence that an employee has used, possesses, sold or solicited drugs while working, while on the employer's premises or while operating the employer's machinery, vehicles or equipment. § 440.102(1)(n).

4. Chapter 440.09(3) provides, in part:

No compensation shall be payable if the injury was occasioned primarily by the intoxication of the employee; by the influence of any drugs, barbiturates, or other stimulants not prescribed by a physician, which affected the employee to such an extent that the employee's normal faculties were impaired . . . If there was at the time of the injury 0.10 percent or more by weight of alcohol in the employee's blood, or if the employee has a positive confirmation of a drug as defined in this act, it shall be presumed that the injury was occasioned primarily by the intoxication of, or by the influence of the drug upon, the employee. In the absence of a drug-free workplace program, this presumption may be rebutted by clear and convincing evidence that the intoxication or influence of the drug did not contribute to the injury . . .

5. The Act amended F.S.A. § 440.09 so as to permit employers to require an injured employee to submit to a test for the presence of drugs and to further provide: "If the injured worker refuses to submit to a test for nonprescription controlled substances or alcohol, it shall be presumed in the absence of clear and convincing evidence to the contrary that the injury was occasioned primarily by the influence of a nonprescription controlled substance or alcohol." F.S.A. § 440.09(7)(c).

C. <u>Notice Requirements for Employees and Job Applicants</u>

1. On a one-time basis only, prior to testing, an employer must give employees and job applicants a written notice containing a general statement of the employer's policy on employee drug use, § 440.102(3) which must identify:

a. The types of drug testing an employee or job applicant may be required to submit to, including reasonable-suspicion drug testing or drug testing conducted on any other basis.

b. The actions the employer may take against an employee or job applicant on the basis of a positive confirmed drug test result.

c. A statement advising the employee or job applicant of the existence of the Act.

d. A general statement concerning confidentiality.

e. Procedures for employees and job applicants to confidentially report to a medical review officer the use of prescription or nonprescription medications to a medical review officer both before and after being tested.

f. A list of the most common medications, by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. A list of such medications as developed by the Agency for Health Care Administration shall be available to employers through the department.

g. The consequences of refusing to submit to a drug test.

h. A representative sampling of names, addresses, and telephone numbers of employee assistance programs and local drug rehabilitation programs.

i. A statement that an employee or job applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within 5 working days after receiving written notification of the test result; that if an employee's or job applicant's explanation or challenge is unsatisfactory to the medical review officer, the medical review officer shall report a positive test result back to the employer; and that a person may contest the drug test result pursuant to law or to rules adopted by the Agency for Health Care Administration.

j. A statement informing the employee or job applicant of his or her responsibility to notify the laboratory of any administrative or civil action brought pursuant to the Act.

k. A list of all drugs for which the employer will test, described by brand name or common name, as applicable, as well as by chemical name.

l. A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the Public Employees Relations Commission or applicable court.

m. A statement notifying employees and job applicants of their right to consult with a medical review officer for technical information regarding prescription or nonprescription medication.

D. <u>Employee Protections</u>

1. Within five (5) days of being informed of a confirmed positive test, an employee may rebut the presumption of drug use by submitting information explaining or contesting the test results, and explaining why the result does not constitute a violation of the employer's policy. § 440.102(5)(i). If the explanation or challenge is unsatisfactory, the employer must provide the employee a copy of the positive test result and a written explanation of its decision, which documentation will be kept confidential and retained by the employer for at least one year. § 440.102(5)(j).

2. An employer may not discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test and by a medical review officer. § 440.102(5)(k)

3. An employer cannot take disciplinary action solely on the basis of an employee's voluntary effort to seek treatment for drug and alcohol problems. § 440.102(5)(n)

4. If drug testing is conducted based on reasonable suspicion, the employer shall promptly detail in writing the circumstances which formed the basis of the determination that reasonable suspicion existed to warrant the testing. A copy of this documentation shall be given to the employee upon request and the original documentation shall be kept confidential by the employer pursuant to subsection (8) and shall be retained by the employer for at least 1 year. § 440.102(5)(o).

5. All positive specimens shall be preserved by a certified laboratory for at least 210 days, or until any administrative or legal challenge by the employee is concluded. The employee may also have the specimen retested by another certified laboratory at the employee's expense. § 440.102(5)(g).

6. Confidentiality provisions. § 440.102(8).

E. <u>Employer Protections</u>

1. An employee or job applicant whose drug test result is confirmed as positive in accordance with the Act shall not, by virtue of the result

alone, be deemed to have a "handicap" or "disability" as defined under federal, state, or local handicap and disability discrimination laws. § 440.102(7)(a).

2. An employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with the Act is considered to have discharged, disciplined, or refused to hire for cause. § 440.102(7)(b).

3. Nothing in the Act shall be construed to prevent an employer from establishing reasonable work rules related to employee possession, use, sale, or solicitation of drugs, including convictions for drug-related offenses, and taking action based upon a violation of any of those rules. § 440.102(7)(d).

4. If an employee or job applicant refuses to submit to a drug test, the employer is not barred from discharging or disciplining the employee or from refusing to hire the job applicant. However, this does not abrogate the rights and remedies of the employee or job applicant as otherwise provided in the Act. § 440.102(7)(f).

F. Public Employees in Safety-Sensitive or Special Risk Positions

1. Public employers who employee individuals in safety-sensitive or special risk positions are required to remove an employee from that position if the employee enters an employee assistance or drug rehabilitation program.

2. "Safety sensitive position" means a position in which drug impairment constitutes an immediate and direct threat to public health or safety, such as a position that requires the employee to carry a firearm, perform life-threatening procedures, work with confidential information or documents pertaining to criminal investigations, or work with controlled substances; a position subject to 110.207 (a position requiring a security background check); or a position in which a momentary lapse of attention could result in injury or death to another person.

3. "Special risk position means a position requiring certification under Chapter 633 or Chapter 933, i.e., firefighters and law enforcement officers.

G. Collective Bargaining Rights

1. Drug-free workplace program requirements are a mandatory topic of negotiations with any certified bargaining unit for non-federal public sector employers. § 440.102(13(a).

2. Drug-free workplace program requirements in a collective bargaining agreement must not violate statutory and constitutional dictates. *Communications Workers of America, Local 3170 v. City of Gainesville*, 697 So.2d 167 (Fla. 1st DCA 1997).

H. Notable Cases

1. Workers' compensation drug-free workplace statutes are designed to accomplish twin goals: discouraging drug abuse and maximizing industrial productivity by eliminating the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees. *Hall v. Recchi America Inc.*, 671 So.2d 197 (Fla. 1st DCA) (1996), *reh'g denied, aff'd* 692 So.2d 153. The First Circuit also held in *Hall* also held that the Act's then-irrebutable presumption that any confirmed drug use was causally related to a workplace injury was unconstitutional because it violated due process protections. Instead, the *Hall* court reasoned that determinations of whether the presence of alcohol or drugs in an employee's body had a causal relation with the employee's workplace injury should be made on a case-by-case basis rather than through a statutory presumption. The *Hall* case dealt with a situation in which a claimant was denied Workers' Compensation benefits because he tested positive for trace elements of marijuana after suffering a workplace injury. A doctor testified that tests indicated that the employee had ingested the marijuana more than five days before the accident and that the drug could have played no part in the accident because its effects usually last less than six hours. The Florida Supreme Court affirmed the decision, and the Act was later amended to include a rebuttable presumption.

2. A Workers' Compensation claimant's refusal to provide second urine sample for drug test after first sample was below acceptable temperature range, disqualified her for benefits; walk-in clinic was not required to allow claimant to return within 24 hours for second test when specimen was not within acceptable temperature range. *Van Duyn v. Truck Driver Services, Inc.*, 805 So.2d 1107 (Fla. 1st DCA 2002).

3. In *Temporary Labor Source v. E.H.*, 765 So.2d 757 (Fla. 1st DCA 2000), *review denied*, 786 So.2d 1189 (Fla. 2001), the court held that although nearly any drug test is admissible to prove a drug defense under F.S.A. § 440.09(3), only a drug test that is taken in strict accordance with the Florida Administrative Code rules will create any presumption against compensability as stated in F.S.A. § 440.09(7)(b).

4. *European Marble Co. v. Robinson*, 885 So. 2d 502 (Fla. 1st DCA 2004) held that the presumption in F.S.A. § 440.09(7), that a claimant's injury was occasioned primarily by the intoxication of claimant, does not arise

unless the statutorily required Florida Administrative Code rules for drug testing are followed, and these rules apply as well to blood-alcohol tests.

5. Because employer's drug free workplace program did not satisfy statutory requirements for such programs, denial of benefits was impermissible under workers' compensation statute providing that, if employer implements drug free workplace program and if drug is found in employee's system, employee shall forfeit his eligibility for benefits. Employer is not entitled to absolute denial of all benefits when employee tests positive for drug use after injury even if employer has substantially complied with statutory drug free workplace program requirements. *Gustafson's Dairy, Incorporated/Professional Administrators, Inc. v. Phillips*, 656 So.2d 1386 (Fla. 1st DCA) (1995).

5 When a symptom of the claimant's injury is caused in part by the habitual use of alcohol, treatment for that symptom is not compensable. *Herrera v. Atlantic Interior Construction*, 772 So.2d 587 (Fla. 1st DCA 2000) (citing F.S.A. § 440.02(1)).

6. The provisions of the drug-free workplace statutes may be utilized by a municipality to establish a drug-free workplace. *Op.Atty.Gen*. 98-38, June 5, 1998.

7. Medical assistant possessed sufficient qualifications to collect workers' compensation claimant's blood for testing, for purpose of determining whether employer operated qualified drug-free workplace program; statutory list of persons qualified to collect specimens in not all-inclusive. In addition, physician authorized to evaluate workers' compensation claimant's blood test results contracted with hospital's testing department, which contracted with employer, thus satisfying requirement of Workers' Compensation drug-free workplace program statute. *Stepanek v. Rinker Materials Corp*., 697 So.2d 200 (Fla. 1st DCA) (1997).

II. Florida Public Sector Drug-Free Workplace Act, 112.0455, Fla. Stat.

A. Overview

1. Chapter § 112.0455 (the "Drug-Free Workplace Act") aims to promote drug-free workplaces within government through fair and reasonable drug-testing methods for the protection of public employees and employers, and by encouraging employers to provide assistance and confidential testing results to employees with drug problems. § 112.0455(1).

2. "Employer" means any agency within state government that employs individuals for salary, wages or other remuneration. § 112.0455(5)(h).

3. "Employee" means any person who works for salary, wages or other remuneration from an employer. § 112.0455(5)(g).

4. "Drug" means alcohol, including distilled spirits, wine, malt beverages, and intoxicating liquors; amphetamines; cannabinoids; cocaine; phencyclidine (PCP); hallucinogens; methaqualone; opiates; barbiturates; benzodiazepines; synthetic narcotics; designer drugs; or a metabolite of any of such substances. § 112.0455(5)(a).

B. Drug Testing of Employees

1. Public employers do not have a legal duty to request an employee or job applicant to undergo drug testing. § 112.0455(4). However, an employer is authorized to conduct four types of testing:

   a. Job applicants

   b. Routine fitness-for-duty tests

   c. Follow up tests at least once a year for two years for employees who have completed a drug treatment program

   d. Reasonable suspicion, i.e., based on a belief, founded on specific objective and articulable facts and reasonable inferences from those facts in light of experience, that an employee is using or has used drugs in violation of the employer's policy. The Act further provides a non-exhaustive list of factors upon which reasonable suspicion testing may be based.

C. Notice Requirements

1. The notice requirements of § 112.0455(5)(h) closely parallel the requirements under § 440.102(3).

D. Discipline Remedies

1. An executive branch employee who is disciplined or a job applicant for another position who is not hired because of positive drug-test results, may file an appeal with the Public Employees Relation Commission (PERC). § 112.0455(14)(a).

E. Employee and Employer Protections

1. The employer and employee protection requirements of § 112.0455(8), (9) and (10) closely parallel the provisions of § 440.102(5), (6) and (7).

2. No employer may discharge, discipline, or discriminate against an employee on the sole basis of the employee's first positive confirmed drug test, unless the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under a health insurance plan, an employee assistance program or an alcohol and drug rehabilitation program, and:

   a. The employee has either refused to participate in the employee assistance program or the alcohol and drug rehabilitation program or has failed to successfully complete such program, as evidenced by withdrawal from the program before its completion or a report from the program indicating unsatisfactory compliance, or by a positive test result on a confirmation test after completion of the program; or

   b. The employee has failed or refused to sign a written consent form allowing the employer to obtain information regarding the progress and successful completion of an employee assistance program or an alcohol and drug rehabilitation program. § 112.0455(8)(n).

F. <u>Confidentiality Provisions</u>

1. The notice requirements of § 112.0455(11) closely parallel the requirements under § 440.102(8).

G. <u>Notable cases</u>

1. Alert to portion of refrigerator by narcotics search dog inside prison employee's apartment on prison property provided factual basis for reasonable suspicion to test both residents of apartment for drugs pursuant to statute, and fact that only one resident was required to submit to such testing did not defeat propriety of testing. *Mitchell v. Department of Corrections*, 675 So.2d 162 (Fla. 4th DCA 1996), *rehearing denied*.

2. Test in which, through variation of mass spectrometry, prison employee's shoulders, arms, and hands were vacuumed, and resulting sample was analyzed for narcotics or explosives residue, was not "drug test" for purposes of statute requiring that employee drug tests be based on reasonable suspicion; whole statutory scheme relating to drug tests was intended to protect employees from unwarranted intrusive drug testing requiring samples of bodily fluids and tissues. *Mitchell v. Department of Corrections*, 675 So.2d 162 (Fla. 4th DCA 1996), *rehearing denied*.

2. Area transportation manager could not be terminated based on positive result on drug test, where manager was not a special risk employee, manager was not afforded an opportunity for a second test, manager did

not review his medical history with a medical reviewing officer, it was not clear that any drug use violated school board's policy of using drugs at school because there was no indication of where alleged drug use took place, and manager made unrefuted allegations that proper testing procedures were not followed. *McIntyre v. Seminole County School Bd*., 779 So.2d 639 (Fla. 5th DCA 2001).

III. Omnibus Transportation Testing Act of 1991 (OTETA), 49 U.S.C. § 31306

A. Overview.

1. Title 49, Section 31306(b) of OTETA requires commercial motor carriers to conduct the following types of drug and alcohol testing of commercial vehicle operators:

   a. pre-employment;

   b. reasonable suspicion (under 49 C.F.R. § 328.307, based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver, *made by a supervisor or company official who is trained in accordance with 49 C.F.R. § 382.603*);

   c. random, and;

   d. post-accident (mandatory for accidents involving loss of human life).

2. OTETA is administered by the United States Secretary of Transportation and the Department of Transportation (DOT). 49 U.S.C. § 31306(b).

3. "Controlled substance" means any substance under section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 802) specified by the Secretary of Transportation.

4. The Fourth Amendment is not violated when individual occupying safety-sensitive position is randomly chosen pursuant to OTETA to take drug test, assuming no abuse thereof. *Parry v Mohawk Motors of Mich., Inc*., 236 F.3d 299 (6th Cir. 2000), *cert denied* (2001) 533 US 951, 150 L Ed 2d 752, 121 S Ct 2594.

5. In order to establish federal Department of Transportation-regulated employee's ineligibility for state unemployment benefits because of positive drug or alcohol test result pursuant to 49 USCS § 31306, there must be clear and convincing evidence that testing was conducted according to federal guidelines; because no evidence was produced that

truck driver was informed of his right to request drug testing of split specimen within 72 hours, misconduct for purposes of unemployment benefits as required by Miss. Code Ann. § 71-5-513A(1)(b) was not established and state's decision to deny truck driver unemployment benefits was improper. If employer wishes to disqualify employee for failing federally-regulated drug test pursuant to 49 USCS § 31306 in which split specimen was taken, it must produce clear and convincing evidence that split specimen was reconfirmed positive or that employee declined to discuss result with medical review officer pursuant to 49 C.F.R. § 40.33(c); doing so will satisfy misconduct requirement of Miss. Code Ann. § 71-5-513A(1)(b) *Southwood Door Co. v Burton* (2003, Miss) 847 So. 2d 833 (Miss. 2003).

6. The scope of the preemption language contained in 49 U.S.C. § 31306(g) is broad, and any state law provisions, enforcement of which would obstruct deterrent effect of statute or nationwide uniformity of testing rules, are therefore pre-empted. *Keaveney v Town of Brookline* 937 F.Supp 975 (D.C. Mass. 1996). Therefore, claims by drivers of commercial vehicles that town's drug and alcohol testing policy violated their rights under state law were preempted by 49 U.S.C. § 31306(g), which required covered employers to institute testing, and testing policy pursuant to federal regulations.

B. <u>Testing and Lab requirements</u>

1. The Secretary of DOL, at 49 U.S.C. § 31306(c)(2), has developed laboratory and testing procedures, incorporating the Department of Health and Human Services scientific and technical guidelines dated April 11, 1988, establishing:

   a. a comprehensive standards for every aspect of laboratory controlled substances testing and laboratory procedures to be applied in carrying out this section, including standards requiring the use of the best available technology to ensure the complete reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimens collected for controlled substances testing;

   b. the minimum list of controlled substances for which individuals may be tested; and

   c. appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this section.

2. The DOL further requires, at 49 U.S.C. § 31306(c)(3)–(8), that employers and laboratories involved in testing under OTETA:

   a. have the capability and facility, at the laboratory, of performing screening and confirmation tests;

   b. provide that any test indicating the use of alcohol or a controlled substance in violation of law or a Government regulation be confirmed by a scientifically recognized method of testing capable of providing quantitative information about alcohol or a controlled substance;

   c. provide that each specimen be subdivided, secured, and labeled in the presence of the tested individual and that a part of the specimen be retained in a secure manner to prevent the possibility of tampering, so that if the individual's confirmation test results are positive the individual has an opportunity to have the retained part tested by a second confirmation test done independently at another certified laboratory if the individual requests the second confirmation test not later than 3 days after being advised of the results of the first confirmation test;

   d. ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations that may be necessary and in consultation with the Secretary of Health and Human Services;

   e. provide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance) of employees, except that this clause does not prevent the use of test results for the orderly imposition of appropriate sanctions under this section; and

   f. ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

C. <u>Notable cases</u>

1. Contractual agreement that requires employer to reinstate employee truck driver who has twice tested positive for marijuana use, but who has not operated vehicle under

influence of drugs, does not run contrary OTEATA's public policy, implementing regulations promulgated by Department of Transportation (DOT), or any other law or legal precedent, and thus courts may properly enforce labor arbitration award that orders such reinstatement. *Eastern Associated Coal Corp. v UMW, Dist. 17* (2000) 531 US 57, 148 L Ed 2d 354, 121 S Ct 46 (2000).

2. Discharge of driver after finding that his urine contained certain level of cannabinoids did not breach collective bargaining agreement, even if cutoff level for initial drug testing for marijuana metabolites in company drug and alcohol policy was higher than that found in driver, where applicable government regulation under 49 U.S.C. § 31306 was amended after collective bargaining agreement was adopted to lower cutoff level, and company policy stated that it was subject to change as required by government regulations. *Guthrie v Central Distributing Co.*, 74 F.Supp.2d 657 (S.D. W. Va 1999), *aff'd*, 217 F3d 838 (4th Cir. 2000).

3. There is no implied private cause of action under OTETA. *Parry v. Mohawk Motors of Michigan, Inc.* , 236 F.3d 299 (6th Cir. 2000) *reh'g denied* (2001 US App LEXIS 2087), *cert denied*, 533 US 951 (2001).

IV. Federal Drug-Free Workplace Act of 1988, 41 U.S.C. § 701

A. Overview

1. The Drug Free Workplace Act, 41 U.S.C. § 701, et seq., requires mandatory compliance by certain federal contractors and grant recipients.

2. 41 U.S.C. § 701 applies to federal contractors, while 41 U.S.C. § 702 Applies to federal grant recipients. The provisions of the two statutes are virtually identical.

3. The DFWA further holds that "[n]o Federal agency shall enter into a contract with an individual unless such individual agrees that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract."

4. The DFWA does not mandate any particular type of drug testing, but requires the employer to maintain a drug-free workplace in compliance with the DFWA, under penalty of denial or debarment from federal

contracts. 41 U.S.C. §§ 701(a)(1) and (b)(1). *See also Parker v. Atlanta Gas Light Co.*, 818 F.Supp. 345, 347 (S.D.Ga.1993) ("the statute establishes no requirement for drug testing" and employee identified no regulations implementing act that did so).

5. A employee who is discharged after refusing to submit to drug test, which was part of employer's fitness for work policy, which had been developed in response to Drug-Free Workplace Act, was not entitled to unemployment compensation, since employee had signed form agreeing to abide by policy. *Riceland Foods, Inc. v. Director of Labor*, 38 Ark. App. 269, 832 SW2d 295 (1992).

B. <u>Drug-Free Workplace Requirements</u>

1. A covered federal contractor or grant recipient meets the requirements of the DFWA by the following:

   a. publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of such prohibition, 41 U.S.C. § 701(a)(1)(A);

   b. establishing a drug-free awareness program to inform employees about: (i) the dangers of drug abuse in the workplace; (ii) the person's policy of maintaining a drug-free workplace; (iii) any available drug counseling, rehabilitation, and employee assistance programs; and (iv) the penalties that may be imposed upon employees for drug abuse violations, 41 U.S.C. § 701(a)(1)(B);;

   c. making it a requirement that each employee to be engaged in the performance of such contract be given a copy of the statement required by subparagraph (A), 41 U.S.C. § 701(a)(1)(C);

   d. notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such contract, the employee will (i) abide by the terms of the statement; and (ii) notify the employer of any criminal drug statute conviction for a violation occurring *in the workplace* no later than 5 days after such conviction, 41 U.S.C. § 701(a)(1)(D);

   e. notifying the contracting agency within 10 days after receiving notice under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction, 41 U.S.C. § 701(a)(1)(E);

f. imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this title, 41 U.S.C. § 701(a)(1)(F); and

g. making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F). 41 U.S.C. § 701(a)(1)(G).

2. A grantee or contractor who receives notice from an employee of a conviction for a drug offense occurring *within the workplace* shall, within 30 days:

a. take appropriate personnel action against such employee up to and including termination; or

b. require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

C. <u>Consequences of Non-Compliance</u>

1. Suspension, termination, or debarment of the contractor. Each contract awarded by a Federal agency shall be subject to suspension of payments under the contract or termination of the contract, or both, and the contractor or the individual who entered the contract with the Federal agency shall be subject to suspension or debarment in accordance with the requirements of this section if the head of the agency determines that:

a. the contractor violates the requirements for a drug-free workplace under the DFWA; or

b. such a number of employees of such contractor have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace as required by the DFWA.

2. Conduct of suspension, termination, and debarment proceedings. If a contracting officer determines, in writing, that cause for suspension of payments, termination, or suspension or debarment exists, an appropriate action shall be initiated by a contracting officer of the agency, to be conducted by the agency concerned in accordance with the Federal Acquisition Regulation and applicable agency procedures. Suspension and debarment proceedings must include notice, opportunity to respond in

writing or in person, and such other procedures as may be necessary to provide a full and fair proceeding to a contractor or individual in such proceeding.

3. Effect of debarment. Upon issuance of a decision requiring debarment of a contractor or individual, such contractor or individual shall be ineligible for award of any contract by any Federal agency, and for participation in any future procurement by any Federal agency, for a period specified in the decision, not to exceed 5 years.

V. Practice issues

1. Assisting employers with formulating and implementing various drug-free workplace programs, policies and procures.

   a. educational component;

   b. documentation requirements;

   c. periodic training, review and revision of policies.

2. Litigation issues.

   a. employee claims;

   b. employer defenses;

   c. administrative debarment proceedings for federal contractors/grant recipients.

USERRA

By

Bernie Mazaheri, Clearwater

The Uniformed Services Employment & Reemployment Rights Act

By Bernie Mazaheri

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) found at 38 U.S.C. § 4301 *et seq.* provides reemployment rights, right to be free from discrimination and retaliation, health insurance protection and may be enforced by a private cause of action or The U.S. Department of Labor, Veterans Employment and Training Service (VETS). USERRA was enacted in 1994 being the newest law protecting veterans' employment and reemployment rights dating from the Selective Training and Service Act of 1940. The immediate precursor to USERRA was the Veterans' Reemployment Rights Act (VRRA). In enacting USERRA Congress intended to clarify and strengthen VRRA and other Federal law protecting veterans' employment and reemployment rights, which remain in full force and affect to the extent they are consistent with USERRA. As of February 2009, the U.S. Supreme Court has not ruled upon any provisions of USERRA, and Eleventh Circuit Court of Appeals has only one published decision on the statute. The only Eleventh Circuit case thus far is *Coffman v. Chugach Support Services, Inc.*, 411 F.3d 1231, 2005 U.S. App. LEXIS 10547 (11th Cir. 2005). *Coffman* deals with the issue of successor in interest or successor employer. *Id.* at 1234. Although the court dealt with only a specific issue of USERRA, it did nonetheless provide a brief synopsis of the Act, which in essence follows:

"Congress enacted USERRA to prohibit employment discrimination on the basis of military service as well as to provide prompt reemployment to those individuals who engage in non-career service in the military. *See 38 U.S.C. § 4301 (2002).* Sections 4311 and 4312 of the USERRA provide separate and distinct statutory protections for service members. *See Wrigglesworth v. Brumbaugh*, 121 F. Supp. 2d 1126, 1134 (W.D. Mich. 2000). Section 4311 prohibits employers from discriminating against employees on the basis of military service and retaliating against individuals, whether service members or not, who testify or give statements on behalf of a USERRA claimant. Section 4311 provides, in pertinent part, that:

> (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
>
> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter.

(c) An employer shall be considered to have engaged in actions prohibited -

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

38 U.S.C. § 4311 (2002).

Section 4312 addresses the right of reemployment for persons who serve in the military. Veteran reemployment statutes "date from the nation's first peacetime draft law, enacted in 1940." *Leib v. Georgia-Pacific Corp*., 925 F.2d 240, 242 (8th Cir. 1991). Congress intended for "the statutory right to reinstatement . . . to bolster the morale of those serving their country and to facilitate their reentry into the highly competitive world of job finding without the handicap of a long absence from work." *Id.* (quotation and citation omitted). Unlike Section 4311, this provision does not require an employee to show any discriminatory animus. *See Wrigglesworth*, 121 F. Supp. 2d at 1134-35. Section 4312 provides, in pertinent part, that:

(a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if -

(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;

(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and

(3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).

. . .

> (d)(1) An employer is not required to reemploy a person under this chapter if -
>
> (A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;
>
> (B) . . . such employment would impose an undue hardship on the employer;
>
> . . . .
>
> (2) In any proceeding involving an issue of whether -
>
> (A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,
>
> (B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or
>
> (C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,
>
> the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.

38 U.S.C. § 4312 (2002*)*. Section 4312 also imposes upon the employee a requirement to timely notify the employer of his intention to return to work. 38 U.S.C. § 4312(e)(1)." *Coffman*, at 1234-36.

In the case of an action against a private employer by a person, the district courts shall have jurisdiction of the action. 38 U.S.C. § 4323(b)(3). In the case of an action against a State by a person, the action may be brought in a state court of competent jurisdiction in accordance with the laws of the state. 38 U.S.C. § 4323(b)(2). The legislative history of the 1998 amendments confirms that Congress intended that actions brought by individuals against a state be commenced in state court. *Townsend v. University of Alaska*, 453 F.3d 478, 2008 U.S. App. LEXIS 18974 *6 (9th Cir. 2008). Section 4323 does not create either an express or implied cause of action against individual state supervisors. *Townsend*, at *15.

An employer is a successor in interest if there is: (1) substantial continuity of the same business operations, (2) use of the same plant, (3) continuity of work force, (4) similarity of jobs and working conditions, (5) similarly of supervisory personnel, (6) similarity in machinery, equipment and production, and (7) similarity of products or services. *Coffman*, at 1237 adopting Eight Circuit Court of Appeals test *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240 (8th Cir. 1991).

There have been very few published decisions in the courts of Florida addressing USERRA. The statute provides relief to a large sect of society, and with the increase of reservists being called to duty, USERRA claims will likely be seen much more in coming months and years. Counsel for both employer and employee ought to be familiar with the statute as employers may find themselves unknowingly violating the statute, and employees may find a much more favorable statute to file claims under. USERRA provides back pay, front pay, reinstatement, as well as attorneys' fees and costs. Uniquely, USERRA claimants do not have to pay filing fees and are not liable for costs. As there are very few published decisions in our Circuit the issues of liability, damages and burden of proof are all fair play in litigation.

OSHA

By

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SUMMARY GUIDELINES FOR HANDLING AN OSHA INSPECTION

1. Decide ahead of time who will meet with the OSHA Compliance Officer(s) both during an Opening Conference and during the Walkaround Inspection.

2. At the Opening Conference, after reviewing the credentials of the Compliance Officer(s) to determine that they are authorized representatives of the local OSHA Area Office, find out:

   a. The names of the Compliance Officer(s),
   b. Whether they are Safety Specialists or Industrial Hygienists,
   c. What the purpose of the inspection is, and
   d. What they intend to do that day and how long they anticipate being on-site.

3. Contact _____

4. If the basis of the inspection is a complaint, get a copy of the complaint from the OSHA Compliance Officer(s). Limit the scope of the inspection to the complaint items, although a Compliance Officer is authorized to broaden the inspection to include anything else that is observed in plain view.

5. Keep a list and a copy of every document that you provide to OSHA. If you have any questions about the relevancy of a requested document, contact any of the people identified in Paragraph #3 above first before turning the document over to OSHA.

6. Make sure that someone is with each of the OSHA Compliance Officers at all times during the Walkaround Inspection. Take written notes of any pertinent comments or observations that the Compliance Officers make and take parallel photographs, videotape, or measurements of anything that the Compliance Officers photograph, videotape, or measure.

7. The Company has a right to have someone present during any interview of a member of management, which typically includes managers from first line foremen or supervisors up to the Plant Manager or General Manager. A designated person should always sit in on all management interviews. OSHA may interview hourly employees

privately. Explain to all interviewees, both hourly and management, that they do not have to agree to have the interview either audio-taped or videotaped and that they are under no obligation to sign a statement that the Compliance Officers create from the interview. If an employee elects to sign such a statement, the employee has a right to receive a copy of that statement and should get a copy at the conclusion of the interview.

8. At the conclusion of each day's inspection, ask the Compliance Officers for an informal summary of their observations – primarily whether they observed any apparent violations – and ask what OSHA plans to do next. Report the status of the inspection each day to whichever Safety Contact Person from Paragraph #3 above is coordinating the inspection and fax a "Report of OSHA Inspection" form to Corporate Safety within 24 hours of each day's visit by OSHA Compliance Officers.

9. During the closing conference, write down each apparent violation that the Compliance Officers identify, listing the specific OSHA Standard provision and the machines, employees, or work areas in question.

10. Make sure that a procedure is in place to receive OSHA citations and forward them immediately to Corporate Safety and the Safety Coordinator who has coordinated the inspection. The failure to contest Citations within 15 working days of receipt means that all of the cited items and proposed penalties are final and cannot be appealed in any way.

Constangy, Brooks & Smith, LLP
Atlanta, Georgia

PREPARING FOR OSHA INSPECTIONS

1. **Appoint and train, as necessary, an appropriate number of OSHA Inspection Coordinators and alternates** so that one coordinator or alternate can be immediately available to represent the Company during any OSHA inspection at any plant.

2. **Training Objectives for Coordinators and Alternates**. OSHA Inspection Coordinators and alternates need to be familiar with the following:

    - The Company's products and any hazardous substances to which associates may be exposed (and if applicable, how such substances are monitored);
    - All Company safety policies and procedures and the nature and extent of the Company's safety program;
    - Company policy regarding OSHA inspections, including: (a) the Company's OSHA Inspection Guidelines, and (b) the accompanying OSHA Inspection Form (attached hereto as Appendix A), which is to be filled out during an inspection;
    - OSHA rules and regulations regarding inspections and citations;
    - The location of all records required to be kept under the Occupational Safety and Health Act and OSHA standards and regulations, including OSHA 300 logs (or 200 logs, as appropriate) for the previous five (5) years; and
    - OSHA developments of relevance to OSHA inspections and any pending OSHA litigation in which the Company is involved.

3. **Establish a Resource Location for OSHA Materials at Each Plant**. Keep the OSHA Inspection Guidelines, the OSHA Inspection Form, and a copy of the relevant Occupational Safety and Health Act standards and regulations in a location readily available to the Inspection Coordinator.

4. **Instruct Employees Who May First Encounter an OSHA Inspector**. Provide all employees who might first encounter an OSHA Inspector (such as guards or receptionists) with instruction on what they are to do when an OSHA Inspector arrives. In particular, they must be given the name(s) and number(s) of the Company representative(s) they must call. They must be instructed that they are not to allow the OSHA Inspector entry until the appropriate Company representative has been contacted, and that the Inspector should be taken to a designated conference room or other location until the Inspection Coordinator arrives. The guards and/or receptionist should be instructed to be very courteous and to offer refreshments to the Inspector(s) while they wait.

SPECIFIC PROCEDURES FOR DURING AND AFTER AN OSHA INSPECTION

1. Purpose

To establish uniform procedures to coordinate management involvement at every location in the event of an OSHA inspection.

2. Presentation of Credentials and Opening Conference

a. When an individual arrives at a plant and presents credentials as an OSHA Compliance Safety and Health Officer, the Company guard or receptionist should direct or escort the Compliance Officer to an appropriate waiting area. The Compliance Officer should be treated courteously at all times. First impressions by the Compliance Officer often dictate the course of the inspection and the characterization of the citations, if any, that result.

b. The guard or receptionist should immediately contact the Plant Manager and Safety Manager and notify them of the presence of the Compliance Officer at the plant.

c. The Plant Manager or Safety Manager should then advise the Corporate Safety Department and the General Counsel's Office that there is an OSHA Compliance Officer at the plant. Under no circumstances should the Compliance Officer be kept waiting more than a brief period of time while these persons are being notified.

d. The Compliance Officer should then be invited to the Plant Manager's office, or another suitable meeting room, to meet with the Plant Manager and the Safety Manager. If the Compliance Officer does not do so on his own, the Plant Manager or Safety Manager should request that the Compliance Officer present his or her credentials. If there is any question about the Compliance Officer's credentials, the Plant Manager may wish to contact the OSHA Area Office for verification.

3. Opening Conference

a. After the presentation of credentials to the Plant Manager, but before an inspection is actually conducted, the Compliance Officer will conduct an informal opening conference. During the opening conference, which should be attended by both the Plant Manager and the Safety Manager, the Compliance Officer should explain whether the inspection is being conducted:

(1) pursuant to a general administrative enforcement plan;
(2) in response to a specific safety and/or health complaint by an employee or representative of employees (*e.g.*, labor organization);
(3) in response to a specific referral by a non-employee (*e.g.*, an official of another government agency, a member of the media, etc.);
(4) in response to a fatality or serious accident; or
(5) to investigate an employee complaint of employer retaliation against employees for their involvement in safety and health-related activities protected by law (*e.g.*, complaining to company management, OSHA or other government agencies about safety and/or health concerns, refusing to be exposed to an imminent danger of death or serious injury, etc.). OSHA normally begins its investigation of such complaints by providing the employer written notice of the retaliation allegations and requesting that the employer submit a position statement in response. Any on-site visits by OSHA investigators are normally scheduled with employers in advance and usually occur after OSHA has reviewed the employer's position statement. If the OSHA officer has arrived without prior notice to conduct a retaliation investigation, the Plant Manager should consult with the Corporate Safety Director and/or the Director of Human Resources and the General Counsel's Office before allowing the on-site investigation to begin.

The opening conference normally will be held jointly with both the employer and, if the employees are represented, an employee representative in attendance. If employees are not represented, the Compliance Officer will typically conduct the inspection without an employee representative.

b. Generally, the Compliance Officer will explain the purpose of the visit and will outline the scope of the inspection, including the scope of the physical inspection of the plant, the records to be reviewed, and whether management and/or private employee interviews will be conducted.

c. The Compliance Officer will also indicate during the opening conference whether the inspection will be primarily safety oriented or health oriented. If it is primarily a health inspection, the Compliance Officer will probably be an industrial hygienist, who will likely seek to review the plant's exposure monitoring records and will typically conduct some form of sampling of workplace environmental conditions. To the extent that it is practical and feasible to do so, it is beneficial in such a situation for the plant to take samples alongside the OSHA industrial hygienist. This ensures that the employer is not unjustly cited because of erroneous laboratory analysis or results that are not representative of actual conditions.

d. If the proposed inspection is in response to a specific complaint or referral, the Company should seek to obtain a copy of the complaint. Although the identity of the complainant employee is confidential, the Compliance Officer should provide an expurgated copy of the complaint, upon request. The Compliance Officer, however, may decline to provide a copy of a referral.

e. If the proposed inspection is in response to a specific complaint or referral, the Company should seek to limit the scope of the inspection to the cited condition identified in the complaint/referral. If the Compliance Officer persists in a request to broaden the scope of the inspection, he should be asked to wait until the Company's legal counsel has been consulted. Even if the inspection starts out being limited to the scope of the complaint/referral, it can be broadened if the Compliance Officer sees or hears about any other hazardous conditions during the course of the inspection.

f. At the beginning of the opening conference, the Plant Manager should identify the company representatives present at the opening conference and offer a brief explanation of why each individual has been asked to attend. Generally, the Compliance Officer will inquire about the Company's safety program. It is essential that those in attendance at the conference have a working knowledge of the plant's safety and health procedures. Specifically, all attendees should have an appreciation of the written programs in effect, how safety and health training programs are implemented, and an understanding of how accidents at the plant are investigated.

g. If the Company has trade secrets that might be revealed during the inspection, these areas should be identified at the opening conference. Any information obtained by the Compliance Officer in these designated areas will be labeled "confidential-trade secret" and cannot be disclosed outside the proceedings to which the information is relevant.

4. Warrant Requirement

Although the U.S. Supreme Court has held that OSHA must obtain a warrant to gain entry to the premises of a company to conduct a general inspection when the employer does not consent to the inspection, it is not difficult to obtain such a warrant. From a practical standpoint, unless there is a known condition that the employer can correct while OSHA is applying for the warrant, consent should be given. While this advice is given as a general proposition, there may well be particular circumstances that would justify requiring OSHA to get a warrant. The decision whether to require OSHA to obtain a search warrant depends on the specific situation presented at the time the Compliance Officer appears at the plant to conduct

an inspection. If you think the particular circumstances presented may justify requiring OSHA to obtain a warrant or if you have any questions, contact the General Counsel's Office for guidance. As a general rule, consideration should be given to requiring a warrant when the Compliance Officer indicates during the opening conference that, although the inspection is complaint/referral-based, he intends to expand the scope of the inspection beyond the areas identified in the complaint/referral.

If the Compliance Officer presents an inspection warrant upon his arrival at the plant, photocopy the warrant and any supporting documentation and contact the Corporate Safety Department and General Counsel's Office for guidance. The warrant should include the exact plant and entity to be inspected as well as the scope of the inspection.

5. Walkaround Inspection

a. Both the Occupational Safety and Health Act and OSHA's regulations provide that a representative of the employer shall be given the opportunity to accompany the Compliance Officer during the inspection. The Plant Manager and/or such persons as the Plant Manager shall designate should accompany the Compliance Officer during the inspection. Depending on the scope of the inspection, a maintenance person (preferably a manager) should be asked to join the designated management representative in order to correct on the spot any minor repair or housekeeping items noted by the Compliance Officer. Do not, however, admit that the Company believes the condition corrected was an OSHA violation. Regardless of the inspection's scope, at least two Company representatives should accompany the Compliance Officer at all times. The Company representatives should be professional and cordial to the Compliance Officer throughout the inspection.

b. The Company's walkaround representatives should take notes during the inspection, documenting everything about which the Compliance Officer is concerned, including pertinent statements made during the inspection. The walkaround representatives should take the same photographs or measurements that the Compliance Officer takes during the inspection as well as identifying what was measured, the method of measurement, how many samples or measurements were taken, and the duration of the samples and measurements. If the Compliance Officer appears to be photographing conditions from a misleading perspective, the walkaround representatives should photograph such conditions from both the Compliance Officer's perspective and other perspectives that more accurately depict the actual condition. To be prepared for an OSHA inspection, the Company should have a videotape camera and a still camera with an adequate supply of videotape and film ready for immediate use.

c. During the course of the inspection, the Compliance Officer may conduct private interviews with as many employees as is deemed necessary. The Company representative should make available a place for the Compliance Officer to conduct the interviews. If management employees are to be interviewed, the Company has a right to have a Company representative present during such interviews. The names of any non-management employees who had private conversations with the Compliance Officer should be noted. A Compliance Officer cannot audiotape or videotape the interviews unless the employee being interviewed consents. Similarly, there is no legal obligation for an employee to sign a written statement prepared by a Compliance Officer.

d. The Compliance Officer may also inspect records required to be maintained under the Occupational Safety and Health Act. The Compliance Officer will typically request that the Company produce its OSHA 300 Log and OSHA Form 301s (or their equivalent), its written Hazard Communication Program, the written Lockout/Tagout Program, exposure monitoring data, and documentation of the training required by various OSHA standards. Except for compliance audit reports, all of the records should be made available to the Compliance Officer upon request. Do not refer to plant audits, and if asked for audit reports, contact the Corporate Safety Department or the General Counsel's Office before providing them for review or copying. The plant should keep a copy of all records provided to OSHA during the inspection.

e. Compliance Officers must comply with all plant safety and health rules and practices and use personal protective equipment as required by the plant. In the event the Compliance Officers' inspection would require use of respiratory protection, such protection must be provided by OSHA. Compliance Officers using respiratory protection must be trained and fit-tested in accordance with OSHA Instruction CPL 2-2.54.

f. In the event that violations such as blocked aisles, unsafe floor surfaces, hazardous projections, or other such deficiencies are pointed out by the Compliance Officer, the Company representatives (preferably including a maintenance manager) should take immediate action to correct the violations where immediate correction can be easily accomplished and where such action is appropriate.

6. Closing Conference

a. After the inspection is concluded, the Compliance Officer will hold a closing conference with the Company during which any safety or health violations that

have been observed will be reviewed. Generally, the Compliance Officer will identify the standards that have been violated. The Compliance Officer typically will not reveal, however, which of these items, if any, will result in the issuance of citations or penalties. Statements made at the conference do not bar the Compliance Officer from subsequently issuing a citation for a violation that the Officer did not specifically raise at the closing conference. Statements made by Company representatives during the closing conference may affect the decision whether to issue a citation, the characterization of the citation, as well as the extent of the proposed penalty. It is, therefore, important to maintain a professional and courteous demeanor throughout the closing conference, even if there is strong disagreement with the Compliance Officer's findings and conclusions. However, if the Compliance Officer makes any factual misstatements, Company representatives should politely correct those misstatements. The closing conference is also a time to ask the Compliance Officer questions and ensure that Company representatives fully understand the Compliance Officer's position.

b Separate closing conferences may be held with plant management and the employees' representative if requested by either party. Under routine circumstances, it shall be _____'s policy to request a joint conference. The plant's management representative shall take detailed notes about items discussed during the closing conference.

c. It is sometimes helpful to abate non-controversial violations immediately (during the inspection, if possible) as a demonstration of good faith. Caution should be used in estimating the time necessary to correct more complex violations because the Company's estimate is likely to become the abatement date required in the citation.

d. The Company representatives in attendance should not admit to any violations, and should not offer any suggestions about how long it would take to complete abatement. If absolutely forced to give an estimate, it should be remembered that OSHA may later require the Company to adhere to that time estimate.

e. The Plant Manager should promptly advise the Corporate Safety Department and General Counsel's Office about the matters discussed during the closing conference.

7. Post-Inspection Procedures

Immediately after the Compliance Officer leaves the plant site, the Plant Manager should meet with all appropriate management representatives concerned with the inspection to discuss both the OSHA inspection and the Compliance Officer's observations and findings. The Plant Manager is responsible for formulating a plan to respond to the Compliance Officer's observations and findings. The attached "Report of OSHA Inspection" must be completed within 24 hours of the conclusion of each day's OSHA on-site inspection and faxed to the Corporate Safety Department. See Attachment 1.

8. The Decision Whether To Contest The Citation

Upon receipt of a citation, the Company has fifteen (15) working days within which to notify OSHA in writing that it wishes to contest the citation and/or proposed notification of penalty. If the Company does not agree with the citation, OSHA encourages employers to ask for an informal conference, usually with the OSHA Area Director, during this fifteen (15) working day period. This is almost always a good idea. It provides an opportunity for further discussion with the Compliance Officer and his or her supervisor, and the amount of penalty is often reduced as a result of these informal conferences. It is important to remember that the informal conference does not extend the fifteen (15) working day requirement for the filing of a written notice of contest.

If the outcome of the informal conference is not satisfactory, the Company may still want to contest the citation. The Company can contest all or any part of the alleged violations (including their characterization as willful, repeat, serious, or other-than-serious), the proposed assessment of penalties, the proposed abatement periods, or the entire citation. If a notice of contest is filed contesting an alleged violation, then as long as the allegedly violative condition is under contest, there is no duty to correct the condition. If the

citation and/or penalty is not contested within fifteen (15) working days from receipt, the citation and assessment become a final order of the Occupational Safety and Health Review Commission which cannot later be reviewed by any court or agency.

The Notice of Contest shall be sent to the Area Director via certified or registered mail. A copy of the Notice of Contest must be posted adjacent to the citation.

Although sometimes there is no question that a hazardous condition exists and that it can be corrected without the expenditure of substantial sums of money, the Company should be aware that once a citation becomes a final order, it may be used as the basis for a repeat or willful violation. Thus, in determining the cost of whether or not to contest a citation, the implications of being cited for a repeat violation sometime in the future also should be considered.

The decision whether to contest an OSHA citation is to be made only after input from the Corporate Safety Department and the General Counsel's office.

9. Receipt of OSHA Citations

OSHA citation and proposed penalties shall be received by certified or registered mail. A copy of the citation(s) shall be posted on the plant bulletin board or in the vicinity of the OSHA poster. Citations shall be posted for a minimum of 3 days or until the condition noted is abated, regardless of whether abatement was completed prior to receipt of the citation(s). A copy of the citation(s) shall be immediately faxed to the Corporate Safety Department and General Counsel's office.

APPENDIX A

OSHA INSPECTION CHECKLIST

Plant Location: _____

Designated Management Representative: _____

Date of Inspection: _____

Type of Inspection: General Inspection_____
Complaint Inspection_____
Referral Inspection_____

Compliance Officer's:

Name: _____

Address: _____

Telephone Number:_____

_____ 1. The designated management representative should cordially greet the Compliance Officer while the Corporate Safety Department and/or General Counsel's Office is contacted and informed of the Compliance Officer's presence.

_____ 2. Ask to see the Compliance Officer's credentials if they are not presented.

_____ 3. At the opening conference with the Compliance Officer:

_____ a. Ask whether the inspection is a general inspection, a complaint or referral inspection, a fatality or accident investigation, or a retaliation investigation. If the inspection was prompted by a complaint, secure a copy of the complaint. If the inspection was prompted by a referral, the Compliance Officer may be unwilling to provide a copy of the referral document, in which case the designated management representative should ask the Compliance Officer what condition(s) are identified in the referral. If the OSHA officer has arrived without

prior notice to conduct a retaliation investigation, the Plant Manager should consult with the Corporate Safety Director and the Director of Human Resources before allowing an on-site investigation to begin.

_____ b. Take notes on the reason for the inspection.

_____ c. Take notes on the scope of the inspection including:

1. Whether employee and/or manager interviews will be held, and from which departments or work areas;
2. Which records, programs, or procedures will be reviewed;
3. How long the inspection will last; and
4. The actual areas to be inspected.

_____ d. Notify the Compliance Officer if any trade secrets exist which might be revealed during the inspection.

_____ e. Promote the Company as committed both to the safety and health of its employees and to complying with all OSHA requirements (If possible, it is important to identify the Company as a "good guy" and establish rapport with the Compliance Officer).

_____ 4. If the Compliance Officer is present in response to an employee complaint or a referral from a governmental entity or some other source, limit the scope of the inspection to the identified condition(s).

_____ 5. Notify the employee representative, if any, about the right to accompany the Compliance Officer during the inspection.

_____ 6. The designated management representative and at least one other Company representative should accompany the Compliance Officer during the inspection. Depending on the scope of the inspection, a maintenance person (preferably a manager) should join the designated management representative in order to correct on the spot any minor repair or housekeeping items noted by the Compliance Officer.

_____ 7. During the inspection, the designated management representative should:

_____ a. If a complaint or referral inspection, direct the Compliance Officer to the referenced machine, structure or area via the route least likely to pass conditions that might catch the Compliance Officers interest (i.e., the shortest route with the least potential for violations).

_____ b. If during a complaint or referral inspection the Compliance Officer asks or begins to inspect other conditions not referenced in the complaint/referral, then the designated management representative should politely remind the Compliance Officer that the understood purpose of the inspection (based on the boundaries set in the opening conference) is to investigate the complaint/referral condition(s). The designated management representative might emphasize that the Company will assist in every way with investigation of the complaint/referral, but politely insist that a broader general inspection is not appropriate. If the Compliance Officer nevertheless insists on broadening the scope of the inspection, the designated management representative should politely ask the Compliance Officer to identify the cause for his request and then contact the Corporate Safety Department or the General Counsel's Office before allowing a broadened inspection.

_____ c. Take written notes on all the Compliance Officer's actions and statements.

_____ d. Measure all items measured by the Compliance Officer.

_____ e. Take photographs of all items photographed by the Compliance Officer, and, if possible, videotape all operations videotaped by the Compliance Officer (If it is not possible to take photographs or videotape, identify the object photographed or the operation videotaped and the location from which the photograph or videotape was taken, and request copies from the Compliance Officer.)

_____ f. If samples are taken, take the same samples and note the duration, etc., of the samples.

_____ g. If interviews are conducted in the presence of the management representative, then all observations should be recorded.

_____ h. If interviews are conducted outside the presence of the management representative, then the name of the interviewed employee, location of the interview, and time and duration of the interview should be noted.

_____ i. If records, reports, programs, or procedures are reviewed by or copied for the Compliance Officer, a copy of these items should be made (A separate copy of any items copied for the Compliance Officer should be made and a file created).

_____ j. Do not refer to plant audits, and if asked for audit reports contact the Corporate Safety Department or the General Counsel's Office before providing them for review or copying.

_____ k. Promote the Company's best practices and refrain from statements that might be construed as admissions.

_____ 8. At the closing conference, the management representative should note all statements made by the Compliance Officer, including any apparent violations identified by the Compliance Officer and any statements concerning the issuance or characterization of citations, penalties, and any proposed abatement methods and/or dates.

_____ 9. If the management representative is asked for an estimate of an abatement period, there should be no admission that a violation or hazard requiring abatement exists. If there is no dispute about the existence of the hazard, the Compliance Officer should be given a liberal estimate of time within which abatement can be accomplished.

APPENDIX B

INSPECTOR IDENTIFICATION LOG

Name	Position	Agency	Address/Phone

APPENDIX C

OSHA INSPECTION NOTES

APPENDIX D

PHOTOGRAPHY/VIDEOTAPING POLICY

It is the policy of [Plant Name] that no photographic equipment be allowed on the premises without the express written permission of appropriate management. Because photographs may reveal confidential information and/or trade secrets to competitors, anyone with photographic equipment on the premises will be escorted off Company premises.

During on-site inspections, OSHA routinely photographs or videotapes conditions that the Agency believes constitute violations of either an OSHA Standard or of the General Duty Clause of the OSH Act.

During the Opening Conference before an OSHA inspector has been allowed to enter the facility to begin the walkaround part of the inspection, the [Plant name] personnel accompanying the OSHA inspector(s) should advise the inspector(s) that the Company considers its equipment and processes to constitute trade secrets and confidential, proprietary information that is protected under Section 15 of the OSH Act and 29 C.F.R.§ 1903.9. The inspector(s) should be asked to sign a statement acknowledging that they have been advised that the Company expects these trade secrets and confidential, proprietary information to be protected accordingly. This Acknowledgment Statement is attached hereto.

Should the inspector refuse to sign the Acknowledgment Statement, please provide the inspector with a copy of the Acknowledgment Statement and document on a second copy that the Acknowledgment Statement was provided to the OSHA inspector and that the inspector refused to sign it.

Constangy, Brooks & Smith, LLP
Atlanta, Georgia

ACKNOWLEDGMENT OF TRADE SECRETS AND CONFIDENTIAL, PROPRIETARY INFORMATION

(Plant name) advises OSHA by this written notice that this facility considers its equipment and processes to constitute trade secrets and confidential, proprietary information. All photographs and videotape taken by any representative of OSHA, as well as any documentary information provided to OSHA during the course of this inspection, are to be considered trade secrets or confidential, proprietary information consistent with Section 15 of the OSH Act and 29 C.F.R.§ 1903.9.

Acknowledged by:

_____
OSHA Representative

_____
OSHA Representative

_____
Date

Witnessed by:

_____

APPENDIX E

REPORT OF OSHA INSPECTION

Instructions: This report covers visits by federal and state OSHA.

Form to be completed and faxed to Corporate Safety within 24 hours after Agency Inspector leaves your premises. A separate form is to be completed for each day an agency official is on the premises. Additional pages may be attached, as necessary, for additional information.

Plant visited: _____

Name of Federal/State Inspector: _____

Agency Represented: _____

Date of visit/opening conference: _____

Time of Arrival: _____ a.m./p.m. Time of Departure: _____ a.m./p.m.

Purpose of Visit (circle all that are applicable and attach copy of written complaint if applicable)

a) Formal Complaint b) Informal Complaint c) Complaint No. _____

d) Programmed Inspection e) Nonprogrammed Insp. f) Comprehensive Inspection

g) Partial Inspection h) Imminent Danger i) Fatality/Catastrophe

j) Referral k) Follow-Up l) Records Review

m) Monitoring/Industrial Hygiene/Health Inspection

Names, job titles, and/or badge numbers and comments (where possible) of all employees interviewed (management and hourly; indicate which employees accompanied the agency inspector during the visit):

_____

_____

_____

_____

_____

_____

Description of all monitoring devices used (give details of location monitored, manufacturer and model numbers of equipment, serial and lot numbers of sampling media, contaminant and results, if available, whether duplicate Company sampling was performed, etc.): _____

_____

_____

_____

Description of all plant locations visited/reviewed by the agency inspector: _____

_____

_____

_____

Comments of agency inspector (associated with visit, other operating conditions, observations, equipment/ process(es) suggested as hazardous, etc.): _____

_____

_____

_____

Date of Closing Conference: _____ Time of Closing Conference: _____ a.m./p.m.

Citation(s) anticipated (give details): _____

_____

_____

_____

Corrective Actions to be Taken (be specific and give target closure dates for each): _____

_____

_____

_____

_____ _____ _____
(Signature of Plant Manager or Designee (Signature of Safety Mgr. or Designee) (Date)

Constangy, Brooks & Smith, LLP
Atlanta, Georgia

If you have any questions regarding these guidelines or procedures, please feel free to contact:

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EEO Substantive Law

By

Mary Ruth Houston, Orlando

I. OVERVIEW OF FEDERAL LAWS THAT PROHIBIT EMPLOYMENT DISCRIMINATION

A. Threshold Issue: Who is the Employer

Most civil rights laws apply to employers with a threshold number of employees, typically 15 or 20. When an employee works for more than one entity, if one of the entities has fewer than 15 employees, or becomes insolvent, the employee may wish to look to the other entity, or to both, for relief as her "employer", under a theory that (1) the two entities are a single integrated employer, (2) they are a joint employer, or (3) one is the agent of the other. In Lyes v. City of Riviera Beach, 166 F.3d 1332, 1341 (11th Cir. 1999) (en banc) the Court explained:

> First, where two ostensibly separate entities are "highly integrated with respect to ownership and operations," we may count them together under title VII. McKenzie, 834 F.2d at 933 (quoting Fike v. Gold Kist, Inc., 514 F. Supp. 722, 726 (N.D. Ala.), aff'd, 664 F.2d 295 (11th Cir. 1981). This is the "single employer" or "integrated enterprise" test.
>
> Second, where two entities contract with each other for the performance of some task, and one company retains sufficient control over the terms and conditions of employment of the other company's employees, we may treat the entities as "joint employers" and aggregate them. See, Virgo, 30 F.3d at 1359-60. This is the "joint employer" test.
>
> Third, where an employer delegates sufficient control of some traditional rights over employees to a third party, we may treat the third party as an agent of the employer and aggregate the two when counting employees. See, Williams, 742 F.2d at 589. This is the "agency" test.

To establish that parent and subsidiary companies are a "single employer," they must share: (1) interrelated operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933 (11th Cir. 1987); United States v. Jacksonville Terminal Company, 351 F. Supp. 452 (M.D. Fla. 1972). Centralized control of labor relations is the most critical factor in the "single employer" determination. Jackam v. Hospital Corp. of America Mideast, 800 F.2d 1577 (11th Cir. 1986). The plaintiff must demonstrate that the amount of control over labor relations exceeds "the control normally exercised by a parent corporation which is separate and distinct from the subsidiary." Frank v. U.S. West, 3 F.3d 1357, 1363 (10th Cir. 1993).

In contrast, the "joint employer" test assumes that companies are independent legal entities but share the control of employment matters including whether both entities influence such matters as hiring and firing of employees, work rules, assignments, conditions of employment, day-to-day supervision and discipline, and control of employee records. Zarnoski v. Hearst Business Communications, 69 FEP Cases 1514 (E.D. Pa. 1996). No single factor is dispositive. Lambertsen v. Utah Department of Corrections, 922 F. Supp. 533 (D. Utah 1995), aff'd., 79 F.3d 1924 (10th Cir. 1996). The fact that one entity contracts with another to manage

its premises, but in the contract retains its status as employer of the staff, is a strong indicator of joint employer status. Virgo v. Riviera Beach Associates, 30 F.3d 1332, 1361 (11th Cir. 1994).

B. The Civil Rights Act of 1866 ("Section 1981")[1]

42 U.S.C. §1981 provides as follows:

> (a) All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence and to full and equal benefit of all laws and proceedings for other security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes and licenses, and exactions of every kind, and to no other.

1. Coverage

Section 1981, which is one of several Reconstruction Era civil rights acts, is a federal remedy for employment discrimination on the basis of race[2] as that term was understood in 1866. Thus, Section 1981 not only applies to "race" as understood today, but also to certain national origins or religions that were considered to be separate "races" in 1866. It does not apply to claims of gender discrimination, Moore v. Allstate Ins. Co., 928 F. Supp. 744, 752 (N.D. Ill. 1996); Gorman v. Roberts, 909 F. Supp. 1479, 1484 (M.D. Ala. 1995); McCoy v. Johnson Controls World Services, Inc., 878 F. Supp. 229, 232-33 (S.D. Ga. 1995) (sexual harassment is not actionable under §1981), age discrimination, Sherlock v. Montefiore Med. Ctr., 84 F.3d 522, 527 (2d Cir. 1966), or disability discrimination; Tafoya v. Bobroff, 865 F. Supp. 742, 752 (D.N.M. 1994), aff'd, 74 F.3d 1250 (10th Cir. 1996).[3]

Unlike Title VII, which applies only to employers of 15 or more persons, Section 1981 contains no such restriction.

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[1] The Civil Rights Act of 1871 is codified at 42 U.S.C. §1983. It is the vehicle for bringing federal statutory and constitutional claims against state and local governments. It applies only where an employer can establish that "state action" exists. Chavis v. Clayton County School Dist., 300 F.3d 1288, 1291-92 (11th Cir. 2002). 42 U.S.C. §1985 prohibits conspiracies to obstruct justice with an intent to deprive citizens of equal protection.

[2] Johnson v. Railway Express Agency, 421 U.S. 454, 459-60, 95 S. Ct. 1716, 1719-20 (1975).

[3] In Saint Frances College v. Al-Khazraji, 481 U.S. 604 (1987), the Supreme Court found that the Act was intended to apply to discrimination based on "ancestry or ethnic characteristics." In Saint Francis, the Court held that although Al-Khazraji was an Arab, and technically Caucasian, he was permitted to state a §1981 claim for race discrimination. See also Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987) (the statute protected Jews from discrimination under §1982, based on a showing that, the time the statutes were enacted, Jews were regarded as a different race); Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 970 (10th Cir. 1979) (Hispanics covered); cf., Ana Leon T. v. Federal Reserve Bank, 823 F.2d 928, 931 (6th Cir. 1987) (per curiam) (§1981 provides no remedy for discrimination on the basis of Colombian national origin, because place of origin alone is insufficient under the statute), cert. denied, 484 U.S. 945 (1987). Where the population of a foreign country is racially homogenous, the court may infer an intent to discriminate on the basis of race from the employer's awareness of national origin and reaction to the people of that foreign country. See, e.g., Sinai v. New England Tel. & Tel. Co., 3 F.3d 471, 474 (1st Cir. 1993) (an Israeli Jew showed discrimination on the basis of race because Israel is closely associated with the Jewish "race"), cert. denied, 115 S.Ct. 597 (1994).

However, with respect to the federal government, the Supreme Court in Brown v. General Services Administration, 425 U.S. 820, 835 (1976) held that §717 of Title VII provides the exclusive remedy for most federal employees. Section 1981 protects federal employees only in those few cases where discrimination in federal employment is not covered by Title VII. Although, Section 1981 does create substantive rights for employees of state and local governments, the exclusive vehicle for enforcing Section 1981 rights against these employers is 42 U.S.C. §1983. Jett v. Dallas Indep. Sch Dist., 491 U.S. 701 (1989). Thus, a plaintiff enforcing her §1981 rights against a municipal employer must contend with all the baggage associated with §1983 claims. As such, she may not rely upon the doctrine of respondeat superior but must meet the §1983 requirement of showing that the violation was caused by a custom or policy of the municipality or agency. Id. at 731-36. Similarly, enforcement of §1981 rights against a statement government agency is subject to the state's Eleventh Amendment immunity to all claims for damages. Will v. Michigan Department of State Police, 491 U.S. 58 (1989).

It is also possible to sue supervisors individually who are personally responsible for the discrimination under Section 1981. Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986); Wallace v. DM Customs, Inc., 2006 WL 2882715 *7-8 (M.D. Fla. 2006) (citing cases).

In 1989, the Supreme Court held that Section 1981 applied only to claims involving actual contractual relationships, e.g., hiring, firing, and promotion. Patterson v. McLean Credit Union, 491 U.S. 164 (1989). To reverse this, in 1991 Congress added 42 U.S.C. §1981(b), which provides:

> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

As a result of the 1991 amendments, the Eleventh Circuit has repeatedly held that Section 1981 now covers much of the ground covered by Title VII, including claims of racial discrimination in hiring, promotion, discharge, and hostile environment. Jackson v. Motel 6 Multipurpose, 130 F.3d 999, 1008 and n.17 (11th Cir. 1997), reh. and reh. en banc den., 167 F.3d 542 (11th Cir. 1998) (hostile environment). See also discussion of applicability of Section 1981 to retaliation claims discussed in the "Retaliation" section below.

2. Damages/Remedies

A plaintiff may elect to bring an action based on Section 1981, rather than on Title VII, in order to seek additional remedies, such as unlimited emotional distress and punitive damages, which are capped under Title VII. A right to a jury trial has always existed under Section 1981, and there are no administrative prerequisites.[4]

[4] Where a Section 1981 claim is based on the amendments of 1991, the statute of limitations is supplied by the catch-all provisions of 28 U.S.C. §1658(a), and is four years. Jones v. R.R. Donnelly & Sons, 541 U.S. 369, 383-84

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C. Title VII of the Civil Rights Act of 1964 ("Title VII")

1. Coverage

Title VII prohibits covered employers from discriminating in employment on grounds of race, color, religion, sex (including sexual harassment), or national origin.[5] Title VII also protects employees associated with members of a protected class, such as employees who are married to or have a companion who is a minority.[6]

Title VII covers employers who are (a) engaged in an industry affecting commerce, and (b) have 15 or more employees[7] on the payroll. Regular part-time employees are also considered "employees" for purposes of meeting the statutory minimum. EEOC "Policy Guide On Whether Part-Time Employees May Be Counted To Satisfy Number Required For Title VII And ADEA Coverage," EEOC Compliance Manual § 605.8(b), BNA 405:6857 (April 20, 1990). See also Walters v. Metropolitan Educ. Enters., 519 U.S. 202, 207, 117 S.Ct. 660, 664 (1997). Title VII also covers "agents" of the employer. Thus, when a person acting on the employer's behalf engages in discrimination, liability is imputed to the employer.[8] The majority of courts hold that no individual liability exists under Title VII.

Title VII's protections extend to hiring, firing, compensation, and all terms, conditions, and privileges of employment. Additionally, Title VII protects job applicants, as well as employees.[9] It does not protect individuals who are (1) aliens outside the United States and its territories,[10] (2) performing work connected with the activities and ministry of a religious corporation, association, educational institution or society, [11] and (3) members of the communist

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(2004). In rare cases which would have been actionable after Patterson, the statute of limitation is derived from the most nearly analogous state statute. In Florida, the four-year statute of limitations for personal injury actions applies in Section 1981 cases. Baker v. Gulf & Western Industries, 850 F.2d 1480, 1482 (11th Cir. 1987); Section 95.11, Florida Statutes.

[5] 42 U.S.C. § 2000e-2(a)-(d).

[6] See, e.g., Watson v. Nationwide Ins. Co., 823 F.2d 360, 361-62 (9th Cir. 1987) (Title VII action is valid where employer's treatment of employee might have been motivated by her interracial marriage).

[7] 42 U.S.C. § 2000e(b) provides in pertinent part: "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . ."

[8] Meyer v. Holley, 123 S. Ct. 824, 829 (2003) ("It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment").

[9] 42 U.S.C. § 2000e-2(a)(2).

[10] 42 U.S.C. § 2000e-1(a).

[11] Id.; see also Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940, 945 (9th Cir. 1999) ("The ministerial exception to Title VII 'precludes civil courts from adjudicating employment discrimination suits by ministers against the church or religious institution employing them'").

party.[12] Title VII is enforced and administered by the Equal Employment Opportunity Commission ("EEOC").[13]

2. Race and Color

a. Color

Discrimination based on color is not always the same as discrimination based on race, and can be based on relative lightness or darkness, for example, of skin color among people of the same race. Walker v. Secretary of the Treasury, 742 F. Supp. 670 (N.D. Ga. 1970). Employment decisions based upon stereotypical assumptions about the abilities, traits or performance of a person based upon his or her race are also unlawful under Title VII. EEOC v. Riss International Corporation, 525 F. Supp. 1094 (W.D. Mo. 1981). An employer may also violate Title VII when it segregates its employees by race in jobs, promotions or other terms or conditions of employment. Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984).

b. "Reverse" Discrimination

Title VII prohibits discrimination on the basis of race against all persons, including whites. McDonald v. Sante Fe Trails Transportation Company, 427 U.S. 273, 279 (1976). Discrimination against individuals of any race based upon an interracial marriage or association, is also prohibited. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 891-92 (11th Cir. 1986) (discrimination based on white plaintiff's interracial marriage); Tetro v. Elliott Popham Pontiac, 173 F.3d 988 (6th Cir. 1999) (discrimination based on plaintiff's having a biracial child).

c. Specific Defenses

There is no "bona fide occupational qualification" ("BFOQ") defense to a race discrimination claim. 42 U.S.C. §2000e-2(e).

Discrimination based on race (or other protected characteristic) pursuant to a voluntary affirmative action plan is permissible only if it (1) is based on an adequate "factual predicate", showing significant under-representation of the protected class; (2) is temporary, and (3) does not "unnecessarily trammel the interests" of non-members of the protected class. Firefighters Local 93 v. City of Cleveland, 478 U.S. 501 (1986).

3. National Origin

Under Title VII, a person's national origin includes membership in a national group, common ancestry, heritage or background, ethnic characteristics, or the geographical place of birth. Janko v. Illinois State Toll Highway Authority, 704 F. Supp. 1531 (N.D. Ill. 1989); Bennun v. Rutgers the State University, 941 F.2d 154, 171-72 (3rd Cir. 1991). The source

[12] 42 U.S.C. § 2000e-2(f).

[13] For an overview of Title VII's prohibition against race and color discrimination, refer to EEOC Compliance Manual, Section 15: Race & Color Discrimination, No. 915.003(April 19, 2006).

of one's national origin need not be a recognized "nation." Pejic v. Hughes Helicopters, 840 F.2d 667, 673 (9th Cir. 1988). As in the case of other forms of discrimination, employment decisions based on stereotypes about the abilities or other characteristics of protected groups violate Title VII. Kang v. U Lim America, 296 F.3d 810, 817 (9th Cir. 2002).

a. **Citizenship**

Although non-citizens are often subject to discrimination based on their national origin, discrimination on the basis of citizenship is not per se discrimination based on national origin. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). After Espinoza, the EEOC revised its guidelines concerning national origin. The revised guidelines state that Title VII is violated if a requirement based upon citizenship has the purpose or effect of discriminating against persons of a particular national origin. 29 C.F.R. § 1606.5.[14]

b. **Language/English-Only Rules**

Discrimination based on the languages an employee speaks, or on her accent, is prohibited, unless the language or accent interferes with job performance. Radd v. Fairbanks North Star Borough School District, 323 F.3d 1185 (9th Cir. 2003).

Employers sometimes adopt rules which require employees to speak only English, and prohibit them from speaking other languages while in the workplace. In Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981), the Fifth Circuit held that an English-only rule requiring bilingual employees to speak only English while on duty did not violate Title VII, where the rule did not apply to conversations during breaks or to employees who could not speak English. Following Gloor, most federal courts have held that English-only rules are not unlawful if applied to bilingual employees, since those employees can easily comply with such rules. Garcia v. Spun Steak Co., 998 F.2d 1480, 1487-88 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994); Prado v. L. Luria & Son, Inc., 975 F. Supp. 1349, 1354 (S.D. Fla. 1997).

The EEOC takes the position that employer rules which require employees to speak only English at all times are presumptively unlawful. 2 EEOC Compliance Manual (BNA) 623:0001, 0007 (Speak-English Only Rules 1989). According to the EEOC, English-only rules that are applied indiscriminately violate Title VII because they burden employees whose primary language is not English, create a hostile work environment and constitute harassment and/or a burdensome term or condition of employment on the basis of national origin. 2 EEOC Compliance Manual (BNA) 622:0014 (Other Employment Practices Which May Violate Title VII 1989).

The EEOC has rejected the following business justifications commonly asserted by employers that implement English-only rules: 1) that the rule is necessary to ensure good communication between employees; 2) that the rule is necessary to maintain supervisory control

[14] Undocumented persons who are not legally in the U.S. may make claims under the federal employment laws, but are not entitled to reinstatement or other relief which would require the employer to employ them illegally. Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002) (decided under National Labor Relations Act).

over employees; 3) generalized concerns about productivity; and 4) co-workers' preference to hear only English in the workplace. 2 EEOC Compliance Manual (BNA) 623:0012-0016.

The EEOC, however, has approved English-only rules that apply only at certain times or under certain circumstances, so long as the rules are justified by business necessity. 2 EEOC Compliance Manual (BNA) 623:0012-0008. According to the EEOC, an employer must show that the English-only rule is necessary for the safe or efficient job performance or business operation. 2 EEOC Compliance Manual (BNA) 623:0002, 0009.

The EEOC's position has received a mixed reception in the courts. English-only rules have been upheld where employers claimed that the rules were necessary to properly monitor and supervise employees, Tran v. Standard Motor Prods., 10 F. Supp. 2d 1199, 1210 (D. Kan. 1998); Gonzalez v. Salvation Army, 1991 U.S. Dist. LEXIS 21692 (M.D. Fla. June 3, 1991), aff'd, 985 F.2d 578 (11th Cir. 1993); to promote harmony in the workplace or to prevent English-speaking employees from feeling uncomfortable or isolated. Roman v. Cornell University, 53 F. Supp. 2d 223 (N.D.N.Y. 1999); Kania v. Archdiocese of Philadelphia, 14 F. Supp. 2d 730 (E.D.Pa. 1998); and to further safety, quality or customer service concerns. Spun Steak, 998 F.2d at 1489.

However, in Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006), plaintiffs challenged an English-only rule that applied to all work related communications, which it defined to include all communications on the employer's telephones and other equipment, but excluded purely private conversations with co-workers or family members during break periods. Relying heavily on the EEOC Guidelines, the Court reasoned that "[t]he less the apparent justification for mandating English, the more reasonable it is to infer hostility toward employees whose ethnic group or nationality favors another language." 433 F.3d at 1305. In this case, the court reversed summary judgment for defendants on plaintiffs' hostile environment, disparate treatment and disparate impact claims.

c. Specific Defenses

The BFOQ defense is available in national origin cases. 42 U.S.C. § 2000e-2(e). Although it is narrowly construed, it has been held to apply where a treaty between the U.S. and another country requires that companies headquartered in the foreign country be permitted to favor its own citizens for employment in the company's operations in the U.S. MacNamara v. Korean Air Lines, 863 F.2d 1125, 1148 (3d Cir. 1988); Fortino v. Quasar Co., 950 F.2d. 389, 393 (7th Cir. 1991).

4. Gender

Title VII's prohibition against gender discrimination includes discrimination based on sexual stereotypes, such as an expectation that women should dress in a certain way, or should not be aggressive or use profanity. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

a. **Pregnancy, Childbirth and Parenting**

The Pregnancy Discrimination Act is part of Title VII and prohibits discrimination against a woman because of pregnancy, childbirth, or a related medical condition.[15]

Congress passed the Pregnancy Discrimination Act ("PDA") as an amendment to Title VII in 1978. It provides that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e-(k). The PDA prohibits adverse actions based on an employee's pregnancy, including actions based on the employer's stereotyped notions about pregnancy or pregnant employees. Laxton v. Gap, Inc., 333 F.3d 572, 584 (5th Cir. 2003).

However, the statute requires only that the employer treat pregnancy as it would treat any other temporary incapacity; it does not require favored treatment of pregnancy. Thus, in Armindo v. Padlocker, Inc., 209 F.3d 1319 (11th Cir. 2000), the court held that an employer does not violate the PDA when it discharged the plaintiff for excessive absences, even though her absences were the result of her pregnancy, unless the employer overlooks comparable absences of non-pregnant employees. 209 F.3d at 1320.[16]

In 2007, the EEOC issued an enforcement guidance entitled “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities,” which collected and summarized cases where disparate treatment based on family responsibilities is considered a form of gender discrimination. The issuance of this guidance suggests that these types of claims may become more prevalent.

b. **Specific Defense**

The BFOQ defense applies to claims of sex discrimination. 42 U.S.C. § 2000e-2(e). The employer/defendant has the burden of establishing that the discriminatory qualification is a BFOQ, and the defense applies only in very narrow circumstances. International Union v. Johnson Controls, 499 U.S. 187, 221 (1991); Dothard v. Rawlinson, 433 U.S. 321, 333 (1977). In order to establish a BFOQ, an employer must prove (1) that there is a direct relationship between gender and the employee's ability to perform the job duties, such that substantially all member of the excluded sex cannot perform them; and (2) the required job qualification goes to the "essence" of the business operation. Johnson Controls, 499 U.S. at 202-203.

In the BFOQ context, safety of employees is often dismissed as "romantic paternalism" and not sufficient to establish the BFOQ defense, but safety of others, such as customers, is given greater deference. Weeks v. Southern Bell Telephone & Telegraph Co., 408

[15] 42 U.S.C. § 2000e(k).

[16] The Third Circuit has held that the PDA also covers discrimination on the basis of an abortion. Doe v. C.A.R.S. Protection Plus, Inc. 527 F.3d 358, 364 (3d Cir. 2008). In Doe, an employee’s doctor recommended an abortion due to medical concerns. Id. at 362. The employee was fired five days after the abortion. Id. at 363. The court ruled that abortion discrimination is protected under the Act’s coverage of “pregnancy and related medical conditions” and allowed the case to proceed to trial. Id. at 364.

F.2d 228, 236 (5th Cir. 1969) (rejecting BFOQ for refusal to allow women to work after midnight); Hardin v. Stynchcomb, 691 F.2d 1364, 1373 (11th Cir. 1982) (rejecting BFOQ for exclusion of women for entry level prison guard positions); but see, Dothard v. Rawlinson, 433 U.S. at 335 (upholding refusal to employ women as prison guards in "contact" positions in male, maximum security prison). Where the employer's concern with safety is limited to its refusal to employ protected class members, and does not extend to other areas of its business, a BFOQ claim will be given little credence. EEOC v. Tennessee Wildlife Resources Agency, 859 F.2d 24, 26 (6th Cir. 1988) (ADEA case).

Similarly, in cases where privacy is the asserted reason for the BFOQ, the overriding consideration is whether the protection of privacy interests is essential to the employer's business. In general, courts have applied a three-part test, requiring the employer to show that (1) it has a factual basis for believing employees of a particular sex are necessary in order to protect the privacy interests of the third parties involved; (2) the asserted privacy interest is entitled to protection under the law; and (3) there is no reasonable alternative to protect those privacy interests other than a sex-based policy. EEOC v. Sedita, 816 F. Supp. 1291 (N.D. Ill. 1993).

Customer preferences generally are insufficient to establish a BFOQ for gender discrimination. Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982), cert. dismissed, 460 U.S. 1074 (1983). The EEOC Guidelines state that sex-based policies may not be based on the preference of clients or customers, except in unusual circumstances where necessary for the purposes of authenticity. 29 C.F.R. §§ 1604.2(a)(1)(iii) and (a)(2). Courts have recognized the customer preference BFOQ in two specific situations: (1) where the preference is grounded on a desire for sexual privacy; and (2) where the employer establishes that refusal to accommodate a customer's preference would undermine the employer's ability "to perform the primary functions or service it offers." Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981); Olsen v. Marriott International, 75 F. Supp. 2d 1052 (D. Ariz. 1999) (BFOQ rejected where employer showed that clients preferred female message therapists).

5. Religion

The definition of religion under the statute includes "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). Religion includes any sincerely held religious belief, whether or not a “mainstream” religion. It also covers any set of ethical beliefs, the right not to believe (atheism). Title VII protects not only beliefs, but also the practices when carrying out those beliefs. Young v. Southwestern Savings & Loan Association, 509 F.2d 140 (5th Cir. 1975). Tiano v. Dillard Dep’t Stores, 139 F.3d 679 (9th Cir. 1998). In 2008, the EEOC added to its new on-line Compliance Manual a section on religious discrimination in the workplace.

a. Duty to Accommodate

Unlike other protected classifications under Title VII, religion carries with it a duty to accommodate. The duty to accommodate religious beliefs and practices was first specified in the EEOC's regulations. 31 Fed. Reg. 8370 (1966) (codified at 29 C.F.R. § 1605.1(a)(2) (1967)); 32 Fed. Reg. 10,298 (1967) (codified at 29 C.F.R. §§ 605.1(b) and (c)

(1980)). Congress responded to the EEOC regulation by establishing an affirmative duty to "reasonably accommodate" bu statute. 42 U.S.C. § 2000e(j)). However, an employer does not have a duty to accommodate a personal preference of convenience as opposed to a tenet of the belief itself. See, e.g., Tiano, id.; Heller v. EBB Auto Co., 8 F.3d 1433 (9th Cir. 1993) (attending conversion ceremony of wife was part of bona fide religious belief). This is a highly factual inquiry.

The employer's obligation is to provide reasonable accommodation of religious belief or practice unless the accommodation would cause an undue hardship. Ansonia Board of Education v. Philbrook, 479 U.S. 60, 67 (1986). Where the employer makes no attempt to accommodate, courts are skeptical of employer speculation about any undue hardship which would result. Draper v. US. Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975).

On the other hand, courts are receptive to hardships that the accommodation may impose on other workers, such as in rescheduling of work hours to honor religious practices. United Airlines v. Hardison, 432 U.S. 63 (1977). The expense of the proposed accommodation is also given weight. Weber v. Roadway Express, 199 F.3d 270 (5th Cir. 2000) (trucking company lawfully denied Jehovah's Witness driver's request that he never be assigned runs that included a female partner because his religion prohibited him from traveling overnight with a woman other than his wife, as accommodation would involve more than a de minimis expense).

b. **Exemptions**

There are three exemptions to the religious discrimination prohibition, two statutory, and one Constitutional.

Title VII permits a "religious corporation, association, educational institution or society" to discriminate on the basis of religion if it chooses to limit employment to persons of a particular religion. 42 U.S.C. §2000e-1(a). A similar second statutory exemption is given for schools and colleges which are run by religious organizations or whose curriculum is intended to propagate a particular religion. 42 U.S.C. §2000e-2(e).

The Constitution's protection of religious freedom, as embodied in the First Amendment's establishment and free exercise clauses, prohibits government interference with a church's selection of its clergy. Thus a rejected, discharged or otherwise aggrieved clergy person may not make a claim against the church, even where the discrimination is alleged to be based on a factor other than religion (e.g., race, sex, etc.). Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000). Note that the Constitutional exemption applies not just to claims of religious discrimination, but to all claims, including those based on race, sex, etc.

6. Damages Under Title VII

a. **Injunctive Relief.**

Courts may issue injunctive relief against specific, unlawful employment practices. Courts have also enjoined defendants from discriminating or retaliating against the named plaintiff or others in the same protected class. EEOC v. Gurnee Inn Corp., 914 F.2d 815

(7th Cir. 1990). Courts may reject claims for injunctive relief as either moot or unnecessary, especially when the employer demonstrates that the discrimination has ceased before the entry of judgment or where plaintiffs showed isolated instances of discrimination by individuals no longer employed. Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir.), cert. denied, 498 U.S. 846 (1990). However, the defendant bears a "heavy burden of persuading the court that the challenged conduct [has ceased and] cannot reasonably be expected to start up again." Sheeley v. MRI Radiology Network, 505 F.3d 1173, 1183 (11th Cir. 2007) (ADA public accommodations case).

The scope of an injunction is usually determined by the scope of the unlawful conduct at issue and the injunction normally is limited to enjoining the specific conduct found to violate the law. Mitchell v. Seaboard System Railroad, 883 F.2d 451 (6th Cir. 1989).

"Affirmative action" relief, including race-based preferences and numerical goals, and benefitting non-party protected class members, is permissible only in rare cases, where a history of egregious discrimination against the protected group is proven and recited in detailed factual findings by the court. Sheet Metal Workers Local 28 v. EEOC, 478 U.S. 421 (1986).

b. **Right To A Jury Trial**

Under Title VII, where the plaintiff seeks compensatory or punitive damages, either party may demand a jury trial. 42 U.S.C. § 1981a(c). If the plaintiff seeks only equitable relief, neither party may demand a jury trial. Dickinson v. Ohio Bell Communications, 996 F.2d 1214 (6th Cir. 1993), cert. denied, 511 U.S. 1068 (1994). Back pay, front pay and reinstatement are treated as equitable relief in Title VII jurisprudence. Id.; EEOC v. W&O, Inc., 213 F.3d 600 (11th Cir. 2000).

c. **Monetary Relief**

Back pay is presumptively awardable to a prevailing Title VII plaintiff, and "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). The governing principle, drawn from cases decided under the National Labor Relations Act, is that victims of discrimination are entitled to "make whole" relief. 422 U.S. at 420.

Back pay includes regular pay, overtime pay, shift differentials, commissions, tips, increases and raises which plaintiff would have earned, absent discrimination. Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1562-63 (11th Cir.), cert. denied, 479 U.S. 883 (1986); EEOC v. Liggett & Myers, 690 F.2d 1072, 1077-78 (4th Cir. 1982).

Back pay also includes the value of fringe and other job-related benefits. 42 U.S.C. §2000e-5(g)(1); US. v. Burke, 504 U.S. 229, 238 (1992); Goldstein v. Manhattan Industries, 758 F.2d 1435, 1446 (11th Cir.), cert. denied, 474 U.S. 1005 (1985). Benefits include vacation pay, medical insurance, pension and retirement benefits, savings plan contributions and

profit sharing plan contributions. Weaver v. Casa Gallardo, 922 F.2d 1515 (11th Cir. 1991); Loeb v. Textron, 600 F.2d 1003, 1021 (1st Cir. 1979).

Back pay liability begins at the time the discriminatory act caused economic injury. Croker v. Boeing Co., 23 FEP Cases 1783 (E.D. Pa. 1979). However, it may not begin more than two years prior to the plaintiff's initial filing of a charge with the EEOC. 42 U.S.C. §2000e-5(g)(1).

The right to back pay terminates, if not earlier, on the date the judgment is rendered or on the date the jury returns a verdict. Nord v. U.S. Steel Corp., 758 F.2d 1462, 1472-73 (11th Cir. 1985). Other events that terminate the back pay period include the plaintiff's accepting employment in a job with pay equal to or greater than her job with the defendant. Smith v. American Service Co., 38 FEP Cases 377, 378-79 (N.D. Ga. 1985), aff'd in relevant part, 796 F.2d 1430 (11th Cir. 1986).

The back pay period will not recommence if the plaintiff thereafter voluntarily resigns from such employment, Sennello v. Reserve Life Insurance Co., 667 F. Supp. 1498, 1514, 1518-19 (S.D. Fla. 1987), affirmed, 872 F.2d 393(11th Cir. 1989), or is terminated for cause. Brady v. Thurston Motor Lines, 753 F.2d 1269, 1277-79 (4th Cir. 1985); contra: EEOC v. Stone Container Corp., 748 F. Supp. 11098, 1107 n.1 (W.D.Mo. 1982).

The burden of proof as to the termination date for back pay rests with the employer. Richardson v. Restaurant Marketing Associates, 527 F. Supp. 690, 697 (N.D. Cal. 1981).

The back pay period is limited to those periods in which the employee is "available to and willing to accept substantially similar employment." Miller v. Marsh, 766 F.2d 490, 492 (11th Cir. 1985), quoted in Latham v. Department of Children and Youth Services, 172 F.3d 786, 794 (11th Cir. 1999). Periods of disability that result in inability to work are excluded from the back pay award. Latham, 172 F.3d at 794. The fact that an employee is awarded disability benefits under the Social Security Act is relevant, but not dispositive on the question of whether she is unable to work for purposes of this analysis. Cleveland v. Policy Management Systems Corporation, 526 U.S. 795, 801 (1999).

Plaintiff has a duty to mitigate her lost wages by using "reasonable diligence in finding other suitable employment." EEOC v. Ford Motor Co., 458 U.S. 219, 231 (1982). The employer bears the burden of proof to show that plaintiff failed to mitigate her damages. Cantrell v. Knoxville Community Development, 60 F.3d 1177 (6th Cir. 1995); Sparks v. Griffin, 460 F.2d 433, 443 (5th Cir. 1972) (§1981 case).

Plaintiff's duty to mitigate requires her to make diligent efforts to secure "substantially equivalent employment", and she need not accept employment which is significantly inferior to that which she held with the defendant. Weaver v. Casa Gallardo, 922 F.2d at 1527. She "need not go into another line of work, accept a demotion, or take a demeaning position." EEOC v. Ford Motor Co., 458 U.S. at 231. However, if the plaintiff's work search is unsuccessful for an extended period of time, some courts hold that she must "lower her sights"

and accept non-comparable work in order to meet her obligation to mitigate. Weaver, 922 F.2d at 1527-28.

If plaintiff decides to attend college or otherwise further her education, the back pay period is not terminated, so long as she continues to search for full-time employment. Nord v. U.S. Steel Corp., 758 F.2d 1462, 1472 (11th Cir. 1985).

Where the employee does obtain new employment, Title VII requires that these "interim earnings" from such employment be deducted from the gross back pay to which she would otherwise be entitled. 42 U.S.C. §2000e-5(g)(1). If the interim earnings exceed the gross back pay liability of the defendant, no back pay award is appropriate. EEOC v. New York Times Broadcasting Service, 542 F.2d 356, 359 (2d Cir. 1976). However, as back pay is computed on a quarterly basis, a court must look at each quarter to determine the gross back pay, minus interim earnings. Kendrick v. Jefferson County Board of Education, 13 F.3d 1510 (11th Cir. 1994); Darnell v. Jasper, 730 F.2d 653 (11th Cir. 1984). Therefore, even where interim earnings for the total period exceed gross back pay, courts award back pay for any quarters in which the interim earnings were less than the gross back pay. Darnell, 730 F.2d at 656-57.

Where the employer makes a good faith, unconditional offer to reinstate plaintiff to her former position or a comparable one, plaintiff's rejection of the offer terminates the back pay period. EEOC v. Ford Motor Co., 458 U.S. at 238-39. To be unconditional, the offer must not require plaintiff to waive any of her legal claims, but it need not include retro-active seniority or back pay. 458 U.S. at 241.

The back pay period is also capped if the employer comes forward with "after-acquired evidence" of the employee's misconduct during her employment with it. McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995). In order to terminate the back pay period, the misconduct must be "of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." 513 U.S. at 362. Such misconduct is often asserted by the employer based on alleged unauthorized copying or removal of employer records, Id., or "resume fraud". Where the prerequisites of McKennon are met, the back pay period is terminated as of the date the after-acquired evidence was discovered. Id.

Awards of back pay are not only taxable, but are subject to employer withholding for federal income tax, federal unemployment (FUTA) tax, and Social Security - Medicare (FICA) tax. 26 U.S.C. §§3301-22, 3101-28 and 3401-06; but see, Churchill v. Star Enterprises, 3 F. Supp. 2d 622, 624 (E.D.Pa. 1998) (back pay award not subject to withholding because it is not payment "for services performed by the employee"). Some courts allow for "gross-ups" to enhance the back pay award in order to compensate for the higher rate of tax on a lump sum award than would have been imposed if the wages had been earned in due course. Sears v. Atcheson, Topeka & Santa Fe Railway, 749 F.2d 1451, 1456 (10th Cir. 1984). However, the general rule is that gross-ups are not awarded. Dashnaw v. Pena, 12 F.3d 1112, 1116 (D.C. Cir. 1994).

Prejudgment interest is "an element of complete compensation" and is awardable as part of the back pay remedy "as a normal incident of suits against private parties,"

including the Postal Service. Loeffler v. Frank, 486 U.S. 549, 557-58 (1988). In McKinley v. Metal Container Corp., 854 F.2d 448, 453-54 (11th Cir. 1988), the Eleventh Circuit confirmed that prejudgment interest on a back pay award is to be calculated based on the IRS prime rates, "calculated in accordance with 28 U.S.C. § 1961." See also, EEOC v. Guardian Pools, 828 F.2d 1507 (11th Cir. 1987).

d. **Reinstatement**

Title VII vests courts with equitable discretion to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees ... or any other equitable relief as the court deems appropriate," in order to "fashion the most complete relief possible" so as to "make the victims of unlawful discrimination whole" 42 U.S.C. §2000e-5(g). Hiring or reinstatement of employees, with full retro-active seniority, is ordinarily "necessary to achieve the `make-whole' purposes of the Act." Franks v. Bowman Transportation Co., 424 U.S. 747, 766 (1976).

Individual injunctive relief may include reinstatement, hiring, transfer, promotion, retroactive seniority, tenure and removal of adverse disciplinary records. Id; Ingram v. Missouri Pacific Railroad, 897 F.2d 1450, 1456-57 (8th Cir. 1990); In re: Pan Am World Airways, 905 F.2d 1457, 1464-65 (11th Cir. 1990); Brown v. Trustees of Boston University, 891 F.2d 337, 359-61 (1st Cir. 1989).

Where some intervening, non-discriminatory event would have ended plaintiff's employment, reinstatement is not appropriate. Thus the employer's discovery of after-acquired evidence of misconduct which would have prompted plaintiffs discharge is a bar to reinstatement. McKennon, 513 U.S. at 362. Similarly, a non-discriminatory reduction in force or termination of particular operations by the employer generally makes reinstatement inappropriate. Neufeld v. Searle Laboratories, 884 F.2d 335, 341 (8th Cir. 1989).

Courts also refuse to order reinstatement where there is an unusual degree of discord and antagonism between the parties, where there is not an available position, or where reinstatement would cause other employees to be displaced. Goldstein v. Manhattan Industries, 758 F.2d 1435 (11th Cir.), cert. denied, 474 U.S. 1005 (1985); Woodhouse v. Magnolia Hospital, 92 F.3d 248 (5th Cir. 1996). However, in these circumstances, an award of front pay may be made as a substitute for reinstatement. Id. Front pay is also available when plaintiff is unable to return to her employment with defendant because of psychological injury inflicted by defendant's acts of discrimination. EEOC v. Gurnee Inn Corp., 914 F.2d 815, 818 n. 4 (7th Cir. 1990); Pollard v. E.I. DuPont de Nemours & Co., 532 U.S. 843, 853 (2001) (dictum).

e. **Front Pay**

"Front pay" is occasionally ordered in lieu of reinstatement where reinstatement is impracticable, as set out above. It represents compensation the employee would have earned, had she been reinstated. It is not open ended, but is based on wages plaintiff would have earned over a specified period of time.

Where a long service employee has been discharged because of discrimination, thereby defeating her intention to continue in the job until retirement age, some

courts award front pay through the likely date of retirement. Blum v. Witco Chemical Corp., 829 F.2d 367, 375-76 (3rd Cir. 1987) (front pay of 8 years); Pierce v. Atchison, Topeka & Santa Fe Railway, 65 F.3d 562, 574 (7th Cir. 1995) (front pay of 10 years); Hukkanen v. International Union of Operating Engineers, 3 F.3d 281, 62 FEP 1125, 1128 (8th Cir. 1993) (front pay of 10 years); Padilla v. Metro-North Commuter Railroad, 92 F.3d 117, 72 FEP 1748, 1755 (2nd Cir. 1996) (front pay of 25 years).

However, because of the "potential for windfall" to plaintiff, Duke v. Uniroyal, Inc., 928 F.2d 1413, 1424 (4th Cir.), cert. denied, 502 U.S. 963 (1991), front pay is often limited to a much shorter period of time. Dominic v. Consolidated Edison Co. of New York, 822 F.2d 1249, 1258 (2d Cir. 1987) (awarding two years' front pay because two years was a reasonable amount of time for the plaintiff to find comparable employment); United Paperworkers v. Champion International Corp., 81 F.3d 798, 805 (8th Cir. 1996) (disapproving award of 24 years' front pay, because front pay until retirement ignores the plaintiff's duty to mitigate damages and the court's obligation to estimate the financial impact of future mitigation).

Front pay is a "special remedy, warranted only by egregious circumstances." Duke, 928 F.2d at 1424. A plaintiff is not entitled to front pay rather than reinstatement merely because she prefers it. Blim v. Western Electric Co., 731 F.2d 1473 (10th Cir.), cert. denied, 469 U.S. 874 (1984).

Like back pay, front pay under Title VII is regarded as an equitable remedy, and is for the court to award, not the jury. EEOC v. W&O, Inc., 213 F.3d 600 (11th Cir. 2000); McCue v. State of Kansas, 165 F.3d 784, 791-92 (10th Cir. 1999).

f. **Compensatory Damages**

The Civil Rights Act of 1991 amended Title VII to provide for awards of compensatory damages in cases of intentional discrimination, i.e. disparate treatment claims, but not disparate impact claims. 42 U.S.C. §§ 1981a(a)(1) & (2), (b)(3). Compensatory damages are available for both pecuniary damages such as consequential economic damages and non-pecuniary damages such as "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses." 42 U.S.C. §§ 1981a(b)(3); Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985); Canada v. Boyd Group, 809 F. Supp. 771, 779 (D. Nev. 1992).

In order to recover damages for emotional distress, a plaintiff must show the nature and extent of the emotional harm that has been caused by the alleged violation of Title VII. Price v. City of Charlotte, 93 F.3d 1241, 1254 (4th Cir. 1996), cert. denied, 520 U.S. 1116 (1997). A plaintiff may accomplish this task by presenting evidence of sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown. Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss or headaches. Id. at 939, quoting EEOC Policy Guidance No. 915.002 § II(A)(2), at 10 (July 14, 1992); Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1121 (3rd Cir. 1988), cert. denied, 492 U.S. 905 (1989).

Several courts have held that a plaintiff's own testimony, without corroboration from other documentation or testimony, is insufficient to support an award of more than nominal damages. Price, 93 F.3d at 1255-56. Other courts have refused to award compensatory damages because the plaintiff did not offer medical evidence regarding his or her non-economic injuries and because the plaintiff was able to continue working in her own field of work. Spence v. Board of Education, 806 F.2d 1198 (3d Cir. 1986). However, in Bogle v. McClure, 332 F.3d 1347, 1358-59 (11th Cir. 2003), the Eleventh Circuit affirmed an award of $500,000 in emotional distress to each of several plaintiffs, where the claim was supported only by the testimony of each plaintiff as to her own injury, and no medical evidence was offered. Although Bogle was a Section 1983 employment discrimination case and not a Title VII case (hence the award in excess of the Title VII caps, described below), the decision is written in general terms and there is nothing to suggest that the standards of proof for mental/emotional distress will not apply in Title VII cases.

g. **Punitive Damages**

The 1991 Civil Rights Act also amended Title VII to provide for awards of punitive damages in cases of intentional discrimination, i.e., disparate treatment claims and mixed motive cases, but not disparate impact claims. Punitive damages are available if the plaintiff proves that the defendant engaged in a discriminatory practice or practices "with malice or with reckless indifference to the federally protected rights" of the plaintiff. 42 U.S.C. § 1981a(b)(1).

In Kolstad v. American Dental Association, 527 U.S. 526 (1999), the Court held that an employer's conduct did not have to be egregious to satisfy the 1991 Civil Rights Act's punitive damages requirement. The Court noted that Title VII limits awards of compensatory and punitive damages to cases of "intentional discrimination," but limits the availability of punitive damages awards to instances of "malice" or "reckless indifference." Id. The Court stated further that the terms "malice" and "reckless indifference" do not pertain to the employer's awareness that it is engaging in discrimination, but to its knowledge that it may be acting in violation of federal law. See Smith v. Wade, 461 U.S. 30, 37 (1983).

The second holding of Kolstad was that a heightened standard of agency applies where punitive damages are sought under Title VII. Thus the plaintiff must show that a high official of the employer was involved in or aware of the alleged discrimination. In addition, in order to promote the policy of Title VII in favor of promoting voluntary efforts to eradicate discrimination, acts of such official which are contrary to the employer's good faith efforts to enforce its anti-discrimination policy will not result in punitive damages. 527 U.S. at 544-46.

In EEOC v. Wal-Mart Stores, 187 F.3d 1241 (10th Cir. 1999), the court held that the employer was liable for punitive damages despite a written policy against discrimination. The court found that the employer did not make a good-faith effort to educate employees about the ADA's prohibitions and one supervisor was not aware of the requirement to make reasonable accommodations until three years after the plaintiff's termination and the personnel manager received no training in employment discrimination.

In Dudley v. Wal-Mart Stores, 166 F.3d 1317 (11th Cir. 1999), the court held that punitive damages should not have been assessed for a discriminatory demotion of an employee by a low level manager at one store. There was no evidence that higher officials had knowledge of the discriminatory acts by two individuals at one of its 2,000 locations. To be awarded punitive damages, the plaintiff would have to show that the discriminating party was high up in the corporate hierarchy or that a person in a position of authority was aware of the discrimination.

Punitive damages are subject to Constitutional limitations, and awards higher than nine times the compensatory damages will rarely be permissible. State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) ("bad faith" insurance case).

h. **Caps On Damages**

The 1991 Civil Rights Act limited the amounts of compensatory and punitive damages that can be awarded under Title VII. The caps apply to amounts awarded under 42 U.S.0 §§ 1981 a(a)(1) & (b)(1)&(3), specifically on the sum of punitive damages and compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." The cap does not apply to traditional Title VII relief such as wages or benefits, 42 U.S.0 § 1981a(b)(2), and is specifically held not to apply to back pay or front pay. Pollard v. E.I. DuPont de Nemours & Co., 532 U.S. 843, 853-54 (2001).

The limitation on the amount of damages is based on the size (number of employees) of the employer. The limitations are as follows:

15 to 100 employees	$50,000
101 to 200 employees	$100,000
201 to 500 employees	$200,000
501 employees or more	$300,000

The caps apply to the sum of the compensatory and punitive damages awards to an individual plaintiff, not to each award separately, or to separate counts. Smith v. Chicago School Reform Board, 165 F.3d 1142 (7th Cir. 1999); Hudson v. Reno, 130 F.2d 1193 (6th Cir. 1997). The caps apply separately to each claimant, not to the total judgment in a lawsuit. Thus in multi-plaintiff suits or cases in which the EEOC is proceeding on behalf of a number of employees, each claimant may recover up to the cap. EEOC v. W&O, Inc., 213 F.3d 600 (11th Cir. 2000).

i. **Attorneys' Fees And Costs**

Title VII, as amended, provides for awards of attorneys' fees to the prevailing party in Title VII and Americans with Disability Act cases. 42 U.S.C. §2000e-5(k).

(1) Prevailing Plaintiff's Entitlement to Attorneys' Fees

In Newman v. Piggy Park Enterprises, 390 U.S. 400 (1968) and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court established the principle that attorneys' fees are presumptively awardable to Title VII plaintiffs; absent special circumstances, it is an abuse of discretion for the court not to award a prevailing plaintiff attorneys' fees. Johnson v. State of Mississippi, 606 F.3d 635 (5th Cir. 1979).

To qualify for attorneys' fees, a plaintiff must be a "prevailing party." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Although Hensley was brought under 42 U.S.C. §1983, and fees were sought under 42 U.S.C. § 1988, the principles established under than statute also apply to Title VII attorney fee cases, and vice-versa. Hensley, 461 U.S. at 433 n.7; Brown v. Culpepper, 559 F.2d 274, 277 (5th Cir. 1977).

Plaintiff is a prevailing party if she succeeds on any significant issue; that is, she resolves a dispute which "changes the legal relationship between [her]self and the defendant". Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1988). Put another way, plaintiff is a prevailing party if she obtained "some of the benefit" she sought by filing suit. Hensley, 461 U.S. at 433. However, plaintiff must have obtained the benefit by judgment or court-approved consent decree, and not by a private settlement, in order to be a prevailing party. Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 604-05 (2001).

In New York Gaslight Club v. Carey, 447 U.S. 54, 55 (1980), the Court held that a an employee may also recover attorneys' fees for legal services performed in prosecuting her Title VII claim before state or federal administrative agencies. This principle was limited in North Carolina Department of Transportation v. Crest Street Community Council, 479 U.S. 6, 15 (1986) to cases in which litigation was subsequently filed in court. Chris v. Tenet, 221 F.3d 648 (4th Cir.), cert. denied, 121 S. Ct. 1189 (2001).

(2) Prevailing Defendants' Entitlement to Attorneys' Fees

Prevailing defendants are entitled to fees only "upon a finding that the plaintiffs action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); Federation of Flight Attendants v. Zipes, 491 U.S. 754, 759-60 (1989) (intervenor union challenging class action settlement is in position of plaintiff for fee award purposes). Even if the claim was not frivolous, unreasonable or without foundation when brought, defendant can recover fees where the claim later became so, and plaintiff continued to litigate the claim. Christiansburg, 434 U.S. at 422. On the other hand, defendant must show more than just that the claim was ultimately unsuccessful. Sullivan v. School Board of Pinellas County, 773 F.2d 1182, 1189 (11th Cir. 1985).

In analyzing a Title VII defendant's claim for attorneys' fees, the Eleventh Circuit looks at three factors: (1) whether plaintiff made out a prima facie case; (2) whether defendant offered to settle; and (3) whether the case was dismissed prior to trial. Sullivan, 773 F.2d at 1189. The Sullivan factors are "general guidelines only, not hard and fast rules." Cordoba

& Dempsey v. Dillards, 419 F.3d 1169, 1177 (11th Cir. 2005). Generally, in cases where fees have been awarded to a defendant, "plaintiffs have typically failed to introduce any evidence to support their claims." Cordoba, 419 F.3d at 1176 (citation and internal quotation marks omitted).

A defendant can waive some of all of its fees by failing to mitigate, such as by failing to move to dismiss plaintiff's complaint, Laffler v. Meer, 936 F.2d 981, 987 (7th Cir. 1991), or by failing to move for summary judgment at the earliest opportunity. Cordoba, 419 F.3d at 1189.

(3) Computation of a Reasonable Fee

The first step is to calculate the "lodestar" by multiplying the attorney's reasonable hourly rate times the number of hours the attorney reasonably expended on the litigation. Hensley, 461 U.S. 424, 433; Blanchard v. Bergeron, 489 U.S. 87, 94 (1989). The lodestar is the presumptively reasonable attorneys' fee award, but maybe adjusted based on the critical factor of the "results obtained". Hensley, 461 U.S. at 436.

Where plaintiff achieves an excellent result, fees are awarded for all hours reasonably expended. Hensley, 461 U.S. at 435; Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1302 (11th Cir. 1988).

Adjustment upward for "exceptional" results is extremely rare under the federal fee-shifting statutes, as former "enhancement" factors such as quality of representation, novelty and complexity of issues, and skill and experience of counsel are now subsumed in the loadstar calculation. Blum v. Stenson, 476 U.S. 886, 898-900 (1984).

Adjustment downward for partial or limited success involves reduction of fees to an amount that is reasonable in light of the results obtained. Hensley, 461 U.S. at 436-37. Downward adjustment is not required where plaintiff's claims were based on common core of facts and related legal theories, and she did not prevail on each; where plaintiff did not prevail on claims pled as alternative grounds for the same result; or where plaintiff did not obtain all the relief requested, so long as the results obtained in proportion to the scope of the litigation were excellent. Hensley, 461 U.S. at 435 and n.11.

When downward adjustment is warranted, a court may chose one of two methods to compute the reduction: (1) it may attempt to identify hours spent on unsuccessful claims, and exclude fees for those hours, or (2) simply reduce fee award by some proportion. Hensley, 461 U.S. at 435, 440; Norman, 836 F.2d at 1302. However, it may not reduce fees by ratio of successful claims to unsuccessful claims. Hensley, 461 U.S. at 435 n.11; Norman, 836 F.2d at 1302.

Because of the time value of money, courts should take into account the delay in payment when awarding attorneys' fees. Missouri v. Jenkins, 491 U.S. 274, 283-284 (1989) ("An adjustment for delay in payment is ... an appropriate factor in the determination of what constitutes a reasonable attorney's fee"). There are two methods to account for the delay in payment: either (1) apply current hourly rates or (2) use historical hourly rates and calculate interest separately. Id.

Where the opposing party claims that the fees sought are excessive, a court may compare it to fee awards in similar cases. Thorne v. Welk Investment, 197 F.3d 1205 (8th Cir. 1999).

The fee applicant bears the burden of establishing entitlement to fees through contemporaneous documentation of her hours and rates. Norman, 836 F.2d at 1303 (11th Cir. 1988). That burden includes "supplying the court with specific and detailed evidence from which the court can determine the reasonable hourly rate. Further, fee counsel should have maintained records to show the time spent on the different claims, and the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity.... A well-prepared fee petition also would include a summary, grouping the time entries by the nature of the activity or stage of the case." Id. (citations omitted)." ACLU of Georgia v. Barnes, 168 F.3d 423 (11th Cir. 1999). "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." Hensley, 461 U.S. at 433.

On review, the appellate court may determine for itself, once it concludes that the district court has abused its discretion, how many hours were reasonably spent in litigation. Barnes, 168 F.3d at 431-32. This approach is preferable to remand so that a request for attorneys' fees does not "result in 'a second major litigation.' " 168 F.3d at 432, quoting, Hensley, 461 U.S. at 437.

When faced with fee applications that are not well-prepared, the court "is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value." Therefore, where documentation or testimonial support is lacking, the court may make the award on its own experience. Norman, 836 F.2d at 1303. Moreover, a trial court's order on attorneys' fees must allow meaningful appellate review. The trial court should articulate principled reasons for its decisions and show some calculations. If the court disallows hours, it must explain which hours are disallowed and show why an award of those hours would be improper. Id. at 1304.

(a) Reasonable Hourly Rate

The reasonable hourly rate is defined as the "prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Loranger v. Stierheim, 10 F.3d 776, 781 (11th Cir. 1994). Thus in ACLU v. Barnes, 168 F.3d at 437, the Eleventh Circuit refused to allow a prevailing plaintiff to recover at New York City rates, as opposed to local Atlanta rates, for the work of their New York-based lawyers.

Work of law clerks and paralegals may also be compensated in a fee award at the prevailing market rates for those positions. Missouri v. Jenkins, 491 U.S. 274, 288 (1989).

The attorney's reasonable hourly rate may by shown by the rate awarded in previous fee petitions, or by the rate the attorney actual charges to hourly clients.

Where they are different, the rate actually charged to hourly clients is considered more probative. Dillard v. City of Greensboro, 213 F.3d 1347, 1354-55 (11th Cir. 2000).

In determining the reasonable hourly rate, the court should consider not just the attorney's years of experience, but her experience in the litigation such as the case before it. Duckworth, 97 F.3d at 1397 (court reduced the attorney's requested hourly rate to $150 per hour because, although the attorney had ten years of experience in products liability and commercial litigation, it was his first § 1983 excessive force case.)

(b) Hours Reasonably Expended on the Litigation

Fee applicants, like lawyers who bill their clients on an hourly basis, are obligated to exercise "billing judgment" in identifying the hours reasonably expended. Thus, the "[h]ours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." Hensley, 461 U.S. at 434 (internal quotation omitted). Billing judgment "means that a lawyer may not be compensated for hours spent on activities for which he would not bill a client of means who is seriously intent on vindicating similar rights, recognizing that in the private sector the economically rational person engages in some cost benefit analysis." Norman, 836 F.2d at 1301. If the fee applicant does not exercise billing judgment, the fee application may be reduced by a percentage. Walker v. US. Department of Housing and Urban Development, 99 F.3d 761, 770 (5th Cir. 1996).

Specific hours may be subject to challenge on the ground that they were spent only as a result of plaintiff's mistakes, and requiring defendants to pay to correct errors committed by a plaintiff's attorney does not serve the underlying purpose of fee-shifting statutes because those costs were not caused by the defendant's discrimination. Eddleman v. Switchcraft, 965 F.2d 422, 425 (7th Cir. 1992) (reducing hours claimed for "wheel-spinning" and time wasted repairing attorney mistakes).

Courts have also recognized that cases may be overstaffed and that hours representing attorney overstaffing should be excluded from fee applications. Hensley, 461 U.S. at 433; ACLU of Georgia, 168 F.3d at 434 (reduction for lawyer overstaffing); Cush-Crawford v. Adchem Corp., 94 F. Supp. 2d 294, 302 (E.D.N.Y. 2000) (holding that in a single plaintiff sexual harassment trial three attorneys was excessive, and allowing fees for only one partner and one associate).

For several years, the rule in the Eleventh Circuit was that attorney's fee awards were taxable to the attorney, but not to the client. Foster v. United States of America, 249 F.3d 1275 (11th Cir. 2001). However, in Commissioner v. Banks, 125 S.Ct. 826, 832 (2005), the Supreme Court held that where a litigant's recovery consists of taxable income, the portion of the recovery which represents a contingent attorney fee is taxable to the litigant. In light of the Civil Rights Attorney's Fees Award Act of 2004, 26 U.S.C. §62(a)(19), the litigant may now deduct from income any portion of the recovery which represents attorney fees actually paid.

j. **Costs**

With the exception of routine office overhead expenses normally absorbed by the practicing attorney, all reasonable expenses incurred during Title VII litigation may be taxed as costs. Johnson v. University Col. of Univ. of Alabama, 706 F.2d 1205, 1209 (11th Cir. 1983), cert. denied, 464 U.S. 994, 104 S.Ct. 489 (1983).

Generally, a prevailing party may recover the costs of photocopies of documents, pleadings, discovery and exhibits tendered to opposing counsel or submitted to the court. Grady v. Bunz Packaging Supply Co., 161 F.R.D. 477, 479 (N.D. Ga. 1995); Desisto College, Inc. v. Town of Howey-In-The-Hills, 718 F. Supp. 906, 913 (M.D. Fla. 1989), aff'd, 914 F.2d 267 (11th Cir. 1990). In contrast, the cost of copies made for the convenience of counsel, for case preparation, for legal research or for the prevailing party's records is not recoverable. Grady, 161 F.R.D. at 479; American Automotive Accessories v. Fishman, 991 F. Supp. 995, 997 (N.D. Ill. 1998) (denying recovery of photocopies of case law and cost of copies generated for the prevailing party's files). Likewise, a prevailing party cannot recover the costs of copies of original documents, which are in her possession.

Courts have routinely held that facsimile charges are not a recoverable cost. Desisto, 718 F. Supp. at 914; Tang How v. Edward J. Gerrits, 756 F. Supp. 1540, 1545 (S.D. Fla. 1991) (cost of facsimile not recoverable), affirmed, 961 F.2d 174 (11th Cir. 1992); Avirgan v. Hull, 705 F. Supp. 1544, 1547 (S.D. Fla. 1989) (disallowing telecopy costs), affirmed, 932 F.2d 1572 (11th Cir. 1991); Cody, 911 F. Supp. at 6 (facsimiles are normally associated with the practice of law, are commonly referred to as "overhead" costs and are not recoverable).

Parking and mileage costs are not recoverable. Pye v. Jarco Security, 60 Fair Empl. Prac. Cas. (BNA) 189, 191 (E.D. Mich. 1992) (cost of mileage and parking not recoverable); Avirgan, 705 F. Supp. at 1544-45 (denying parking and mileage); Walters v. President and Fellows of Harvard College, 692 F. Supp. 1440, 1442 (D. Mass. 1988) (disallowing traveling and parking expenses).

Title VII differs from other federal fee-shifting statutes in its treatment of costs in one important respect — the recovery of expert witness fees. Although expert witness fees are generally not recoverable under federal fee-shifting statutes, West Virginia University Hospitals v. Casey, 499 U.S. 83, 86-87 (1991), the Civil Rights Act of 1991 amended Title VII to allow for recovery of expert fees. 42 U.S.C. §2000e-5(k).

D. Equal Pay Act of 1963 ("Equal Pay Act")

The Equal Pay Act mandates equal pay (including fringe benefits), without regard to sex, for work performed in the same establishment under similar work conditions for jobs requiring equal skill, effort, and responsibility. EEOC v. J.C. Penney Co., 843 F.2d 249, 252 (6th Cir. 1988) (group health insurance). The Equal Pay Act therefore prohibits employers from paying employees of one sex at a rate lower than employees of the opposite sex, if they work the same jobs under similar conditions and have equal skills and responsibilities. The EPA provides as follows:

> No employer having employees subject of any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which aer performed under similar working conditions.

29 U.S.C. §206(d)(1) (emphasis added). Many of the details of EPA coverage are filled in by the EPA regulations at 29 CFR, Part 1620.

1. Coverage

Since the Equal Pay Act is part of the Fair Labor Standards Act ("FLSA"), it applies only to employers who are covered by the FLSA. Such employers must have gross annual sales of at least $500,000, and have two or more employees engaged in either interstate commerce or in handling, selling or otherwise working on goods or materials moved in or produced for interstate commerce.[17] The EEOC enforces the Equal Pay Act. Like the FLSA, the EPA dopes not require the exhaustion of administrative remedies prior to the filing of a civil action. County of Washington v. Gunther, 452 U.S. 161, 175 n. 14 (1981).

2. Damages/Remedies

A plaintiff may seek lost wages and liquidated damages under the EPA, as in any other FLSA claim. Id. As in FLSA cases generally, back pay is limited to the two-year period prior to the filing of the complaint, extended to three years for willful violations. 29 U.S.C. §255(a).

To avoid liquidated damages, an employer must show that it acted in good faith and had reasonable grounds for believing it was in compliance with the EPA.

The statute specifically prohibits an employer from reducing the wage rate of an employee in order to achieve compliance; for example, it may not reduce the wage rate of male employees in order to equalize wage rates. 29 U.S.C. §206(d)(1).

Punitive damages are only available in EPA retaliation claims.

Prevailing plaintiffs are also entitled to recover reasonable attorneys' fees and costs.

3. Specific Defenses

The EPA provides several specific affirmative defenses that are discussed in the proving discrimination section below.

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[17] 29 U.S.C. §§ 203(s).

E. Age Discrimination in Employment Act of 1967 ("ADEA")

The ADEA is part of the Fair Labor Standards Act ("FLSA"), and is subject to its procedural requirements. ADEA claims are analyzed under the same burden-shifting framework as Title VII claims, but vary significantly from Title VII in certain respects, including prohibited conduct and damages.

1. Coverage

The ADEA prohibits discrimination in employment against individuals who are age 40 and older.[18] The ADEA prohibits discrimination in hiring, firing, compensation, and all terms, conditions, and privileges of employment. In addition, the ADEA prohibits discrimination in the administration of benefit plans. The ADEA applies to employers with 20 or more employees.[19]

The ADEA initially applied only to private employers but was amended in 1974 to include the states. However, in Kimel v. Florida Bd of Regents, 528 U.S. 62 (2000), the Supreme Court ruled that Congress exceeded its authority when it attempted to abrogate the states' Eleventh Amendment immunity as to ADEA claims. As a result, the states are not subject to suit under the ADEA. This ruling does not affect the applicability of the ADEA to political subdivisions of the state (county and municipal governments), which do not enjoy Eleventh Amendment immunity.

2. Exemptions

The ADEA does contain certain exemptions from coverage, including "bona fide executives or high policymakers." 29 U.S.C. §631(a). Under this exemption, employees who have attained 65 years of age and held either of these positions for the preceding two-year period may be subjected to involuntary retirement, so long as they are entitled to an immediate non-forfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan which equals (in the aggregate) at least $44,000.00. Id.

The ADEA also permits state and local governments to implement mandatory retirement ages for firefighters and law enforcement officers. 29 U.S.C. §623(6). Where a mandatory retirement age for such positions is establishes through state or local law, the public employer may deny employment to applicants or terminate current employees based upon their age. Id. However, the scope of this exemption depends upon the effective date of the state or local law which establishes the retirement age.[20]

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[18] As enacted, the ADEA only protected individuals between 40 and 64 years of age. This portion of the Act was amended twice, first to extend the upper limit to 69, then again to remove the upper limit. As a result, the Act now protects any individual who is at least 40 years of age. 29 U.S.C. §631(a).

[19] This also includes regular, part-time employees.

[20] Laws in effect on March 3, 1983 or enacted after September 30, 1996: Laws falling within either period may establish any maximum age for hiring. As to retirement age, laws in effect as of March 3, 1983 may establish any such age, while those enacted after September 30, 1996 may not establish a retirement age lower than 55.

(continued...)

Litigation is currently pending regarding mandatory retirement ages for airline pilots, particularly following the passage of the Fair Treatment for Experienced Pilots Act in December 2007, which allows both pilots on a domestic flight to be up to age 65.

3. Specific Defenses

The ADEA expressly provides for a BFOQ defense. 29 U.S.C. § 623(f)(1). The ADEA also contains two other statutory defenses not found under Title VII:

- Seniority System. The ADEA permits covered entities to observe the terms of a bona fide seniority system, so long as it (a) does not require or permit involuntary retirement of protected individuals, and (b) is not otherwise intended to evade the purposes of the Act. 29 U.S.C. § 623(f)(2)(A).

- Employee Benefit Plan. The ADEA also permits covered entities to observe the terms of a bona fide employee benefit plan where the plan (a) provides that payments made or costs incurred on behalf of older workers are no less than those made or incurred on behalf of younger workers, or (b) is a voluntary early retirement incentive plan "consistent with the relevant purpose or purposes of this chapter." 29 U.S.C. § 623(f)(2)(B). Note that covered entities may not rely upon such plans to deny employment to, or force retirement upon, protected individuals due to their age. Id.

Covered entities asserting the above-referenced defenses bear the burden of proof. 29 U.S.C. § 623(f)(2).

4. Damages/Remedies

The ADEA incorporates the FLSA's remedial scheme. See 29 U.S.C. §626(b). In particular, the ADEA provides a back pay award for lost wages attributable to the discrimination. While the ADEA does not expressly reference benefits, federal courts routinely award the value of lost pension, insurance benefits, profit sharing and other benefits as part of "lost wages." See, e.g., Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1446 (11th Cir.), cert. denied, 474 U.S. 1005 (1985). As with Title VII, an unconditional offer of reinstatement serves to cut off damages from the point of the offer. See Ford Motor Co. v. EEOC, 458 U.S. 219 (1982).

If a prevailing plaintiff provides a "willful" violation of the ADEA, he or she is also entitled to liquidated damages. 29 U.S.C. §626(b). A violation of the ADEA is considered willful if the employer "either knew or showed reckless disregard for the matter of whether its

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(...continued)

Laws in effect after March 3, 1983 and enacted before October 1, 1996: Any such law may be no more restrictive than one in place as of March 3, 1983.

Example – In March 1999, individual is terminated from her position as a firefighter upon reaching the retirement age of 55, pursuant to a local ordinance passed in 1990. Because the law was not in effect on March 3, 1983 or enacted after September 30, 1996 the termination does not fall within the exemption. Id.; EEOC Compliance Manual, no. 915.003, sec. 2-III(A)(6)(b).

conduct was prohibited by the ADEA." Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985). An employment decision need not be based upon a formal, facially discriminatory policy to be deemed willful – rather, ad hoc, informal, individualized decisions may also support such a finding. Once the individual demonstrates a willful violation, he or she need not make any additional showing that the conduct as outrageous, provide direct evidence of the employer's motivation or prove that age was the predominant factor in the challenged decision. Id.

Liquidated damages are awarded in an amount equal to the net back pay award (after mitigation), and in the Eleventh Circuit, do not preclude an award of prejudgment interest. Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1102 (11th Cir. 1987). Front pay is not included in the calculation of liquidated damages. Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1340 (11th Cir. 1999).

Reinstatement is an equitable remedy available under the ADEA. 29 U.S.C. §626(b). While reinstatement is the preferred remedy, when reinstatement is not feasible, front pay may be awarded as an alternative to compensate the individual for future lost compensation.

Injunctive relief is also available against covered entities under the ADEA. Such injunctions might restrict against terminating severance pay, see EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987), or protect an individual from further "widespread continuous antagonism" by the employer.

The ADEA does not provide for awards of compensatory or punitive damages. See, e.g., Maschka v. Genuine Parts Co., 122 F.3d 566 (8th Cir. 1997) (compensatory); Haskell v. Kama Corp., 743 F.2d 113 (2nd Cir. 1984) (compensatory); Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir. 1982) (punitive), cert. denied, 459 U.S. 1039; Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806 (8th Cir. 1982) (punitive).

The ADEA incorporates the provisions of the FLSA providing for an award of attorneys' fees and costs to a prevailing individual. 29 U.S.C. §626(b).

5. Involuntary Retirement

Consistent with its prohibition against age-related discrimination, the ADEA generally prohibits involuntary retirement based on age. See 29 U.S.C. § 623(f)(2)(A) (providing that no seniority system may require or permit involuntary retirement based on age); 29 U.S.C. § 623(f)(2) (providing that no employee benefit plan shall require or permit involuntary retirement based on age). This restriction remains subject to the exemptions for firefighters and law enforcement officers, and for bona fide executives and high policymakers discussed above.

6. Employee Benefits

The Older Workers Benefit Protection Act ("OWBPA"), enacted in 1990, amended the ADEA by expressly extending its scope to cover employee benefits.

Specifically, the OWBPA prohibits age discrimination in employee benefits, except where age-based reductions in employee benefit plans are justified by significant cost considerations. This provision overturned Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989), which held that the ADEA does not apply to employee benefits, except in rare circumstances.

The OWBPA implements an "equal benefit or equal cost" rule for employee benefits. Under this rule, employers must either (a) provide older workers with benefits at least equal to those provided to younger workers, or (b) incur at least the same costs in providing lesser benefits to older workers. 29 U.S.C. § 623(f)(2)(B)(i). Stated differently, employers may reduce benefits based upon age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers. Id.

On December 26, 2007, the EEOC adopted a final rule permitting employers to adopt Medicare "bridge plans" and Medicare "wrap-around plans", and generally to take into consideration an employee's eligibility for Medicare benefits, and in so doing to provide a correspondingly lower level of benefits for such employees, based on their age. 72 F.R. 72938 (12-26-7).

On June 19, 2008, the Supreme Court, in Kentucky Retirement Sys. v. EEOC, 128 S. Ct. 2361, 2364 (2008), ruled that a Kentucky state pension plan that provides more generous benefits to employees who become disabled before reaching the plan's normal retirement age than to employees who become disabled after reaching normal retirement age did not violate the ADEA. The U.S. Equal Employment Opportunity Commission (EEOC) had argued that the Kentucky plan discriminated against a 61-year-old former sheriff's office employee by calculating his disability pension benefits differently than it did for younger employees. Id. at 2365. Relying upon its Hazen Paper Co. v. Biggins, 507 U.S. 604, (1993), the Court determined that the issue was whether the employer, in creating a pension benefit disparity, was "actually motivated" by age bias. Id. at 2367. The Court found that the Kentucky plan is not motivated by age bias because age "factors into the disability calculation only because the normal retirement rules themselves permissibly include age as a consideration." Id. at 2368-2369. The disparity "turns upon pension eligibility and nothing more." Id. at 2369.

7. Waiver Of Rights

In addition to extending the ADEA's scope to cover employee benefits, the OWBPA also set minimum standards for evaluating the validity of waivers pertaining to ADEA claims. To be effective, any such waiver must be "knowing and voluntary." 29 U.S.C. § 626(f)(1); 29 C.F.R. § 1625.22. To be considered "knowing and voluntary," the waiver, at a minimum,

- must be in writing, drafted in a manner calculated to be understood by the individual, or by the average individual eligible to participate;
- must specifically refer to ADEA rights or claims;
- may not waive rights or claims that may arise in the future (after the date of execution);

- must be in exchange for consideration in addition to anything of value to which the individual is already entitled;

- must advise the individual in writing to consult with an attorney prior to executing the agreement;

- must provide the individual with at least twenty-one (21) days within which to consider the agreement; and

- must provide that the individual may revoke the agreement within seven (7) days of its execution.

29 U.S.C. § 626(f)(1); 29 C.F.R. § 1625.22. The period for considering the agreement (see subsection V(A) (6), supra) maybe waived by the individual if he or she signs the release early. 29 C.F.R. § 1625.22(0(6).

When a waiver is sought in connection with an exit incentive or other employment termination program (e.g., layoff or reduction in force), the following additional requirements must also be met: (1) the period for considering the agreement (see subsection V(A)(6), supra) must be extended from twenty-one (21) to forty-five (45) days; and (2) the employer must inform the individual in writing, in a manner calculated to be understood by the average individual eligible to participate, as to (a) any class, unit or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and (b) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. 29 U.S.C. § 626(f)(1)(F)(ii) and (H); 29 C.F.R. § 1625.22.

When a waiver is sought in connection with the settlement of an EEOC charge or civil action alleging age discrimination, the above requirements are slightly relaxed. Under these circumstances, the OWBPA requires compliance with steps 1-5 in subsection V(A), supra, and that the individual be given a "reasonable period of time within which to consider the settlement agreement." 29 U.S.C. § 626(f)(2); 29 C.F.R. § 1625.22.

The party asserting waiver has the burden of proving that each of the above referenced elements for a valid waiver has been met. 29 U.S.C. § 626(f)(4); 29 C.F.R. § 1625.22(h).

In Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998), the Supreme Court held that individuals who have entered into agreements to waive ADEA claims may subsequently bring such claims against their employers without first returning, or "tendering back," the consideration received for the waiver. The Court further held that the individual does not ratify an invalid waiver (one that does not comply with the OWBPA's requirements) by retaining such consideration.

The EEOC has issued a regulation addressing tender back and the Oubre decision. See 29 C.F.R. § 1625.23. The regulation provides that any individual alleging that an ADEA waiver was not "knowing and voluntary" (see subsection v (A), supra) is not required to tender back the consideration received for the agreement before filing an ADEA charge or suit. The regulation

further provides that retention of the consideration neither forecloses a challenge to the waiver, nor does it constitute ratification of such waiver. 29 C.F.R § 1625.23(a).

This regulation also expands on the Oubre decision by prohibiting penalties in ADEA waiver agreements which might discourage individuals from challenging the agreement. The regulation provides, in pertinent part, that

> No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement. This prohibition includes, but is not limited to, provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit.

29 C.F.R. § 1625.23(b). Finally, when an individual successfully challenges a waiver and prevails on an ADEA claim, the regulation provides that the court may apply a setoff against the individual's monetary award for consideration received by the individual in exchange for the waiver. 29 C.F.R. § 1625.23(c). Such restitution or setoff may not exceed the consideration received by the individual or the amount recovered through suit. Id.

F. Rehabilitation Act of 1973

The Rehabilitation Act of 1973 prohibits discrimination against disabled applicants and employees by federal employers,[21] employers with federal contracts or subcontracts,[22] and employers who receive financial assistance from the federal government, such as Medicare and Medicaid funds.[23]

Section 503 of the Rehabilitation Act requires covered federal contractors and subcontractors to adopt an affirmative action plan to employ qualified individuals with disabilities.[24]

Section 504 of the Rehabilitation Act covers employers who receive any type of federal financial assistance for any purpose. It prohibits such employers from discriminating against individuals with disabilities in employment.[25]

The Rehabilitation Act expressly adopts the same liability standards as the ADA. 29 U.S.C. §791(g); Mullins v. Crowell, 228 F.3d 1305, 1313 (11th Cir. 2000).

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[21] 29 U.S.C. § 794(a).

[22] 29 U.S.C. § 793(a). Employers with government contracts or subcontracts of more than $10,000 for supplies or services are covered.

[23] 29 U.S.C. § 794(a).

[24] 29 U.S.C. § 793.

[25] 29 U.S.C. § 794.

G. Americans with Disabilities Act of 1990 ("ADA")[26]

1. Coverage

Title I of the ADA prohibits all employers with 15 or more employees from discriminating against qualified disabled individuals with regard to any term, condition or privilege of employment.[27] The ADA protects any "qualified individual with a disability," which means an individual with a disability who, with or without reasonable accommodation, can perform the "essential functions" of the employment held or desired.[28]

By its terms, the ADA includes state and local government, but not the federal government, within its coverage. However, in Board of Trustees of University of Alabama v. Garrett, 531 U.S. 536, 368 (2001), the Court held that the Eleventh Amendment bars application of the ADA to state governments.

Unlike the Rehabilitation Act, the ADA applies to private employers regardless of whether they have a connection to the government (e.g., receipt of federal funds or a government contract). The ADA regulates decisions regarding hiring, advancement, discharge, compensation, and training.

2. The ADA Amendments Act

The ADA was enacted in 1990, and almost 20 years of case law has defined and implemented its provisions. However, in reaction to various Supreme Court decisions that Congress believed had narrowed the ADA beyond its original intent,[29] the Americans with Disabilities Act Amendments Act of 2008 ("Act") was signed on September 25, 2008, with the express intent of broadening coverage under the ADA. It went into effect on January 1, 2009.

In particular, the Act changes the definition of "disability". Although the Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment, it alters the way in which these statutory terms are to be construed. In particular, the Act:

- expands the definition of "major life activities" by including non-exhaustive lists of activities previously recognized as "major life

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[26] On the 17th anniversary of the passage of the ADA, the ADA Restoration Act of 2007 ("ADARA") was introduced in Congress. ADARA proposes to amend the ADA in order to "restore the intent and purpose" of the ADA. ADARA proposes major changes to the ADA which will alter compliance requirements for employers.

[27] 42 U.S.C. § 12112(a).

[28] 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

[29] See, e.g., Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534U.S. 184 (2002), which held that 1) mitigatingfactors could be considered in determining whether an impairment substantially limited a major lifeactivity; and 2) the terms "substantially" and "major"should be strictly interpreted to create a "demanding standard" for qualifying as a disabled individual.

activities," such as walking, as well as activities that have not necessarily been recognized as major life activities, such as reading, bending, and communicating; and major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");

- mandates that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in determining whether an individual has a disability;

- states that even if an impairment is episodic or in remission, it is to be considered a disability if the impairment would substantially limit a major life activity when active;

- provides that an individual subjected to a prohibited action under the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is "transitory and minor;"

- provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation; and

- emphasizes that the term "disability" should be interpreted broadly.

In light of the Act, employers are having to reassess their procedures for engaging in the interactive process with employees who request accommodations, as the number of employees potentially eligible for accommodations has greatly increased. Furthermore, defining the "essential functions" of jobs will take on greater significance, as the employee must still be able to perform the "essential functions" of the job with or without reasonable accommodation. Employers are not required to remove the essential functions of a job as an accommodation. Another result of the expanded definition of disability is that litigation will now likely focus on the effectiveness and reasonableness of an accommodation, as opposed to whether someone is covered by the Act in the first instance.

3. Definition of "Disability" Under the Pre-Amendment ADA

"Disability" is defined to include "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," as well as a record of such an impairment, or being regarded as having such an impairment. 42 U.S.D. §12102(2). The ADA also protects a non-disabled individual from discrimination based on her relationship with a person with a known disability, such as a disabled child or partner. 42 U.S.C. §12112(b)(4); Reddinger v. Hospital Central Services, 4 F. Supp. 2d 405, 408 (E.D. Pa. 1998) (citing cases).

There are three distinct elements to the definition of "disability": (1) an impairment (2) substantially limiting a (3) major life activity.

Under the Act as originally enacted, a medical diagnosis of an impairment, without evidence that the impairment substantially interferes with a major life activity of the specific individual, is insufficient to invoke the protections of the ADA. Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002). However, even before the ADA amendments, courts have held the following to be major life activities: procreating, Bragdon v. Abbott, 524 U.S. 624 (1998); reading, Bartlett v. New York State Bd. of Law Examiners, 226 F.3d 69 (2d Cir. 2000); writing, Gonzales v. National Bd. of Med. Examiners, 225 F.3d 620 (6th Cir. 2000); and interacting with others, McAlindin v. City of San Diego, 192 F.3d 1226 (9th Cir. 1999). Ladder climbing, on the other hand, is not a major life activity. See Weber v. Strippitt, Inc., 186 F.3d 907 (8th Cir. 1999).

The Eleventh Circuit has held that plaintiffs' inability to engage in activities such as standing, sitting and walking "for a prolonged period of time", but not altogether, did not substantially limit them in a major life activity. Rossbach v. City of Miami, 371 F.3d 1354, 359 (11th Cir. 2004).

Prior to the amendments, disability determinations were made in light of remedial measures taken by the individual to treat or correct the physical or mental impairment. Employers and courts had to consider whether, after accounting for corrective devices, medication or other mitigating measures, the employee is still substantially limited in a major life activity. Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) (eyeglasses); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999) (blood pressure medication); Albertson's, Inc. v. Kirkinburg, 527 U.S. 555 (1999) (self-accommodation through body's own system). If the employee is not substantially limited after taking such remedial measures into account, the ADA does not cover the employee's impairment as a disability. Now, the only remedial measure that may be considered is eyeglasses or contact lenses.

As a general matter, temporary conditions, even if they substantially limit a major life activity, are not covered by the ADA. Thus, conditions like broken limbs, concussion, appendicitis, influenza, or a healthy pregnancy are not covered by the ADA. Kay v. Lester Coggins Trucking, 141 Fed.Appx. 824, 825 (11th Cir. 2005) (unpublished) (temporary lifting restriction during period of recovery from surgery). Because covered conditions usually have permanent or long-term impact, the mere possibility of recurrence of a temporary condition is not sufficient to establish substantial limitation. See Plant v. Morton Int'l, Inc., 212 F.3d 929 (6th Cir. 2000).

Some conditions are expressly excluded from the definition of a disability by statute. Transvestitism, for example, is excluded, see 42 U.S.C. § 12208, as are individuals who are currently engaging in the illegal use of drugs. See 42 U.S.C. § 12114.

4. Qualified Individual with Disability

For purposes of the employment discrimination provisions of the ADA, a "qualified individual" with a disability is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires. 42 U.S.C. § 12111(8).

Courts make a two-part inquiry in determining whether a plaintiff is a "qualified individual". First, an individual must satisfy the employer's legitimate prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, and licenses. Second, the individual must be able to perform the position's essential functions with or without an accommodation. Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 863-65 (7th Cir. 2005).

A job function is essential if (i) the position exists to perform that function; (ii) few employees are available to perform that function, or (iii) the function is highly specialized and the employee was hired for his or her expertise to perform that function.

The fact that an individual has asserted in an application for Social Security disability benefits that she is disabled from engaging in gainful employment is not an automatic bar to an ADA claim, because the Social Security definition of disability does not take into account the possibility of a reasonable accommodation which would allow the individual to work. Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 803 (1999).

5. Reasonable Accommodations

"Reasonable accommodation" is defined as:

> (a) "making existing facilities used by employees readily accessible to and usable by individuals with disabilities;" and
>
> (b) "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."
>
> 42 U.S.C. § 12111(9).

Employers are required to consider and possibly implement multiple types of reasonable accommodations for covered employees. The employer's duty to accommodate extends to individuals who are "regarded as" disabled to the employer, as well as those who are actually disabled. D'Angelo v. ConAgra Foods, 422 F.3d 1220, 1235 (11th Cir. 2005).

An accommodation is not unreasonable simply because it gives a preference to the disabled employee, by allowing her to violate a neutral rule that others must obey. US Airways v. Barnett, 535 U.S. 391, 396-98 (2002). However, the effect of a proposed accommodation on other employees is a factor in considering whether it is reasonable. 535 U.S. at 400-01. Indeed, where an accommodation involves a transfer to a different job which would require the employer to violate the seniority rules of a collective bargaining agreement, it is generally regarded as unreasonable, albeit not unreasonable per se. 535 U.S. at 403.

The duty to provide a reasonable accommodation does not mean the employer must provide the accommodation preferred by the employee. An individual's preferred accommodation does not have to be given if there is another reasonable accommodation the employer wishes to provide. Reed v. Petroleum Helicopters, Inc., 218 F.3d

477 (5th Cir. 2000). Furthermore, as pointed out by the EEOC in its recent guidance on "The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities", issued in 2008, employers do not necessarily have to provide lower performance or conduct standards to disabled employees.

a. **Undue Hardship"**

An accommodation is not required where it would cause "undue hardship" to the employer. 42 U.S.C. § 12112(5)(A). Undue hardship means "an action requiring significant difficulty or expense." Id. at § 12111(10)(A). Factors to consider include:

- Nature and cost of accommodation;
- Financial resources of facility;
- Number of persons employed at facility;
- Impact on expenses, resources or otherwise on operation of facility;
- Overall financial resources of covered entity;
- Type of operation of the covered entity, including composition, structure and function of workforce; and
- Relationship between facility and covered entity.

42 U.S.C. § 12111(10)(B).

While the employee has the burden of proving that a requested accommodation is reasonable, the burden of proof as to undue hardship rests with the employer. U.S. Airways v. Barnett, 535 U.S. 391, 400 (2002).

A cost/benefit analysis, which assesses the cost of a reasonable accommodation in relation to the perceived benefit to the employer and the employee, is not necessarily determinative of undue hardship. The EEOC suggests that whether the cost of a reasonable accommodation imposes an undue hardship depends on the employer's resources. Nevertheless, some courts have applied a cost-benefit analysis to determine undue hardship. See, e.g., Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002) ("[T]he employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health.").

b. **The interactive process**

Generally, an employee has a duty to request an accommodation, which then triggers the employer's obligation to enter into an interactive process to determine a reasonable accommodation. See 29 C.F.R. § 1630.9 ("It is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.").

Numerous cases establish the rule: see, e.g., Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001) (noting "the general rule" that "an employee must make an initial request" for an accommodation); Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361 (11th Cir. 1999) ("[I]nitial burden of requesting an accommodation is on the employee. Only after the employee has satisfied this burden and the employer fails to provide that accommodation can the employee prevail on a claim that her employer discriminated against her."); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998) ("There is no question that the EEOC has placed the initial burden of requesting an accommodation on the employee. The employer is not required to speculate as to the extent of the employee's disability or the employee's need or desire for an accommodation.").

However, even where the employee has not made a request, the employer may still have an obligation to engage in an interactive process if the employer knows of an employee's disability and/or need for accommodation or an employee's disability affects employee's ability to request an accommodation. See, e.g., Stephenson v. United Airlines, 2001 WL 580459 (9th Cir. May 30, 2001) (an "employer is obligated to engage in an interactive process with employee when an employee requests an accommodation or if the employer recognizes that an accommodation is necessary"); Bultemeyer v. Fort Wayne Community Schs., 100 F.3d 1281 (7th Cir. 1996) ("an employer cannot expect an employee to read its mind and know that he or she must specifically say 'I want a reasonable accommodation,' particularly when the employee has a mental illness. The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help."). The employee need not use the word "accommodation" if her request is clear from the context. Smith v. Henderson, 376 F.3d 529, 535 (6th Cir. 2004) (Rehabilitation Act case).

The employer must engage in interactive process in good faith, and a failure to do so may lead to ADA liability, at least in certain circuits. Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128 (9th Cir. 2001), cert. denied, 535 U.S. 1011 (2002) (holding that, as a matter of law, employer violated ADA when it rejected plaintiff's proposed accommodations of at home work and leave of absence, without participating in interactive process); Fjellestad v. Pizza Hut, 188 F.3d 944 (8th Cir. 1999) (employer's failure to engage in interactive process generally renders it inappropriate to grant summary judgment in favor of employer). The employer and employee should engage in informal dialogue through which they "identify the precise limitations" caused by the disability and should "explore potential accommodations" to overcome those limitations. 29 C.F.R. § 1630.9(a). Such a dialogue should be undertaken in good faith and with the view to accommodating disabilities if possible.

In Willis v. Conopco, 108 F.3d 282 (11th Cir. 1997), the Eleventh Circuit held that if the interactive process would have been futile because there was no reasonable way to accommodate the employee, then the employer would not be liable under the ADA even if it did not engage in the interactive process. See also Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999) (noting that an employee need not request an accommodation if such a request would be futile; where an employee "knows of an employer's discriminatory policy against reasonable accommodation, he need not ignore the policy and subject himself to 'personal rebuffs' by making a request that surely will be denied").

If an employee abandons the interactive process, however, he or she will not be able to bring a claim under the ADA. Jones v. Georgia Dept. of Corrections, 2008 WL 779326 *8 (N.D. Ga. 2008).

c. **Types of accommodations**

More and more, employers are faced with the obligation to consider an ever-widening list of possible accommodations. Cases make clear that the appropriateness of an accommodation should be analyzed on a case-by-case basis. An employer should consider a wide variety of accommodations, depending on the circumstances, including leave and modified schedules, medication breaks, and even reassignment. Among the accommodations, the EEOC has recommended and the courts have considered:

- Work schedule adjustments. An employer may need to adjust an employee's work schedule as a reasonable accommodation, including adjusting work hours, providing periodic rest periods, changing times for the performance of certain duties, allowing employee to take accrued (or unpaid leave). Where an employer believes that a schedule adjustment would cause undue hardship, the EEOC has advised employers to consider carefully whether a requested modification would significantly disrupt their operations. According to the EEOC, if modifying an employee's schedule would pose an undue hardship, an employer must consider reassigning an employee to a vacant position that would enable the employee to work during the hours requested.

- Telecommuting. Courts remain split as to whether work-at-home is a reasonable accommodation.

- Medication breaks. Although an employer is not required to monitor an employee's use of medication or medical treatment, it is required to provide reasonable accommodation for an employee with a disability who needs to take medication, according to the EEOC. An employer may be required to provide breaks in order for an employee to take medication and must provide reasonable accommodations for the side effects of medication and for symptoms or medical conditions that result from the disability.

- Reassignment. The ADA lists "reassignment to a vacant position" as an example of reasonable accommodation for employees (but not applicants for employment). 42 U.S.C. § 12111(9)(B). The EEOC characterizes reassignment as the reasonable accommodation of "last resort," required only after a determination that (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current job, or (2) all other reasonable accommodations would produce an undue hardship. In such circumstances, according to the EEOC, an employer must reassign a qualified employee to a vacant position with equivalent pay, status, or other relevant factors. If no equivalent position is available, the employer must reassign the employee to a

lower level position for which he/she is qualified. If there is more than one vacancy, the employer should place the employee in the position most similar to the current position, and if it is unclear, the employer should consult with the employee about his/her preference.

- Reassignment to positions in other offices. An employer's obligation to offer reassignment to a vacant position is not limited to those vacancies within an office, department, branch, facility, or geographic area, even if the employer has a policy prohibiting such transfers, according to the EEOC. The employer's obligation to search for a vacant position may be circumscribed by its seniority system, U.S. Airways v. Barnett, supra, or by a claim of undue hardship.

d. **Leave as a Reasonable Accommodation**

(1) Length of Leave

As a general matter, unpaid leave may be an appropriate accommodation when an individual expects to return from work after getting treatment for a disability, recovering from an illness, or taking some other action in connection with his/her disability. See, e.g., Walsh v. United Parcel Serv., 201 F.3d 718 (6th Cir. 2000) (a leave of absence may, in appropriate circumstances, constitute a reasonable accommodation).[30]

However, the length of leave required is not at all certain. Leaves of up to twelve weeks are generally considered reasonable. Smith v. Diffee Ford-Lincoln-Mercury, 298 F.3d 955 (10th Cir. 2002) (an employee is generally entitled to at least as much leave as is available under the Family and Medical Leave Act; where an employee took no more leave than the FMLA required, "we cannot conclude that the length of time was unreasonable or that the leave unduly burdened" the employer.)

Courts, however, generally agree that leaves extending beyond one year are not required, although they will still make a fact specific inquiry as to reasonableness.[31] In fact, one court has held that a one-year leave is per se unreasonable. "[A]s a matter of law, an employer is not required to grant a one-year leave of absence, and such an accommodation is, on its face,

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[30] Interpretive regulations confirm that allowing the use of accrued paid leave and granting additional unpaid leave may be an appropriate accommodation. See 29 C.F.R. § 1630.2(o). Courts have agreed. See, e.g., Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128 (9th Cir. 2001) (leave of absence is reasonable accommodation where it would permit employee with obsessive-compulsive disorder "upon his return, to perform the essential functions of the job"); Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998) (temporary leave for employee's physician "to design an effective treatment program" for her depression is a possible accommodation).

[31] Courts generally closely scrutinize the appropriateness of requested leave between twelve (12) weeks (the FMLA minimum) and one year. For example, a request for leave beyond four months was unreasonable where neither plaintiff nor his doctor knew when he would be able to return. See Bowers v. Multimedia Cablevision, Inc., 1998 WL 856074 (D. Kan. Nov. 3, 1998). But a request for four-month leave of absence was reasonable where the employee told the employer that treatment of traumatic stress disorder would last only four months and prognosis for recovery was good. See Rascon v. U.S. West Communications, Inc., 143 F.3d 1324 (10th Cir. 1998). In any event, extended leave is not a reasonable accommodation where the plaintiff cannot provide some evidence of the expected duration of his impairment. Id.

unreasonable." Dockery v. North Shore Med. Ctr., 909 F. Supp. 1550 (S.D. Fla. 1995). However, a number of courts have held that application of a "per se" rule is impermissible and an individualized inquiry should be made, even if the leave exceeds what would normally be considered reasonable. Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000).

But courts have made clear that indefinite leave is not required. "[A] request for indefinite leave cannot constitute 'reasonable' accommodation" because such a request "does not allow the employee to perform the essential functions of the job in the near future." Cisneros v. Wilson, 226 F.3d 1113 (10th Cir. 2000); accord, Wood v. Green, 323 F.3d 1309, 1314 (11th Cir. 2003).

In determining whether a requested leave of absence is reasonable under the ADA, the following factors should be considered: the employer's leave of absence policies; the employer's past leave of absence practices; the size of the company; the cost of the leave; and the existence of a different accommodation that would allow the employee to return to his or her job or another position.

For example, in Brannon v. Luco Mop Co., 521 F.3d 843, 846 (8th Cir. 2008), an employee had two lengthy medical leaves, and then missed 40 out of 77 work days. She requested another leave but could not show that the leave would result in her being able to return with consistent attendance. Id. The employer denied the leave and terminated her. Id. at 845. The court held that consistent attendance is a crucial requirement to forbear from discipline, and an employer is only required to grant treatment leaves if these will result in achievement of reasonable attendance. Id. at 849. Since the requested leave would not have resolved the attendance problem, it was not a "reasonable" accommodation, and the employer was not required to continue the employment. Id.

An employer must assess a leave request consistently with its internal leave policies and past practices. Where employer's benefit policies allowed up to one-year leave and it regularly hired seasonal employees, it probably would not create an undue hardship on the employer to grant extended leave. See Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999). Where a job was vacant for months before the employee was hired, it took six months to fill the position after the employee was discharged, and other employees were able to handle the job duties on an interim basis, two to four week leave is not unreasonable. See Haschmann v. Time Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998). Employers must recognize that reassignment to a vacant position after leave might be a reasonable accommodation. See 42 U.S.C. § 1211(9)(B).

Employers may decline to grant a leave of absence when doing so imposes an undue hardship. Establishing an undue hardship, however, is difficult – particularly if temporary employees are available to fill the position. Under the ADA, an employee may be entitled to return to the identical position following leave unless holding the job open or reinstating the employee would constitute an undue hardship for the employer.

If an employer is not able to hold the position open without incurring an undue hardship, then it must consider whether it has a vacant, equivalent position for which the

employee is qualified. If so, the employer should reassign the employee to that equivalent position when the employee returns from leave.

(2) Pay

The ADA does not require employers to pay employees during a leave, unless paid leave is provided to non-disabled employees. An employer is not expected to provide employees with disabilities with any more paid leave time than other similarly situated employees. Leave may be provided with no benefits continuation unless the employer would provide benefits to nondisabled employees under similar circumstances.

5. **Confidentiality Concerns and Reasonable Accommodations**

An employer may not disclose to other employees the fact that an employee is receiving a reasonable accommodation. Employers are also prohibited from disclosing an employee's medical information. The EEOC has advised that an employer may respond to a request from an employee about why a co-worker is receiving "special" treatment "by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The employer may also find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy."

6. Medical Examinations

a. **Before A Job Offer Is Made (During The Application Process)**

Prior to the making of a conditional job offer (see below), employers should NOT require medical exams or ask questions that could lead to the disclosure of medical information. However, an employee can ask a person with an obvious disability how he or she will perform a particular essential function of the job. Also, employers may give non-medical exams, such as fitness tests. Note that drug testing (unlike alcohol testing) is <u>not</u> considered a medical examination, and therefore can be conducted at this stage. However, an employer must be careful about asking questions about drug use as some questions may reveal past addiction (which is protected) or give medical information (e.g., use of prescription drugs).

b. **After A Conditional Job Offer Is Made**

After a conditional offer of employment is made, but before the employee starts work, the employer can ask any disability or medical inquiry, whether or not related to the job, as long as it is done for all entering employees in that job classification. If an employee is denied employment as a result of the inquiry, however, the basis for the denial must be job related and consistent with business necessity.

A conditional offer of employment has been made when the employee has met all of the non-medical requirements of the job, so all that is outstanding is the medical exam/questionnaire. The reason for this requirement is so a finder of fact can determine that the reason the person did not receive the job was actually the disability (as the employee would have

met all other criteria). The only exception to this rule is where it is not practical for an employer to make the determinations of the non-medical criteria before the medical exam has occurred.

Thus, it is important for employers to consider how sequence background checks, drug testing, and the like. One possibility is for the employer to tell an applicant that he/she has met all criteria of employment contingent on passing of drug tests, background checks, etc. Then, the employer can conduct the drug tests and background tests. If the employee passes these benchmarks, the employer can inform the applicant that he/she will be hired contingent on passing the medical examination/questionnaire. It should be clear that the medical exam is the last step in the process.

If it is truly impossible to make the medical examination the last step, then the employer should have evidence to justify its position and to explain why. See, Leonel v. American Airlines, Inc., 2005 WL 976985 (9th Cir.).

c. After Employment Has Started

After employment has started, a request for information regarding an employee's medical condition must be "job related and consistent with business necessity." The following inquiries/exams meet this standard:

> Employee requests accommodation where the need for accommodation is not known or obvious. The employer may request documentation that supports the disability and/or the necessity of the accommodation. Documentation is sufficient if it describes the nature, severity and duration of the impairment, the activities it limits, and the extent to which the employee's activities are limited, and substantiates why the requested accommodation is needed. If insufficient documentation is provided, then the employer should explain this to the employee and allow him or her to provide the missing information. If documentation is still insufficient, an employer can require the employee to go to a health care professional of its choice at the employer's cost. An employer is not allowed to ask for documentation when both the disability and the need for reasonable accommodation are obvious or if the individual has already provided the employer with sufficient information to substantiate the disability and needs the reasonable accommodation requested.
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> Employee poses a "direct threat" to him/herself or others. 29 CFR §1630.15(b)(2). An employer may also ask disability/medically related questions or require an examination (at the employer's cost) if the employee poses a direct threat. A "direct threat" exists when an employer has a reasonable belief, based on objective evidence, that the employee poses a threat. The belief may also be based on information from a credible third party. See Chevron USA v. Echazabal, 536 U.S. 73, 81 (2002) (upholding regulation).
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> Employee is unable to perform essential job functions due to a medical condition. An employer may make medical inquiries if it has a reasonable belief, based on

objective evidence (same standard as for direct threat) that the employee cannot perform his/her essential job functions.

Sick leave/Return to Work: An employer may ask for documentation for sick leave, such as a doctor's note. If an employee requests additional leave, further documentation can be requested. An employer can also require a return to work note.

Any medical information obtained from a disability related inquiry or medical examination, or medical information voluntarily disclosed by the employee, must be treated as confidential. Employers may share the information only with supervisors or managers with a need to know, first aid and safety personnel, or government officials investigating ADA issues. Consequently, the number of people making a decision as to accommodations should be restricted and as little medical information disclosed as possible.

Under the ADA, medical examinations may be administered by the employer's physician.[32]

Any medical examination conducted by the employer's health professional must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation. If an employer requires an employee to go to a health care professional of the employer's choice, the employer must pay all costs associated with the visit(s).

In addition, employers should exercise caution when requiring employees to submit to a medical examination by the employer's chosen health care provider. The EEOC takes the position that requiring additional documentation where the employee already has provided sufficient evidence of the existence of a disability and the need for accommodation "could be considered retaliation" unless the employer is acting with a "good faith belief" that the documentation submitted by the employee is insufficient.

H. Immigration Reform and Control Act ("IRCA")

IRCA prohibits employment discrimination based on an individual's citizenship or national origin. It extends to hiring, recruiting, discharge, and referral practices. The IRCA applies to employers of four to 14 employees.[33] Employers with more than 15 employees are covered by Title VII; those with less than four employees are entirely exempt from the IRCA. Since the IRCA also prohibits employers from hiring unauthorized aliens, it does not protect unauthorized aliens from employment discrimination.[34]

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[32] 42 U.S.C. § 12112(d)(3-4).

[33] INA § 274B.

[34] INA § 274B(a)(1).

II. THE FLORIDA CIVIL RIGHTS ACT ("FCRA")

A. Coverage

The FCRA prohibits employers from discriminating against any person on the basis of race, color, religion, sex, national origin, age, handicap or marital status.[35] Although sexual orientation is not a protected category under Title VII or the FCRA, some cities and counties in Florida have local ordinances making such discrimination unlawful. The prohibition on marital status, however, does not include "the specific identity or actions of an individual's spouse." Donato v. AT&T, 767 So.2d 1146 (Fla. 2000). The protections apply to hiring, discharge, compensation, and virtually all terms, conditions, and privileges of employment. The FCRA is enforced by the Florida Commission on Human Relations ("FCHR"). The FCRA specifically states that it is to be construed in accordance with Title VII.

B. Damages/Remedies

Some of the remedies under the FCRA are greater than remedies under Title VII; in particular, the FCRA provides for unlimited emotional distress damages. Punitive damages, however, are capped at $100,000.00. It is unclear under Florida law whether the federal Title VII standard for awarding punitive damages applies or the less restrictive state standard.

C. Other Issues

Some jurisprudence suggests that state courts may be more likely to find that conduct meets the severe or prevasiveness standards for hostile work environment claims. In Speedway Superamerica LLC v. DuPont, 933 So.2d 75 (Fla. 5th DCA 2006), the court specifically distinguished federal cases that had failed to find a hostile work environment in the face of even more egregious behavior. The court noted that Florida had a strong policy against sexual harassment and that the FCRA was to be liberally construed.

Another recent issue concerned whether pregnancy discrimination was covered by the FCRA. After some contrary rulings by federal courts, in Corsillo v. City of Lake Worth, 2008 Fla. App. LEXIS 18071 (Fla. 4th DCA 12/3/08), the Fourth Circuit held that the FCRA prohibited pregnancy discrimination as a form of sex discrimination. A retaliation claim may also be brought under the FCRA for complaining about pregnancy discrimination. Carter v. Health Mgmt. Assoc., 989 So.2d 1258 (Fla. 2d DCA 2008).

[35] Fla. Stat. §760.10, et seq.

III. PROOF OF ILLEGAL EMPLOYMENT PRACTICES: ADVERSE ACTION CASES

A. Disparate Treatment: Title VII, Section 1981, ADA, ADEA

Disparate treatment is intentional discrimination. Disparate treatment occurs when an employer treats members of a protected group less favorably than non-members of the group.[36] A plaintiff bears the burden of proof and may rely upon direct evidence, circumstantial evidence and/or statistical evidence to prove his or her case.

Plaintiffs most commonly attempt to prove disparate treatment through circumstantial evidence. The United States Supreme Court has established a three part order and allocation of proof in such cases.[37] First, the plaintiff must establish a prima facie case. Next, the employer must identify – but not prove –a legitimate, nondiscriminatory reason for its action. Finally, the plaintiff must prove that the employer's articulated reason was false, and that the real reason for the action was unlawful discrimination.[38]

1. Prima Facie Case

The elements of the prima facie case vary from case to case depending on the factual circumstances.[39] In general, they follow the following formulation: (1) the plaintiff belongs to a protected group (race, gender, national origin, etc.); (2) the plaintiff applied for a job or promotion for which the employer was seeking applicants; (3) the plaintiff is qualified; and (4) the plaintiff was rejected and a less qualified applicant/employee who is not in the protected group is selected (i.e., there has been an adverse employment action).

a. Reduction in Force Cases

In an ADEA case, to establish a prima facie case of age discrimination in discharge, the plaintiff need not establish that his or her replacement was outside of the protected age group (under forty years of age), if the replacement was significantly younger than plaintiff. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996). However, the prima facie case is modified for "reduction in force" (RIF) cases, so as to require plaintiff to show that (1) she was in a protected age group and was discharged or laid off; (2) she was qualified for her current position or to assume another position at the time of the discharge; and (3) there is evidence by which the fact finder could reasonably conclude that the employer intended to discriminate on the basis of age in reaching that decision. Smith v. J. Smith Lanier & Co., 352

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[36] International Brotherhood of Teamster v. United States, 431 U.S. 324, 335-336, 97 S. Ct. 1843, 1854, fn. 15 (1977); Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 355, 100 Cal. Rptr. 2d 352, 378, fn. 20 (2000).

[37] McDonnell Douglas Corp v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510, 122 S. Ct. 992, 997 (2002); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981).

[38] McDonnell Douglas Corp., 411 U.S. at 802-03.

[39] Id. at 802, fn. 13.

F.3d 1342, 1344 (11th Cir. 12-12-03); Jameson v. Arrow Co., 75 F.3d 1528, 1531-32 (11th Cir. 1996).

b. **Adverse Employment Action**

An "adverse employment action" requires the plaintiff to show that defendant's action caused "a serious and material change in the terms, conditions and privileges of employment." Davis v. Town of Lake Park, 245 F.3d 1232 (11th Cir. 2001) 245 F.3d at 1239 (emphasis in original). Typical adverse employment actions are refusal to hire or promote, discharge, demotion, and reduction in pay. Where the only adverse action is a negative evaluation, or the removal of job responsibilities, without a reduction in pay, a Title VII discrimination claim (as opposed to a retaliation claim) generally will not lie. 245 F.3d at 1243; compare, Gillis v. Georgia Department of Corrections, 400 F.3d 883, 888 (11th Cir. 2005) (evaluation that results in denial of "a raise of any significance" is an adverse employment action). However, there is authority for treating actions with indirect economic consequences, such as a transfer to a new job site requiring significant additional travel, as actionable. Maddow v. Proctor & Gamble, 107 F.3d 846, 852-53 (11th Cir. 1997).

Another type of "adverse action" is a "constructive discharge," when an employer's biased treatment of an employee becomes so intolerable that it causes her to resign. Hill v. Winn-Dixie Stores, 934 F.2d 1518, 1527 (11th Cir. 1991). If the employee successfully established constructive discharge, the employer is liable for all relief which would be available "as if it had formally discharged the aggrieved employee." Buckley v. Hospital Corporation of America, 758 F.2d 1525, 1530 (11th Cir. 1985). The test for constructive discharge is an objective one: "did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign." Pennsylvania State Police v. Suders, 124 S. Ct. 2342, 2351 (2004). See, e.g., Torrech-Hernandez v. General Electric Co. (1st Cir., 2008) (even though there may have been some evidence of age discrimination in evaluation, the resignation was the employee's own choice, and "pressure" alone did not make the resignation involuntary). In assessing the reasonableness of the employee's response to the discriminatory working conditions, courts generally require that the employee attempt to resolve the matter internally before resigning. Garner v. Wal-Mart Stores, 807 F.2d 1536, 1539 (11th Cir. 1987). On the other hand, it is not necessary for the employee to show that the employer intended to force her to resign. Suders, 124 S.Ct. at 2351-52, 124 S.Ct. at 2357-58 (Thomas J. Dissenting); Borque v. Powell Electric Manufacturing Co., 509 F.2d 140, 144 (5th Cir. 1975).

In Ledbetter v. Goodyear Tire & Rubber Co., 127 S.Ct. 2162, 2164 (2007), the Court held that where plaintiff received lower pay than males based on poor evaluations received over the years because of her sex, that each pay-setting decision was a "discrete act" and that the limitations period had run on any such decisions on which she had not filed a charge within the charge-filing period.

2. Legitimate, Non-Discriminatory Reason

If the plaintiff establishes a prima facie case, the employer must identify a legitimate, nondiscriminatory reason for the adverse employment action.[40] Some examples of legitimate reasons for an adverse employment action include: the plaintiff was not the most qualified; the employee engaged in misconduct; there is a need to eliminate jobs; and the need to comply with rules set in union contracts. At this stage, the employer need not persuade the trier of fact, but simply must produce a reason. This burden is "exceedingly light." Walker v. NationsBank, 53 F.3d 1548, 1556 (11th Cir. 1995).

In addition, the employer may engage in otherwise unlawful discrimination when the selection decision is based on a "bona fide occupational qualification" ("BFOQ").[41] To establish the BFOQ defense, the employer must show that (1) the protected characteristic is directly related or "reasonably necessary" to the ability to perform the job duties at issue (or that safe or efficient performance would be impossible without it);[42] and (2) the job qualification relates to the "essence" or "central mission" of the employer's business.[43] The BFOQ defense, however, has limited application in Title VII actions. For example, an employer may assert the BFOQ defense in an action under Title VII only if the suit involves discrimination in hiring.[44] Moreover, the BFOQ defense cannot be asserted in a racial discrimination case under Title VII.[45] See also discussion of specific BFOQ defenses in Section I above.

Where an employer relies on subjective factors as its legitimate, nondiscriminatory reasons, it must articular "a clear and reasonably specific factual basis upon which it based its subjective opinion." Chapman v. A-1 Transport, 229 F.3d 1012, 1033 (11th Cir. 2000) (en banc).

If the employer carries this burden of production, "the presumption raised by the prima facia case is rebutted" and "drops from the case." Burdine, 450 U.S. at 255, n.10. However, if the employer fails to articular a legitimate, nondiscriminatory reason for its action, the presumption of discrimination created by plaintiff's prima facie case stands, and "the Court

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[40] The employer carries only a burden of production, which means that it must produce evidence that supports, but does not necessarily have to prove, its position. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 254-5.

[41] Title 42 U.S.C. § 2000e-2(e) provides, in part, that "notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . or for an employer . . . to admit or employ any individual . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ."

[42] International Union, United Auto., Aerospace & Agr. Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187, 207, 111 S. Ct. 1196, 1208 (1991).

[43] Id. at 203-204.

[44] Id. at 201.

[45] Harriss v. Pan American World Airwars, Inc., 649 F.2d 670, 674 (9th Cir. 1980). It is acceptable, however, as a defense under FEHA. See Gov. C. § 12940(a).

must award judgment to plaintiff as a matter of law." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993).

3. Pretext

In order to prevail in a discrimination case, a plaintiff must prove that the employer's proffered justification was a pretext for unlawful discrimination (i.e., that the reason was false).[46] This may be proven by (1) discriminatory statements or admissions, (2) comparative[47] evidence, and (3) statistics.[48] Once the employer adequately articulates its legitimate nondiscriminatory reasons, the presumption created by the prima facie case drops from the case, and the burden of proof remains with plaintiff to show, by a preponderance of the evidence, that the articulated reason was a pretext for discrimination. Burdine, 450 U.S. at 256. The trier of fact considers all pretext evidence offered by plaintiffs, along with the original "evidence establishing the prima facie case and inferences properly drawn therefrom," in order to reach the ultimate determination as to whether plaintiff was a victim of unlawful discrimination. Reeves v. Sanderson Plumbing, 530 U.S. 133, 143 (2000); Burdine, 450 U.S. at 256.

A plaintiff can establish pretext by either of two methods: "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256 (emphasis added), citing McDonnell Douglas, 411 U.S. at 804-05.

a. Directly Showing Pretext

Pretext may be shown directly in a number of ways. Courts may consider the employer's treatment of similarly situated employees outside plaintiff's protected class, its treatment of plaintiff throughout his employment, its treatment of other protected class members, biased remarks by its decision-makers, its reaction to plaintiff's legitimate anti-discrimination activities, its "policy and practice with respect to minority employment," the statistical or numerical makeup of its workforce, and its departure from its own procedures. McDonnell Douglas, supra, 411 U.S. at 804-05; Patterson v. McLean Credit Union, 491 U.S. 164, 187-88; Reeves, 530 U.S. at 152-53.

Comparison of the employer's treatment of similarly situated employees outside the protected class, referred to as "comparators," is commonly offered as pretext evidence. The question of who may be "similarly situated" so as to be treated as a comparator is a seminal one,

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[46] McDonnell Douglas Corp., 411 U.S. at 802-804, 93 S. Ct. at 1824-1825 (1973).

[47] See, e.g., Becker v. ARCO Chem. Co., 207 F.3d 176, 194, fn. 8 (3rd Cir. 2000) (evidence of employer's prior discriminatory acts toward other employees may be used to show pretext); McDonell Douglas Corp., 411 U.S. at 804 ("Especially relevant to (a showing of pretext) would be evidence that the white employees involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained or retired).

[48] See Diaz v. American Tel. & Tel., 752 F.2d 743, 746 (9th Cir. 1985) (plaintiff may use statistical evidence showing general discriminatory pattern to create inference of discriminatory intent by decision-maker). Note, however, statistical evidence is rarely sufficient to prove disparate treatment cases when it is not focused on one particular decision-maker; see also, Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 663, fn. 6 (9th Cir. 2002).

and prompts an inquiry as to whether the proposed comparator (1) was in a job similar to plaintiff's, and (2) engaged in misconduct of comparable serious to that of plaintiff. As to the first inquiry, some courts hold that an employee must have the same supervisor as plaintiff, Jones v. Gerwins, 874 F.2d 1534, 1541 (11th Cir. 1989), while others require only that the employee be in the same ultimate chain of command and subject to the same work rules. Anderson v. WBMG-42, 253 F.3d 561, 565-66 (11th Cir. 2001). Some require that the employee hold the same position as plaintiff, Nix v. WLCY Radio, 738 F.2d 1181, 1186 (11th Cir. 1984), while others apply that requirement only when the two positions are subject to different work rules. Lathem v. DCYS, 172 F.3d 786, 793 (11th Cir. 1999)

As to the second inquiry, the Supreme Court held in McDonald v. Santa Fe Trails Transportation Co., that "precise equivalence in culpability between employees is not the ultimate question: as we indicated in McDonnell Douglas, an allegation that other employees were involved in acts against (the employer) of comparable seriousness . . . were nevertheless retained ... " is sufficient. Compare: Silvera v. Orange County School Board, 244 F.3d 1253, 1259 (11th Cir. 2001) ("In order to satisfy the similar offenses prong, the comparator's conduct must be nearly identical to the plaintiffs in order to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges"). Where the employer has a system of "progressive discipline," pretext is shown if others committed similar offenses but were given progressive discipline, whereas plaintiff was discharged. Busy v. City of Orlando, 931 F.2d 764, 778 (11th Cir. 1991); NLRB v. Dynatron/Bondo Corp., 176 F.3d 1310, 1321 (11th Cir. 1999) (NLRA case).

The Eleventh Circuit had adopted a heightened standard for comparator evidence in promotion cases, which required that the differences in qualifications between the plaintiff and the selectee (comparator) be so obvious that they "virtually jump off the page and slap you in the face." Denny v. City of Albany, 247 F.3d 1172, 1187 (11th Cir. 2001); Lee v. GTE Florida, 226 F.3d 1249, 1253 (11th Cir. 2000), cert. den. 532 U.S. 958 (2001). The Supreme Court resoundingly rejected this standard in Ash v. Tyson Foods, - U.S. -, 126 Y S.Ct. 1195, 1197 (2006) ("visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications"). The Supreme Court in Ash declined to specify what the standard should be, but cited with apparent approval cases requiring a showing of "clearly superior" qualifications or disparities in qualifications "of such weight and significance that no reasonable person" could have chosen the white candidate. 126 S.Ct. at 1197-98. Subsequent to Ash, the Eleventh Circuit has generally applied the latter standard. Springer v. Convergys Customer Management Group, - F.3d -. 2007 WL 4357395 *4 (11th Cir. 2007) (per curiam); Tippie v. Spacelabs Medical, 180 Fed. Appx. 51, 55 (11th Cir. 2006); but see, Roper v. Foley, 177 Fed. Appx. 40, 49 (11th Cir. 2006) (applying "substantially less qualified" standard) and Price v. M& H Valve Co., 177 Fed.App. 1, 13 (11th Cir. 2006) (same).

Thus, while the words may have changed, it seems that some form of heightened standard for proof by comparators still applies in the Eleventh Circuit. The impact of the heightened standard is tempered, however, by the fact that comparator evidence is not only type of evidence which can establish pretext; other forms of direct pretext evidence, as set out above, and indirect evidence of pretext, set out below, are also relevant. Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989) (reversing trial court for erroneously instructing jury that

plaintiff could prevail on promotion claim only by showing that she was more qualified than the selectee).

Where the adverse action is taken by the same manager who initially hired the employee, an employer may argue that an inference that the "same actor" discriminated against plaintiff is implausible. Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) ("[W]here the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." However, this is not a per se rule, and the trier must examine the evidence as a whole in each case. Haun v. Ideal Industries, 81 F.3d 541, 546 (5th Cir. 1996); Williams v. Vitro Services Corp., 144 F.3d 1438, 1443 (11th Cir. 1998) (reversing summary judgment for employer because "same actor" theory is not a presumption, but merely a permissible inference). Several scenarios in which the "same actor" theory would not be probative are set out in Johnson v. Zema Systems Corporation, 170 F.3d 734, 745 (7th Cir. 1999) (aversion to have a protected class member in a higher position, stereotyped expectations regarding behavior, dress, language, etc. of protected class member, etc.).

Evidence of discriminatory statements or admissions of bias by a decisionmaker are also evidence of pretext, even if they do not meet the standard for "direct evidence" of discrimination. Wilson v. B/E Aerospace, 376 F.3d 1079, 1091 (11th Cir. 2004). The probative value of such evidence depends on "various factors including context, inflection, tone of voice, local custom, and historical usage." Ash v. Tyson Foods, 126 S.Ct. 1195, 1197 (2006) (reversing summary judgment for employer where Eleventh Circuit held that referring to African American employees as "boy", without some racial adjective modifying the word, was not evidence of discriminatory intent). However, where the alleged discriminatory statements were made by somebody who was not one of the decision makers, the evidence is not probative. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.2d 1169, 1188-89 (11th Cir. 2005).

However, in February 2008, in Sprint/United Management Co. v. Mendelsohn, 128 S.Ct. 1140 (2008), the Supreme Court held that evidence from non-parties that they experienced discrimination by the same employer as the plaintiff, though the individuals doing the discriminating were different was admissible. In Mendelsohn, the plaintiff, who had been terminated as part of a reduction in force, claimed she had been discriminated against on the basis of age. She sought to introduce testimony by five former employees who also claimed that their supervisors had discriminated against them because of age. Sprint moved to exclude the non-parties' evidence on the grounds of relevance because the witnesses had different supervisors from Mendelsohn and therefore were not "similarly situated" to her, and also argued that the probative value of the proposed testimony was substantially outweighed by the factors in Federal Rule of Evidence 403. The Supreme Court ultimately remanded the case to the district court to clarify the basis for its exclusion of the evidence. Although the Supreme Court stated that nothing indicated that the district court had applied a "per se" rule excluding such evidence, it did note that, "had the District Court applied a per se rule excluding the evidence, the Court of Appeals would have been correct to conclude that [the District Court] had abused its discretion."

b. **Indirectly Showing Pretext**

Pretext is shown indirectly through evidence that the employer's proffered reasons are unworthy of credence. Burdine, 450 U.S. at 256. This approach is based on the principle, first articulated in Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) that "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration". 438 U.S. at 577 (emphasis in original); Reeves, 530 U.S. at 148. Where the employer has advanced different and conflicting reasons for its actions at various stages of the process, the trier can infer that the employer was "dissembling to cover up a discriminatory purpose" and conclude that its proffered reasons are "unworthy of credence." Cleveland v. Home Shopping Network, 369 F.3d 1189, 1194-95 (11th Cir. 2004) (citation and internal quotation marks omitted).

Except in unusual circumstances, the evidence adduced in support of the prima facie case, together with evidence that the employer's asserted reasons are unworthy of credence, are sufficient to permit, but not require the trier to infer than unlawful discrimination has occurred. Reeves, 530 U.S. at 148-50; Hinson v. Clinch County, Georgia Board of Education, 231 F.3d 821, 831-32 (11th Cir. 2000). This showing does not automatically entitle plaintiff to relief, but the existence of genuine issues of material fact on this question does require that a defense motion for summary judgment be denied. Combs v. Plantation Patterns, 106 F.3d 1519, 1529 (11th Cir. 1997).

Where the employer proffers multiple non-discriminatory reasons for its action, and plaintiff attempts to show pretext indirectly, plaintiff must show that each of the proffered reasons is unworthy of credence. Combs, 106 F.3d at 1529.

Even where the employer's reasons are shown to be untrue, the employer may defend on the basis that the inference of discrimination should not be drawn, because it had an "honest belief' that the reasons were true at the time it acted. Brill v. Lante Corp., 119 F.3d 1266, 1270 (7th Cir. 1997). However, the court "need not take an employer at its word", and must determine whether the belief is in fact honest; "the more objectively reasonable a belief is, the more likely it will seem that the belief was honestly held." Gordon v. United Airlines, 246 F.3d 878, 889 (7th Cir. 2001) (citation and internal quotation marks omitted). On the other hand, a court is not to sit as a "super-personnel department" that unduly scrutinizes an employer's honestly held beliefs which formed the basis for its decision. Chapman v. A-1 Transport, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc).

4. **Pattern or Practice**

An individual claim of disparate treatment is sometimes combined with a claim that the employer's disparate treatment of the plaintiff is part of a "pattern or practice" of general discriminatory treatment toward members of the plaintiffs protected class. Pattern or practice claims are generally advanced in actions brought by the government or class action plaintiffs, although there are some cases where they have been brought by individual private plaintiffs. Castle v. Sangamo Weston, 837 F.2d 1550, 1558 (11th Cir. 1988); Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1559 (11th Cir.), cert. denied, 479 U.S. 883 (1986). However, in

February 2008, in Davis v. Coca-Cola Bottling Co. Consolidated, 516 F.3d 555 (11th Cir. 2008), the Eleventh Circuit joined other circuits to hold that a "pattern or practice" claim can be maintained only as a class action.

In a pattern or practice case, plaintiff establishes a prima facie case by showing "that .. . discrimination was the company's standard operating procedure." Cox, 784 F.2d at 1559, citing Teamsters v. U.S., 431 U.S. 324, 336 (1977). Plaintiff may establish a prima facie "pattern or practice" case through statistics alone, or may attempt to bring "the cold numbers convincingly to life" by supplementing the statistics with anecdotal evidence showing how individual employees have been impacted by the pattern or practice of discrimination. Teamsters, 431 U.S. at 339.

An employer can rebut a pattern or practice case by (1) explaining away the statistical disparity or (2) introducing alternative statistical evidence. Once the defendant offers evidence that challenges the plaintiffs evidence, then the plaintiff has the burden of persuading the trier of fact that defendant's evidence is biased, inaccurate or not worthy of credence. Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985).

If the defendant cannot defeat the prima facie case of a pattern or practice of discrimination, then the court may infer that there was discrimination on a class wide basis. Then the case proceeds to the remedial stage, where the court determines the relief, in any, to be granted. During this stage, the employer has the burden of persuasion to overcome the rebuttable presumption that each individual class member was a victim of its pattern or practice of discrimination Cox, 784 F.2d at 1559 (citations omitted).

5. Disability Discrimination

A prima facie case of disability discrimination is established by showing that (1) plaintiff is disabled, (2) is a qualified individual, and (3) was subjected to unlawful discrimination because of the disability. Carruthers v. BSA Advertising, 357 F.3d 1213, 1215 (11th Cir. 2004).

Disparate treatment analysis in an ADA claim is illustrated by the decision in Raytheon Co. v. Hernandez, 540 U.S. 44, 49 (2003). Plaintiff had been previously forced to resign from Raytheon due to drug abuse. Two years later, plaintiff reapplied, asserting that he had overcome his substance abuse problems. When Raytheon refused to rehire him, plaintiff filed a charge under the ADA, alleging that Raytheon had discriminated against him because of his record of drug abuse and because it regarded him as being a drug addict. In response to plaintiff's prima facie case under the ADA, Raytheon proffered evidence that it rejected plaintiff's application based on its policy against rehiring employees who are terminated for workplace misconduct. Raytheon also asserted that the decision maker did not know about plaintiff's former drug use when she rejected his application. The Court held that Raytheon had met his burden of articulating a legitimate, nondiscriminatory reason for refusing to rehire plaintiff, and remanded the case for a determination as to whether respondent's explanation was a pretext for discrimination.

6. Mixed Motive Cases

As part of the 1991 amendments to Title VII, Congress added provisions designed to address the U.S. Supreme Court's ruling in Hopkins v. Price-Waterhouse, 490 U.S. 228 (1989). In Hopkins, the Court ruled that where a plaintiff proves that a discriminatory factor played a motivating part in the employer's decision, the burden of persuasion shifted to the employer. The employer's burden was then to prove by a preponderance of the evidence that it would have made the same decision in the absence of discrimination. If it could do this, the employer was absolved of all liability. 490 U.S. at 229.

The Civil Rights Act of 1991 overruled the Price Waterhouse holding. After the 1991 Act, once the plaintiff shows that a protected characteristic "was a motivating factor for any employment practice, even though other factors also motivated the practice," the "same decision" defense allows the employer to avoid liability only for monetary damages, including back pay, front pay, emotional distress and punitive damages, and reinstatement or promotion of the plaintiff. Id. at 42 U.S.C. § 2000e-5(g)(2)(B)(ii). The employee is still entitled to declaratory relief, injunctive relief and attorneys' fees, if the illegitimate factor was "a motivating factor," even though the employer would have made the same decision, absent the illegitimate factor. 42 U.S.C. § 2000e-5(g)(2)(B)(I). The 1991 Act also states the employer has the burden of pleading and proving mixed-motive as an affirmative defense. 42 U.S.C. § 2000e-5(g)(2)(B) (the employer must 'demonstrate' that it "would have taken the same action in the absence of the impermissible motivating factor"). Thus, the amendment had the effect of preventing a windfall to the employee – who would have suffered the adverse action anyway – but did not absolve the employer who had in fact engaged in discriminatory concuct.

The critical distinction between mixed motive and the McDonnell Douglas-Burdine framework is that in the former, the burden of persuasion actually shifts to the employer; by contrast, the employer's only burden under the McDonnell Douglas-Burdine framework is one of production, and the burden of persuasion remains at all times with the plaintiff.

Application of mixed motive has been limited, however, by the courts of appeals to cases in which there was "direct evidence" of discrimination. Trotter v. Board of Trustees of University of Alabama, 91 F.3d 1449, 1453-54 (11th Cir. 1996). Direct evidence is evidence which, if believed, proves the existence of the fact in issue without inference or presumption. Hinson v. Clinch County, Ga. Board of Education, 231 F.3d 821 (11th Cir. 2000). Direct evidence in the context of discrimination claims includes only "remarks made by employers that reveal discriminatory attitudes and are related to the challenged employment decision." Allen v. City of Athens, 937 F. Supp. 1531, 1538 (N.D. Ala. 1996). Because direct evidence is that which proves the fact of discrimination without further inference, "only the most blatant remarks whose intent could be nothing other than to discriminate constitute direct evidence." Clark v. Coates & Clark, Inc., 990 F.2d 1217, 1223 (11th Cir. 1993). This high standard for direct evidence made application of mixed motive analysis rare.

This all changed, however, with the Supreme Court's decision in Desert Palace v. Costa, 539 U.S. 90 (2003). Writing for a unanimous Court, Justice Thomas held that a plaintiff can take advantage of "mixed motive" analysis under Title VII whenever the record contains either direct or circumstantial evidence suggesting that a prohibited characteristic was a

motivating factor for a challenged employment practice. Thus mixed motive analysis is appropriate in any case where some discriminatory motive is shown, regardless of whether there is "direct evidence" of discrimination. 539 U.S. at 100-101.

Costa has spawned much litigation as to whether the new formulation of mixed motive analysis will apply to claims other than Title VII discrimination cases, given the Court's reliance in part on the text of that statute. As such, it is not even clear whether Costa applies to Title VII retaliation claims. Some courts have held that Costa applies to other statutory claims, while others have held or assumed that it does not. Compare, Shomsky v. Speedway SuperAmerica, 267 F. Supp.2d 995, 1000 (D.Minn. 2003) (Costa applies to ADA claim); Head v. Glacier Northwest, 413 F.3d 1053, 1065 (9th Cir. 2005) ("mixed motive" or "motivating factor" analysis can be applied in ADA cases, citing cases) with Hedrick v. Wsetern Reserve Care System, 355 F.3d 444, 454 (Costa does not apply to ADA claim); and Richel v. Nationwide Mutual Insurance Co., 297 F. Supp.2d 854 (M.D.N.C. 2003) (Costa applies to ADEA claim) and Hill v. Lockheed Martin Logistics Management, 354 F.3d 377, 285 n.2 (4th Cir. 2004) (assuming Costa does not apply to ADEA claim).

The better rule would seem to be that the elimination of the direct evidence requirement for mixed motive analysis does apply outside the Title VII context, as the Court's rationale for this aspect of the holding drew on a long history of reliance on circumstantial evidence in many types of cases, including criminal cases, and not just on the language of Title VII. Costa, 539 U.S. at 99-100; see, Walker v. Northwest Airlines, 2004 WL 114977 (D.Minn. 2004) (direct evidence no longer required, after Costa, for mixed motive analysis in discrimination claim under 42 U.S.C. §1981). However, the specific statutory provision of Title VII, that the employer is liable for injunctive relief and attorney fees even if it shows it would have made the same decision, absent the discriminatory motive, would not seem to apply outside the Title VII discrimination context.

Some courts and commentators have suggested that after Costa, mixed motive analysis supplants the traditional McDonnell Douglas disparate treatment analysis, or modifies it to the point where plaintiff's identification of any evidence of discriminatory motive shifts the burden not just of production, but of persuasion, to the employer. See, e.g., Dare v. Wal-Mart Stores, 267 F. Supp.2d 987, 990-91 (D.Minn. 2003); Van Detta, "Le Roi Est Mort; Vive Le Roi: An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a 'Mixed-Motives Case," 52 Drake L. Rev. 71 (2003). However, the Eleventh Circuit has not taken this approach, and has continued to treat mixed motive cases as a distinct species, limiting its application of Costa to that class of cases. Cooper v. Southern Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004).

Presumably in recognition of some of the confusion caused by these decisions, in December 2008, the Supreme Court granted a request to review the case of Gross v. FBL Financial Services, Inc., 2008 WL 4462486 (U.S.), which presents the question of whether a plaintiff is required to present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case.

7. Statistical Evidence

Statistical evidence is commonly used in class-wide cases, but may also be used in individual disparate treatment cases to show pretext. McDonnell Douglas, 411 U.S. at 804-05. However, it is generally held that statistical evidence alone is not sufficient to prove individual disparate treatment, or the lack thereof. Bullington v. United Air Lines, Inc., 186 F.3d 1301 (10th Cir. 1999)

To be relevant and persuasive, statistical evidence must provide meaningful comparisons between appropriate sets of data. Le Blanc v. Great Amer. Ins. Co., 6 F.3d 836 (1st Cir. 1993) (incomplete data sets not probative of discriminatory intent), cert. denied, 511 U.S. 1018 (1994); Hollander v. American Cyanamid Co., 172 F.3d 192 (2nd Cir.), cert. denied, 102 S. Ct. 399 (1999) (failure to account for possible explanations for statistical imbalance other than unlawful discrimination, and arbitrary and misleading grouping of age bands, rendered statistical evidence inadmissible in age discrimination case). On the other hand, plaintiffs "need not prove discrimination with scientific certainty," and statistics which do not take account of every possibility are still worthy of consideration even if they are imperfect. Bazemore v. Friday, 478 U.S. 385, 400 (1986).

B. Disparate Impact

In contrast to disparate treatment, a plaintiff suing under the theory of disparate impact does not have to establish the employer's discriminatory intent in order to prevail.[49] Under the disparate impact theory of liability, an employer may be liable where a facially neutral policy or practice, has a significant adverse impact upon a protected group.[50] While disparate treatment theory focuses on discriminatory intent, disparate impact theory focuses on discriminatory results. Although individual employees may sue under a disparate impact theory, it is more commonly used in class actions and multi-plaintiff cases. Disparate impact claims are also cogizable under the ADA, Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003), and the ADEA, Smith v. City of Jackson, 544 U.S. 228, 240 (2005).

The ADA, Title VII and the ADEA prohibit the use of discriminatory employment tests and selection procedures. Therefore, an employer is not permitted to utilize a test to determine whether an applicant and/or employee is most qualified for a particular job if an employer intentionally utilizes the test to discriminate against an individual based on race, color, sex, national origin, religion, disability or age (40 or older). For more information on this topic, refer to the U.S. Equal Employment Opportunity Commission, Fact Sheet on Employment Tests and Selection Procedures, http://www.eeoc.gov/policy/docs/factemployment_procedures.html (last modified June 23, 2008).

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[49] Also, Title VII does not permit jury trials for disparate impact cases, in contrast to disparate treatment claims.

[50] Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849 (1971).

1. Prima Facie Case

To establish a prima facie case, the plaintiff must show that the employer has a practice or policy that, although facially neutral, affects members of a protected class significantly more harshly than non-members of the class. For example, a minority employee who alleges disparate impact in promotions based on racial discrimination could show that the employer's requirement for a high school diploma adversely affects minorities significantly more often than it does non-minorities. The plaintiff typically relies on statistics, such as selection rates, comparisons, and regression analyses, to show adverse impact upon a particular protected group.[51]

Generally, plaintiff must also identify "the specific facially-neutral practice which is casually responsible for the identified statistical disparity." EEOC v. Joe's Stone Crab, 220 F.3d 1263, 1268 (11th Cir. 2002). However, the 1991 Civil Rights Act relaxed this requirement in cases where plaintiff demonstrates that the individual elements of the employer's selection process "are not capable of separation for analysis." 42 U.S.C. § 2000e-2(k). In such cases, the plaintiff may present evidence on the disparate impact of the decision-making process as a whole. Id.

Once the plaintiff presents statistical proof, the defendant may challenge that proof by asserting problems with the data set or analysis, for example, that the sample size is too small, thereby minimizing or eliminating the statistical significance. The plaintiff's statistics can also be attacked with a separate statistical analysis showing that legitimate factors explain any disparity.

2. Business Necessity

If the plaintiff makes out the prima facie case , the employer must prove that the policy or practice is "job related."[52] This means that the practice is necessary to the employer's business.[53]

Once a plaintiff establishes a prima facie case of adverse impact, the defendant may defend its policy or practice by establishing that it is "job related for the position in question" and "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). A selection device causing adverse impact is lawful if shown, by professionally accepted methods, to be predictive of important elements of work behavior that comprise or are relevant to the job at issue. Conteras v. City of L.A., 656 F.2d 1267 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982). Unlike a McDonnell Douglas disparate treatment claim, a disparate impact claim imposes a rebuttal burden on the employer not just of production, but of persuasion. 42 U.S.C. § 2000e-2(k)(1)(B)(ii).

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[51] See, e.g., Paige v. State of California, No. 01-55312, 2002 U.S. App. LEXIS 10279 (9th Cir. May 31, 2002).

[52] Albermarle Paper Co. v. Moody, 422 U.S. 405, 425, 95 S. Ct. 2362, 2375 (1975); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1553 (11th Cir. 1984).

[53] 42 U.S.C. §2000e-2(k)(1)(A)(i).

3. Other Alternatives

If the employer establishes that the practice or policy is job related and consistent with business necessity, the plaintiff may offer a rebuttal. Evidence may be proffered to show that the employer had alternatives to the practice or policy at issue, and that the employer could have chosen one that would not impact the protected group in a less favorable manner.[54]

4. ADEA

In 2008, in Meacham v. Knolls Atomic Power Laboratory, the Supreme Court clarified how courts should apply these rules where an employer makes an employment-related decision that disproportionately negatively impacts older workers. The court held that the employer bears the burden of persuasion to show that its action was based on reasonable factors other than age. In Meacham, the employer selected those to be laid off by scoring employees on "performance," "flexibility," "critical skills" and length of service. Although none of the criteria were overtly age-related, the result of the scoring disproportionately affected older workers. The employer argued that the criteria fell within the ADEA exemption stating that it is not unlawful age discrimination for an employer to take an adverse action against employees where differential treatment is based on "reasonable factors other than age" ("RFOAs"), and that as long as it produced evidence of RFOAs, the burden fell on the employees to prove that the RFOAs were not reasonable. The Supreme Court rejected this argument, and ruled that when an employer uses the RFOA affirmative defense, the employer bears the ultimate burden of proving reasonableness. Thus, Meacham increases the burden on employers to ensure they can support the criteria they use in reductions in force and to analyze whether they will result in a disproportionate effect on older workers.

C. The Equal Pay Act

Unlike discrimination statutes such as Title VII of the Civil Rights Act of 1964, the EPA does not require proof of intentional discrimination. Rather, like the FLSA, it is applied in an objective and technical manner. Meeks v. Computer Associates International, 15 F.3d 1013, 1019 (11th Cir. 1994).

The "disparate treatment" model of proof, as developed in Title VII jurisprudence, does not apply in EPA cases. Once plaintiff shows that a disparity in pay exists, and that the jobs are substantially similar, the burden of proof shifts to the employer to show that the disparity is based on "a factor other than sex." Miranda v. B & B Cash Grocery Store, 975 F.2d 1518, 1533 (11th Cir. 1992).

In determining whether working conditions are "similar," the surroundings in which the work is performed and the hazards encountered by the employee are considered. 29 C.F.R. § 1620.18

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[54] See, e.g., Contreras v. City of Los Angeles, 656 F.2d 1267, 1275 (9th Cir. 1981) (After employer meets its burden, plaintiff has the burden to prove that there was an effective business alternative with less disparate racial impact available to the employer).

1. Prima Facie Case

An EPA plaintiff must point to at least one comparator of the opposite sex to establish a prima facie claim. Houck v. Virginia Polytechnic Institute, 10 F.3d 204, 206-07 (4th Cir. 1993) (comparison to hypothetical male counterpart is insufficient; must use an actual male comparator). Predecessors and successors may be used for the purpose. If a plaintiff succeeds in identifying a comparator, a claim may be established even if there are other individuals of the opposite sex who receive the same wages as the plaintiff.

Typically, the comparator must be employed at the same establishment – or physical location, as the plaintiff. However, if the employer's operations are integrated and its administration is centralized, this requirement need not be met. 29 C.F.R. § 1620.9(b).

The comparator must also be engaged in "equal work," which includes:

a. **Equal Skill**.

The term "skill" generally refers to experience, training, education and ability. 29 C.F.R. § 1620.15.

b. **Equal Effort and Responsibility**.

The term "effort" and "responsibility" refer to the nature, volume and difficulty of tasks assigned to the plaintiff and the comparator(s), the time spent in completing the task, and the economic value of the task to the employer. 29 C.F.R. §§ 1620.13, 1620.16.

2. Defenses

There are four affirmative defenses recognized by the regulations interpreting the EPA. They are:

a. Seniority Systems

b. Merit Systems

c. Quantity/Quality of Production

d. Any Factor other than Sex (The ultimate "catch-all"? Perhaps, but courts do look for a legitimate purpose when the defense is applied). See 20 C.F.R. § 1620.22.

IV. PROOF OF ILLEGAL EMPLOYMENT PRACTICES: HARASSMENT

Actionable harassment can be based on race, age, religion, national origin, disability or gender.[55] A specific type of gender harassment is sexual harassment. Sexual harassment in the

[55] Most courts of appeals have held that a claim of hostile work environment may be brought under the ADA. Flowers v. Southern Regional Physician Services, 247 F.3d 229 (5th Cir. 2001); see also Dockery v. Nicholson, 170

(continued...)

workplace can occur when an unwanted condition is imposed on a person's employment because of his or her sex. However, unlike most forms of discrimination, sexual harassment can exist even where the harasser never intended to harass, as it is the impact of what a person does, not his or her intent, that determines liability. Both men and women can be the victims of sexual harassment, including same sex sexual harassment. Sexual harassment can comprise the following behaviors: (1) unwelcome sexual advances; (2) hostile conduct based on the victim's gender; and (3) offensive, sexually charged workplace behavior affecting persons who may or may not be the targets of the gender-based conduct.

Although Title VII does not specifically prohibit "harassment" or a "hostile work environment," such discrimination is covered by the "terms, conditions and privileges" language of the statute. Harris v. Forklift Systems, 510 U.S. 17, 21 (1993). Title VII is violated when the workplace is permeated with "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Meritor Savings Bank v. Vinson, 477 U.S. at 67.

A. Types of Sexual Harassment

1. Quid Pro Quo ("This for that")

Quid pro quo harassment occurs when a work-related benefit is conditioned expressly or impliedly on the granting of a sexual favor. For example, "Spend the night with me and I'll promote you." Quid pro quo harassment can occur where an individual is penalized for refusing to participate in such conduct. "If you don't go out with me, you'll be fired."

The prima facie case in a quid pro quo case is whether a tangible job benefit was conferred or a tangible job detriment was imposed based on discriminatory or prohibited criteria. The EEOC's Guidelines state that unwelcome sexual advances constitute sexual harassment if submission to such conduct is made a condition of employment or if employment decisions are based on submission or rejection of such conduct. See 29 C.F.R. §§ 1604.11(a)(1)–(2).

In Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2268 (1998), the majority opinion by Justice Kennedy defines a "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits." In "most cases" such an action "inflicts direct economic harm," and "is documented in official company records, and may be subject to review by higher level supervisors." Id. at 2269. See also Cotton v. Cracker Barrel Old Country Store, Inc., 434 F.3d 1227 (11th Cir. 2006).

In quid pro quo sexual harassment cases employers are strictly liable for the acts of their supervisors, despite a lack of notice by the employer of the harassment. Thus, in order to prevail the employee need not prove that the employer knew or should have known of the harassment and failed to take prompt remedial action.

(...continued)

Fed. Appx. 63, 67 (11th Cir. 2006) (unpublished) (assuming, without deciding, that hostile environment claim may be made under the ADA).

2. Hostile Work Environment

By contrast, a hostile environment claim involves unwelcome verbal or physical conduct of a sexual nature which alters conditions of employment and which creates an environment that both the claimant and a reasonable person would find intimidating, hostile, abusive or offensive. Harris v. Forklift Sys., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993); see also Meritor Sav. Bank v. Vinson, Inc., 477 U.S. 57 (1986). It does not require proof of a tangible job detriment or benefit.

In bringing a "hostile work environment" claim, a plaintiff must demonstrate that her work environment was subjectively (i.e., to her) and objectively (i.e., to a reasonable person in her shoes) "hostile." Harassment can be verbal, visual, or physical. Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991) (in adopting a "reasonable woman" standard for assessing claims of hostile environment the court commented that "[c]onduct that many men may consider unobjectionable may offend many women," and a "sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women").

B. Other Types of Harassment

Derogatory or demeaning conduct toward others on the basis of characteristics such as race, national origin, ancestry, religion, age, marital status, veteran status and disability is prohibited. This includes, but is not limited to, jokes, insults and nicknames which allude to such characteristics of another in an unfavorable light.

Harassment based on any protected characteristic is a violation of Title VII. Harrison v. Metropolitan Government of Nashville & Davidson County, 80 F.3d 1107 (6th Cir. 1996), cert. denied, 519 U.S. 863 (1996). Precedent developed in sexual harassment cases is applicable in all hostile work environment cases. National Railroad Passenger Association v. Morgan, 536 U.S. 101, 116 n.10 (2002) (hostile environment cases based on race are reviewed under standards developed in sexual harassment cases).

All races, minority and majority, are protected against racial harassment. Davis v. Kansas City Housing Authority, 822 F. Supp. 609 (W.D. Mo. 1993). Similarly, men as well as women are protected from harassment, and employees are protected from "same sex harassment," so long as the harassment was motivated by the victim's sex. Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998).

In Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998), the Supreme Court held that same-sex harassment is actionable without evidence that the defendant acted out of sexual desire, but only if the plaintiff can show that the harassment was "because of ... sex." Id. at 1002.

C. Proving Hostile Work Environment

In order to prove a hostile environment claim, a plaintiff must show:

> (1) that she belongs to protected group; (2) that she has been subject to unwelcome harassment; (3) that the harassment was

> based on a protected characteristic; (4) that the harassment was sufficiently severe or pervasive to alter terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability.

Miller v. Kenworth of Dothan, 277 F.3d 1269, 1275 (11th Cir. 2002), citing Mendoza v. Borden, 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc).[56]

1. Belongs to Protected Group

This element is obvious in most cases. Where white employees claim harassment based on race, a claim will lie for harassment based on their own race; however, courts disagree as to whether white employees may make a claim because their work environment is permeated with racial hostility directed at African Americans. Compare, EEOC v. Mississippi College, 626 F.2d 477, 482-83 (5th Cir. 1980), cert. denied 453 U.S. 912 (1981) (white plaintiff does not have standing to assert the rights of others, including employees of other races, but does have standing to assert his own right to work in an environment which is not charged with hostility to non-whites) and Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), (the "terms, conditions or privileges" language of Title VII protects a white plaintiff's right to a work environment which is not "charged with discrimination" against non-whites) with Bermudez v. TRC Holdings, 138 F.3d 1176 (7th Cir. 1998) (white employee has no standing to assert claim based on racial slurs directed at African American job applicants).

2. Unwelcome Conduct

In determining whether conduct was unwelcome, the perspective is that of the employee. The conduct is considered unwelcome if the employee regarded the conduct as undesirable or offensive. Conduct may be unwelcome even if the employee voluntarily submits to it. The fact that sex-related conduct was "voluntary" in the sense that the complaining employee was not forced to participate against the employee's will, is not a defense to a sexual harassment suit. Rather, the most significant part of any sexual harassment claim is that the sexual conduct was unwelcome.

In determining whether conduct was unwelcome, an employee's failure to complain may be relevant. In certain instances an individual may be required to tell an alleged harasser directly that his/her comments or conduct is unwelcome. In other instances, however, an individual's consistent failure to respond to suggestive comments or gestures may be

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[56] The burden-shifting framework of McDonnell Douglas and its progeny does not apply in hostile environment cases. Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d 501, 510-511 (11th Cir. 2000), citing Henson v. City of Dundee, 682 F.2d 897, 905 n.11 (11th Cir. 1982). As such, there is no shifting of the burden to defendant to articulate its nondiscriminatory reasons, nor back to plaintiff to establish pretext; the parties must simply proceed to prove or refute the elements of a hostile environment claim. Johnson, 234 F.3d at 511. Likewise, mixed motive analysis does not apply to hostile environment claims; simply put, "[a]n employer could never have a legitimate reason for creating a hostile work environment." Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1994).

sufficient to communicate that the alleged harasser's conduct is unwelcome. Where a relationship is truly consensual, there is no sexual harassment claim. However, once a consensual relationship ends, the employee may have a claim for sexual harassment if requests for sexual favors continue or if an adverse employment action results.

Even if the employee involved in the consensual relationship does not complain, other employees may. In some instances an employer may be liable where there is widespread sexual favoritism by supervisors who have granted advantages to employees with whom they are having sexual relationships.

3. Harassment was Based on Protected Characteristic

The very content of much harassment often demonstrates that it was based on a protected characteristic. Harassment such as the use of racial slurs, "jokes", sexual innuendos, segregation of facilities, and sexual advances carry a racial or sexual content that itself reveals that they are based on a protected characteristic.

Harassment that is not based on a protected characteristic does not violate Title VII. A mere "personality conflict" or "personal feud" between two employees of different races or genders is not actionable. McCollum v. Bolger, 794 F.2d 602, 610 (11th Cir. 1986). However, the fact the two employees have previously quarreled over other matters or, conversely, had an intimate relationship which ended in acrimony, does not automatically preclude a hostile environment claim. Lipphardt v. Durango Steakhouse of Brandon, 267 F.3d 1183, 1188 (11th Cir. 2001).

Some courts have held that, where it is shown that supervisors and other harassers use epithets with clear racial content, it can be inferred "that racial animus motivated not only [their] overtly discriminatory conduct but all of [their] offensive behavior toward [plaintiffs]." Bowen v. Missouri Department of Social Services, 311 F.3d 878, 884 (8th Cir. 2002); O'Shea v. Yellow Technical Services, 185 F.3d 1093, 1097 (10th Cir. 1999). Thus in the context of harassment which is overtly based on a protected characteristic, these courts hold that other conduct of the employer, which is not explicitly racial in nature, may be treated as part of the challenged harassment. Carter v. Chrysler Corp., 173 F.3d 693 (8th Cir. 1999). But see Gupta v. Florida Board of Regents, 212 F.3d 571, 583 (11th Cir. 2000) ("Innocuous statements or conduct, or boorish ones that do not relate to the sex of the actor or of the offended party are not counted"). As will be seen below, this becomes significant in evaluating whether the harassment is a set of isolated instances, or so permeates the work environment as to violate Title VII.

4. Harassment Was Sufficiently Severe Or Pervasive

Whether supervisor or co-employee conduct is severe or pervasive enough to constitute sexual harassment is largely a question of degree. Jackson v. City of Racine, 474 F.3d 493, 499 (7th Cir. 2007) ("One instance of conduct that is sufficiently severe may be enough…Conversely, conduct that is not particularly severe but that is an incessant part of the workplace environment may, in the end, be pervasive enough and corrosive enough that it meets the standard for liability"). In some instances, a single incident if outrageous enough may be sufficient. In other instances, isolated remarks or conduct of a less outrageous nature may not be

actionable. In an effort to determine whether harassment is sufficiently severe or pervasive to create a hostile environment, federal courts have required that the harasser's conduct be evaluated from the victim's perspective, that of a "reasonable person of the same gender" (e.g., a reasonable woman if the victim was a woman).

Not all workplace conduct of a harassing nature is actionable under Title VII. Oncale v. Sundowner Offshore Services,523 U.S. 75 (1998) (Title VII is not intended to be a "general civility code."). Simple teasing, offhand comments and isolated incidents do not rise to the level of actionable discrimination. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2283 (1998). Conduct must be extreme to amount to a change in the terms and conditions of employment. Id.

The test for determining severity is both an objective and a subjective one: "the environment must be one that a reasonable person would find hostile or abusive and that the victim subjectively perceives to be abusive." Mendoza, 195 F.3d at 1246, quoting Harris, 510 U.S. at 21.

Objective Severity. In evaluating the objective prong of severity, courts focus on four factors: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. Miller, 277 F.3d at 1276 (citations omitted). Courts do not require that a plaintiff demonstrate that each factor is present, but look at the "totality of the circumstances", including the relative strength of each factor. Id., citing Mendoza, 195 F.3d at 1246; "no single factor is required." Harris, 510 U.S. at 23.

Subjective Severity. The subjective prong of "severity" is intertwined with the second element ("unwelcomeness") of the hostile environment case. Johnson, 234 F.3d at 509. Plaintiff need not show that her psychological well-being was affected in order to establish a claim. Harris, 510 U.S. at 22. Although subjective severity is rarely an issue in hostile environment cases, some employers have suggested that the use of racial slurs in popular music, and sometimes by plaintiffs or other African Americans themselves, is evidence that some notorious racial slurs are no longer subjectively severe. To date, that argument does not seem to have been accepted. See Rodgers v. Western-Southern Life Insurance Co., 12 F.3d 668, 675 (7th Cir. 1993) ("The fact that black employees also may have spoken the term does not mitigate the harm caused by [the supervisor's] use of that epithet; a supervisor's use of the term impacts the work environment far more severely than use by co-equals.")

A biased remark can form a part of the hostile working environment, and support a particular plaintiff's claim, even though it was not directed at that particular plaintiff or even spoken in her presence. Reeves v. C.H. Robinson Worldwide, Inc., 525 F.3d 1139, 1144-1145 (11th Cir. 2008) (exposure to sexually charged language and radio programming over three years actionable even though the plaintiff was not the target); EEOC v. Beverage Canners, 897 F.2d 1067, 1070 (11th Cir. 1990) (racially charged comments "made to or about [protected class] employees" are part of hostile environment, even if not addressed to plaintiffs); Busby v. City of Orlando, 931 F.2d 764, 785 (11th Cir. 1991) (exclusion of evidence of racial slurs directed at others, even if not heard directly by plaintiff, is an abuse of discretion in a hostile environment

case); Schwapp v. Town of Avon, 118 F.3d 106, 111 (2nd Cir. 1997) (citations omitted) (reversing summary judgment for defendant because court failed to consider evidence of second-hand reports to plaintiff of racial epithets); Conner v. Shrader-Bridgeport International, 227 F.3d 179, 200 (4th Cir. 2000) ("[t]he fact that two [other members of plaintiffs protected class] later hired into the Department . . . experienced the same types of unwelcome conduct is also highly supportive of [a hostile environment claim]"). However, incidents of harassment not made known to plaintiff until after she left defendant's employ "could not have contributed to her subjective view of a hostile environment," and are not considered in the analysis of the claim. Edwards v. Wallace Community College, 49 F.3d 1517, 1522 (11th Cir. 1995).

Pervasiveness. In Baskerville v. Culligan International Co., 50 F.3d 428 (7th Cir. 1995), the Seventh Circuit reversed a jury damage award for sexual harassment holding that nine instances of vulgarity spread over seven months did not add up to unlawful sexual harassment. "A handful of comments spread over months is unlikely to have so great an emotional impact as a concentrated or incessant barrage." 50 F.3d at 431. See also Trotta v. Mobil Oil Corp., 788 F. Supp. 1336 (S.D.N.Y. 1992) (to be deemed pervasive, the complained of conduct must be continuous and concerted, and not merely episodic). However, hostile environment claims have been upheld in cases where the harassment did not occur daily, or occurred regularly but only during brief exposures to the harasser. Johnson, 234 F.3d at 509 (11th Cir. 2000) (fifteen instances over four months); Miller, 277 F.3d at 1276 (11th Cir. 2002) (daily for a period of one month); McCowan v. All Star Maintenance, 273 F.3d 917, 925-26 (10th Cir. 2001) (daily for three weeks where plaintiff was exposed to primary harasser for two to fifteen minutes each day); Young v. Southwestern Savings & Loan Association, 509 F.2d 140 (5th Cir. 1975) (requirement that employees attend a monthly staff meeting that began with a short religious talk and a prayer, delivered by a minister, is unlawful religious harassment).

Racial harassment may also consist of "pranks" and other forms of hazing, even if not accompanied by slurs, if they are racially motivated. Richardson v. City of Albuquerque, 857 F.2d 727 (10th Cir. 1988); Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982).

Severity or pervasiveness is a major battleground in most cases. The decisions are very fact specific, and often difficult to reconcile. Compare, Mitchell v. Carrier Corp, 954 F. Supp. 1568 (M.D.Ga. 1995), aff'd 108 F.3d 343 (11th Cir. 1997) (table) (judgment for employer where plaintiff was exposed to racial epithets such as "Woody Wilson – n----- ape" and "N-----s go home to Africa," and racist graffiti and drawings of rebel flags and the initials KKK on documents); Miller v. Aluminum Company of America, 679 F. Supp. 495 (W.D.Pa.), affirmed, 856 F.2d 184 (3d Cir. 1988) (allegations of harassment, including a supervisor unjustly criticizing the plaintiff's work and assigning her menial tasks, teasing the plaintiff about whom she was dating, and making an embarrassing remark about plaintiff's breasts, did not rise to the level required for actionable sexual harassment); Downes v. Federal Aviation Administration, 775 F.2d 288, 293-94 (Fed. Cir. 1985) (crude jokes and sexually explicit remarks were not sufficiently severe to constitute actionable sexual harassment) with Spriggs v. Diamond Auto Glass, 242 F.3d 179, 184 (4th Cir. 2001) ("Far more than a 'mere offensive utterance,' the word 'n------' is pure anathema to African-Americans. 'Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'n------' by a supervisor in the presence of his subordinates,'" citing Rodgers v. Western-Southern Life Insurance Co., 12 F.3d 668, 675 (7th

Cir. 1993)); Bowen, 311 F.3d at 884-85 (claim upheld where harasser twice called plaintiff a "white bitch", once referred to her in a conversation with another employee as a "menopausal bitch," threw a cake she had baked on the floor, and once ran toward her); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (claim upheld where employees posted nude pictures of women, made sexually demeaning remarks and jokes, and harassed other female employees).

5. Liability For Supervisor Harassment in Hostile Work Environment Cases

A hostile work environment claim involves severe and pervasive harassment, as described above, including an unfulfilled threat or promise of a tangible job detriment or benefit. Where such conduct is committed by a supervisor, an employer is liable unless the employer proves "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (holding that where there is no tangible employment action, employer must prove affirmative defense to avoid liability); see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998) (applying same standard). See discussion below in section on Defenses to Harassment Claims.

In Ellerth, the Court explicitly added the "severe or pervasive" requirement to any harassment claim if the employee has not suffered a tangible employment action due to his or her refusal to submit to a supervisor's sexual demands. "For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive." Id. at 2265. Unfulfilled threats require a showing of severe or pervasive conduct. Id. Likewise, the Court in Faragher reaffirmed that "conduct must be extreme to amount to a change in the terms and conditions of employment." Faragher, 118 S.Ct. at 2284. "'[O]rdinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'" are not sufficient. Id. (citations omitted).

With respect to hostile work environment harassment, an employer is not liable unless the employer (1) had actual or constructive notice of the conduct, and (2) failed to take immediate, effective corrective action. Muggleton v. Univar USA, Inc., 249 Fed. Appx. 160, 163 (11th Cir. 2007) (citations omitted); see also Myers v. Central Florida Investments, Inc., 237 Fed. Appx. 452, 457 (11th Cir. 2007) (employer aware of allegations of sexual harassment and failed to take corrective action, precluding summary judgment in favor of the employer); Breda v. Wolf Camera & Video, 222 F.3d 886 (11th Cir. 2000) (fact question existed as to whether employer received notice of alleged sexual harassment via complaints to store manager, including whether manager was adequately informed that employee was complaining she was a victim of sexual harassment and whether complaint was about sexual harassment or about general workplace animosity, precluding summary judgment); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (reversing summary judgment for employer because employer's failure to discharge harasser until 11 months after initial complaint was not immediate corrective action); Nichols v. Frank, 42 F.3d 503, 511-12 (9th Cir. 1994) (holding that employer was not liable for hostile work environment harassment by a supervisory employee because management-level personnel neither knew nor could have known of the harassment).

6. Liability for Co-Employee Harassment

The federal Equal Employment Opportunity Commission ("EEOC") guidelines provide that employers are liable for sexual harassment directed against an employee by a non-supervisory co-employee where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can be shown that the employer took immediate and appropriate corrective action. 29 C.F.R. § 1604.11(d).

Under federal law, an employer is not liable for hostile environment sexual harassment by the plaintiff's co-workers if the plaintiff cannot show that the employer both (1) knew or should have known that harassment was occurring, and (2) failed to take prompt and appropriate corrective action once it learned.

A plaintiff can prove that the employer knew or should have known of co-worker harassment by showing that the harassment was open or pervasive enough to charge the employer with constructive knowledge. Underwood v. Northport Health Services, 57 F. Supp. 2d 1289 (M.D. Ala. 1999). See also Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503 (11th Cir. 1989), cert. denied, 513 U.S. 1155 (1995). A plaintiff may also prove an employer's knowledge by showing that she complained to higher management. Huddlestone v. Roger Dean Chevrolet, 845 F.2d 900 (11th Cir. 1988). An employer may be on notice of an employee's harassment of a co-worker where the employer is aware of prior instances of harassment by the same individual of other employees, even if the plaintiff did not complain. Hirase-Doi v. U.S. West Communications, 61 F.3d 777 (10th Cir. 1995). Factors considered in determining if the employer had notice are the extent and seriousness of the earlier harassment and the similarity and temporal proximity to the later harassment. Id.

7. Liability For Harassment By Non-Employees

The EEOC guidelines provide that an employer "may . . . be responsible for the acts of non-employees with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and failed to take immediate and appropriate corrective action." In reviewing such cases, the EEOC will "consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." 29 C.F.R. § 1604.11(e). Such control might exist over subcontractors, frequent customers or outside personnel, such as security guards. In other instances, client or customer harassment should not be actionable.

Several courts, following the EEOC Guidelines, have held employers liable for sexual harassment committed by non-employees, such as the employer's customers, where the employer "knows or should have known of the [harassment by the non-employee] and fails to take immediate and appropriate corrective action." Folkerson v. Circus Circus Enterprises, 107 F.3d 754 (9th Cir. 1997); Lockard v. Pizza Hut, 162 F.3d 1062, 1073-75 (10th Cir. 1998).

D. Defenses to Harassment Claims

If the only injury claimed by the plaintiff is from the harassment itself (as opposed to a tangible job detriment or benefit), defendant may raise the affirmative defense that (1) it

exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) plaintiff unreasonably failed to take advantage of these procedures. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Miller, 277 F.3d at 1278.

The Faragher defense is available only where there has been no "tangible employment action" taken against the employee. Where the employee has suffered a "tangible employment action" such as a suspension, denial of a promotion, or discharge, the Faragher defense is not available. Miller, 277 F.2d at 1278, citing Faragher, supra, 524 U.S. at 807. Burlington Industries v. Ellerth, 524 U.S. 742, 760-61 (1998).

The first element of defense requires more than the employer's adoption of an anti-harassment policy; rather, the employer must show that it has promulgated "an effective and comprehensive" anti-harassment policy, and has "aggressively and thoroughly disseminated" that policy. Miller, quoting, Farley v. American Cast Iron Pipe Co., 115 F.3d 1548, 1554 (11th Cir. 1997); Faragher, 524 U.S. at 808. "Where there is no policy, or where there is an ineffective or incomplete policy, the employer remains liable" for harassment. Farley, 115 F.3d 1548, 1554 (11th Cir. 1997), quoted in Miller, 277 F.3d at 1279. In order to be an effective shield against liability, the employer's anti-harassment policy must provide for an avenue to complain that permits bypassing the supervisor in cases where the supervisor is the alleged harasser. Faragher, 524 U.S. at 808; see, Gentry v. Export Packaging Co., 238 F.3d 842 (7th Cir. 201) (policy which was unclear on to whom the sexual harassment should be reported was not "effective and comprehensive").

As part of the defense, an employer must investigate the complaint. In Baldwin v. Blue Cross / Blue Shield, 480 F.3d 1287, 1303-05 (11th Cir. 2007), the Eleventh Circuit held that the standard for an employer's investigation of a harassment complaint is "reasonableness in all of the circumstances, and the permissible circumstances my include conducting the inquiry informally in a manner that will not disrupt the company's business, and in an effort to arrive at a reasonably fair estimate of the truth;" an employer is not required "to conduct a full-blown, due process, trial-type proceeding in response to complaints of sexual harassment." Rejecting the plaintiff's challenges to the adequacy of the investigation, the Court admonished: "We already have enough to do, and our role under the Faragher and Ellerth decisions does not include micromanaging internal investigations."

The second element of the Faragher defense is the employer's showing that plaintiff unreasonably failed to utilize its anti-harassment complaint procedure. "The Faragher and Ellerth decisions present employees who are victims of harassment with a hard choice: assist in the prevention of harassment by promptly reporting it to the employer, or lose the opportunity to successfully prosecute a Title VII Claim based on the harassment." Baldwin v. Blue Cross / Blue Shield, 480 F.3d at 1307 (employer successfully invokes Faragher defense where plaintiff delayed for three months in reporting harassment); Walton v. Johnson & Johnson Services, 347 F.3d 1272 (11th Cir. 2003) (plaintiff's failure to complain, based on her general fear of retaliation, was not reasonable); Leopold v. Baccarat, 239 F.3d 243, 245 (2d Cir. 2001) (failure to complain because anti-harassment policy did not expressly guarantee confidentiality and non-retaliation was not reasonable); Romero v. Caribbean Restaurants, 14 F. Supp. 2d 185(D.P.R.1998) (failure to complain because plaintiff did not want anything to do with the

harasser again, was too ashamed to tell anyone, did not trust the district manager and was afraid that the company would not give him his back pay was not reasonable).

However, a employee's reasonable attempt to complain, even if it does not strictly follow through to the end of the process, is not necessarily treated as a failure to take advantage of the employer's policy. In Breda v. Wolf Camera & Video, 222 F.3d 886 (11th Cir. 2000), the employer's policy required that complaints be made first to the immediate supervisor, and if not satisfactorily resolved there, to the personnel department. The employee followed company policy by reporting sexual harassment to her manager, but failed to take it to the personnel department when the manager did not resolve it. The court held that where the employer identifies the person, such as the immediate supervisor, to whom employees should report harassment, "once the employee complains to the designated person or persons, the employer is deemed to have actual notice of the harassment." 222 F.3d 886, 889 (11th Cir. 2000); see also, Varner v. National Super Market, 94 F.3d 1209 (8th Cir. 1996), cert. denied, 519 U.S. 1110 (1997) (employer was on notice where harassment was reported to supervisor other than those specified in the employer's sexual harassment policy). However, in Coates v. Sundor Brands, Inc., 164 F.3d 1361 (11th Cir. 1999), it was held that the employer had established the Faragher defense where the employee confided in a co-worker, who complained to management, which took prompt action to discipline the harasser. And in Baldwin v. Blue Cross / Blue Shield, 480 F.3d at 1300-01, the employer was not liable for discharging sexual harassment victim after she demanded that her supervisor be fired, refused to enter joint counseling and continue to work under his supervision, and refused employer's offer of a transfer to another city.

The Faragher defense is an "affirmative defense" and must be pled as such in the employer's answer to the complaint in a court action. 524 U.S. 807. The employer has the burden of proof on this defense, and must establish both elements of the defense by a preponderance of the evidence. Id.; Frederick, 246 F.3d at 1313. Where the employee quits her job because of the hostile work environment, and claims she was constructively discharged, the Faragher affirmative defense may be raised as to both claims, in the absence of a tangible employment action. Pennsylvania State Policy v. Suders, 542 U.S. 129 (2004).

V. RETALIATION

Claims of retaliation have grown dramatically over the last several years. Consequently, it is important for employers to be sensitive to the fact that the treatment of an employee who has claimed discrimination, or who has supported another employee's claim of discrimination, may give rise to a wholly separate claim of retaliation.

Title VII, the ADEA and the ADA all protect employees against retaliation.[57] In order to show that retaliation has occurred, a plaintiff must show that he/she engaged in statutorily protected activity, suffered an adverse action, and that a causal connection existed between the adverse action and the statutorily protected activity. Fleming v. Boeing Company, 120 F.3d 242, 248 (11th Cir. 1997). Should the plaintiff make this showing, then the burden of production shifts to the employer to state a legitimate business reason for the adverse action, just as it does for a discrimination case under the discrimination statutes. At that point, the plaintiff bears the burden of showing that the proffered reason for the action is a mere pretext for unlawful retaliation.

An employee making a claim of retaliation must follow the same administrative requirements as under Title VII, the ADEA and the ADA.

A. Prima Facie Case

1. Statutorily protected activity means either (1) participation in an investigation or proceeding brought under the applicable statute (the "participation clause") or (2) opposition to an employer's practice that is unlawful under the applicable statute (the "opposition clause").

The definition of "participation" extends to all aspects of the process of communicating, or refusing to communicate allegations or evidence to an agency charged with the enforcement of civil rights. This includes the filing of a formal charge and, according to some courts, expressing the intent to file a charge. Croushorn v. Univirsity of Tennessee Board of Trustees, 518 F. Supp. 9 (M.D. Tenn. 1980). Furthermore, courts have interpreted "assisting" and "participating" to cover the private gathering of non-confidential information for the agency's use, being a probable witness for a plaintiff, testifying for a co-worker, assisting fellow workers in their discrimination claims and refusing to cooperate with an employer as a witness. See EEOC v. United Association of Journeymen, 311 F. Supp. 464 (S. D. Ohio 1970); Enstrom v. Beech Aircraft Corp., 712 F. Supp. 841 (D. Kan. 1989).

Where an employer receives notice from the EEOC of a charge of discrimination, and then conducts an investigation of the allegations in the charge, an employee's participation in that investigation is protected activity within the participation clause. Clover v. Total System Services, 176 F.3d 1346, 1353 (11th Cir. 1999).

In October 2008, the Supreme Court heard argument in Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee (Case 06-1595) regarding whether the participation clause of the anti retaliation provisions of Title VII protects an employee from

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[57] Furthermore, despite some initial contrary decisions by circuit courts, the Supreme Court has now held that Section 1981 also encompasses retaliation claims. CBOCS West v. Humphries, 128 S. Ct. 1951, 1958 (2008).

The ADA also prohibits retaliation against any person who has opposed discrimination, filed a charge or participated in an investigation. 42 U.S.C. §12202(a). ADA retaliation charges are analyzed according to the same principles as Title VII retaliation charges. Wright v. CompUSA, 352 F.3d 472, 278 (1st Cir. 2003). Requesting an accommodation is also protected activity under the ADA anti-retaliation provision. Haulbrook v. Michelin North America, 252 F.3d 696, 706 (4th Cir. 201).

retaliation for cooperating with employer's internal investigation without any agency involvement.

Courts have also extended this protection to one who suffers adverse employment action because his or her employer believes, although in error, that he or she has filed a charge or because he or she is related to someone who has engaged in protected activity. Frank Briscoe, Inc. v. NLRB, 637 F.3d 946 (3rd Cir. 1981) (retaliation under National Labor Relations Act).

The opposition clause prohibits adverse employment action against an individual because he or she has opposed any practice made an unlawful employment practice by Title VII. Frequently, the protected activity involves making a discrimination complaint under the employer's internal complaint or anti-harassment procedures, or less formally complaining of or protesting discrimination.[58]

Sometimes it is not clear whether an employee's words or conduct are actually "opposition." Courts have construed the opposition clause as protecting the following activities: contacting an attorney after complaining about sexual harassment from customers, asking an employer if race played a part in an employment decision, and indicating support to a supervisor for another employee who has filed an EEOC charge. Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984); Federoff v. Walden, 17 FEP Cases 91 (S.D. Ohio 1978).

Other actions by employees have been held not to be protected "opposition," such as: an African American employee's letter to his employer asking to meeting to discuss affirmative action and race relation issues, Wallace v. Motherhood Maternity Shops, 17 FEP Cases 242 (C.D. Cal. 1977); a radio announcer's violation of a station's programming decision not to permit Spanish to be spoken on the air, Jurado v. Eleven-Fifty Corp., 813 F.2d 1406; and vague complaints of "ethnicisim" and hints of racism. Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304 (6th Cir. 1989).

2. Adverse Action.

For many years, the concept of "adverse action" in a retaliation case was considered similar to adverse action in a discrimination action. However, in Burlington Northern v. White, 548 U.S. 53 (2006), the United States Supreme Court held that, "The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." The Court went on to state that a plaintiff could show retaliation where "a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" What such conduct includes depends on the context. For example, the Court stated:

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[58] Participation in the employer's investigation of a discrimination complaint is protected activity, Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d 501, 507 (11th Cir. 2000) (holding that plaintiff's activity was protected, but not specifying whether it was "participation" or "opposition"); Rollins v. State Department of Law Enforcement, 868 F.2d 397, 400 (11th Cir. 1989) (same); but see, EEOC v. Total Systems, 221 F.3d 1171, 1174-75 (11th Cir. 2000) (holding that participation in internal investigation of sex discrimination was not "participation," but not reaching question or whether it was "opposition").

> A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. Cf., e.g., Washington, supra, at 662 (finding flex-time schedule critical to employee with disabled child). A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. See 2 EEOC 1998 Manual §8, p. 8-14. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others." Washington, supra, at 661.

Exactly how the courts will apply the Burlington Northern standard is still up in the air. Compare Donovan v. Broward County Board of Commissioners, 974 So.2d 458 (Fla. 4th DCA 2008) (holding that a county's policy of foreclosing internal remedies because an employee had filed a discrimination charge with government agencies was an adverse employment action constituting retaliation under Title VII), with Reis v. Universal City Development Partners, Ltd., 442 F. Supp. 1238, 1253 (M.D. Fla. 2006) (denial of request for transfer not materially adverse, as required for retaliation claim under Burlington Northern).

3. Causal Connection. A causal connection may be established by circumstantial evidence, and will typically depend on the length of time between the adverse action and the protected activity. Other issues that are important include whether the decision maker with respect to the adverse action had any actual knowledge of the protected activity.

The third prong of the prima facie case is satisfied by a showing that the protected activity and the adverse action are not "wholly unrelated." Shannon v. BellSouth Communications, 292 F.3d 712, 715 (11th Cir. 2002). A showing that the protected activity and the adverse employment action occurred in "close temporal proximity", and that the employer was aware of the protected activity, is often sufficient to establish the causal connection. Shannon v. BellSouth Communications, 292 F.3d at 716-17. However, close temporal proximity is not sufficient evidence of causation if the employer can show that the adverse action was already in process prior to plaintiff's protected activity. Cotton v. Cracker Barrel, 434 F.3d 1227, 1232 (11th Cir. 2006).

Close temporal proximity is one way to show causation, but it is not the only way, and the "mere passage of time is not legally conclusive proof against retaliation." Robinson v. SEPTA, 982 F.2d 892, 894 (3rd Cir. 1993); Che v. Massachusetts Bay Transportation Authority, 342 F.3d 31, 38 (1st Cir. 2003) ("temporal proximity is but one method of proving retaliation"). In such situations, causation has been established where plaintiff went on leave after engaging in protected activity and the employer had no opportunity to retaliate until he returned, Smith v. St. Louis University, 109 F.3d 1261, 1266 (8th Cir. 1997), and where several acts of retaliation occurred more than two years after protected activity, but initial retaliatory acts began shortly

after protected activity. Bass v. Board of County Commissioners, 256 F.3d 1095, 1119 (11th Cir. 2001).

4. Other Issues

In order to establish that he engaged in protected activity, the employee need not prove that the act she complained about was in fact unlawful discrimination; rather, she need only show that she reasonably held a "good faith belief that the alleged discrimination existed." Taylor v. Runyon, 175 F.3d 861 (11th Cir. 1999). Even if the underlying claim is later dismissed, the retaliation claim survives if plaintiff had a good faith belief at the time she made the internal complaint. Tipton v. Canadian Imperial Bank of Commerce, 872 F.2d 14911, 1494 (11th Cir. 1989); Sullivan v. National Railroad Passenger Corp., 170 F.3d 1056, 1058 (11th Cir. 1999). However, that belief must be an "objectively reasonable" one. Little v. United Technologies, 103 F.3d 956, 960 (11th Cir. 1997).

A special problem arises for employees wishing to make internal complaints about a hostile work environment. If they complain after only a few incidents, before the harassment has become clearly "severe or pervasive", they may find themselves in the same position as the unfortunate employee in Jordan v. Alternative Resources Corp., 458 F.3d 332 (4th Cir. 2006), cert. denied, 2007 WL 407765 (April 16, 2007), whose complaint was held to be not protected activity because she could not have reasonably believed that isolated comments of co-worker were "severe or pervasive" harassment. On the other hand, if victims of harassment wait for the harassment claim to ripen, they risk suffering the fate of the plaintiff in Baldwin v. Blue Cross / Blue Shield, 480 F.3d 1287, 1300-01 (11th Cir. 2007), whose claim was dismissed because the court concluded that in waiting three months before making her internal complaint of harassment, she had failed to promptly utilize the employer's internal complaint procedure. Some resolution of this dilemma is needed. Such a resolution would take into account the principle that a purpose of the anti-discrimination laws is to "encourage employees to report harassing conduct before it becomes severe or pervasive." Burlington Industries v. Ellerth, 524 U.S. 742, 764-65 (1998). The Court's recent decision in Ledbetter v. Goodyear Tire & Rubber Co., 127 S.Ct. 2162, 2164 (2007), holding that en employee may be required to make a timely complaint about a discriminatory evaluation or disciplinary action, if she wishes to challenge later consequences of that action, may figure into that resolution.

Not all forms of opposition are protected. The Supreme Court has held that an employee who engages in "deliberate, unlawful activity" is not protected under Title VII. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1972) (stall-in that blocked plaint entrances and violated traffic laws lost its status as protected activity). Numerous courts of appeals have held that activity may not be protected in other circumstances, such as where an employee "violates legitimate company rules, knowingly disobeys company orders, disrupts the work environment of his employer, or wilfully interferes with the attainment of the employer's goals." Unt v. Aerospace Corp., 765 F.2d 1440, 1446 (9th Cir. 1985) (citations omitted). Courts apply a balancing test, weighing "the need to protect individuals asserting their rights against the employer's legitimate demands for loyalty, cooperation and a generally productive work environment." Rollins v. Florida Department of Law Enforcement, 868 F.2d 397, 400-01 (11th Cir. 1989). The test must be applied with caution, however, as "[a]lmost every form of 'opposition to an unlawful employment practice' is in some sense 'disloyal' to the employer,

since it entails a disagreement with the employer's views and a challenge to the employer's policies." EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1014 (9th Cir. 1983); accord: Grant v. Hazelet Strip-Casting Corp., 880 F.2d 1564, 1570 (2nd Cir. 1989); Jennings v. Tinley Park School District, 796 F.2d 962, 968 (7th Cir. 1986), cert. den. 481 U.S. 1017 (1987).

The question of whether an employee's conduct is so disruptive or disloyal that it loses its protected status is a fact-intensive one, requiring the balancing of interests on a case-by-case basis. Rollins, supra, 868 F.2d at 401. Compare, Cruz v. Coach Stores, Inc., 202 F.3d 560 (2nd Cir. 2000) (female employee's slapping male employee in the face in response to an inappropriate sexual remark is not reasonable opposition and not protected); Rollins, supra, 868, F.2d at 398-99, 401 (repeated and disruptive complaints, often unsupported and "plainly spurious" and outside established channels, over 9-year period, were to disruptive and unreasonable that they lost their protected status, and were legitimate reasons for the employer's failure to promote plaintiff); Robbins v. Jefferson County School District, 186 F.3d 1253 (10th Cir. 1999), (frequent voluminous and sometimes acrimonious complaints, antagonistic behavior towards supervisors, including accusing one supervisor of slander, malicious intent, and lying, did not constitute protected opposition); Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222, 230-34 (1st Cir. 1976) (activity not protected where plaintiff persistently interrupted staff meetings, invited a reporter to examine confidential salary information, was reprimanded twice for unsatisfactory work performance, caused two employees to quit, and created numerous other disruptions over a three-year period); with EEOC v. Crown Zellerbach Corp., 720 F.2d at 1014 (employee's letter to school board, a major customer of defendant, accusing defendant of discrimination and protesting school board's giving affirmative action award to defendant, is protected activity and not a legitimate reason for defendant's discipline of plaintiff); Hicks v. Abt Associates, 572 F.2d 960, 968-69 (3d Cir. 1978) (communication of discrimination complaint to agency which provides funding to defendant is protected activity); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1136-37 (5th Cir. Unit A 1981), cert. denied, 455 U.S. 1000 (1982) (laid off employee's picketing and boycotting defendant is protected activity); Coleman v. Wayne State University, 664 F. Supp. 1082, 1092 (E.D.Mich. 1987) (personnel officer's public statements, including statements to newspaper, that defendant engages in discrimination is protected activity); Hertz v. Luzenac America, 370 F.3d 1014, 1021-22 (10th Cir. 2004) (yelling loudly at supervisor in hallway, where other employees could hear, did not render opposition unprotected, as emotional outburst in reaction to perceived discrimination "is a most natural human reaction"); Heller v. Champion International Corp., 891 F.2d 432, 436-37 (2nd Cir. 1989) (plaintiff's secretly tape recording meetings with his managers, while reprehensible, was not so disruptive or disloyal as to be unprotected under anti-retaliation provision of the Age Discrimination in Employment Act).

B. State Laws

In Florida, the Florida Civil Rights Act protects employees against retaliation in the same manner as Title VII.

VI. SPECIAL PROCEDURAL CONCERNS IN TITLE VII LITIGATION

Administrative procedures before the EEOC and other agencies are covered separately in other materials. However, four procedural areas which arise frequently in equal employment opportunity litigation are briefly discussed below.

A. Pleading in Title VII Cases

Several federal courts, including the Eleventh Circuit, formerly imposed a "heightened pleading standard" for civil rights complaints, by which it was necessary to allege in detail the specific facts on which the claim was based. Oladeinde v. City of Birmingham, 963 F.2d 1481, 1484-85 (11th Cir. 1992). However, the "heightend pleading standard" was repudiated, as inconsistent with Rule 8 of the Federal Rules of Civil Procedure, which requires only a "short and plain statement of the claim," in Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 167-68 (1993) (Claim under Reconstruction-Era Civil Rights Law) and Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002) (Claim under Title VII).

Under the "notice pleading" standard of Rule 8, a civil rights complaint need not be any more detailed than any other civil complaint. Specifically, it is not necessary to plead the elements of a "prima facie case" in a complaint under Title VII. Swierkiewicz, 534 U.S. at 511-12.

In Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1968-69 (2007), an anti-trust case, the Court repudiated the oft-quoted language from Conley v. Gibson, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." That language had been quoted in Leatherman and Swierkiewicz and virtually every other pleading decision since 1957. In Twombly, the Court held that a conspiracy claim must be supported by factual allegations showing the existence of a conspiracy, and that a bare assertion that defendants engaged in parallel conduct which amounts to a conspiracy was insufficient to satisfy Rule 8. The Twombly Court did take great pains to state that it was not applying a "heightened pleading standard," nor undermining the Leatherman and Swierkiewicz decisions. 127 S.Ct. at 1973-74 and n.14.

B. Summary Judgment Practice

A great many Title VII cases are resolved on summary judgment, usually on motion by the employer. Summary judgment is appropriate where the moving party shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), F.R.Civ.P. Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and, by affidavits, documents, "depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Cartrett, 477 U.S. 317, 324 (1986).

In Chapman v. A-1 Transport, 229 F.3d 1012, 1025 (11th Cir. 2000) (en banc), the full bench of the Eleventh Circuit Court of Appeals held that the principles set down in

Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000) apply to summary judgment motions in our circuit. Although Reeves involved a Rule 50 motion for judgment as a matter of law, the standards for resolving that motion are the same as the standard for summary judgment motions. 530 U.S. at 150. Reeves holds that a court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves, 530 U.S. 133 at 150 (citations omitted). As it reviews the evidence to determine whether there is a genuine issue as to any material fact, the court must consider the entire record, but

> [D]isregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

530 U.S. at 151, citing 9A Wright & Miller, Federal Practice & Procedure §2529 (2nd ed. 1995) (citations and internal quotation marks omitted).

The former rule of the Fifth and Eleventh Circuits, that summary judgment is generally inappropriate in discrimination cases because of the "elusive factual question" of discriminatory intent, has been rejected as inconsistent with Supreme Court precedent established under Rule 56. Chapman, 229 F.3d at 1026.

Some recent scholarship has given new life to the long-simmering issue of the compatibility of Rule 56, particular as applied in employment discrimination cases, with the Seventh Amendment to the U.S. Constitution. See, e.g., Thomas, Why Summary Judgment is Unconstitutional, 93 Va. L.Rev. 139 (2007). However, there is no indication that this argument is gaining any traction in the courts as yet. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S.Ct. 2499, 1512 n.8 (2007) ("In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment", citing, inter alia, a summary judgment case but without referencing Professor Thomas's article).

C. Time Limits - Continuing Violation

The aggrieved party must file a charge of discrimination with the EEOC or a state deferral agency within 180 days from the date of the unlawful employment practice, except that in a deferral state, such as Florida, the charge may be filed with the EEOC within 300 days. 42 U.S.C. §2000e-5(e); EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988).

Under the "continuing violation" doctrine, courts have held that a case may not be dismissed where some of the discriminatory acts occurred outside the limitations period, as long as additional discriminatory actions occurred within the limitations period. Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986). However, in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), the Court severely limited the continuing violation doctrine, holding that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in the timely filed charges." 536 U.S. at 113. Therefore, "discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire" are

not actionable if they occurred outside the 300-day limitations period for Title VII charges. 536 U.S. at 114. Such acts may, however, be admitted as "background evidence" supporting the timely claims. Id.

The Court in Morgan did not disturb its prior holding in Bazemore v. Friday, 478 U.S. 385, 395 (1986) that, where the employer had put in place a discriminatory pay system, the limitation period runs from the most recent paycheck issued at the allegedly discriminatory rate ("each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of [when] this fact pattern was begun"). Morgan, 536 U.S. at 112. However, in Ledbetter v. Goodyear Tire & Rubber Co., 127 S.Ct. 2162, 2164 (2007), the Court held that where plaintiff received lower pay than males based on poor evaluations she had received over the years because of her sex, that each pay-setting decision was a "discrete act" under Morgan, and that the limitations period had run on any such decisions on which she had not filed a charge within the charge-filing period. The Ledbetter court distinguished Bazemore as a case where a discriminatory pay structure had been put in place long ago, and the issuance of unequal pay checks based on that discriminatory structure each constituted a violation; by contrast, the Court held, the unequal pay checks in Ledbetter were based on a pay structure which was facially neutral and neutrally applied when the pay checks were issued, but resulted in unequal pay only because of discriminatory performance appraisals which occurred each year. 127 S.Ct. at 2174. The decision may have the effect of forcing employees to file a charge whenever they receive a discriminatory performance evaluation or any form of discriminatory discipline which might later result in unequal pay or some other adverse consequence; such actions have, until now, been regarded as not forming the basis for a charge, unless they result in an "adverse employment action", which usually means an action with direct and immediate economic consequences. Legislation is presently before Congress to reverse the result in Ledbetter.

The continuing violation doctrine still has life in hostile environment cases, where the practice does not consist of one discrete act, and "cannot be said to occur on any particular day but can occur over a series of days or perhaps years." Morgan, 536 U.S. at 115. The rule for hostile environment cases is that, "[p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." Id. The defense of laches may be interposed, by showing the employee's lack of diligence in making the claim, and prejudice to the employer. 536 U.S. at 121.

D. Agreements To Arbitrate

Some employers require prospective employees to sign arbitration agreements as a condition of employment. Typically, these agreements provide that employment disputes, including discrimination claims, are to be resolved exclusively through a private grievance-arbitration process, and that the employee waives her right to pursue her statutory discrimination claims in court. In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, (1991), the Supreme Court upheld such an agreement in an age discrimination (ADEA) case, as the challenged arbitration agreement included adequate procedures for a neutral decision-maker, discovery, a written decision and a full range of relief, even though it did not provide for discovery as extensive as that allowed under the Federal Rules, and did not provide for class actions. 500

U.S. at 28-30. The policy of the Federal Arbitration Act, 9 U.S.C. §1, et seq., including its provision for staying court proceedings so as to compel arbitration, was held to trump the ADEA's provision that the forum for litigation such claims was state or federal court. The Court also rejected the argument that the arbitration agreement was a contract of adhesion, due to the obvious unequal bargaining power of the parties. 500 U.S. at 32-33. The Court distinguished its prior decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), refusing to enforce a waiver of statutory rights in a collective bargaining agreement, on the ground that the agreement there was between the union (not the individual employee) and the employer, and it authorized the arbitrator to enforce only the collective bargaining agreement, and not the anti-discrimination statutes. 500 U.S. at 33-34.

In Brisentine v. Stone & Webster, 117 F.3d 519, (11th Cir. 1997), the Eleventh Circuit refused to enforce an arbitration agreement to which the employee did not individually assent and which did not specifically provide that the arbitrator had the authority to resolve statutory claims. The Court of Appeals established three criteria for assessing the validity of compulsory arbitration agreements: (1) whether the employee individually agreed to the arbitration provision (agreement by union in collective bargaining agreement is insufficient); (2) whether the agreement specifically authorizes the arbitrator to resolve statutory claims; and (3) whether the employee herself, and not just a union acting on her behalf, has the right to compel arbitration if her claims are not resolved in the grievance process. 117 F.3d at 526-27. In Caley v. Gulfstream Aerospace Corp., - F.3d -, 2005 WL 2840372 (11th Cir. 2005), the court enforced an arbitration agreement which was not signed by the employee but was distributed to each employee with a letter explaining that it was a contract and employees would accept it by performance if they continued working for the employer.

Even where an arbitration agreement is flawed, arbitration may be compelled if the agreement contains a severability clause and can be saved by severing any invalid provisions. Jackson v. Cintas Corporation, 425 F.3d 1313, 1317 (11th Cir. 2005) (enforcing arbitration agreement where unconscionably short limitations period could be severed from agreement per severability clause).

In Circuit City Stores v. Adams, 532 U.S. 105 (2001) the Court re-affirmed Gilmer, and narrowly construed the Federal Arbitration Act's exemption of certain employment-related arbitration agreements from its coverage. The Court also noted that the Act had previously been held to pre-empt state law restrictions on arbitration, and declined to disturb that holding.

In EEOC v. Waffle House, 534 U.S. 279, (2002), the Court held that an arbitration agreement does not bar the EEOC from pursuing its own civil enforcement action based on an employee's EEOC charge, including seeking "victim-specific relief" such as reinstatement and back pay for the employee in court.

As a result of the above decisions, arbitration agreements meeting the Brisentine criteria are generally enforceable to bar litigation of the employee's statutory discrimination claims in court. However, they do not bar the employee from filing a charge with the EEOC. Gilmer, 500 U.S. at 28.

EEO Laws – Administrative Procedures

By

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EEO LAWS – ADMINISTRATIVE PROCEDURES
By F. Damon Kitchen, Esq.

I. INTRODUCTION.

A keen understanding of the various procedural prerequisites and administrative exhaustion schemes that apply to most federal and state employment discrimination statutes is absolutely critical for any attorney practicing in the area of employment discrimination law. Attorneys representing plaintiffs need this understanding in order to avoid dismissal, whereas defense practitioners must possess this knowledge in order to eliminate and/or reduce their clients' risk of civil liability. In this portion of the Certification Review Course materials, we will discuss the various federal and state employment discrimination laws that possess procedural prerequisites and administrative exhaustion requirements. We will also carefully focus upon the similarities and differences that exist under the statutes containing these procedural prerequisites and administrative exhaustion requirements to bringing suit.

II. THE APPLICABLE LAWS AND REGULATIONS.

A. Employment Discrimination Statutes Containing Procedural Prerequisites and/or Administrative Exhaustion Requirements.

The federal and Florida employment discrimination statutes containing procedural prerequisites and/or administrative exhaustion requirements are as follows:

1. **Title VII of the Civil Rights Act of 1964 ("Title VII").**
2. **Age Discrimination in Employment Act of 1967 ("ADEA").**
3. **Americans with Disabilities Act of 1990 ("ADA").**
4. **Florida Civil Rights Act of 1992 ("FCRA").**

Generally speaking, a claimant seeking to bring a lawsuit for employment discrimination under one or more of these statutes must first file a charge of discrimination with an administrative agency, such as the Equal Employment Opportunity Commission ("EEOC"), the Florida Commission on Human Relations ("FCHR"), or a local fair employment practices agency ("FEPA"), before being able to initiate a civil action.[1] Depending upon the statutes at issue, additional pre-suit prerequisites and/or administrative exhaustion requirements may also need to be satisfied.

B. Employment Discrimination Statutes That Do Not Contain Procedural Prerequisites and/or Administrative Exhaustion Requirements.

The federal and Florida employment discrimination statutes that do not contain procedural prerequisites and/or administrative exhaustion requirements are as follows:

1. **Section 1981 of the Civil Rights Act of 1866.**

[1] FEPAs are also sometimes referred to as "deferral" or "referral" agencies.

2. Equal Pay Act of 1963.

3. Florida AIDS, AIDS-Related Complex, and HIV Discrimination Act.

Unlike the federal and state statutes mentioned in Section "II. A." above, claimants bringing suit for employment discrimination under these statutes may immediately proceed with a civil action without having to satisfy statutory conditions precedent and/or exhaust administrative remedies before the EEOC, the FCHR, or a local FEPA.

C. Local Fair Employment Practices Ordinances.

In addition to the federal and state statutes, several counties and cities within Florida have local FEPAs that enforce fair employment practice ordinances which are implemented on a municipal or county level. Generally, the substantive provisions of these ordinances are at least as comprehensive as the federal statutes, but sometimes they are broader.

D. A Brief Overview of the Coverage of Title VII, the ADEA, the ADA and the FCRA.

Admittedly, threshold coverage issues, such as: (a) how many employees must an employer employ in order to be covered under the various federal and state employment discrimination laws; (b) who constitutes an "employee;" and/or (c) how employees are actually counted for determining "covered employer" or "covered entity" status, do not concern either procedural prerequisites or issues of administrative exhaustion and are therefore beyond the purview of these written materials. Nevertheless, a brief discussion of these threshold coverage issues may prove helpful in understanding the procedural prerequisites and administrative exhaustion schemes discussed below.

1. Title VII.

Title VII prohibits discrimination in employment because of race, color, religion, sex, or national origin. Sex is specifically defined to include pregnancy. Title VII covers employers engaged in an industry affecting commerce that have fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding year. Title VII also covers employment agencies and labor organizations. Bona fide private membership clubs are exempt. See 42 U.S.C. Section 2000e. Title VII also contains exemptions for, inter alia, aliens employed outside of any state and religious corporations, societies and educational institutions where it is necessary to employ individuals of a particular religion to perform certain work. See 42 U.S.C. Section 2000e-l(a).

2. The ADEA.

The ADEA is based on the Fair Labor Standards Act. Its substantive and procedural requirements are thus a little different from those of Title VII and the ADA. The ADEA prohibits employers, labor organizations and employment agencies from discriminating against individuals in employment on the basis of age if the individual is forty (40) years of age or older. See 29 U.S.C Section 623. An employer is a person engaged in an

industry affecting commerce who has twenty (20) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding year.

3. The ADA.

The Americans with Disabilities Act prohibits employment discrimination against a qualified individual with a disability because of the individual's disability. Like Title VII, the ADA covers employers in an industry affecting commerce with fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding year. Again, bona fide private membership clubs are exempt. Labor organizations and employment agencies are covered. See 42 U.S.C. Section 12111. The ADA's enforcement mechanisms adopt those set forth in Title VII at 42 U.S.C. Section 2000e-5. See 42 U.S.C. Section 12117(b).

4. The FCRA

The Florida Civil Rights Act prohibits employment discrimination by employers because of race, color, sex, national origin, age, handicap or marital status. See Section 760.10, Florida Statutes. An employer is defined as a person employing fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year. See Subsection 760.02(7), Florida Statutes.

5. Defining and Counting Employees for Determining Threshold Coverage.

The term "employee" is basically defined in all the statutes as "an individual employed by an employer," followed by a list of exceptions. The Supreme Court has endorsed the "payroll method" for determining whether an employer has fifteen (15) or more employees on any given day in a week. See Walters v. Metropolitan Educational Enterprises. Inc., 519 U.S. 202, 207, 117 S. Ct. 660, 664 (1997). Under this method, it can be determined whether an employer has an employment relationship with an employee by whether the employee appears on the payroll during each day of the week, regardless of whether the employee is actually working that day. Part time employees are also counted under this method.

Titles do not control whether an individual is an employee. Courts usually apply the "economic realities" or "right of control" tests to determine if an individual is an employee. While independent contractors are generally not employees, merely terming an employee an independent contractor will not change the reality. The EEOC, FCHR, or FEPA will review all of the facts and circumstances to determine if an individual is truly an independent contractor.

Directors and board members are generally not employees, but they will be considered employees if they perform traditional employee duties. See EEOC v. Pettegrove Truck Service, Inc., 716 F. Supp. 1430 (S.D. Fla. 1989). This is true even if the board member or director is not drawing a salary. Similarly, partners who are partners in name

only and do not actively participate in the management of the partnership may be considered employees rather than employers. EEOC v. Sidlev Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002); Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996).

Typically, volunteers are not considered employees, even though they may receive reimbursement for work related expenses and/or certain kinds of fringe benefits such as workers' compensation insurance, or gratuitous bonuses. See e.g., Hall v. Delaware Council on Crime and Justice, 780 F. Supp. 241 (D. Del. 1992); and York v. Association of the Bar of the City of New York, 2001 WL 776944 (S.D.N.Y. 2001).

E. Procedural Regulations Applicable to Title VII, ADA, ADEA and FCRA Claims.

It is important to note that the EEOC has promulgated procedural regulations concerning the administration of Title VII, ADA and ADEA charges of discrimination. Similarly, the FCRA has enacted procedural regulations pertaining to charges filed pursuant to the FCRA. Although these regulations are interpretive rules and not legislative enactments, they are given great deference by both state and federal courts and are usually observed unless demonstrated to be contrary to the law. See EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991).

The EEOC has issued a set of procedural regulations that apply to both Title VII and the ADA. These regulations are codified as 29 C.F.R. Sections 1601.1 through 1601.93. By contrast, the EEOC has promulgated a separate set of procedural regulations for the ADEA, which are codified as 29 C.F.R Sections 1626.1 through 1621.22. The FCHR's procedural guidelines concerning the FCRA are codified as Chapters 60Y-1 through 60Y-5 of the Florida Administrative Code.

III. THE CHARGE FILING PROCESS.

As set forth above, in most circumstances, a claimant suing his or her employer under Title VII, the ADEA, the ADA or the FCRA cannot simply file his or her claim of discrimination with the clerk of the court, but instead must first exhaust his or her administrative remedies before a federal, state or local agency authorized to investigate alleged violations of the statutes.

A. Who Can File a Charge?

Title VII, the ADA and the FCRA all state that a charge of discrimination may be filed by an "aggrieved person." See 42 U.S.C. Section 2000e-5(b); 42 U.S.C. Section 12117(a); and Subsection 760.11(1) Florida Statutes. Similarly, the procedural regulations applicable to the ADEA state that aggrieved persons may also file charges of discrimination. See 29 C.F.R. Section 1626.3. Unfortunately, none of these statutes, or their respective procedural regulations, define precisely what or who an "aggrieved person" is. As a result, this issue has been hotly contested in the courts. Although the question of precisely who or what constitutes an aggrieved person is a substantive legal issue that exceeds the scope of this presentation, suffice it to say that suits addressing

whether an individual or an entity is an aggrieved party can be segregated into five (5) distinct categories:

1. Charges Filed by Individuals Who Are Members of the Protected Group Identified in the Charge and Who Are Affected by the Adverse Employment Action Alleged Therein;

2. Charges Filed by Individuals Who Are Members of the Protected Group Identified in the Charge, but Who Are Not Affected by the Adverse Employment Action Alleged Therein;

3. Charges Filed by Individuals Who are Not Members of the Protected Group Identified in the Charge but Who Claim to Have Been Affected by the Adverse Employment Action Alleged Therein;

4. Charges Filed by Organizations Claiming to Be Aggrieved Persons; and

5. Charges Filed by "Testers" (i.e., Individuals Who Apply for Positions of Employment They Do Not Intend to Accept in Order to Uncover Unlawful Hiring Practices).

See II B. Lindemann & P. Grossman, Employment Discrimination Law, pp. 1282-1301 (3d ed. 1996).

In the vast majority of instances, the aggrieved person filing the charge of discrimination is actually an individual claiming to be the victim of an unlawful employment practice. However, it should be noted that in addition to aggrieved persons, other individuals and entities may be permitted to file charges of discrimination under Title VII, the ADEA, the ADA and the FCRA.

1. Title VII and the ADA.

Under Title VII and the ADA, charges can be filed on behalf of any person claiming to be aggrieved, or by a member of the Commission (i.e., EEOC). See 42 U.S.C. Section 2000e-5(b). Charges filed on behalf of aggrieved persons can be filed by any individual, agency, or organization. See 29 C.F.R. Section 1601.7. Charges filed by the Commission are known as "commissioner charges," and may be filed in the name of the commissioner, or on behalf of an aggrieved person. See 29 C.F.R. Section 1601.11(b).

2. ADEA.

Although the text of the ADEA is silent about who, other than the alleged victim of discrimination, can file a charge of discrimination, the procedural regulations interpreting the statute state that charges can be filed both "by and on behalf of the

aggrieved person . . . ." See 29 C.F.R. Section 1626.3. Notably, neither the text of the ADEA, nor its procedural regulations, specifically state that the Commission can file a charge of discrimination on behalf of an aggrieved person. However, the procedural regulations interpreting the ADEA do state that "[w]here the information [received by the EEOC from any source] discloses a possible violation, the appropriate Commission office may render assistance in the filing of a charge." See 29 C.F.R. Section 1626.4. Based upon this regulation, both the EEOC and most courts have adopted the view that the EEOC may file charges on behalf of aggrieved persons under the ADEA.

3. FCRA.

The text of the FCRA merely states that "any person aggrieved by a violation of ss. 760.01-760.10 may file a [charge] with the [FCHR]. . . ." See Subsection 760.11(1), Florida Statutes. Thus, one might conclude that others who are not aggrieved would not be permitted to file charges. However, this is not the case, as the procedural regulations interpreting the FCRA provide that in addition to an aggrieved person, the Attorney General, Commissioners of the FCHR and the FCHR also have the authority to file charges. See Section 60Y-5.001(1) of the Florida Administrative Code.

B. Form and Verification Requirements of Title VII, ADEA, ADA and FCRA Charges.

For the most part, the form of charges filed under Title VII, the ADA, the ADEA and the FCRA are identical. All charges must be in writing and must be signed by the individual or entity filing the charge. However, there is one significant difference concerning the form of a charge that warrants noting: Title VII, ADA and FCRA charges require verification (i.e., the charge must be attested to under oath), whereas ADEA charges do not. Compare 42 U.S.C. Section 2000e-5(b); 29 C.F.R. Section 1601.9; Subsection 760.11(1), Florida Statutes and Section 60Y-5.001(5) of the Florida Administrative Code with 29 C.F.R. Section 1626.6. Most courts that have addressed the issue, including the United States Court of Appeals for the Eleventh Circuit, have determined that the verification of Title VII and ADA charges is mandatory. See Rizo v. Alabama Dep't of Human Resources, 228 Fed. Appx. 832, 836 (11th Cir. 2007); and Vason v. City of Montgomery, Alabama, 240 F.3d 905 (11th Cir. 2001).

1. Amending a Title VII/ADA Charge to Cure the Lack of Verification.

One issue concerning the verification of Title VII and ADA charges that has been the source of considerable litigation is exactly when a charge must be verified. More specifically, must a charge of discrimination be verified at the time of filing, or at some point in time thereafter, and if it can be verified thereafter, must it be verified within 180/300 days of the alleged unlawful practice, or at a point in time even later than that?

According to the EEOC's procedural regulations, "[a] charge may be amended to cure technical defects or omissions, including failure to verify the charge. . . . Such amendments . . . will relate back to the date the original charge was received." See 29 C.F.R. Section 1601.12(b). Notably, this procedural regulation does not specify whether an unverified charge can be amended to provide verification after the period for filing a timely charge of discrimination has already passed. As a consequence, courts that confronted this issue often reached conflicting results.

Recently, the United States Supreme Court, in Edelman v. Lynchburg College, 535 U.S. 106 (2002), addressed this issue and determined that timely filed charges could be verified more than 180/300 days after the alleged unlawful practice under the relation back principle set forth in 29 C.F.R. Section 1601.12(b). In particular, the Court in Edelman determined that a verified charge filed 313 days after the alleged unlawful employment practice related back to an earlier letter the claimant had filed with the EEOC within 300 days of the alleged unlawful practice pursuant to 29 C.F.R. Section 1601.12(b).

What the Court in Edelman did not specifically address was the issue of whether a claimant could use the relation back principles of 29 C.F.R. Section 1601.12(b) to verify a charge that was unverified after the date that the EEOC has issued a Dismissal and Notice of Rights (i.e., a notice of right to sue). See B. Lindemann & P. Grossman, Employment Discrimination Law 2002 Cumulative Supplement, p. 904 (C.G. Weirich 3d ed. 2002). Prior to Edelman, most courts that had addressed this issue, including the Eleventh Circuit, had determined that a charge could not be amended to cure a verification defect after the notice of right to sue had been issued and therefore a lawsuit predicated upon such a defective charge was doomed to fail. See e.g., Vason, supra; Balazs v. Liebenthal, 32 F.3d 151 (4th Cir. 1994); Hazeur v. Federal Warranty Service Corp., 2000 WL 365013 (E.D. La. 2000). The rationale of these cases is that once a notice of right to sue is issued, the EEOC closes its file and is powerless to correct an unverified charge via 29 C.F.R. Section 1601.12(b). See Danley v. Book-of-the-Month Club, Inc., 921 F. Supp. 1352 (M.D. Pa. 1996), aff'd, 107 F.3d 861 (3d Cir. 1997). However, at least one court prior to Edelman maintained a contrary view. See Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1972).

2. Amending an FCHR Charge to Cure a Lack of Verification.

Similar to the EEOC, the FCHR has issued procedural regulations applicable to the FCRA. One of these regulations also deals with the amendment of charges and the relation back principle. See Section 60Y-5.007 of the Florida Administrative Code. Under this Rule, amendments must be made within sixty (60) days of the filing of the charge, unless good cause can be established for making an amendment at a later point in time. Even then, the Executive Director of the FCHR must consent to the amendment. See Section 60Y-5.007(a) of the Florida Administrative Code.

Based upon the text of the FCRA, it would appear that an unverified charge would not be capable of being verified once a civil action has been initiated, even if the Executive Director approved such an amendment, because the "commencement of such action shall divest the [FCHR] of jurisdiction of the [charge]." See Subsection 760.11(5), Florida Statutes.

C. The Required Content of Title VII, ADEA, ADA and FCRA Charges.

As far as the content of the charge is concerned, the EEOC and FCHR have stated that the following information should be contained in the charge of discrimination:

1. The Name, Address and Telephone Number of the Person Filing the Charge;

2. The Name, Address and Telephone Number of the Respondent;

3. A Clear and Concise Statement of the Facts, Including Pertinent Dates, Constituting the Unlawful Employment Practice;

4. If Known, the Approximate Number of Employees of a Respondent Employer;

5. If Known, a Statement Disclosing Whether Proceedings Involving the Alleged Unlawful Employment Practice Have Been Commenced before a Federal, State or Local Agency Charged with the Enforcement of Fair Employment Practices Laws and, if so, the Date of such Commencement and the Name of the Agency.

See 29 C.F.R. Section 1601.12(a)(1)-(5); 29 C.F.R. Section 1626.8(a)(1)-(5); and 60 Y-5.001(6)(a)(1)-(5).

However, as a practical matter, the EEOC and FCHR will accept a charge as being sufficient even if it does not meet all of the requirements above if it is in writing, signed by the complainant or aggrieved individual, verified (unless it is an ADEA charge, as no verification is required) and generally identifies the parties and the action or practice complained of. See 29 C.F.R. Section 1601.12(b); 29 C.F.R. Section 1626.8(b); and 60 Y-5.001(6)(b) of the Florida Administrative Code.

Recently, the United States Supreme Court had occasion to determine what level of sufficiency is required to constitute a charge for purposes of the ADEA. See Federal Express Corporation v. Holowecki, --- U.S. ---, 128 S. Ct. 1147 (2008). In Holowecki, the plaintiff, Holowecki, had filed an ADEA civil action prior to actually filing a charge of discrimination with the EEOC. However, prior to filing her lawsuit, Holowecki had filed both an EEOC intake questionnaire, as well as a six page sworn affidavit. Federal Express argued that because Holowecki had not filed an actual charge of discrimination at least 60 days before she filed her lawsuit, her lawsuit was procedurally defective and should be dismissed. Holowecki argued that since she had filed both an intake

questionnaire containing all of the information required in 29 C.F.R. Section 1626.8(a)(1)-(5), as well as an affidavit providing specifics about her ADEA claim, she had provided all of the information she was required to provide. The district court agreed with Federal Express after determining that the mere filing of an intake questionnaire and affidavit did nothing to provide notice to the employer, as would be the case if she had actually filed a charge of discrimination before filing suit. However, on appeal, the United States Court of Appeals for the Second Circuit reversed the district court.

In affirming the Second Circuit, the Supreme Court first analyzed the ADEA and its various regulations to determine whether the term "charge" had been clearly defined. In so doing, the Court concluded that "the regulations identify the procedures for filing a charge but do not state the full contents a charge document must contain." --- U.S. ---, 128 S. Ct. at 1155. Deferring to the EEOC's interpretation of its own regulations, the Court concluded that "[i]n addition to the information required by the regulations, i.e., an allegation and the name of the charged party, if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." --- U.S. ---, 128 S. Ct. at 1158-1159.

Turning to the facts at issue in the case, the Court ruled that the EEOC's conclusion that Holowecki's intake questionnaire and affidavit were sufficient to constitute a charge, was not unreasonable. The Court noted that the intake questionnaire included all of the information required by 29 C.F.R. Section 1626.8; moreover, the affidavit expressly contained a request for the EEOC to take remedial action against Federal Express.

Notably, the Court rejected the notion advanced by Holowecki that an EEOC intake questionnaire will always be accepted as a charge of discrimination and noted that in general, "the wording of the questionnaire suggests the opposite: that the form's purpose is to facilitate pre-charge filing counseling and enable the agency to determine whether it has jurisdiction over 'potential charges.'" --- U.S. ---, 128 S. Ct. at 1159. However, it concluded that a completed questionnaire, when supplemented with an affidavit or other document requesting remedial relief, may be sufficient to constitute a charge.

From management's perspective, Holowecki is quite troubling. Instead of providing a bright line test that uniformly articulated what constitutes charge, the Court left this decision to the EEOC to determine on a case-by-case basis. As Justice Thomas noted in his dissenting opinion, today a "charge of discrimination under the Age Discrimination in Employment Act is whatever the Equal Employment Opportunity Commission says it is." --- U.S. ---, 128 S. Ct. at 1161. To make matters worse, the opinion permits litigants, like Holowecki, to totally avoid giving their employers notice of their claims, and deprives those employers of the opportunity to participate in conciliation procedures, whereas litigants who actually file charges under the ADEA must afford their employers such rights and opportunities.

Even more disturbing, though, is manner in which some lower courts throughout the nation have applied the Court's ruling in Holowecki to cases under Title VII and the ADA. Although the Court expressly cautioned that EEOC enforcement mechanisms and statutory waiting periods differ in some respects from those under Title VII and the ADA, and that care should be taken to ensure that rules which may be applicable under one statute are not automatically applied to a different statute, several lower court decisions have applied Holowecki in Title VII and ADA cases without any apparent analysis or consideration of the procedural nuances and differences that distinguish those statutes from the ADEA.

D. Timeliness.

In the watershed case of McDonnell Douglas v. Green, 411 U.S. 792 (1973), the United States Supreme Court noted that there were two (2) "jurisdictional prerequisites" to a Title VII action: "(1) filing timely charges of employment discrimination with the Commission and (2) by receiving and acting upon the Commission's statutory notice of the right to sue." Although almost a decade later, the Court, in Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), would clarify that the above-described prerequisites to suit were not truly "jurisdictional" -- but were rather conditions precedent which were more akin to a statute of limitations and therefore could be tolled under certain circumstances – a claimant's failure to file a timely charge of discrimination typically bars his or her ability to bring a subsequent employment discrimination lawsuit.

1. Title VII and ADA Charges.

According to 42 U.S.C. Section 2000e-5(e), a Title VII or ADA claimant must file a charge with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice. However, if that claimant has initially instituted proceedings with a state or local FEPA with authority to grant or seek relief from such an unlawful employment practice, or institute criminal proceedings with respect thereto, he or she has 300 days from the occurrence of the alleged unlawful employment practice in which to file a charge with the EEOC. Id.

It is important to note that if an alleged unlawful employment practice occurs in a state, or a political subdivision of a state, having a state or local law prohibiting such an unlawful practice, as well as a FEPA which grants or seeks relief from such a practice, no charge can be filed with the EEOC before either: (a) the expiration of sixty (60) days after the institution of proceedings by the state or local FEPA; or (b) the FEPA terminates its proceedings. See 42 U.S.C. Section 2000e-5(c). The requirement that a claimant must wait to institute charge-filing proceedings with the EEOC until after the state or local agency has had an opportunity to do so is known as "deferral." The purpose of deferral is to allow a state or local FEPA the first opportunity to resolve the alleged unlawful employment practice before resorting to the EEOC. See Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). Deferral is both required and mandatory under Title VII and the ADA.

2. ADEA Charges.

Pursuant to 29 U.S.C. Section 626(d), an ADEA claimant must also file a charge within 180 days of the alleged unlawful event, unless the alleged unlawful practice has occurred in a state which has a law prohibiting discrimination upon the basis of age and has authorized a FEPA to grant or seek relief from such a discriminatory practice. In such an instance, the claimant must file his or her charge of discrimination with the FEPA within 300 days of the alleged unlawful employment practice, or within thirty (30) days of notification that the FEPA is terminating its investigation under state law, whichever occurs first. Id.

Unlike Title VII and the ADA, however, under the ADEA, the claimant must file his or her charge with a state (as opposed to a local) FEPA in order to obtain the longer 300 day filing period. Id.; citing 29 U.S.C. Section 633(b). Although this requirement is similar to the deferral requirement discussed above with respect to Title VII and ADA claims, it is called "referral" under the ADEA. Referral to a local FEPA will not suffice. As is the case under Title VII and the ADA, referral to a state FEPA is mandatory. See Oscar Mayer, supra.

3. FCRA Charges.

In contrast to Title VII, the ADEA and the ADA, a claimant filing a charge of discrimination under the FCRA is permitted 365 days from the alleged unlawful employment practice to do so. See Subsection 760.11(1), Florida Statutes. Under the FCRA, a charge is deemed filed when it is date-stamped by the FCHR, the EEOC, or any other local FEPA within Florida. The date the charge is deemed filed with the FCHR is earliest date of filing with the FCHR, the EEOC, or the Florida FEPA. See Subsection 760.11(1), Florida Statutes.

4. Tolling of the Charge-Filing Period.

a. Tolling under Title VII, the ADEA and the ADA.

As set forth above, the charge-filing requirements of Title VII, the ADEA, and the ADA are not jurisdictional, but are rather are more akin to statutes of limitation. See Zipes, supra. As a result, these charge-filing time limits can, in certain circumstances, be equitably tolled and/or estopped. According to the Supreme Court, equitable tolling and/or estoppel can occur when a claimant is somehow prevented from filing a timely charge of discrimination. See Electrical Workers v. Robinson & Meyers, Inc., 421 U.S. 454 (1975).

The most common basis for equitably tolling the charge-filing limitations period of Title VII, the ADA and the ADEA occurs when the respondent takes action that misleads the claimant and causes him or her to miss meeting the charge-filing deadline. This practice is sometimes referred to as "sandbagging." See II B. Lindemann & P. Grossman, Employment Discrimination Law, p. 1366 (3d ed. 1996). However,

sometimes a claimant's excusable ignorance – if objectively reasonable – can serve as a basis for equitable tolling. See Carter v. West Publishing Co., 225 F.3d 1258 (11th Cir. 2000) (limitations period did not begin to run until the claimant knew, or reasonably should have known, that she had been discriminated against).

b. Tolling under the FCRA.

Similar to Title VII, the ADEA and the ADA, the charge-filing time limit set forth in the FCRA is a statute of limitations and is also subject to tolling; however, unlike Title VII, the ADEA and/or the ADA, the grounds for tolling the limitations periods in the FCRA are specifically set forth in Section 95.051, Florida Statutes. See Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646 (Fla. 5th DCA 1997). Notably, the grounds for tolling set forth in Section 95.051, Florida Statutes do not include either misleading conduct by the respondent, or a claimant's objectively reasonable ignorance of the charge-filing deadline.

E. Deferral/Referral Dilemmas, the Advent of Dual Filing and Worksharing Agreements.

Because of esoteric, yet important, differences among the procedural prerequisites for bringing suit under Title VII, the ADEA and various state and local anti-discrimination laws, unwitting employment discrimination claimants often failed to exhaust their administrative remedies in jurisdictions with state and local FEPAs and therefore, found themselves precluded from maintaining civil actions. Believing that Congress, when it enacted these federal civil rights statutes, had not intended the deferral/referral process to be a trap for the unwary, both the Supreme Court and the EEOC took action to rectify the problem.

1. Significant Supreme Court Deferral/Referral Decisions

Two (2) cases are particularly illustrative of the Supreme Court's extreme efforts to untangle these deferral/referral dilemmas. See Oscar Mayer, supra and Mohasco Corp. v. Silver, 486 U.S. 107 (1988).

In Oscar Mayer, the claimant, Evans, had filed a charge of age discrimination in the deferral state of Iowa within 300 days of the alleged unlawful employment practice. However, Evans had never filed a timely charge with the state FEPA, the Iowa State Civil Rights Commission. When Evans filed a civil action under the ADEA, Oscar Mayer moved to dismiss the suit arguing that pursuant to 29 U.S.C. Section 633(b), "no suit may be brought under section 626 of [the ADEA] before the expiration of sixty days after proceedings have been commenced under state law, unless such proceedings have been earlier terminated." Oscar Mayer argued that referral to the Iowa State Civil Rights Commission was mandatory before a civil action under the ADEA could be initiated, but that no such referral had occurred. Moreover, Oscar Mayer

argued that no such referral was now possible because the statute of limitations for filing a charge with the Iowa State Civil Rights Commission (i.e., 120 days from the occurrence of the alleged unlawful act), as set forth in the Iowa Civil Rights Act, had now expired.

Although the Supreme Court agreed with Oscar Mayer that 29 U.S.C. Section 633(b) mandated Evans must first commence state administrative proceedings before filing a civil action under the ADEA, it disagreed that he must do so within the limitations period established by the Iowa Civil Rights Act. Instead, the Court held that "state limitations periods cannot govern the efficacy of the federal remedy . . . ," and ruled that Evans' ADEA action be held in abatement until he could commence proceedings under state law by filing a charge of discrimination (albeit an untimely one) with the Iowa State Civil Rights Commission.[2]

Just months after issuing its decision in Oscar Mayer, the Supreme Court faced another thorny deferral dilemma. In Mohasco Corp., the claimant, Silver, filed a charge of religious discrimination with the EEOC 291 days after the date of his termination. Silver claimed to have been subjected to an unlawful employment practice in New York, a deferral state. What Silver had not done was commence state proceedings under New York law. Somewhat similar to 29 U.S.C. Section 633(b) of the ADEA, 42 U.S.C Section 2000e-5(c) states that "no charge may be filed under [42 U.S.C. Section 2000e-5(b) of Title VII] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under State or local law, unless such proceedings have been earlier terminated . . . ."[3] Immediately upon receiving the charge, and before the passage of 300 days from the date of Silver's termination, the EEOC deferred the charge to the New York State Division of Human Rights; however, the New York State Division of Human Rights did not terminate proceedings on Silver's charge prior to the passage of this 300 day deadline. Ultimately, the EEOC concluded its investigation and issued Silver a notice of right to sue. Thereafter, Silver commenced a Title VII religious discrimination lawsuit against Mohasco Corp.

Mohasco Corp. filed a motion for summary judgment arguing that Silver's charge of discrimination could not have been filed with the EEOC on the 291st day after his termination – i.e., the date the EEOC had received it – because he had not initiated state proceedings at least sixty (60) days before filing his charge with the EEOC, nor had the New York State Division of Human Rights terminated its proceedings before the passage of the 300 day limitation period applicable to deferral states. The Supreme Court agreed with Mohasco Corp. According to the Court, if a claimant fails to initiate state proceedings prior to filing a charge with the EEOC, his charge must be filed with the EEOC no later than the 240th day after the alleged unlawful event, in order to allow the state or local FEPA at least sixty (60) days to resolve the claim in accordance with 42

[2] Nine (9) years later, the Supreme Court, in EEOC v. Commercial Office Prods. Co., used an identical analysis in a Title VII case to argue that a claimant's failure to file a charge with a state deferral agency within the limitations period established by state law was not fatal to a Title VII civil action.

[3] Note, however, that 29 U.S.C. Section 633(b) states "no civil action" will be filed before commencement of state proceedings, whereas 42 U.S.C. Section 2000e-5(c) states "no charge" will be filed before commencement of state proceedings.

U.S.C. Section 2000e-5(c). Charges received by the EEOC after the 240th day would only be deemed timely if they were deferred to the state or local FEPA and the FEPA voluntarily terminated the state proceedings before the passage of the 300th day.

A classic Mohasco Corp. deferral dilemma occurred in Maynard v. Pneumatic Products. Corp., 256 F.3d 1259 (11th Cir. 2001). In that case, Maynard filed his charge with the EEOC 292 days after his termination, but could not prove that he had timely filed his charge with the FCHR. As a result, his case was dismissed. See also, Armstrong v. Lockheed-Martin Beryllium Corp., 990 F. Supp. 1395 (M.D. Fla. 1997) (although individual intended to dual file the charge, her failure to check the dual file box prevented her from exhausting her administrative remedies under state law).

2. Worksharing Agreements.

In contrast to the Court, the EEOC has attempted to resolve the problem of coordinating federal, state and local charge filing requirements by entering into contractual agreements with state and local FEPAs known as "worksharing agreements." The criteria for being deemed a FEPA for the purposes of Title VII and/or the ADA are set forth at 29 C.F.R. Part 1601, subpart H. Section 1601.24 lists current FEPAs that can receive and process Title VII and ADA charges. When a FEPA becomes certified, the EEOC will generally accept its findings without individual case-by-case substantial weight reviews. See 29 C.F.R. Section 1601.75. Detailed procedures for the processing of Title VII and ADA charges between the FEPAs and the EEOC are set out at 29 C.F.R. Section 1601.13.

Under the ADEA, FEPAs that may accept referrals of age cases are set forth in 29 C.F.R. Section 1626.9. Note that 29 C.F.R. Section 1626.10 only allows the EEOC to enter into worksharing agreements with state FEPAs (not local ones) for the processing of age discrimination charges.

Worksharing agreements have been developed to comply with the deferral and referral requirements of the federal statutes. The worksharing agreements are primarily used to divide charges by type and geography to determine which agency will initially process the charge or complaint. Worksharing agreements are public records and may be obtained from the EEOC. Local FEPAs will accept initial responsibility for certain numbers of charges that originate in their geographic area. The FCHR and EEOC basically divide their jurisdiction through the middle of the state. Other considerations, such as the timeliness of the charge, work load and the particular issue may affect which agency processes a charge.

Under the agreement, the EEOC and the FEPA are allowed to receive and accept charges as an agent of the other for the purposes of charge filing so that filing with one agency also constitutes filing with the other agency. See McGhee v. Sterling Casino Lines. L.P., 833 So.2d 271, 272 (Fla. 5th DCA 2002) (Under the worksharing agreement, each agency has appointed the other as an agent for, inter alia, receiving charges.).

Importantly, under these worksharing agreements, if the EEOC receives a charge of discrimination on or after the 240th day in a deferral state that has not previously instituted state or local proceedings, the state or local FEPA agrees to waive its right under 42

U.S.C. Section 2000e-5(c) to exclusively process, investigate and/or resolve the charge. This allows the EEOC to immediately accept the charge as filed and avoids the dilemma faced by the claimant in Mohasco Corp.

F. The Single Filing Rule: an Exception to the Charge Filing Requirement.

There is an exception to the requirement that every individual must timely file a charge of discrimination before he or she may participate in a lawsuit under one of the federal statutes. This exception is known as the "single-filing rule." Under that rule, in multiple plaintiff actions, co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame do not have to separately satisfy the charge-filing requirement if one plaintiff has filed a charge of discrimination. Two (2) requirements must be met, however, to satisfy the single-filing rule: (a) at least one plaintiff must have timely filed a charge; and (b) the individual claims of the plaintiffs who filed and did not file charges must have arisen out of similar treatment in the same time frame. Forehand v. Florida State Hospital at Chattahoochee, 89 F.3d 1562, 1555-1556 (11th Cir. 1996); Jackson v. Seaboard Coast Line R.R. Co., 678 F.2d 992, 1011 (11th Cir. 1982).

IV. NOTIFICATION TO THE RESPONDENT.

A. What Constitutes Notice under Title VII and the ADA?

Pursuant to the unambiguous text of 42 U.S.C. Section 2000e-5(b), the EEOC is to notify the respondent of a Title VII and/or ADA charge within ten (10) days of the date it receives one. As a practical matter, however, this rarely occurs and most courts to address the issue have held that the EEOC's failure to provide the respondent with notice of a charge within ten (10) days does not affect subsequent litigation by a private litigant (however, it may sometimes bar a suit subsequently filed by the EEOC). See II B. Lindemann & P. Grossman, Employment Discrimination Law, p. 1224 and n. 123 and 124 (3d ed. 1996). This notice is supposed to include the date, place, and circumstances of the alleged unlawful employment practice asserted in the charge. See 42 U.S.C. Section 2000e-5(b).

B. What Constitutes Notice under the ADEA?

In contrast to Title VII and the ADA, the ADEA only requires that the EEOC "promptly notify all persons named in such charge as prospective defendants." See 29 U.S.C. Section 626(d)(2). See also 29 C.F.R. Section 1626.11. Neither the text of the ADEA, nor its procedural regulations, specify what kind of information this notice must contain.

C. What Constitutes Notice under the FCRA?

According to the text of the FCRA, the FCHR is required to provide notice to the person who allegedly committed the unlawful employment practice within five (5) days of the date the charge has been filed, by mailing him, her, or it a copy of the claimant's charge of discrimination via registered mail. See Subsection 760.11(1), Florida Statutes. As a practical matter, notice is rarely, if ever, provided within five (5) days.

V. SUIT FILING ADMINISTRATIVE EXHAUSTION REQUIREMENTS.

A. Filing Suit under Title VII, the ADEA and the ADA.

1. Administrative Exhaustion for Title VII and ADA Lawsuits.

To file a suit under Title VII or the ADA, a claimant must typically receive a notice of right to sue. Notices against private entities are issued by the EEOC. Notices against public entities are issued by the Department of Justice. After receipt of the notice, suit must be filed within ninety (90) days. Note that jurisdiction for Title VII and ADA actions lies in both federal and state courts. It makes no difference to the charging parties' rights whether the EEOC finds reasonable cause to believe that discrimination occurred.

2. Administrative Exhaustion for ADEA Lawsuits.

By contrast, the procedures under the ADEA are slightly different. Under the ADEA, a claimant can, but need not, await a notice of right to sue from the EEOC. Should a claimant desire to do so, he or she may file suit under the ADEA as early as sixty (60) days after filing a charge with the EEOC. In that situation, a right to sue notice is not required. See 29 U.S.C. Section 626(d). If the claimant waits until the conclusion of EEOC processing and receives a notice of right to sue, he or she must file his or her lawsuit within ninety (90) days of its receipt. See 29 U.S.C. Section 626(e).

3. Requesting a Notice of Right to Sue before the Passage of 180 Days from the Date the Charge Was Filed with the EEOC.

The EEOC is directed to complete its administrative processing of a charge filed under Title VII and the ADA within 180 days. See 42 U.S.C. Section 2000e-5(f)(l). However, because of the large number of charges filed every year, it was not uncommon for a charge to remain pending before the EEOC for several weeks and/or months after the 180 day period had passed.[4] In order to address its large backlog of charges, the EEOC, with respect to Title VII and ADA charges, has promulgated procedural regulations which permit it to issue right to sue notices to claimants who request them in writing. See 29 C.F.R. Section 1601.28(a)(1) and (2).[5]

Pursuant to 29 C.F.R. Section 1601.28(a)(1), the EEOC is authorized to issue a notice of right to sue to a Title VII or ADA claimant who requests it 180 days or more after he or she has filed his or her charge with the EEOC. By contrast, 29 C.F.R. Section

[4] The EEOC's failure to complete an investigation within this time frame has no consequences upon the parties. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 361, 97 S. Ct. 2447, 2452 (1977).

[5] Unlike Title VII and the ADA, the ADEA does not require the EEOC to complete its administrative processing of a charge within 180 days. This is because under the administrative exhaustion scheme set forth in the ADEA, a claimant can file suit without a notice of right to sue at any time sixty (60) days after filing a charge of age discrimination with the EEOC. See 29 U.S.C. Section 626(c)(2).

1601.28(a)(2) states that the EEOC can issue a claimant a notice of right to sue prior to the passage of 180 days from the date the charge was filed with the EEOC if: (a) the claimant requests such a notice in writing; (b) the respondent is not a government, governmental agency, or political subdivision; and (c) the EEOC determines and certifies that it is probable that it would be unable to complete its administrative processing of the charge within 180 days of the date of the filing of the charge. Although many respondents have argued that 29 C.F.R. Section 1601.28(a)(2) defeats the administrative exhaustion requirements set forth in 42 U.S.C. Section 2000e-5(f) and is therefore contrary to Congress' legislative intent, the Eleventh Circuit, in Sims v. Trus Joist MacMillan, 22 F.3d 1059 (11th Cir. 1994), has upheld the regulation.

While requesting a right to sue notice before the expiration of 180 days will not be deemed a failure to exhaust administrative remedies, there are occasions where a claimant's conduct during the investigation, usually marked by a total failure to cooperate, has been determined to constitute a failure to exhaust the remedies. For example, in Forehand, supra, the court refused to grant an equitable modification of the exhaustion rule because the individual in question actively frustrated the EEOC's attempts to investigate the charge.

4. What Happens When a Title VII or ADA Claimant Files a Lawsuit before Receiving a Notice of Right to Sue?

Sometimes claimants file lawsuits prior to receiving a notice of right to sue from the EEOC. Many courts addressing this issue have chosen not to dismiss these cases, but have placed these cases in abatement until such time as the EEOC issues a notice of right to sue. See II B. Lindemann & P. Grossman, Employment Discrimination Law, p. 1375 and n. 199 (3d ed. 1996). Other courts have dismissed the actions without prejudice pending the receipt of the notice. Id. at p. 1375-1376 and n. 200.

B. Administrative Exhaustion for FCRA Lawsuits.

The FCHR is obligated to make a determination on complaints within 180 days. See Subsection 760.11(3), Florida Statutes. If the FCHR finds that there is reasonable cause to believe that discrimination occurred, the claimant may either bring a civil action or request an administrative hearing. See Subsection 760.11(4), Florida Statutes. If a claimant who receives a determination of reasonable cause within 180 days of the date his or her charge was filed with the FCHR elects to file a civil action, he or she has one (1) year from the date of the issuance of the determination of reasonable cause in which to do so. See Subsection 760.11(5), Florida Statutes; Joshua v. City of Gainesville, 768 So.2d 432, 436 (2000). By contrast, if the claimant receiving a determination of reasonable cause within 180 days of the date of the filing of his or her charge elects to have an administrative hearing, he or she must request one no later than thirty-five (35) days after the issuance of the reasonable cause determination. See Subsection 760.11(6), Florida Statutes.

If the FCHR issues a determination of no reasonable cause within 180 days of the filing of the charge, the claimant's remedy is restricted to an administrative hearing before the Division of Administrative Hearings ("DOAH"). This hearing must be requested within thirty-five (35) days of the no reasonable cause determination. See Subsection 760.11(7),

Florida Statutes. The claimant may not directly proceed into court on a no cause finding. However, if the DOAH hearing officer issues a recommended order in the claimant's favor that is affirmed by a final order of the FCHR, he or she can choose to file a civil action under the FCRA within one (1) year of the date of the FCHR's issuance of its final order. Id.

If the FCHR fails to make any finding within 180 days, the claimant may proceed as though reasonable cause has been found. See Subsection 760.11(8), Florida Statutes. Pursuant to the Florida Supreme Court's ruling in Joshua, a claimant then has four (4) years to file a civil action (relying on Subsection 95.1l(3)(f), Florida Statutes). The Florida Supreme Court did not address when the four (4) year statute of limitations starts to run, but reliance on Title VII law would indicate that it commences when the individual receives notice of the alleged discriminatory act. See Delaware State College v. Ricks, 449 U.S. 250 (1980).

If the FCHR makes a reasonable cause determination after 180 days but before an individual has filed suit, the individual still has the benefit of the four (4) year statute of limitations. Joshua, supra. The same is true if the FCHR makes a finding of no reasonable cause after the expiration of 180 days, but before the individual has filed a civil action. See Woodham v. Blue Cross and Blue Shield, Inc., 829 So. 2d 891 (Fla. 2002).

1. What Happens if an FCRA Claimant Files an FCRA Lawsuit Before the Passage of 180 Days and the Issuance of a Determination of Reasonable Cause or No Reasonable Cause by the FCHR?

It is important to note that for purposes of the FCRA, a determination of no reasonable cause from the FCHR operates differently than a determination of no cause by the EEOC in a Title VII, ADEA or ADA action. In the latter circumstance, the claimant receives a notice of right to sue and can initiate a civil action. However, as set forth above, when the FCHR issues a determination of no reasonable cause under the FCRA, the claimant cannot directly initiate a civil action, but instead must proceed with an administrative hearing before DOAH. See Subsection 760.11(7), Florida Statutes.

Respondents confronted with this situation typically argue that they are entitled to a dismissal, because the claimant's premature filing of a civil action before the passage of either 180 days or a determination by the FCHR precludes the possibility that the FCHR might issue a determination of no reasonable cause – a result that would mandate an administrative hearing and not a civil proceeding. These respondents further argue that if more than 365 days have passed since the last discriminatory event, then this premature filing cannot be cured by the FCHR because according to the text of the FCRA, the claimant's initiation of the civil action divests the FCHR of jurisdiction to entertain the charge. See Subsection 760.11(5), Florida Statutes.

To date, a handful of courts within Florida have addressed the issue of what to do when: (a) a claimant initiates a civil action less than 180 days after his or her charge has been filed with the FCHR; and (b) the FCHR has yet to issue a determination of cause or no cause with respect to that charge. Where less than 365 days have passed from the occurrence of the alleged unlawful employment practice, at least one court has held

that the dismissal of the action is not warranted as long as the claimant files a second timely charge of discrimination concerning the same unlawful employment practices. See Dixon v. Sprint-Florida, Inc., 787 So.2d 968 (Fla. 5th DCA 2001).

However, the answer is less clear where more than 365 days have passed since the alleged unlawful employment practice asserted in the FCHR charge, and may depend upon whether you are in a federal or state forum. Published Florida court opinions have uniformly ruled that the premature filing of an FCRA action is fatal to a claimant's FCRA cause of action once more than 365 days had passed from the last alleged discriminatory occurrence. See, e.g., Sweeney v. FP&L Co., Inc., 725 So. 2d 380 (Fla. 3rd DCA 1998); and Brewer v. Clerk of the Circuit Court, Gadsden County, 720 So. 2d 602, 604-605 (Fla. 1st DCA 1998). The Sweeney and Brewer decisions were actually based on an earlier federal court decision that reached the same conclusion. See Ayers v. Wal-Mart Stores. Inc., 941 F. Supp. 1163 (M.D. Fla. 1996) (court dismissed with prejudice a civil action filed only 117 days after filing of a charge because of a failure to exhaust administrative remedies).

Although WESTLAW still shows Ayers as being good precedent, a 2005 decision by the Eleventh Circuit would appear to have superseded that decision, at least in the federal forum. See Webb v. Worldwide Flight Services, Inc., 407 F.3d 1192 (11th Cir. 2005). In Webb, the Eleventh Circuit concluded that a claimant's premature filing of an FCRA suit before either the FCHR's rendering of a determination, or the passage of 180 days, was not fatal to his claims because only the "proper filing" of an FCRA action divests the FCHR of jurisdiction over the charge. Id., 407 F.3d at 1194-1195. In that case, the claimant's initial suit was filed less than 180 days after his charge was filed with the FCHR and before the FCHR rendered any determination of cause or no cause. Although the lawsuit was initially dismissed, the trial court permitted the claimant to reinstate his case after he petitioned and obtained a Notice of Right to Sue from the FCHR. After the lawsuit was reinstated, the respondent again moved to dismiss, asserting that the jurisdictional defect caused by the premature filing could not be cured because more than 365 days had passed since the occurrence of the alleged discriminatory events and, as a result, those claims were now time barred. According to the Eleventh Circuit, however, an FCRA suit is properly filed only when it is commenced "'after the date of determination of reasonable cause by the commission.' Section 760.11(5) does not provide that a civil action filed prior to a reasonable cause determination, or the equivalent 180 day filing period set forth in section 760.11(8), divests the commission of jurisdiction."[6] Holding that the initial suit was never properly filed, the Eleventh Circuit ruled that FCHR was never divested of jurisdiction and that the plaintiff's subsequent refiling of his lawsuit after the receipt of the FCHR's Notice of Right to Sue was

[6] The Eleventh Circuit's rationale in Webb appears predicated on a strained reading of the FCRA. Nowhere in the FCRA is there any mention of what constitutes the "proper filing" of a civil action. In its order, the Court in Webb paraphrases and partially quotes portions of Subsection 760.11(5), Florida Statutes to reach its conclusion. However, when read in its entirety, the cited portion of Subsection 760.11(5) states: "A civil action brought under this section shall be commenced no later than 1 year after the date of determination of reasonable cause by the commission. The commencement of such an action shall divest the commission of jurisdiction over the suit." It is clear (to this writer at least) that the Florida Legislature made no pronouncement about either premature suit commencement under the FCRA, or the "proper filing" of an FCRA action (other than to state that suits filed more than one year after a determination of cause will be deemed time barred).

therefore timely. Id.

2. A Peculiar Anomaly: Right to Sue Notices from the FCHR.

As stated above, the claimant in Webb received a Notice of Right to Sue letter from the FCHR. The FCHR's issuance of a Notice of Right to Sue letter is indeed a peculiar occurrence, in view of the fact that neither the text of the FCRA, nor the FCHR's own administrative rules, provide for the issuance of such a letter. Unlike Title VII and the ADA, the FCRA contains no requirement that a claimant must receive a Notice of Right to Sue before he or she can commence suit. Instead, a claimant is permitted to file suit as if he or she received a determination of cause at any time after 180 days have passed since the date his or her charge was filed with the FCHR. See Subsection 760.11(8), Florida Statutes. Despite the absence of any statutory or rule authority to do so, the FCHR has nevertheless issued Notice of Right to Sue letters in recent years. A copy of such a Notice of Right to Sue letter follows the Conclusion section of this article.

3. Can a Determination by the EEOC That It Is Unable to Conclude That a Violation of the Statutes Has Occurred Be Used as a Determination of No Cause for Purposes of the FCRA?

An EEOC finding that it is unable to conclude that the information obtained establishes a violation of the statutes (i.e., the language the EEOC now uses instead of a "no cause" finding), is not a determination of no reasonable cause for purposes of the FCRA. See e.g., Woodham, supra; Segura v. Hunter Douglas Fabrication Co., 184 F. Supp. 2d 1227 (M.D. Fla. 2002). Thus, such a finding does not consign an individual to the state administrative process. An EEOC finding of reasonable cause also does not necessarily translate into a finding of cause by the FCHR since the FCRA makes the FCHR responsible for making its own determination on the merits of a charge. Jones v. Lakeland Regional Medical Center, 805 So. 2d 940 (DCA 2nd Fla. 2002); Segura, 184 F. Supp. 2d at 1230.

C. What Triggers the Ninety (90) Day Suit-Filing Period Under Title VII, the ADEA and the ADA?

Certainly, the receipt of a notice of right to sue by a claimant triggers the ninety (90) day suit-filing period. See 42 U.S.C. Section 2000e-5(f)(1); and 29 U.S.C. Section 626(e). However, courts within the nation are divided as to whether, and/or when, the ninety (90) day suit-filing period is triggered when the notice is received by someone other than the claimant, or is sent to the claimant's old address.

Within the Eleventh Circuit, the ninety (90) suit-filing day period begins to run from the date the notice of right to sue is received by a member of the claimant's household. See Law v. Hercules, Inc., 713 F.2d 691 (11th Cir. 1983) (a notice of right to sue that was picked up at the post office by the claimant's seventeen year old son at the request of claimant's wife, was deemed received as of the date of the son's receipt). Likewise, a charge received by a claimant's family member is deemed received even if the claimant is out of town at the time of receipt. See Bell v. Eagle Motor Lines, 693 F.2d 1086 (11th Cir. 1982). However, in certain circumstances, equitable tolling may prevent the ninety (90) day suit-filing period. See

Stallworth v. Wells Fargo Armored Services Corp., 936 F.2d 532 (11th Cir. 1991) (notice of right to sue that had been received by the claimant's nephew did not trigger the ninety (90) day suit-filing period when the claimant was represented by counsel and the EEOC, in derogation of its own policies as set forth in the EEOC Compliance Manual, failed to send a copy of the notice to the attorney).

In the Eleventh Circuit, the ninety (90) day suit-filing period normally commences within three (3) days of the claimant's receipt of efforts of an attempt to deliver the notice of right to sue, regardless of when the claimant actually receives it. See Zillyette v. Capital One Financial Corp., 179 F.3d 1337 (11th Cir. 1999). In Zillyette, an agent of the United States Postal Service twice attempted to deliver a notice of right to sue by certified mail but was unable to do so because the claimant was not home. On each occasion, the postal agent left the claimant standard postal notices informing him that the notice of right to sue could be picked up at the post office. However, the claimant did not pick up of the notice of right to sue until several days later.

Most courts agree that the ninety [90] day suit-filing period is not tolled when a claimant moves and fails to keep the EEOC informed of his or her new address and, as a result, a notice of right to sue is then sent to the claimant's old address. See B. Lindemann & P. Grossman, Employment Discrimination Law 2002 Cumulative Supplement, p. 962 and n. 97 (C.G. Weinrich 3d ed. 2002).

D. Tolling the Ninety (90) Day Suit-filing Period for Federal Claims.

The United States Supreme Court has suggested that the suit-filing period for Title VII (and ostensibly ADEA and ADA actions) may be equitably tolled under certain circumstances. See Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990). However, most courts narrowly construe the doctrine of equitable tolling with respect to the ninety (90) day suit-filing period. See B. Lindemann & P. Grossman, Employment Discrimination Law 2002 Cumulative Supplement, p. 966 and n. 113 (C.G. Weinrich 3d ed. 2002). Equitable tolling usually is permitted in situations in which the claimant is the victim of affirmative misinformation received from the EEOC. Id. at pp. 966-967 and n. 114; see also Armstrong v. Martin Marietta Corp., 138 F.3d 1374 (11th Cir. 1997) (court equitably tolled suit-filing period where claimants were affirmatively misled by the EEOC concerning the appropriate statute of limitations); and Browning v. AT&T Paradyne, 120 F.3d 222 (11th Cir. 1997) (court equitably tolled the suit-filing period for an ADEA action when the EEOC issued the claimant an old right to sue notice that did not reflect that the suit-filing period was now ninety (90) days from receipt, as opposed to two (2) or three (3) years after the alleged unlawful employment practice had occurred).

E. Tolling of the Suit-Filing Period for the FCRA.

As set forth above, issues of tolling limitations periods set forth in the FCRA are governed by Section 95.051, Florida Statutes. See Greene, supra. These grounds consist of: (1) absence of the party to be sued from the state; (2) use of a false name by the person to be sued; (3) concealment of the person to be sued within the state such that service of process cannot be effectuated; (4) adjudication of incapacity of the person to be

sued before the cause of action to be sued upon accrues; and (5) the pendency of any arbitral proceeding to a dispute that is the subject of the suit being brought. See Subsections 95.051(1)(a)-(d) and (g), Florida Statutes. Notably, these statutory grounds do not include a claimant's receipt of affirmative misinformation provided by the EEOC which causes him or her to miss the suit-filing deadlines of the FCRA.

VI. Determining the Scope of the Charge.

Sometimes a complaint in a civil action will allege facts or claims that were not asserted by the plaintiff in his or her charge of discrimination filed with the EEOC or local FEPA. In those circumstances, the question becomes whether the court will allow the plaintiff to maintain those claims in his or her subsequent civil action. The leading case regarding when the allegations of a charge of discrimination may limit the scope of a subsequent civil action is Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970). Sanchez involved a plaintiff who originally filed a timely EEOC charge of discrimination alleging discrimination only upon the basis of sex, but who later filed a delinquent amended charge alleging sex and national origin discrimination. Complicating matters even further, the plaintiff then brought suit alleging discrimination upon the basis of race and color. Although the trial court dismissed the plaintiff's complaint for bringing suit on claims of discrimination that did not appear on the face of her charge, the Fifth Circuit reversed and remanded the case.

According to the Fifth Circuit, the allegations in the plaintiff's untimely amended charge were permissible pursuant to the EEOC's relation-back regulation (i.e., 29 C.F.R. § 1601.12(b)), because the allegations in the amended charge were nothing more than a "mere clarification and amplification of the original charge." In this respect, the Court of Appeals ruled that it is not necessary for the words in the narrative portion of the charge "presage with literary exactitude" the allegations of the subsequent civil complaint. Instead, the test for determining whether a subsequent lawsuit can be maintained is not whether the allegations in the civil complaint can be found in the charge itself, but rather whether the EEOC, in investigating that charge, would unearth such allegations of discrimination. Since the Court of Appeals concluded that the EEOC, in investigating the plaintiff's charges, could possibly have unearthed evidence of race and color discrimination, it remanded the case to the trial court.

In ruling that the scope of a charge of discrimination is determined by the facts and claims that can be reasonably expected to grow out of the EEOC's investigation of the charge and not the allegations contained in the charge itself, the Fifth Circuit specifically rejected the notion that the plaintiff's failure to check the boxes marked "race," "color" and "national origin" on her original charge barred her lawsuit alleging race and color discrimination. Instead, it ruled that the plaintiff's failure to check boxes was nothing more than a "technical defect or omission." According to the Court of Appeals, charges of discrimination are not judicial filings and thus should be liberally, as opposed to strictly, construed.

Since Sanchez was decided over a generation ago, several courts have wrestled with the issue of what kinds of claims can be reasonably expected to grow out of the EEOC's investigation of a charge of discrimination. Typically, where a plaintiff's charge alleges one or more acts of a particular type of discrimination and then his or her subsequent civil complaint alleges additional acts asserted to be the result of the same type of discriminatory animus, most

courts will determine that the additional acts are "like and related" to the acts alleged in the charge and therefore allow the claims to proceed to trial. See EEOC v. Jacksonville Shipyards, Inc., 696 F. Supp. 1438, 1444 (M.D. Fla. 1988) (promotion claim in complaint was sufficiently related to claims of job assignment discrimination and hostile work environment found in EEOC charge).

However, when a plaintiff tries to assert a type or basis of discrimination in his or her civil complaint that is different than that alleged in his or her charge of discrimination, a stricter test is usually applied. For example, a plaintiff who alleged only race discrimination in his charge, typically will not be allowed to assert claims of sex or age discrimination in his civil complaint, unless he can show that the new claims of discrimination are closely related to the allegations in the charge of discrimination and that the EEOC, in investigating that charge, would reasonably have been expected to have unearthed evidence of these new bases for discrimination. See Caldwell v. ServiceMaster Corp., 966 F. Supp. 33, 36 (D.D.C. 1997) (claim of sex discrimination not like or reasonably related to claims of race discrimination and retaliation). Sometimes, however, this analysis can become murky in instances in which the bases of discrimination asserted in the charge and lawsuit, although different, are closely related (as can be the case with claims of race, color and national origin discrimination). See Dixit v. New York, 972 F. Supp. 730, 735 (S.D.N.Y. 1997) (national origin claim in lawsuit was deemed to be like and related to claim of race discrimination in charge).

Courts typically do not require plaintiffs, after the filing of an initial charge, to file subsequent charges of discrimination concerning acts of alleged discrimination that are like and related to the type of discrimination alleged in their original charges. Additionally, in most cases, courts do not require plaintiffs to file separate charges alleging retaliation concerning acts that allegedly took place as a consequence of their filing their initial charges. See University of Mississippi, 148 F.3d 493, 514 (5th Cir. 1998) (retaliation claim deemed to grow out of the filing of the plaintiff's initial ADEA charge).

VII. Conclusion.

The procedural prerequisites and administrative exhaustion requirements of Title VII, the ADEA, the ADA and the FCRA are quite intricate and can often be both difficult and confusing to negotiate. Nevertheless, compliance with these prerequisites and requirements can mean the difference between winning and losing a case.

State of Florida
Florida Commission on Human Relations
An Equal Opportunity Employer • Affirmative Action Employer

Jeb Bush
Governor

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Rita Barreto Craig
Chair

Derick Daniel
Executive Director

COPY

FCHR No. [redacted]
EEOC No. [redacted]

[redacted]

Complainant

RECEIVED
AUG 2 6 2005

Respondent

Constangy, Brooks & Smith, LLC
Attorneys at Law

RIGHT TO SUE

The above-referenced Complaint was dual-filed with the Florida Commission on Human Relations (FCHR) and the Equal Employment Opportunity Commission, (EEOC). The EEOC investigated the case pursuant to the Work-Sharing Agreement between the FCHR and the EEOC, and the EEOC issued its determination that it was "unable to conclude that the information obtained during its investigation established violations of the statutes." As such, the EEOC issued its Right to Sue.

Now that the EEOC has concluded its case, you are entitled to seek a substantial weight review from the FCHR. The FCHR does not reinvestigate the case, or overrule the EEOC. Instead, the FCHR reviews the case and grants substantial weight to the determination of the EEOC.

In your case, the EEOC was not able to make a decision. Instead, it determined that it was unable to conclude that the information obtained during the investigation established violations of the statutes. Therefore, the FCHR is unable to grant substantial weight to the EEOC's decision. Instead, the FCHR hereby issues this Right to Sue. Since it has been more than 180 days since your complaint was filed, and since no determination was made within 180 days, you are entitled to pursue the case as if the FCHR issued a Determination of Reasonable Cause. See *Woodham v. Blue Cross and Blue Shield, Inc.*, 829 So.2d 891, (Fla. 2002).

You may pursue this case in the Division of Administrative Hearings by filing a Petition for Relief with the FCHR within 35 days from the date of this Right to Sue letter, or you may file a lawsuit in a circuit court of the State of Florida anytime within one year from the date of this Right to Sue letter, provided such time period is not more than four years from the date the alleged violation occurred.

FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS

Derick Daniel
Executive Director

8/23/05
Date

Unemployment Appeals

By

Hon. Alan O. Forst, Palm City

PURSUING AN UNEMPLOYMENT BENEFITS CLAIM IN FLORIDA

Hon. Alan Orantes Forst*[*]
Chairman (2001-Present)
Unemployment Appeals Commission of the State of Florida

I. UNEMPLOYMENT COMPENSATION OVERVIEW

A. Statutory Authority. The Florida Unemployment Compensation Program administration and services are authorized under Chapter 443, Florida Statutes and the U.S. Social Security Act of 1935.

B. Program Purpose. The purpose of the Unemployment Compensation Program is to provide temporary income payments to make up a part of the wages lost to workers who lose their jobs through no fault of their own, and are available for work, in order to expedite their reemployment while providing a fair, equitable and cost-effective unemployment compensation system for the employers of Florida.

C. Program Summary. The Florida Unemployment Compensation Program was established in 1937 as a result of the Great Depression of the 1930's and high lever of unemployment experienced during this era. The program operates as part of a joint federal-state system created by the U.S. Social Security Act of 1935. While federal law establishes specific requirements under which states must comply, each state may decide eligibility requirements for awarding benefits, disqualifications, manner in which claims are processed and appealed, and established the amount and collection methodology of taxes levied on employers.

D. The Florida UC Process. An individual files a claim with the State of Florida for unemployment benefits. This individual is now a "claimant." Not necessarily a successful claimant. Generally, he/she is a Florida resident and/or earned wages from a Florida employer at some point during the "base period" preceding his/her "benefit year." The "benefit year" commences with the filing of the claim. The "base period" is the first four of the last five completed calendar quarters immediately preceding the first day of the benefit year. So, if the claim is filed any time between January 1 and March 30, 2008, the base period would encompass October 1, 2006-September 30, 2007. Since that isn't complicated enough, the statute moreover stipulates that, to qualify for unemployment compensation benefits, the claimant must have base period wages for insured work in two or more calendar quarters of the base period; and total base period wages equaling at least 1.5 times the wages paid during the high quarter of the base

[*] Alan Orantes Forst was first appointed Chairman of the Unemployment Appeals Commission by Governor Jeb Bush in June 2001. He was reappointed by Governor Bush in June 2005 and confirmed by the Florida Senate in 2006. Hence, he is "honorable." He is the immediate past President of the Martin County Bar Association and the current Chair of the Florida Bar's Labor and Employment Law Section (2008-09). He is also the Grand High Exalted Mystic Ruler of the Florida Federalist Society. Hence, he is "busy" (in an "honorable" fashion, of course).

period, but not less than $3400. The "high quarter" is the calendar quarter in which the most wages were paid.

After making some inquiries to both the claimant and the employer(s), an Agency for Workforce Innovation (AWI) claims examiner issues a decision, either granting benefits to the claimant or denying them. In some cases, the Agency may grant benefits to the claimant without "charging" the employer (such as where the employer is exempt from the statute). The non-prevailing party, either the claimant or the employer, can appeal this decision to AWI's Office of Appeals and request a hearing. This hearing will be conducted (almost always telephonically) by an appeals referee. Following the hearing, a referee's decision will be issued. This decision is also appealable, to the Unemployment Appeals Commission (UAC) by either the non-prevailing party or by AWI. The Commission, in turn, will review the entire record, including the hearing recording, and issue a final order. The non-prevailing party can seek review of the Commission's order in the appropriate District Court of Appeals. At this point, the UAC becomes one of the appellees and will generally defend (almost always successfully!) its decision in court.

II. SOME MAJOR UC PRINCIPLES OF LAW[**]

One of the initial issues to be addressed when an individual files a claim for unemployment is whether the individual was unemployed during the week(s) for which benefits were claimed (benefits are not payable for weeks for which no claim was made; thus, a claimant who delays filing his/her claim cannot collect benefits for any period of unemployment beyond the two most recent weeks prior to the date of the claim). The courts have determined that the claimant bears the burden of proving that he/she was "unemployed." Lewis v. Lakeland Health Care Center, Inc., 685 So. 2d 876 (Fla. 2d DCA 1996); Florida Indus. Comm'n v. Ciarlante, 84 So.2d 1 (Fla. 1955); Newkirk v. Florida Indus. Comm'n, 142 So. 2d 750 (Fla. 2d DCA 1962). Once that is established, the burden shifts to the employer to prove that the claimant was discharged for "misconduct connected with work." Alternatively, the employer can assert an affirmative defense that the claimant voluntarily quit. The employer has the initial burden to establish that the employee voluntarily left the employment. Lewis at 878. If the referee determines that the claimant was discharged, the burden is placed on the employer to establish that the discharge was due to "misconduct connected with work." If the referee determines that the employer met its burden of establishing that the claimant quit, then the burden shifts to the claimant to prove that he or she left the employment for "good cause."

A claimant who is otherwise eligible (as will be discussed later) will not be disqualified from benefits unless he/she is fired for "misconduct connected with work" or quits his/her job without "good cause." The claimant may also be disqualified if he/she refuses a suitable offer of employment without good cause or if, during a period of unemployment, he/she is not "able and available" for work (the claimant must be able to work and looking for work for which he/she is

[**]Earlier Drafts of this material relied in part on Kulzik, Raymond S. Florida Unemployment Compensation Tax: Who Must Report Wages and Pay UC Taxes? Kulzick Associates, PA, 1999; Spero, Donald J. Unemployment Compensation in Florida: Coverage and Eleigibility. Florida Mediation Group, Inc, Inc., 2001.

qualified and capable of performing). A "base period" employer's unemployment account will be "charged" if it fires an employee for reasons other than "misconduct connected with work" or the employee quits with good cause attributable to the employer. The account will generally not be charged if the employee leaves with good cause (as defined by the statute) that is not attributable to the employer or if the employee is fired due to poor performance during an initial 90 day probationary period.

A. The Unemployment Compensation Law of Florida defines **misconduct connected with work** as:

> (a) Conduct demonstrating willful or wanton disregard of an employer's interests and found to be a deliberate violation or disregard of the standards of behavior which the employer has a right to expect of his or her employee; or
>
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

Section 443.036(29), Florida Statutes. Additionally, Florida's appellate courts have quoted with approval the following language of the Wisconsin Supreme Court in Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941):

> [M]ere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Tucker v. Florida Department of Commerce, 366 So.2d 845, 847 (Fla. 1st DCA 1979); Fredericks v. Florida Department of Commerce, 323 So.2d 286, 288 (Fla. 2d DCA 1975). See also Johnson v. Unemployment Appeals Commission, 884 So.2d 228 (Fla. 2d DCA 2004); Bigler v. Florida Unemployment Appeals Commission, 841 So.2d 610 (Fla. 3d DCA 2003); Lucido v. Unemployment Appeals Commission, 862 So.2d 913 (Fla. 4th DCA 2003); Spink v. Unemployment Appeals Commission, 798 So.2d 899 (Fla. 5th DCA 2001).

B. Florida courts have held that mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertence or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are **not to be deemed misconduct connected with work.** Hammett v. Florida Department of Commerce, 352 So.2d 948 (Fla. 2d DCA 1977); Fredericks v. Florida Department of Commerce, 323 So.2d 286 (Fla. 2d DCA 1975); Spaulding v. Florida Industrial Commission, 154 So.2d 334 (Fla. 3d DCA 1963).

C. **To voluntarily leave employment for good cause,** the cause must be one which would reasonably impel the average able-bodied qualified worker to give up his or her

employment. The term "good cause" includes cause attributable to the employing unit or attributable to illness or disability of the individual "requiring separation from his or her work." Furthermore, a claimant will not be disqualified if he/she voluntarily leaves a temporary job in order to immediately return to work with a permanent employing unit that had temporarily terminated the claimant within the previous 6 calendar months. Finally, since July 1, 2004, the unemployment compensation law has found that a claimant had "good cause" to leave his/her work if he/she did so in order to "relocate as a result of his or her military-connected spouse's permanent change of station orders, activation orders, or unit deployment orders."

As noted above, Section 443.101(1)(a), Florida Statutes, provides that an individual shall be disqualified from receipt of benefits for voluntarily leaving work without **good cause attributable to the employing unit.** Good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment." Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). Moreover, even if the employee arguably has "good cause" to leave his or her employment, he or she may be disqualified from benefits based on a failure to expend reasonable effort to preserve his or her employment. See Glenn v. Florida Unemployment Appeals Commission, 516 So.2d 88 (Fla. 3d DCA 1987). See also Lawnco Services, Inc. v. Unemployment Appeals Commission, 946 So.2d 586 (Fla. 4th DCA 2006) (claimant voluntarily left work without good cause when he quit due to dissatisfactions with his pay without first bringing his concerns to the employer's attention or making any other reasonable effort to preserve his employment)**;** Tittsworth v. Unemployment Appeals Commission, 920 So.2d 139 (Fla. 4th DCA 2006) (claimant quit her job without good cause attributable to her employer as there was no evidence that she asked the employer for time off to go to Columbia to care for a sick member of her family or otherwise sought to take the leave and retain her job). When an employee, in the face of allegations of misconduct, chooses to leave his employment rather than exercise his right to have the allegations determined, such action supports a finding that the employee voluntarily left his job without good cause. Board of County Commissioners, Citrus County v. Florida Department of Commerce, 370 So.2d 1209, 1211 (Fla. 2d DCA 1979). However, if there are no specific allegations of misconduct involved and "no evidence of any possibility that [the claimant] could have been retained by the [employer] if he had gone through a hearing," he may be qualified to receive benefits. Schenck v. Unemployment Appeals Commission, 868 So. 2d 1239 (Fla. 4th DCA 2004). See also Grossman v. Jewish Community Center of Greater Fort Lauderdale, Inc., 704 So. 2d 714 (Fla. 4th DCA 1998) (an employee who quits before availing herself of grievance procedures is not disqualified if the grievance procedure did not offer a *feasible* alternative for the employee).

D. The Commission, in reliance upon recent court decisions, has held that an employee who is **separated due to illness or injury or disability** is not disqualified if that condition was the cause of the claimant being separated from his/her pre-injury/pre-illness/pre-disability job. For instance, if a claimant was employed as a laborer and suffered a back injury, he/she would not be disqualified from the receipt of benefits if he/she quit due to an inability to perform the duties of his/her laborer position. If the employer offers an alternative position which the claimant refuses, then the inquiry becomes whether this is a suitable offer of employment. If the claimant seeks to return to work in an alternative position and no such position is offered (or is offered and then discontinued), the Commission will nonetheless treat this as a quit due to illness or disability, as it was the injury/illness or disability that caused the separation from "his or her

work," i.e., the pre-injury position. See UAC Order No. 07-08542 (2007). Generally, if a decision is rendered finding the claimant quit due to illness or disability, the account of the employer is not charged.

E. There is a vast difference between a finding based upon **conflicting testimony and evidence** and a finding based upon uncontradicted testimony and evidence. In those instances where the testimony and evidence are in conflict, it is the duty of the trier of facts to reconcile the differences, and if unable to do so, then to select that testimony and evidence that he feels is worthy of belief and that is more probable and reasonable under the circumstances. However, where the testimony and evidence are uncontradicted, a finding contrary to the manifest weight of such testimony and evidence could not be said to be supported by competent substantial evidence. Caranci v. Miami Glass and Engineering Company, 99 So.2d 252, 254 (Fla. 3d DCA 1957). The Unemployment Appeals Commission has set forth the factors to be considered in resolving conflicts. These include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. See UAC Order No. 03-10946. The appeals referee is responsible for weighing and resolving conflicting evidence and making credibility determinations. See Miller v. Florida Unemployment Appeals Comm'n, 768 So. 2d 1218, 1219 (Fla. 4th DCA 2000). The Commission is required to affirm the factual findings if they are supported by substantial competent evidence. Id. The fact that there is evidence in the record to support the opposite decision by the appeals referee does not require the Commission to reweigh such evidence. See Sharp v. Unemployment Appeals Comm'n, 766 So. 2d 444, 445 (Fla. 4th DCA 2000).

F. **Temporary or Leased Employees' and Employers' Obligations Upon Separation:** Prior to July 1, 2008, Section 443.101(10)(b), Florida Statues, provided, in pertinent part:

> A temporary or leased employee is deemed to have voluntarily quit employment and is disqualified for benefits . . . if, upon conclusion of his or her latest assignment, the temporary or leased employee, without good cause, failed to contact the temporary help or employee-leasing firm for reassignment, if the employer advised the temporary or leased employee at the time of hire and that the leased employee is notified also at the time of separation that he or she must report for reassignment upon conclusion of each assignment, regardless of the duration of the assignment, and that unemployment benefits may be denied for failure to report.

One of the initial inquiries in an unemployment case is "who is the employer?" It is easy to focus on a client as the employer, in a staff leasing situation. While the facts surrounding the claimant's separation from the client company are pertinent, the legal issue is whether the claimant was separated from his job with the employer under disqualifying circumstances. The referee must determine the precise relationship between the employing unit, its client and the claimant. The referee has the duty in cases involving employers of this nature to ensure that the

record is fully developed regarding the relationship of the parties and to make appropriate findings that will enable the Commission to review the correctness of the decision. It is not sufficient to passively allow the parties to establish the scope of the hearing and to testify only concerning the reasons for the separation from the client. To do so relegates the employer/client relationship to the level of a creative fiction and renders it impossible to determine the reason for the claimant's separation from the employing unit, a parallel issue which must be resolved. In the absence of evidence detailing the relationship between the claimant, the employer and the client, the Commission cannot determine whether the claimant became unemployed under circumstances that warrant disqualification from the receipt of benefits. Specifically, the referee must determine whether the employer had informed the claimant at the time of hire that he was required to report to the employer for reassignment after separation from a client and that the failure to report might result in the denial of benefits. §443.101(10)(b), Fla. Stat. The referee must also determine whether the claimant reported to the employer for reassignment after his separation from the client.

In order to comply with Section 443.101(10), Florida Statutes, a worker must notify the leasing company **at the conclusion** of the assignment. In Careerxchange, Inc. v. Unemployment Appeals Commission, 916 So.2d 68 (Fla. 4th DCA 2005), the worker contacted the leasing company six weeks before the assignment ended. In concluding that notice must be given at the conclusion of the assignment, not six weeks in advance, the court noted the claimant was not available for reassignment at the time she contacted the employer and, although the employer did not have other work available at that time, another assignment may have been available if the claimant had called six weeks later.

There are many situations where the claimant was separated from a "daily work, daily pay" job, as opposed to working for a continuous, indefinite or long-term period. The Commission held that, in such cases, the record must be developed regarding any notice provided to the employee at the beginning of this assignment regarding his obligation to report back. Notification given to a claimant at the commencement of the first period of employment was deemed to be insufficient to meet the legal requirements that such notice be provided at the time of hire for subsequent distinct periods of employment. Thus, in situations where a claimant's employment was not continuous, the notice to report back for reassignment had to have been provided to the worker each time the worker was hired for a new assignment. See U.A.C. Order No. 06-00427 (March 29, 2006). If the employer did not advise the claimant when he was rehired for his last assignment of his duty to report for reassignment, then the Commission held that the claimant was laid off due to lack of work.

Effective July 1, 2008, the statute now addresses claims made based on the loss of employment as a leased employee for an employee leasing company or as a temporary employee for a temporary help firm or labor pool. Under the revised statute, specific provisions are made for day laborers. A day laborer is deemed to have voluntarily quit employment and is disqualified for benefits under the statute if, upon conclusion of his or her latest assignment, the day laborer, without good cause, fails to return in person on the next business day to obtain a new assignment. The labor pool must advise the day laborer at the time of hire that he or she must report in person for reassignment the next business day following conclusion of each assignment, regardless of the duration of the assignment, and that unemployment benefits may be denied for

failure to report in person. The time of hire for a day laborer is upon his or her acceptance of the first assignment following completion of an employment application with the labor pool. Finally, the revised statute provides some guidance as to what constitutes "notice." It states that "The notice must be given by means of a notice printed on the paycheck, written notice included in the pay envelope, or other written notification at the conclusion of the current assignment."

G. **Probationary Period Discharge.** Many employers contend that the claimant seeking benefits was discharged during an established 90-Day probationary period and that the employer's experience tax rating account therefore should not be subject to charges. Section 443.131(3)(a)2., Florida Statutes, provides:

> When an individual is discharged by the employer for unsatisfactory performance during an initial employment probationary period, benefits subsequently paid to the individual based on wages paid during the probationary period by the employer before the separation may not be charged to the employer's employment record. The employer must notify the Agency for Workforce Innovation of the discharge in writing within 10 days after the mailing date of the notice of initial determination of a claim. As used in this subparagraph, the term "initial employment probationary period" means an established probationary plan that applies to all employees or a specific group of employees and that does not exceed 90 calendar days following the first day a new employee begins work. The employee must be informed of the probationary period within the first 7 days of work. The employer must demonstrate by conclusive evidence that the individual was separated because of unsatisfactory work performance and not because of lack of work due to temporary, seasonal, casual, or other similar employment that is not of a regular, permanent, and year-round nature.

An employer cannot utilize this statutory provision beyond the initial employment of an employee. Thus, an employee that has previously worked for the employer cannot, once rehired, be put under an "initial" probationary period for purposes of the statute.

H. **Eligibility.** An eligible claimant must have been an "employee," not an "independent contractor," earned more than $3,400 during his base period, and is either not currently earning more than the amount of benefits for which he is qualified to receive or, if totally unemployed, must be able and available for work and making reasonable efforts to seek employment. Furthermore, a claimant can be disqualified from the receipt of benefits if he/she, without good cause (although it may be person "good cause"), fails to accept an offer of suitable employment.

III. APPLICABLE COURT DECISIONS AND UAC ORDERS

A. Misconduct

Section 443.036, F.S. notes that "Misconduct" includes, but is not limited to, the following, which may not be construed in pari materia with each other:

> (a) Conduct demonstrating willful or wanton disregard of an employer's interests and found to be a deliberate violation or disregard of the standards of behavior which the employer has a right to expect of his or her employee; or
>
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

When contesting a claimant's right to receive benefits on the basis of misconduct, the employer must prove both that the act or acts were committed and that the actions of the claimant then fulfills the statutory definition of misconduct. In Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413, 414 (Fla. 1986), the court stated:

> In our view, excessive unauthorized absenteeism presumptively hampers the operation of a business and is inherently detrimental to an employer. We hold, therefore, that a finding of misconduct under section 443.036(24) is justified when an employer presents substantial competent evidence of an employee's excessive unauthorized absenteeism. Once excessive unauthorized absenteeism is established, the burden is on the employee to rebut the presumption that his absenteeism can be characterized as "misconduct" within the meaning of the statute.

In cases that involve allegations of misconduct, the question is not whether the employer is justified in discharging the employee, but whether the conduct amounted to misconduct as defined in the Statute. The Florida Supreme Court has held that "In defining misconduct, courts are required to liberally construe the statute in favor of the claimant." Mason v. Load King Mfg. Co., 758 So.2d 649 (Fla. 2000). The courts have not been reluctant to reverse the Commission in cases where the court determines that the claimant's actions may have justified the employer's termination of the claimant's employment, but did not amount to misconduct sufficient to deny unemployment benefits. See, e.g. McCarty v. Fla. Unemployment Appeals Commission, 878 So.2d 432 (Fla. 1st DCA 2004); Lucido v. Unemployment Appeals Commission, 862 So.2d 913 (Fla. 4th DCA 2003); Spink v. Unemployment Appeals Commission, 798 So.2d 899 (Fla. 5th DCA 2001). See also Stringfellow v. Fla. Unemployment Appeals Commission, 920 So.2d 723 (Fla. 1st DCA 2006) ("[b]ecause there [was] no showing in the record that claimant repeatedly violated explicit policies after several warnings," the court found that the claimant's violation of the employer's policies without warning did not constitute disqualifying misconduct); Rosas v.

Remington Hospitality, Inc., 899 So.2d 390 (Fla. 3d DCA 2005) (holding an isolated incident, such as a claimant's failure to follow policies and rules, is not generally considered disqualifying misconduct). A review of court cases illustrates that there is a narrow line between disqualifying behavior, such as insubordination, and nondisqualifying "poor judgment." In addressing a discharge case, the adjudicator must examine the claimant's work history, disciplinary record and the incidents at issue.

In Mason v. Load King Mfg. Co., 758 So.2d 649 (Fla. 2000), the Florida Supreme Court exercised its discretionary review jurisdiction to resolve conflict between Mason v. Load King Mfg. Co., 715 So.2d 279 (Fla. 1st DCA 1998) and Blumetti v. Unemployment Appeals Commission, 675 So.2d 689 (Fla. 5th DCA 1996). Blumetti involved a worker who was warned of excessive tardiness. Since the worker had good excuses for the last two incidents and was not discharged because of the earlier incidents, the court reasoned he should not be disqualified for benefits. Citing Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986), Mason criticized the reasoning in Blumetti and affirmed the Commission's disqualification of the claimant. The Supreme Court held that, to the extent that Blumetti required a finding that the last offense precipitating the discharge was inexcusable in order to find misconduct, it was wrong and disapproved it. Mason was approved.

1. Isolated Incident of poor judgment. Spaulding v. Florida Industrial Commission, 154 So.2d 334 (Fla. 3d DCA 1963), involved a supermarket cashier who was discharged for failure to properly ring up an "exact amount" purchase left by a customer while the claimant was checking out another customer. The cashier's act violated a rule of the employer, but the Third District Court of Appeal held that her violation merely demonstrated "inadvertence, ordinary negligence or poor judgment and inattention," but did not constitute "misconduct" within the meaning of the statute. 154 So.2d at 339.

Anderson v. Florida Unemployment Appeals Commission, 517 So.2d 754 (Fla. 2d DCA 1987, involved a claimant who was struck by a coworker during an altercation. In retaliation, the claimant struck the coworker with a two by four piece of lumber. The appeals referee and the UAC held that the claimant was guilty of misconduct connected with work because he should have retreated, instead of escalating the altercation. The court reversed and held in the claimant's favor, stating that he was under no obligation to refrain from striking a retaliatory blow. The court relied on Davis v. Unemployment Appeals Commission, 472 So.2d 800 (Fla. 3d DCA 1985), to find that the claimant's actions evinced poor judgment and inability to control himself but not misconduct connected with work.

As noted above, isolated acts of "poor judgment" do not necessarily amount to misconduct. In Gunther v. Barnett Banks, Inc., 598 So.2d 243 (Fla. 2d DCA 1992), a bank security officer completed a form indicating he had conducted a safety and security inspection of a particular branch bank. Contrary to normal procedure, the officer had not personally visited the branch. The form was completed on the basis of information received by a telephone call. The court observed that the officer had not disobeyed a specific directive of the employer and concluded that this was an isolated incident of poor judgment that did not amount to misconduct.

Similarly, a single good faith mistake will not qualify as misconduct. In Miller v. Barnett Bank of Broward County, 650 So.2d 1089 (Fla. 3d DCA 1995), involved a bank branch manager who released funds on a large deposit which had not cleared. It was later discovered that the deposit consisted of stolen instruments. The error caused the bank to suffer a huge monetary loss. The court reversed the agency's determination that the manager's error was misconduct. The court characterized it as a good faith error in judgment that did not rise to the level of misconduct. However, in C. F. Industries, Inc. v. Long, 364 So.2d 864 (Fla. 2d DCA 1978), the appeals referee found that the employer failed to prove the claimant committed the last offense for which he was charged, but accumulation of offenses during the course of his employment amounted to misconduct. The UAC reversed. The court reversed the UAC. It held that the appeals referee's decision was supported by competent substantial evidence and was improperly rejected by the UAC.

In Parker v. Department of Labor and Employment Security, 440 So.2d 438 (Fla. 1st DCA 1983), an employee was discharged for missing 26 days of work while incarcerated. The record contained no evidence that the employee was guilty of the charges which were eventually dropped. The court stated:

> There will undoubtedly be circumstances where an employee's pre-trial incarceration may reach the point where he ought to be considered as having abandoned his employment.
>
> The court observed that the employee's absence was not literally voluntary and volition could not be inferred from any culpability on the part of the employee. The court concluded that the voluntarily leaving provision could not be applied and, in the absence of culpability, the misconduct provision was also inapplicable.

Courts have also considered intent when deciding whether a claimant's action amounts to misconduct. Proffitt v. Unemployment Appeals Commission, 658 So.2d 185 (Fla. 5th DCA 1995), involved a supermarket cashier who was discharged when the employer learned she had provided false information on her employment application. When she completed the application, the employee answered "no" to the question, "Have you ever been convicted of a felony? Six years earlier she had pled guilty to a second degree grand theft charge in connection with a bad check she had written. As a result of the plea, the circuit court withheld adjudication and placed the employee on probation for two years and imposed a $15 fine. The circuit court judge advised the employee that she could respond in the negative to the question whether she had ever been convicted of a felony because adjudication had been withheld. When the employee applied for unemployment benefits, they were denied on the grounds that she had been discharged from employment for misconduct connected with work because she falsified her employment application. The district court of appeal reversed. The court pointed out that a degree of confusion exists as to whether a person whose adjudication of guilt has been withheld has actually been convicted of the crime charged. Because of this ambiguity, the court held that the employee's response to the question could not be considered misconduct.

2. Abusive Language. In Benitez v. Girlfriday, Inc., 609 So.2d 665 (Fla. 3d DCA 1992), an employee used profane and abusive language during a telephone conversation with a supervisor. The court held that the ensuing discharge was not for misconduct because the conversation was an isolated incident and was kept private:

> Misconduct, as a ground for disqualification from unemployment compensation benefits, is to be narrowly construed. The burden of proving misconduct is on the employer. Moreover, there is a distinction between the word misconduct as used in labor law and misconduct as defined for unemployment compensation purposes. Misconduct serious enough to warrant an employee's dismissal is not necessarily serious enough to warrant the forfeiture of compensation benefits.

In late 2007, the Commission dealt with two "abusive language" discharge cases. In UAC Order No. 07-09003, the Commission affirmed the referee's decision that the claimant was discharged for reasons other than misconduct. The claimant in that case referred to a manager as a "fucking Jew bastard." The Commission characterized this as an isolated instance of poor judgment, noting the lack of prior disciplinary action against the claimant, noting that the comment was directed to a supervisor outside the presence of other persons, and the claimant acknowledged that he "said some things he should not have said," and he apologized for his outburst. In contrast, in UAC Order No. 07-07846, the Commission reached a different conclusion, affirming a referee's disqualification of a claimant who was discharged due to an incident where she referred to a co-worker as a 'nasty nigger-lover.'" The Commission noted that the claimant in that case did not apologize and, per the referee's credibility determination, lied about what had been said (she claimed that she called the co-worker a "gigger-lover"). The claimant found entitled to benefits "apologized for his bigoted remark." The claimant found to be disqualified "refused to acknowledge what had been said and made up an excuse that the referee found to be a lie, thus adding dishonesty and lack of contrition to what had been an isolated use of obscene language."

3. Dishonesty. "If the Agency for Workforce Innovation or the Unemployment Appeals Commission finds that the individual was terminated from work for any dishonest act in connection with his or her work, the individual is not entitled to unemployment benefits . . . ." § 443.101(9)(b), Florida Statutes. An isolated instance of poor judgment may be a sufficient reason for an employer to discharge an employee; however, it will not generally constitute disqualifying misconduct under the unemployment compensation law. See Stringfellow v. Fla. Unemployment Appeals Commission, 920 So.2d 723 (Fla. 1st DCA 2006). An isolated act of dishonesty, however, can be sufficient to constitute disqualifying misconduct. See Sauerland v. Fla. Unemployment Appeals Commission, 923 So.2d 1240 (Fla. 1st DCA 2006) (holding the claimant's falsification of time log records to constitute disqualifying misconduct); Terry Roberts Site Work, Inc v. Unemployment Appeals Commission, 908 So. 2d 592 (Fla. 5th DCA 2005) (holding that the claimant's actions in discussing on company time the formation of a private business venture constitutes misconduct connected with work).

In Fink v. Florida Unemployment Appeals Commission, 665 So.2d 373 (Fla. 4th DCA 1996), a sales associate for a home improvement store was discharged for violating the store's policy prohibiting conflicts of interests. The policy prohibited employees from doing work for customers using the employer's products. The claimant maintained a side business doing electrical work. On several occasions, he suggested to his clients that they purchase their electrical supplies at the employer's store. Afterward, the claimant would perform the work on the side. The appeals referee and the Unemployment Appeals Commission held that the claimant has willfully violated the employer's policy and his actions amounted to misconduct connected with work. Citing Brown v. Unemployment Appeals Commission, 633 So.2d 36 (Fla. 5th DCA 1994), review denied, 642 So.2d 1362 (Fla. 1994), for the principle that an administrative agency's action should be sustained on appeal if based upon an acceptable view of the evidence, the court affirmed.

4. Insubordination. The Courts have held that an employee's obdurate or belligerent refusal to comply with a valid work order amounts to misconduct sufficient to deny unemployment benefits. See, e.g. Hinson Electrical v. Unemployment Appeals Commission, 914 So.2d 1033 (Fla. 1st DCA 2005); Givens v. Florida Unemployment Appeals Commission, 888 So.2d 169 (Fla. 3d DCA 2004); Boyd v. Ikon Office Solutions, Inc., 743 So.2d 1152 (Fla. 3d DCA 1999); Hines v. Department of Labor and Employment Security, 455 So.2d 1104 (Fla. 3d DCA 1984); Citrus Central v. Detwiler, 368 So.2d 81 (Fla. 4th DCA 1979). See also Evans v. Unemployment Appeals Commission, 903 So.2d 298 (Fla. 3d DCA 2005)(holding that a claimant's intentional violation of a direct order from the employer, without good cause, amounted to disqualifying misconduct); Peaden v. Unemployment Appeals Commission, 865 So.2d 690 (Fla. 5th DCA 2004) (holding vulgarity directed at a supervisor, in the presence of other employees, is akin to "mutiny on the high seas," and sufficient to constitute misconduct).

In Clay County Sheriff's Office v. Loos, 570 So.2d 394 (Fla. 1st DCA 1990), a deputy sheriff was discharged because he attended a radar training course in direct disobedience of an order of his superior officer. The court held that the deputy's disregard of the "chain of command" amounted to misconduct connected with work.

In National Insurance Services, Inc. v. Unemployment Appeals Commission, 495 So.2d 244 (Fla. 2d DCA 1986), two office employees were discharged for refusing to participate in a newly implemented procedure whereby each employee would take turns cleaning a small area used for coffee breaks. The discharged employees did not use the facility and believed they should be exempted from the cleaning requirement. The Unemployment Appeals Commission allowed benefits, but the court reversed, noting that the employer's requirement was not unreasonable and the employees' refusal was tantamount to insubordination amounting to misconduct.

Generally, refusal to perform a reasonable job duty constitutes insubordination, absent a compelling excuse. In Gulf County School Board v. Washington, 567 So.2d 420 (Fla. 1990), the court held that failure to obtain a certification necessary to continue in employment is not misconduct if failure was due to inability, and not due to refusing to take the steps necessary to properly prepare. Thus, the Commission has found no misconduct in cases where a teacher is

fired after continued failure to pass a required professional exam. See, e.g., UAC Order No. 07-07999 (December 2007).

The Commission has reviewed many appeals which involved a discharge based on a claimant's refusal to sign a warning notice. The Commission has acknowledged that this issue was addressed by the court in Mompoint v. Ward Stone College, Inc., 701 So.2d 1267 (Fla. 3d DCA 1997). The court held a worker's actions in merely refusing to sign a warning notice is not sufficiently egregious to fall within the definition of misconduct. See, e.g., UAC Order No. 06-09669 (March 2007) (absent evidence that the claimant refused to read the warning or was otherwise insubordinate, refusal to sign the warning notice was not sufficiently egregious to fall within the definition of misconduct).

In Vilar v. Unemployment Appeals Commission, 889 So.2d 933 (Fla. 2nd DCA 2004), the court reversed the Commission and held that although the employee was wrong to disobey her supervisor's instructions to return to her work area, this was an isolated instance of poor judgment and does not constitute misconduct. On the other hand, only one week before the issuance of the Vilar decision, a panel of the Third DCA affirmed the Commission's disqualification of a claimant, noting that the claimant was discharged for misconduct "because he obdurately refused contrary to the direct orders of his supervisor, to operate a forklift." Givens v. Unemployment Appeals Commission, 888 So.2d 169 (Fla. 3d DCA 2004). Thus, there is clearly a narrow line between disqualifying insubordination and nondisqualifying "poor judgment."

In 2005, the First DCA held that a claimant's failure to report to work without good cause after the employer expressly directed him to do so as a result of Hurricane Ivan constitutes misconduct connected with work. Gulf Power Co. v. Unemployment Appeals Commission, 912 So. 2d 1256 (Fla. 1st DCA 2005).

Also in 2005, IMO, the 3rd DCA missed the boat on an insubordination case. See Forte v. Florida Unemployment Appeals, 899 So. 2d 1159 (Fla. 3d DCA 2005). I wrote the following opinion in the Commission's Order setting aside its previous order:

> *The court's decision in this case reverses an order of the Commission, which in turn had affirmed a referee's decision that the claimant was disqualified from the receipt of unemployment compensation benefits.*
>
> *The referee's findings of fact, which were not rejected by the court, are as follows:*
>
> > *The claimant was employed by a security company, as a security officer, on April 29, 1999. The claimant worked approximately forty (40) hours per week, on a varied schedule. The claimant was aware of the employer's holiday attendance procedure and admitted reading it in the monthly newsletter put out by the*

> *employer. The claimant signed for and received a copy of the employer's policies and procedures concerning taking time off during the holiday season. The claimant submitted a note to the employer on December 22, 2003, saying that she was going to be taking Christmas off and the day after. The claimant was informed that her request was denied. The claimant did not report to work as scheduled. The claimant was considered to have abandoned her job by not reporting to work during the holiday season, as required.*

Based on these findings, the referee concluded that the claimant voluntarily left her employment on December 22, 2003 without good cause attributable to the employer, as "she knew the holiday party and that her request for vacation was denied, but decided not to go in to work." The Commission affirmed the referee's disqualification of the claimant, though its opinion noted that "the evidence deemed credible by the appeals referee supports the conclusion that the claimant was discharged for misconduct connected with work."

In reversing the Commission and granting benefits to Ms. Forte, the court cites to Mason v. Load King Mfg. Co., 758 So.2d 649 (Fla. 2000) for the proposition that "Although 'excessive unauthorized absenteeism' justifies the denial of benefits, a single absence does not." The court concluded that Ms. Forte's "one unauthorized absence" was "an isolated incident of poor judgment which did not rise to the level of misconduct within the meaning of the law." I believe that the court's reliance on Mason is misplaced. The Mason case dealt with an employee who was discharged based on a pattern of absences that the court deemed "excessive" and "unauthorized." The instant case involves insubordination. The claimant requested leave for Christmas Day and December 26. Her request was made after the leave policy deadline for such requests, and she was unable to secure a replacement to cover her shift. The employer informed her that she could not take those days off. The claimant responded by informing the employer that she was going to spend time with her family on those days. The referee characterized the claimant's refusal to work on those two days as a voluntary quit. The Commission, perhaps mistakenly (upon reflection, the referee's conclusion appears to be correct), characterized the claimant's refusal as insubordination justifying discharge.

> *The court's decision implies that an employee who willfully and wantonly disregards an express denial of a leave request is guilty of no more than "an isolated instance of poor judgment." This conclusion is not only in conflict with common sense (an employer cannot enforce its vacation or leave policy without having its unemployment account charged), but it also conflicts with other DCA decisions, including decisions issued by the Third DCA. For example, last December a panel of the Third DCA (which included one of the judges who concurred in the Forte decision) affirmed the Commission's disqualification of a claimant, noting that the claimant was discharged for misconduct "because he obdurately refused contrary to the direct orders of his supervisor, to operate a forklift." Givens v. Unemployment Appeals Commission, 888 So.2d 169 (Fla. 3d DCA 2004). This was not the first instance of a DCA finding that a single incident of refusing to follow a reasonable work order amounts to misconduct. See e.g., Boyd v. Ikon Office Solutions, Inc., 743 So.2d 1152 (Fla. 3d DCA 1999); Clay County Sheriff's Office v. Loos, 570 So.2d 394 (Fla. 1st DCA 1990); Kraft, Incorporated v. Unemployment Appeals Commission, 478 So.2d 1183 (Fla. 2d DCA 1985); National Insurance Services, Inc. v. Unemployment Appeals Commission, 495 So.2d 244 (Fla. 2d DCA 1986); Citrus Central v. Detwiler, 368 So.2d 81 (Fla. 4th DCA 1979).*
>
> *There is a difference between an "unauthorized absence" and a refusal to report to work in contravention of an express order/denial of leave. The Commission will continue to recognize this distinction.*

On the other hand, the 4th DCA affirmed (by PCA) the Commission in an interesting case that gained some attention on the internet. Littrell v. State Unemployment Appeals Comm'n, 916 So. 2d 806 (Fla. 4th DCA 2005). The Commission's Order in Littrell v. St. Lucie County School Board, UAC Order No. 04-11550 (2004) is as follows:

> *The issue before the Commission is whether the claimant was suspended by the employer for misconduct connected with work as provided in Section 443.101(1), Florida Statutes.*
>
> *The referee's findings of fact recite as follows:*
>
> *The claimant was employed with this school board as a teacher from 1990 through September 23, 2004, the date of the hearing. The claimant was warned in 2000 after allegations of handling a child physically and insubordination. On March 10, 2004, the principal received a complaint about an incident*

involving the claimant. On March 5, 2004, the claimant involved her ninth grade students in an assignment that she calls "keep your mind clean." The claimant posed ten questions to her students verbally. The claimant intended to provide clues that could cause the students to first think of an answer that was not "clean," and to give the students a "hint" that might lead them to another answer that was not "bad." One question stated by the claimant to her students was, "what compound word starts with an 'f' and ends with 'u-c-k'? Hint: you always envision red- "fire truck." An investigation was conducted by the employer. The claimant was asked for a copy of the assignment while she was teaching class one day. The claimant submitted a written list of questions that were not written exactly as the claimant read them orally; the claimant did not give the assignment in written form. The investigation results included the fact that at least once the claimant had provided the students with the etiology of the word "shit" after one student used the word in class." The claimant provided a report of the incident to the dean, who reported to the claimant that he believed that her actions were "a good idea." The investigation included a sign by one of the students that was placed on the wall. The sign depicted an upright finger with the words "pluck ewe," and statements pertaining to the etiology of that expression.

The employer considered these incidents a pattern of behavior in violation of the school board rules and principles of professional conduct, both of which the claimant was aware at the time of the final incident. The Principles include: "[s]eek to exercise the best professional judgement and integrity; [s]trive to achieve and sustain the highest degree of ethical conduct; [n]ot engage in harassment; [s]hall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety; [s]hall not intentionally expose a student to unnecessary embarrassment or disparagement; [s]hall not harass or discriminate . . . " For these reasons the claimant was suspended.

Based upon the above findings, the referee held that the

claimant was suspended for reasons other than misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes that the referee's decision is not in accord with the law; accordingly, it is reversed.

Section 443.036(29), Florida Statutes, defines misconduct connected with work as:

> *(a) Conduct demonstrating willful or wanton disregard of an employer's interests and found to be a deliberate violation or disregard of the standards of behavior which the employer has a right to expect of his or her employee; or*
>
> *(b) Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.*

The record reflects the claimant was suspended for engaging her ninth grade students in an exercise (the "ten questions") that involved offensive and sexually inappropriate matters. While some students may have found the exercise to have been entertaining and/or "clever," the claimant's responsibility as a ninth grade teacher includes being vigilant in not exposing students to unnecessary embarrassment. Moreover, portions of the subject matter of the assignment were offensive and inappropriate for the students to which it was administered and, as such, a form of harassment. In fact, if this were a male supervisor presenting this "exam" to female subordinates, an employer would be justified in fearing a sexual harassment lawsuit.

One can rationalize that 14-year old kids are already being exposed to the words and concepts that were introduced by the assignment at issue, through shows such as "South Park" or "Howard Stern." However, generally such shows advertise that they feature "adult content." Moreover, a parent generally (or, at least ideally) has some control over whether or not to let his/her child watch/listen to such programs or to watch/listen to the show with the child and discuss it afterwards. In essence, the claimant's "assignment" to her public school students usurped the parental responsibility to introduce/discuss subjects such as sexual intercourse, masturbation, and male sexual anatomy. The claimant should not have assumed that these were already familiar

concepts for all of the children in her class and that none of the students (or their parents) would be uncomfortable with such a discussion. The claimant knew or should have known that exposing 14-year old children to this material, without prior consultation with the school's administration, demonstrated a disregard of the standards of behavior which the employer has a right to expect of its employees, as this particular assignment had the potential to erode the trust that parents bestow upon public school teachers. Accordingly, the claimant's lapse of judgment amounted to misconduct within the meaning of the unemployment compensation law.

The claimant is disqualified for the duration of the suspension from work.

5. Drug Use. If an individual is discharged from employment for drug use as evidenced by a positive, confirmed drug test as provided in the Statute, or is rejected for offered employment because of a positive, confirmed drug test, test results and chain of custody documentation provided to the employer by a licensed and approved drug-testing laboratory will be self-authenticating and admissible in unemployment compensation hearings, and such evidence will create a rebuttable presumption that the individual used, or was using, controlled substances, subject to the following conditions:

a. To qualify for the presumption described in this subsection, an employer must have implemented a drug-free workplace program under ss. 440.101 and 440.102, and must submit proof that the employer has qualified for the insurance discounts provided under s. 627.0915, as certified by the insurance carrier or self-insurance unit. In lieu thereof, an employer who does not fit the definition of "employer" in s. 440.102 may qualify for the presumption provided that the employer is in compliance with equivalent or more stringent drug-testing standards established by federal law or regulation.

b. Only laboratories licensed and approved as provided in s. 440.102(9), or as provided by equivalent or more stringent licensing requirements established by federal law or regulation may perform such tests.

c. Disclosure of drug test results and other information pertaining to drug testing of individuals who claim or receive compensation under this chapter shall be governed by the provisions of s. 443.1715.

SKF Management and Palace Management, Bueno Vista Palace Hotel v. Unemployment Appeals Commission, 664 So.2d 345 (Fla. 5th DCA 1995), involved a claimant who was

discharged from her job as a hotel room attendant for allegedly testing positive for use of cocaine. The employer attempted to establish that it was entitled to the statutory presumption of Section 443.101(11), Florida Statutes. If an employer is able to meet the requirements of the statute, a rebuttable presumption is created that the discharged employee had used a controlled substance. Testing positive for use of a controlled substance may constitute misconduct connected with work. See Ford v. Southeast Atlantic Corporation, 588 So.2d 1039 (Fla. 1st DCA 1991). The UAC and the court agreed that the employer failed to meet two of the requirements of the statute. It failed to prove that it had a drug-free workplace program that qualified it for insurance discounts under Section 627.0915, Florida Statutes. It also failed to prove that the laboratory which performed the testing of the claimant's specimen was licensed and approved as provided in Section 440.102(9), Florida Statutes. The court sustained the decision of the appeals referee and the UAC that the claimant had been discharged from employment under nondisqualifying conditions.

AAA Gold Coast Moving and Storage, Inc. v. Weiss, 654 So.2d 281 (Fla. 4th DCA 1995): Approximately one and one half years after the claimant began employment, the employer implemented a random drug testing program. The claimant refused to submit t being tested and was terminated. The court sustained the finding of the appeals referee and the commission that the claimant's refusal did not constitute misconduct. The court distinguished Fowler v. Unemployment Appeals Commission, 537 So.2d 162 (Fla. 5th DCA 1989), because the employer in the case before it, unlike the employer in Fowler, did not have a reasonable suspicion that the employee refusing the test had abused drugs.

6. Excessive Absenteeism and/or Tardiness. The Unemployment Compensation Law does not provide relief from charging an employer's experience tax rating account when the employee is "discharged" by the employer due to the employee's personal illness or disability. However, a claimant who is discharged because of excessive unauthorized absenteeism commits "misconduct" under section 443.036(29). Tallahassee Housing Auth. v. Fla. Unemployment Appeals Comm'n, 483 So. 2d 413, 414 (Fla. 1986). It is the employer's burden to prove excessive unauthorized absenteeism. Id. Specifically, the employer must present "satisfactory proof . . . of a serious and identifiable pattern of excessive absenteeism" that is willful. Mason v. Load King Mfg. Co., 758 So. 2d 649, 654 (Fla. 2000). The Mason decision explained:

> By "unauthorized absences," we are generally referring to those absences where the employee has wilfully chosen to violate her fundamental obligation to an employer to come to work and carry out her assigned duties. Obviously, the failure of an employee to carry out his or her obligation can be devastating to the functioning of an employer's business. Excessiveness must also be proven. While we realize that excessiveness may well depend on factors such as the particular employment context and presence or absence of workplace guidelines, we do not deem it unreasonable to require an employer who seeks to deny a former employee unemployment compensation benefits to meet this burden.

Id. at 654-55. Once the employer meets its burden of proving that the employee's absences were excessive and unauthorized, the burden shifts to the employee to rebut the presumption that the absenteeism constituted "misconduct" under section 443.036(24). Tallahassee Housing Auth., 483 So. 2d at 414; Hamilton v. Unemployment Appeals Commission, 880 So.2d 1284 (Fla. 2d DCA 2004). Absences that are properly reported to the employer and are for compelling reasons, such as illness, do not constitute misconduct connected with work. Cargill, Inc. v. Unemployment Appeals Comm'n, 503 So. 2d 1340 (Fla. 1st DCA 1987); Howlett v. South Broward Hospital Tax District, 451 So.2d 976 (Fla. 4th DCA 1984); Taylor v. State Department of Labor and Employment Security, 383 So.2d 1126 (Fla. 3d DCA 1980). The Commission has consequently held that absences/tardiness based upon a compelling reason, such as illness, generally do not constitute willful absences/tardiness, even though they may be unauthorized by the employer.

7. Driving Accidents. The courts have been relatively lenient with claimants who were terminated due to driving accidents. See, e.g., *Lyster v. Florida Unemployment Appeals Commission*, 826 So. 2d 482 (Fla. 1st DCA 2002) (holding that truck driver who was fired due to his involvement in five accidents in a ten-month period was not disqualified from receiving unemployment compensation based on misconduct), and *Maxfield v. Unemployment Appeals Commission*, 716 So. 2d 859 (Fla. 5th DCA 1998) (holding that evidence that driver had been involved in three car accidents in a twelve-month period did not support a finding that claimant's acts of misjudgment leading to multiple vehicle accidents constituted misconduct). The court in Girgis v. Unemployment Appeals Comm'n, 897 So. 2d 513 (Fla. 4th DCA 2005) certified conflict with those cases, but concluded that "driving without looking where you are going, particularly after past driving misconduct and other related misconduct resulting in employment probation" constitutes misconduct connected with work.

B. Voluntary Leaving of Employment

1. Attributable to employer (in general). As a correctional officer, the claimant in Beard v. State Department of Commerce, 369 So.2d 382 (Fla. 2d DCA 1979), was required to work whatever shift was assigned by the employer. When assigned a shift that conflicted with her child care arrangements, however, the employee quit without attempting to make alternative arrangements. Unemployment benefits were denied on the theory that her reason for quitting was personal and not attributable to her employer. The significance of the statutory amendment was recognized by the Second District Court of Appeal in Beard v. State Department of Commerce, 369 So.2d 382 (Fla. 2d DCA 1979), where the court commented:

> [T]he legislature, when it added the phrase "attributable to the employer" to the good cause requirement for voluntary termination, must have intended to remove domestic obligations as a good cause for voluntary termination. (footnote omitted).

369 So.2d at 385. In Slusher v. State Department of Commerce, 354 So.2d 450 (Fla. 1st DCA 1978), the First District Court of Appeal was confronted with a case involving an unemployment compensation claimant who had left employment for an unquestionably valid reason, but was

denied benefits because her reason for leaving was not attributable to the employer. The court summarized the facts of the case and the contentions of the claimant as follows:

> [The claimant] voluntarily quit her employment to relocate with her husband in Virginia where he had secured employment. [The claimant] does not deny that she left her employment in order to be with her husband but urges that her decision to do so was for the preservation of her "American home way of life which is the basic foundation of this nation" and further argues that "no reasonable or sane person would abrogate the responsibility of a lawful marriage to satisfy a mere whim or fancy that leaving their place of employment was without good cause attributable to the employer."

354 So.2d at 451. The court expressed sympathy for the claimant's situation, but affirmed the agency's denial of benefits with the following language:

> We certainly agree with the proposition that it is desirable to preserve marriages and keep families together. However, we must also agree with the statement of the appeals referee wherein he stated:
>
> "Although the claimant's reason for leaving may be considered a good personal reason, it cannot be considered attributable to the employer. Accordingly, it can only be considered that the claimant voluntarily left her employment without good cause attributable to her employer."

Arredondo v. Jackson Memorial Hospital, 412 So.2d 912 (Fla. 3d DCA 1982), involved an employee who quit employment because he did not like working the night shift which interfered with his sleep and he was unhappy with the pay differential for the shift. The court held that these dissatisfactions did not constitute good cause within the meaning of the unemployment compensation statute for quitting employment. Marcelo v. Department of Labor and Employment Security, 453 So.2d 927 (Fla. 2d DCA 1984), involved a worker who had difficulty communicating with his foreman because they did not speak a common language. The worker was ill and attempted to demonstrate this to the foreman by blowing his nose and showing the bloody phlegm to him. The foreman took offense and physically assaulted the worker and was about to assault him again when two others intervened. The worker was frightened and left work, believing he had been discharged. The court concluded that the individual had good cause attributable to the employer for leaving the employment and, therefore, was not disqualified from receiving benefits.

Advanced Mobilehome Systems, Inc. v. Unemployment Appeals Commission, 663 So.2d 1382 (Fla. 4th DCA 1995), involved a claimant who quit his job as a roofing foreman because his employer insisted that he shave three days growth of beard before beginning work. The UAC ruled that the claimant had good cause attributable to the employer to quit because the employer failed to demonstrate the reasonableness of its clean shaven requirement. The court reversed. It

found that the employer had a legitimate business interest in having its employees present a certain appearance to the public. The court further found that the claimant had right to quit his employment if he did not like the employer's policy but his quitting was not for good cause attributable to the employer. The court distinguished cases where it was held that a government entity must demonstrate rational relationship with a valid public purpose before it can interfere with an individual's right to choice of personal appearance.

2. Change in duties. Perez v. State Department of Labor and Employment Security, 377 So.2d 806 (Fla. 3d DCA 1979), involved a clerk in an auto parts dealership who was required to fill in for the delivery driver who had quit. The clerk complained because he was not relieved of his regular duties. After two weeks, he quit claiming the job had become intolerable. The court agreed with the agency that the clerk did not have good cause to quit within the meaning of the statute because the average, able-bodied qualified worker would not have left his or her employment because of the conditions. See Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). The court further observed that it would not overturn a decision of an administrative agency if it was based upon an acceptable view of the evidence. Yet in Iglesias v. Eagle National Bank of Miami, 598 So.2d 262 (Fla. 3d DCA 1992), an assistant bank branch manager was given additional duties after the branch manager was terminated. For six months, the claimant requested additional assistance from his supervisor, but he received no response. The court reversed the UAC finding that the claimant did not have good cause to quit and reinstated the appeals referee who found that the employer's disregard of the claimant's requests for assistance gave him good cause to leave the employment.

In Salinas v. Eastern Aero Marine, 908 So. 2d 1169 (Fla. 3rd DCA 2005), the court found the claimant had good cause to quit when he was transferred to a job that exposed him to certain chemicals that affected his allergies. The decision discusses similar cases:

> In Vazquez v. GFC Builders Corp., 431 So. 2d 739 (Fla. 4th DCA 1983), the court held that an employer may "add to, subtract from, or change an employee's work assignments," and if "the duties and requirements are reasonable, within the ambit of the position for which the employee is hired, and applied to all employees without discrimination," the employee's refusal to perform the change of assignments constitutes misconduct connected with work "sufficient to relieve the employer of liability for unemployment benefits." Vazquez, 431 So. 2d at 741; see also Davidson v. AAA Cooper Transp., 852 So. 2d 398, 401 (Fla. 3d DCA 2003) ("Terminated employees are not . . . necessarily disqualified from receiving benefits for refusing to perform tasks outside the scope of employment."); Maynard v. Florida Unemployment Appeals Comm'n, 609 So. 2d 143, 145 (Fla. 4th DCA 1992) ("The general rule is that changes may be made in the duties of an employee, so long as they are reasonable and are usual for the particular position for which the employee was hired. Moreover, where such a change of duties is made and the employee refuses to perform, the employee is guilty of misconduct, justifying denial of employment

compensation benefits."); Kraft, Inc. v. State of Fla., Unemployment Appeals Comm'n, 478 So. 2d 1183 (Fla. 2d DCA 1985).

In cases that involve a claimant's contention that she was compelled by the employer to resign from her employment in order to address a family emergency, the Commission requires the referee to make a special inquiry as to whether the claimant had the option of taking a leave of absence with reasonable, defined parameters. The referee must also make findings regarding whether the claimant gave the employer an opportunity to provide such a leave, and whether the claimant made a reasonable request for time off or other temporary accommodation to address a family emergency. See Tittsworth v. Unemployment Appeals Commission, 920 So.2d 139 (Fla. 4th DCA 2006). If such a request was made, the referee must then determine whether the employer's denial of such leave or accommodation was unreasonable and would reasonably impel the average able-bodied qualified worker to leave gainful employment. See Szniatkiewicz v. Unemployment Appeals Commission, 864 So.2d 498 (Fla. 4th DCA 2004). Generally, the decision of an appeals referee involving a purported "family emergency" should address each of the following points:

- Whether a bona fide family emergency existed;
- The nature of the emergency and its anticipated duration;
- Whether the claimant requested time off or another accommodation to address the emergency and, if so, whether the request was reasonable and appropriate under the circumstances;
- Whether an alternative response to the emergency was available, discussed and/or offered to the claimant;
- Whether this alternative would permit the claimant to remain employed and/or was otherwise reasonable under the circumstances and, if so, why the claimant did not elect an alternative solution;
- Whether the employer granted or denied the claimant's request, and the reason for denial; and
- Any other pertinent circumstances regarding the specific situation.

3. Good Cause Due to Illness. A claimant does not lose eligibility for voluntarily leaving a job due to "illness or disability of the individual requiring separation from his or her work." Florida Statutes 443.101(1)(a)1. **In such situations, the employer's account is not charged.** Florida Statutes 443.131(3)(a)1. In Jennings v. Unemployment Appeals Commission, 825 So.2d 525 (Fla. 2d DCA 2002), the court held:

> "[T]he determination of whether an employee voluntarily leaves a job without good cause attributable to an employer should focus on whether the circumstances behind the employee's departure would have impelled the average, ableminded, qualified worker to give up his employment." Lewis v. Lakeland Health Care Ctr. Inc., 685 So. 2d 876, 879 (Fla. 2d DCA 1996) (quoting Dean v. Fla. Unemployment Appeals Comm'n, 598 So. 2d 100, 101 (Fla. 2d DCA 1992)). Applying this test, the Third District granted benefits

> to a factory worker who was physically unable to do the heavy lifting required by her job. Gottardi v. Joaquin Gen. Distribs., Inc., 618 So. 2d 363 (Fla. 3d DCA 1993). The Third District concluded that the factory worker acted reasonably in quitting a job that was physically beyond her. "[T]here is no meaningful difference between an employee who unavoidably finds that he or she cannot meet a known condition of employment and one who is discharged for simply failing to measure up to the requirements of the job." 618 So. 2d at 365 (quoting Gulf County Sch. Bd. v. Washington, 567 So. 2d 420, 423 (Fla. 1990)). See also Krulla v. Barnett Bank, 629 So. 2d 1005 (Fla. 4th DCA 1993) (awarding unemployment benefits because claimant was physically unable to do job); Vajda v. Fla. Unemployment Appeals Comm'n, 610 So. 2d 645 (Fla. 3d DCA 1992) (same); Herman v. Fla. Dep't of Commerce, 323 So. 2d 608, 609 (Fla. 3d DCA 1975) (considering the remedial and humanitarian purpose of the unemployment compensation statute, "[a] claimant ought not be penalized for seeking to be employed even if, in her desire to be employed, she takes an unsuitable job and after a few days cannot continue the employment"). Because the referee found that Jennings felt the job was too physically strenuous and there are no other findings, of fact or credibility, to support a contrary conclusion, we reverse the denial of unemployment compensation benefits.

In a recent case involving a claimant who quit her job without notice, during her first week on the job, the Commission reversed the referee and found a quit with good cause attributable to illness. The Commission noted:

> The referee held the claimant disqualified from the receipt of benefits, reasoning that, since she did not inquire prior to accepting the job whether she would be allowed to sit during her shift, the claimant did not have good cause attributable to the employer to quit. The claimant testified she was hired as a cashier for the employer and, when she reported to the job, she asked her supervisor if she could have a chair to use during her shift. According to the claimant, the supervisor, who did not appear at the hearing, responded it was not the employer's policy to give her a chair and no chairs were allowed in the cashier area. The claimant further testified she worked the eight hour shift and, when she got home, she had to take pain medications because of the effects of her continued standing. Finally, the claimant testified she returned to the job the next day, but was unable to work the entire shift because of the pain, so she advised the supervisor at noon that she was resigning. The employer's witness testified the claimant's supervisor advised her that the claimant had quit because she was asked to do some light cleaning, which she refused. This testimony must be rejected, however, because it

constitutes hearsay evidence. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. §120.57(1)(c), Fla. Stat.; Yost v. Unemployment Appeals Commission, 848 So.2d 1235 (Fla. 2d DCA 2003).

In Belcher v. Unemployment Appeals Commission, 882 So.2d 486 (Fla. 5th DCA 2004), the appellate court considered a somewhat factually similar case. The claimant in Belcher was a 52 year old, five feet 2 inch, 110 pound female who was physically unable to perform the work, which involved the lifting of heavy boxes. The court specifically held the claimant was not told at hire the work would require her to perform manual labor and that the physical inability to perform the job gave her good cause to leave her employment. See also Humble v. Unemployment Appeals Commission, 963 So. 2d 956 (Fla. 2d DCA 2007); Vajda v. Unemployment Appeals Commission, 610 So. 2d 645 (Fla. 3d DCA 1992). In the instant case, the claimant had not been advised by a doctor to quit this job. However, like the claimant in Belcher, the claimant did seek accommodation from her supervisor (she asked for a chair). Moreover, the claimant gave unrebutted evidence regarding her physical impairments which precluded her from performing the requirements of the job as the employer had defined the job (standing required; no chair permitted). The claimant's physical impairments were not short-term, such as a broken arm. Similar to the claimant in Humble, the claimant in the instant case accepted a job offer without fully understanding the nature of the job and the work environment and the impact that her physical impairments would have on her ability to perform her job functions. She made an attempt to perform the job, determined that her physical impairment precluded her from doing so (as the job was structured) without impacting her health, and resigned before completing a full week on the job. Although the claimant made a minimal effort to preserve her employment (she only spoke with her supervisor), the Belcher decision stands for the proposition that notice of physical difficulty in performing the job is not required beyond notice to the first-level supervisor (if at all). However, in a situation such as this (new job, long-term impairments that interfere with claimant's performance of expected duties), the statute and case law dictate the conclusion that the claimant had good cause attributable to illness or disability requiring separation from this position.

A claimant in this situation can not be said to be "gaming" the system. There is no impact on the employer's account (as the

> employer is not subject to charging) and little direct impact on the unemployment regime in general, as the claimant accumulated very little in the way of wage benefits from his very short stint with this employer. Inasmuch as the record in the present case does not reflect the claimant was told at hire that she could not sit during her shift and she was unable to work an eight hour shift without such an accommodation, we find the claimant quit her employment with good cause attributable to illness or disability. Accordingly, the claimant is not disqualified from the receipt of benefits.

4. Demotion. ABC Auto Parts, Inc. v. Florida Department of Labor and Employment Security, 372 So.2d 197 (Fla. 1st DCA 1979), involved an employee who was demoted for failure to perform her assigned duties. She refused to accept the demotion and left the employment. The court held that the employer was disqualified from receiving unemployment benefits, reasoning as follows:

> We hold that under a reasonable interpretation of the letter, intent and purpose of the unemployment compensation law, an employer may, in lieu of discharge of an employee who has been guilty of misconduct sufficient to justify discharge, transfer or demote that employee to a lesser position; and that if the employee on that account voluntarily leaves the employment, it cannot be claimed that it was for "good cause attributable to he employer"….

372 So.2d at 199.

5. Settlement. When an individual accepts an early retirement opportunity, a workers' compensation settlement, or some similar voluntary job separation program, in the absence of explicit notice of layoff or discharge, such individual cannot be said to have separated with good cause attributable to the employer within the meaning of the unemployment compensation law. Under such circumstances, the individual is disqualified from the receipt of benefits. See Smith v. Unemployment Appeals Commission, 823 So.2d 873 (Fla. 5th DCA 2002); Calle v. Unemployment Appeals Commission, 692 So.2d 961 (Fla. 4th DCA 1997); In re Astrom, 362 So.2d 312 (Fla. 3d DCA 1978). The decision in Rodriguez v. Florida Unemployment Appeals Commission, 851 So.2d 247 (Fla. 3d DCA 2003) dictates that, where the employer provides assurance to its employees considering taking a buyout that acceptance of the buyout will not affect their eligibility for unemployment benefits, a claimant who accepts the buyout will have a good claim for UC benefits because the employer does not have totally clean hands. In Yarabothu v. Unemployment Appeals Commission, 721 So.2d 379 (Fla. 5th DCA 1998), a claimant accepted a cash settlement from the employer to end a lawsuit he had initiated. A condition of the settlement agreement was that the claimant would resign. The Commission concluded that the claimant had voluntarily left his employment without good cause attributable to the employer. The court held that the Commission's interpretation was not clearly erroneous and affirmed. The court was less deferential to the Commission in Sardinas v. Florida Unemployment Appeals Commission, 906 So.2d 1204 (Fla. 4th DCA 2005). Chairman Forst's

concurring opinion in UAC Order No. 04-04988 (2005) details the deficiencies in the court's decision.

C. Hearsay.

"Hearsay" evidence is an oral or written assertion made outside the hearing, which is offered into evidence to prove the truth of the matter asserted. See §90.801, Fla. Stat. While hearsay evidence is admissible in unemployment hearings, it can only be used to supplement or explain other evidence, and is not sufficient in itself to support a finding of fact unless admissible over objection in a civil action. Fla. Admin. Code Rule 60BB-5.024(3)(d); Yost v. Unemployment Appeals Commission, 848 So.2d 1235 (Fla. 2d DCA 2003). The "Appeals Information" pamphlet provided to the parties prior to the hearing places them on notice that "the best type of evidence is testimony from someone who was present when an event occurred and can answer specific questions about what happened" and that documents or affidavits standing alone are normally regarded as "hearsay" and may be insufficient to prove a case. In University of North Florida v. Unemployment Appeals Commission, 445 So.2d 1062 (Fla. 1st DCA 1984), a public university attempted to rely on documentary evidence to support its allegation that a former employee was guilty of misconduct connected with work. The court affirmed the decision of the appeals referee and the Unemployment Appeals Commission that the employer's evidence was inadequate to prove its case. Some of the records introduced might have qualified for the public records exception to the hearsay rule, but with respect to most of the other documents the employer was unable to show that they were prepared in accordance with a duty imposed by statute or regulation. Section 90.803(8), Fla. State. In Department of Health and Rehabilitative Services v. Unemployment Appeals Commission, 503 So.2d 403 (Fla. 1st DCA 1987), a pro se claimant argued on appeal to the court that the information pamphlet he was provided did not advise him that hearsay evidence was inadequate to prove his case. The court pointed out, to the contrary, the pamphlet instructs the parties of the need to bring witnesses who have firsthand knowledge of the facts to the hearing. The court found this sufficient to explain the shortcomings of hearsay evidence. A recent case that provided a good discussion regarding hearsay evidence in the unemployment hearing context is Sunshine Chevrolet Oldsmobile v. Unemployment Appeals Commission, 30 Fla. L. Weekly D2274 (Fla. 2d DCA Sept. 23, 2005).

D. Able and Available for Work.

The burden of proving eligibility for benefits, including "availability," rests on the claimant. Florida Industrial Commission v. Ciarlante, 84 So.2d 1 (Fla. 1955). The claimant must show that he/she is "ready, willing, and able to work," and can do so by the introduction of competent evidence, including evidence demonstrating that the claimant is actively seeking employment. Id. In Florida Industrial Commission v. Ciarlante, the Florida Supreme Court held that the burden of proving eligibility for benefits including "availability" rests on the claimant. Id. at 5. The court further held that, in order to show "availability," a claimant must demonstrate that he is actively seeking employment. 84 So.2d at 4. The Supreme Court's interpretation of the statute has been consistently followed by the district courts of appeal. See e.g., Sandra Fashions, Inc. v. Doyle, 389 So.2d 1234 (Fla. 5th.DCA 1980); Andrus v. Florida Department of Labor and Employment Security, 379 So.2d 468 (Fla. 4th DCA 1980); Teague v. Florida

Industrial Commission, 104 So.2d 612 (Fla. 2d DCA 1958). The courts have also held that a claimant who is substantially restricted in his or her ability to work is not able and available with the meaning of the statute. See Adams v. Auchter Co., 339 So.2d 623 (Fla. 1976); Alfred v. Unemployment Appeals Commission, 487 So.2d 355 (Fla. 3d DCA 1986; Gibbs v. Florida Department of Commerce, 368 So.2d 651 (Fla. 3d DCA 1979); McCormick v. Henry Koerber, Inc., 252 So.2d 599 (Fla. 1st DCA 1971).

> A person who is genuinely attached to the labor market and desires employment will make a reasonable attempt to find work, and will not wait for a job to seek him out. (citations omitted).

Ciarlante, 84 So.2d at 3.

> [I]t is generally held that the burden is on the claimant to prove that he has met the requirements of eligibility prescribed by the Act, including, or course, the requirement of "availability" for work. (citation omitted).

Ciarlante, 84 So.2d at 5.

> The Unemployment Compensation Act was designed to alleviate the financial hardship of those unfortunate workers who become unemployed through no fault of their own and who are ready, willing and able to work but cannot find suitable employment. It was not intended to provide a vacation with pay for a seasonal worker (or for a non-seasonal worker, for that matter) at the expense of the unemployment compensation fund.

Ciarlante, 84 So.2d at 5.

Baptist Medical Center v. Stolte, 475 So.2d 959 (Fla. 1st DCA 1985), rev. denied, 486 So.2d 548 (Fla. 1986), involved a nurse working p.r.n. (as needed) who could refuse assignments without penalty was held not "available for work" within the meaning of the statute as interpreted by the court. The majority relies on North Miami General Hospital, Inc. v. Plaza, 432 So.2d 723 (Fla. 3d DCA 1983). Dissent (Ervin) argues that agency interpretation should not be supplanted.

Groudas v. Pinellas County School Board, 793 So.2d 983 (Fla. 2d DCA 2001), involved a claimant who was claiming benefits when she found and accepted a temporary, part-time job with a school board. Approximately two months later, she quit the part-time job to facilitate her search for full-time employment which she had enjoyed prior to becoming unemployed. The agency ruled that she was disqualified because she voluntarily left employment without good cause attributable to the employer. The claimant argued that she should not be completely denied benefits because the job was only part-time. On the basis of recent legislation, the court rejected the claimant's argument and affirmed the agency action.

Hill v. Unemployment Appeals Commission, 686 So.2d 658 (Fla. 5th DCA 1996), involved a worker who refused to return to work with a former employer where she had commuted 82 miles to and from work. She refused because the worker whom she had commuted to work with no longer worked for the employer. The majority agreed with the referee and the commission that the work was suitable for the claimant because she had previously been employed in exactly the same position.

MacDonald v. Florida Department of Labor and Employment Security, Unemployment Appeals Commission, 568 So2d 1319 (Fla. 2d DCA 1990), involved a claimant who refused an offer of employment. The offered employment would have required the claimant to work from 5:00 p.m. to 1:00 a.m. The claimant, who had been unemployed only three days, was seeking daytime work. In addition, the work was somewhat different from the claimant's previous work. The court agreed with the claimant that the work was not suitable for her.

In Kratz v. Florida Unemployment Appeals Commission, 901 So.2d 1022 (Fla. 4th DCA 2005), the claimant was dismissed from employment as an assistant golf professional. He enrolled in a training program to become a radiology technician and sought unemployment compensation benefits. The law provides that a claimant in training with the approval of AWI is not required to seek, be available for, or accept work for weeks in which training is in progress. However, one of the conditions for receiving approval of training is "The labor market demands for the claimant's present skills must be minimal." The court concluded that, as the labor market demand for the claimant's skills as a golf professional was not minimal, he did not fall under the exception to the general rule regarding being able and available for work.

The courts have held that an employer is an interested party in the issue of whether a claimant is able and available for work. Sun States Services Inc., d/b/a Always Care v. Grasiano, 714 So.2d 1177 (Fla. 2d DCA 1998); Port Carriers, Inc. v. Simmons, 412 So.2d 910 (Fla. 1st DCA 1982).

The Commission has held that a claimant is not to be penalized for seeking work that he reasonably believes he can perform with accommodation, merely because his former employer and/or prospective employers with whom he is seeking work are unwilling to make those accommodations. U.A.C. Order No. 08-06074 (2008).

E. Scope of Review by the Unemployment Appeals Commission and the Courts.

Baeza v. Pan American/National Airlines, Inc., 392 So.2d (Fla. 3d DCA 1980), involved interpretation of a provision of the unemployment compensation statute. The court observed:

> The Unemployment Compensation Law is remedial, humanitarian legislation and should be liberally and broadly construed." City of Fort Lauderdale v. Flowler, 355 So.2d 159, 161 (Fla 4th DCA 1978) (quoting Williams v. State, Department of Commerce, 260 So2d 233, 234 (Fla. 1st DCA 1972). Section 443.20, Rule of Liberal Construction, Florida Statutes (1977), states that the unemployment compensation chapter shall be liberally construed

> to accomplish its purpose to promote employment security and to secure for the citizens of this state certain grants and privileges. It provides that all doubts as to the proper construction of any provision of the chapter shall be resolved in favor of conformity with those requirements. The Unemployment Compensation Law should be liberally construed in favor of claimants. Smallwood v. Florida Department of Commerce, 350 So2d 121 (Fla. 4th DCA 1977); Fredericks v. Florida Department of Commerce, 323 So2d 286 (Fla 2d DCA 1975). Disqualifying provisions are to be narrowly construed. St. Joe Paper Company v. Gautreaux, 180 So2d 668 (Fla. 1st DCA 1965).

392 So2d at 923. See Commonwealth Life Ins. V. Walters, 581 So2d 643 (Fla. 3d DCA 1991). Baeza also acknowledged that:

> [C]onstruction of a statute by the agency or body charged with its administration is entitled to great weight and will not be overturned unless it is clearly erroneous. Ft. Pierce Utilities Authority of the City of Ft. Pierce v. Florida Public Service Commission, 388 So2d 1031 (Fla. 1980) (Case No. 57,854, opinion filed September 25, 1980); State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823 (Fla. 1973).

In Department of General Services v. English, 534 So2d 726 (Fla. 1st DCA 1988), the court reviewed the decision of the appeals referee that had been entered after the referee had reconsidered a prior decision pursuant to the court's mandate. The prior decision had been set aside because the appeal referee had not given proper consideration to documentary evidence introduced by the employer. Department of General Services v. English, 509 So2d 1198 (Fla. 1st DCA 1987). After conducting a new hearing and considering all of the evidence, the appeals referee again found that the claimant had not committed the acts for which he was accused and, therefore, was not guilty of misconduct as charged. The court held that it was bound to accept the appeals referee's credibility determination. The court also ruled that misconduct as defined by the unemployment compensation statute, Chapter 443, is different from cause which will justify termination of a career service employee as provided in Section 110.227, Florida Statutes.

In Glover v. Sanford Child Care, Inc., 429 So2d 91 (Fla. 5th DCA 1983), on the basis of a credibility determination, the appeals referee found that the claimant had been discharged under nondisqualifying conditions. The UAC reversed. The court reversed the UAC, stating that conflicting evidence is for the appeals referee to resolve, not the UAC.

In Kinlaw v. Unemployment Appeals Commission, 417 So.2d 802 (Fla. 5th DCA 1982), the court acknowledged that it could not substitute its judgment for that of the agency on disputed issues of fact. See Perez v. State Department of Labor and Employment Security, 377 So2d 806 (Fla. 3d DCA 1979).

Cargill, Inc. v. Unemployment Appeals Commission, 503 So2d 1340 (Fla. 1st DCA 1987), involved an employer who had a strict policy requiring written confirmation from a physician each time an employee was absent because of illness. The employer discharged an employee who failed to provide a note from his physician when he returned to work after calling in sick. The employee stated that he did not see a physician because he was suffering from a minor stomach ailment which he did not think required a physician's assistance. The Unemployment Appeals Commission reversed its appeal referee and held the claimant qualified for unemployment benefits. The court affirmed, stating:

> In its interpretation of the statute, the Commission concluded that an employee's absence from work based upon a compelling reason, when properly reported to the employer without a note from a physician, does not rise to the statutory level of misconduct on the grounds that the employee's actions cannot be considered to constitute a willful or wanton disregard of the employer's interests, or negligence of such a degree as to disclose an intentional disregard of the employer's interests. We defer to the Commission's interpretation. The rule is clear that an agency's interpretation of a statute, with which it is legislatively charged with administering, shall be accorded great weight and should not be overturned "unless clearly erroneous." The Department of Insurance v. Volusia Hospital District, 438 So.2d 815 (Fla. 1983), appeal dismissed 466 U.S. 901 (1984).

In Microfile, Inc. v. Williams, 425 So.2d 1218 (Fla. 2d DCA 1983), the court held:

> Reaching a different conclusion of law from that of the referee is within the scope of review of the Unemployment Appeals Commission as provided by Section 443.151(4)(c).

F. Attorney Fees and Claimant Costs.

Section 443.041, Florida Statutes, provides that a representative for any individual claiming benefits in any proceeding before the Commission shall not receive a fee for such services unless the amount of the fee is approved by the Commission. The Commission requires a claimant's representative to provide the amount, if any, the claimant has agreed to pay for services, the hourly rate charged or other method used to compute the proposed fee, and the nature and extent of the services rendered. In examining the reasonableness of the fee, the Commission is cognizant that: (1) in the event a claimant prevails at the Commission level, the law contains no provision for the award of a representative's fees to the claimant's representative, by either the opposing party or the State (i.e. a claimant must pay his or her own representative's fee); and (2) the amount of unemployment benefits secured by a claimant may be very small. The legislature specifically gave referees (with respect to the initial appeal) and the Commission (with respect to the higher level review) the power to review and approve a representative's fees due to a concern that claimants could end up spending more on fees than they could reasonably expect to receive in unemployment compensation benefits.

In Florida Industrial Commission v. Ciarlante, 89 So.2d 3 (Fla. 1956), the Florida Supreme Court awarded attorney's fees to counsel for the appellee claimant. The appeal had been filed in the Florida Supreme Court by the Florida Industrial Commission to review a decision of the circuit court that was favorable to the claimant. Since the appeal was filed by a party other than the claimant, the claimant was entitled to a fee award under the law existing at that time regardless of the outcome of the appeal. Section 443.041(2)(b), F.S., currently authorizes a district court of appeal to award attorneys' fees to a claimant if the court's decision results in the claimant receiving more benefits than provided in the decision from which the appeal was taken. This section also provides that the amount of the fee may not exceed 50% of the total amount of the regular benefits permitted under s. 443.111(5)(a), F.S., during the claimant's benefit year. Since the maximum amount of such benefits it $7,150, the maximum fee that the district court may award a claimant is $3,575. Section 443.041(2)(b), Florida Statutes makes no mention of court costs, and s. 443.041(2)(c), F.S., prohibits AWI from paying any fees or costs not authorized by this statute. Section 443.041(2)(c), F.S., mandates that AWI pay the attorney fees from the Employment Security Administration Trust Fund.

In Gretz v. Florida Unemployment Appeals Commission, 572 So.2d 1384 (Fla. 1991), the Florida Supreme Court held that the Unemployment Appeals Commission must prepare transcripts for claimants free of charge. Section 120.57(1)(b)7, Florida Statutes, requires the UAC to provide the transcripts and Section 443.041(2)(a), Florida Statutes, prohibits the commission from charging claimants a fee of any kind.

G. Overpayment.

In Unemployment Appeals Commission v. Comer, 504 So.2d 760 (Fla. 1987), the Florida Supreme Court approved Sheppard v. State Department of Labor and Employment Security, 442 So.2d 1114 (Fla. 4th DCA 1983), and held that the unemployment compensation statute requires the agency to recover benefit overpayments from claimants; but permits the agency, in its discretion, to effect such recovery by recoupment from any future benefits which may become available to the claimant, provided such recoupment would not be contrary to equity and good conscience or violate the purpose of the statute.

H. Telephonic Hearing.

Nearly all appeals hearings are conducted telephonically. In Augustin v. State of Florida Unemployment Appeals Commission and Devonshire Employment Services, 906 So. 2d 1238 (Fla. 4th DCA 2005) and Greenberg v. Simms Merchant Police Service, 410 So.2d 566 (Fla. 1st DCA 1982), the courts recognized that telephonic hearings satisfy due process.

IV. PERTINENT STATUTORY SECTIONS[***]

[***]The entire Chapter 443 is not included in this material. The subjects covered by this Chapter (but not necessarily by Chairman Forst's material, are: 443.011 Short title. 443.012 Unemployment Appeals Commission. 443.031 Rule of liberal construction. 443.0315 Effect of finding, judgment, conclusion, or order in separate or subsequent action or proceeding; use as evidence. 443.036 Definitions. 443.041 Waiver of rights; fees; privileged communications. 443.051 Benefits not alienable; exception, child support intercept. 443.061 Vested rights not

443.011 Short title.--This chapter may be cited as the "Unemployment Compensation Law."

443.012 Unemployment Appeals Commission.—

(1) There is created within the Agency for Workforce Innovation an Unemployment Appeals Commission. The commission is composed of a chair and two other members appointed by the Governor, subject to confirmation by the Senate. Only one appointee may be a representative of employers, as demonstrated by his or her previous vocation, employment, or affiliation; and only one appointee may be a representative of employees, as demonstrated by his or her previous vocation, employment, or affiliation.
(a) The chair shall devote his or her entire time to commission duties and is responsible for the administrative functions of the commission.
(b) The chair has authority to appoint a general counsel and other personnel to carry out the duties and responsibilities of the commission.
(c) The chair must have the qualifications required by law for a judge of the circuit court and may not engage in any other business vocation or employment. Notwithstanding any other law, the chair shall be paid a salary equal to that paid under state law to a judge of the circuit court. **Commencing in 2001, the position of chair shall only be filled by the coolest labor and employment law attorney in the State of Florida. If he/she isn't available, Alan Forst can have the job.**
(5) The commission is not subject to control, supervision, or direction by the Agency for Workforce Innovation in performing its powers or duties under this chapter.
(11) The commission has authority to adopt rules under ss. 120.536(1) and 120.54 to administer the provisions of law conferring duties upon it.
(12) Orders of the commission relating to unemployment compensation under this chapter are subject to review only by notice of appeal to the district courts of appeal in the manner provided in s. 443.151(4)(e).

443.031 Rule of liberal construction.--This chapter shall be liberally construed in favor of a claimant of unemployment benefits who is unemployed through no fault of his or her own. Any doubt as to the proper construction of this chapter shall be resolved in favor of conformity with federal law, including, but not limited to, the Federal Unemployment Tax Act, the Social Security Act, the Wagner-Peyser Act, and the Workforce Investment Act.

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created. 443.071 Penalties. 443.091 Benefit eligibility conditions. 443.101 Disqualification for benefits. 443.111 Payment of benefits. 443.1115 Extended benefits. 443.1116 Short-time compensation. 443.121 Employing units affected. 443.1215 Employers. 443.1216 Employment. 443.1217 Wages. 443.131 Contributions. 443.1312 Reimbursements; nonprofit organizations. 443.1313 Public employers; reimbursements; election to pay contributions. 443.1315 Treatment of Indian tribes. 443.1316 Unemployment tax collection services; interagency agreement. 443.1317 Rulemaking authority; enforcement of rules. 443.141 Collection of contributions and reimbursements. 443.151 Procedure concerning claims. 443.163 Electronic reporting and remitting of contributions and reimbursements. 443.171 Agency for Workforce Innovation and commission; powers and duties; records and reports; proceedings; state-federal cooperation. 443.1715 Disclosure of information; confidentiality. 443.181 Public employment service. 443.191 Unemployment Compensation Trust Fund; establishment and control. 443.211 Employment Security Administration Trust Fund; appropriation; reimbursement. 443.221 Reciprocal arrangements.

443.0315 Effect of finding, judgment, conclusion, or order in separate or subsequent action or proceeding; use as evidence.--Any finding of fact or law, judgment, conclusion, or final order made by a hearing officer, the commission, or any person with the authority to make findings of fact or law in any proceeding under this chapter is not conclusive or binding in any separate or subsequent action or proceeding, other than an action or proceeding under this chapter, between an individual and his or her present or prior employer brought before an arbitrator, court, or judge of this state or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.

443.036 Definitions.--As used in this chapter, the term:

(1) "Able to work" means physically and mentally capable of performing the duties of the occupation in which work is being sought.

(6) "Available for work" means actively seeking and being ready and willing to accept suitable employment.

(7) "Base period" means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year.

(8) "Benefits" means the money payable to an individual, as provided in this chapter, for his or her unemployment.

(9) "Benefit year" means, for an individual, the 1-year period beginning with the first day of the first week for which the individual first files a valid claim for benefits and, thereafter, the 1-year period beginning with the first day of the first week for which the individual next files a valid claim for benefits after the termination of his or her last preceding benefit year. Each claim for benefits made in accordance with s. 443.151(2) is a "valid claim" under this subsection if the individual was paid wages for insured work in accordance with the provisions of s. 443.091(1)(f) and is unemployed as defined in subsection (43) at the time of filing the claim. However, the Agency for Workforce Innovation may adopt rules providing for the establishment of a uniform benefit year for all workers in one or more groups or classes of service or within a particular industry when the agency determines, after notice to the industry and to the workers in the industry and an opportunity to be heard in the matter, that those groups or classes of workers in a particular industry periodically experience unemployment resulting from layoffs or shutdowns for limited periods of time.

(10) "Calendar quarter" means each period of 3 consecutive calendar months ending on March 31, June 30, September 30, and December 31 of each year.

(11) "Casual labor" means labor that is occasional, incidental, or irregular, not exceeding 200 person-hours in total duration. As used in this subsection, the term "duration" means the period of time from the commencement to the completion of the particular job or project. Services performed by an employee for his or her employer during a period of 1 calendar month or any 2 consecutive calendar months, however, are deemed to be casual labor only if the service is performed on 10 or fewer calendar days, regardless of whether those days are consecutive. If any

of the services performed by an individual on a particular labor project are not casual labor, each of the services performed by the individual on that job or project may not be deemed casual labor. Services must constitute casual labor and may not be performed in the course of the employer's trade or business for those services to be exempt under this section.

(12) "Commission" means the Unemployment Appeals Commission.

(13) "Contributing employer" means an employer who is liable for contributions under this chapter.

(14) "Contribution" means a payment of payroll tax to the Unemployment Compensation Trust Fund which is required under this chapter to finance unemployment benefits.

(16) "Earned income" means gross remuneration derived from work, professional service, or self-employment. The term includes commissions, bonuses, back pay awards, and the cash value of all remuneration paid in a medium other than cash. The term does not include income derived from invested capital or ownership of property.

(17) "Educational institution" means an institution, except for an institution of higher education:

(a) In which participants, trainees, or students are offered an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes, or abilities from, by, or under the guidance of, an instructor or teacher;

(b) That is approved, licensed, or issued a permit to operate as a school by the Department of Education or other governmental agency that is authorized within the state to approve, license, or issue a permit for the operation of a school; and

(c) That offers courses of study or training which are academic, technical, trade, or preparation for gainful employment in a recognized occupation.

(18) "Employee leasing company" means an employing unit that has a valid and active license under chapter 468 and that maintains the records required by s. 443.171(5) and, in addition, maintains a listing of the clients of the employee leasing company and of the employees, including their social security numbers, who have been assigned to work at each client company job site. Further, each client company job site must be identified by industry, products or services, and address. The client list must be provided to the tax collection service provider by June 30 and by December 31 of each year. As used in this subsection, the term "client" means a party who has contracted with an employee leasing company to provide a worker, or workers, to perform services for the client. Leased employees include employees subsequently placed on the payroll of the employee leasing company on behalf of the client. An employee leasing company must notify the tax collection service provider within 30 days after the initiation or termination of the company's relationship with any client company under chapter 468.

(19) "Employer" means an employing unit subject to this chapter under s. 443.1215.

(20) "Employing unit" means an individual or type of organization, including a partnership, limited liability company, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign; the receiver, trustee in bankruptcy, trustee, or successor of any of the foregoing; or the legal representative of a deceased person, which has or had in its employ one or more individuals performing services for it within this state.

(a) Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit is deemed to be employed by the employing unit for the purposes of this chapter, regardless of whether the individual was hired or paid directly by the employing unit or by an agent or employee of the employing unit, if the employing unit had actual or constructive knowledge of the work.

(b) Each individual performing services in this state for an employing unit maintaining at least two separate establishments in this state is deemed to be performing services for a single employing unit for the purposes of this chapter.

(c) A person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

(d) A limited liability company shall be treated as having the same status as it is classified for federal income tax purposes.

(21) "Employment" means a service subject to this chapter under s. 443.1216 which is performed by an employee for the person employing him or her.

(23) "Fund" means the Unemployment Compensation Trust Fund created under this chapter, into which all contributions and reimbursements required under this chapter are deposited and from which all benefits provided under this chapter are paid.

(24) "High quarter" means the quarter in an individual's base period in which the individual has the greatest amount of wages paid, regardless of the number of employers paying wages in that quarter.

(26) "Institution of higher education" means an educational institution that:

(a) Admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of a certificate of graduation;

(b) Is legally authorized in this state to provide a program of education beyond high school;

(c) Provides an educational program for which it awards a bachelor's or higher degree, or provides a program that is acceptable for full credit toward a bachelor's or higher degree; a program of postgraduate or postdoctoral studies; or a program of training to prepare students for gainful employment in a recognized occupation; and

(d) Is a public or other nonprofit institution.

The term includes each community college and state university in this state, and each other institution in this state authorized under s. 1005.03 to use the designation "college" or "university."

(27) "Insured work" means employment for employers.

(28) "Leave of absence" means a temporary break in service to an employer, for a specified period of time, during which the employing unit guarantees the same or a comparable position to the worker at the expiration of the leave.

(29) "Misconduct" includes, but is not limited to, the following, which may not be construed in pari materia with each other:

(a) Conduct demonstrating willful or wanton disregard of an employer's interests and found to be a deliberate violation or disregard of the standards of behavior which the employer has a right to expect of his or her employee; or

(b) Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

(30) "Monetary determination" means a determination of whether and in what amount a claimant is eligible for benefits based on the claimant's employment during the base period of the claim.

(31) "Nonmonetary determination" means a determination of the claimant's eligibility for benefits based on an issue other than monetary entitlement and benefit overpayment.

(32) "Not in the course of the employer's trade or business" means not promoting or advancing the trade or business of the employer.

(33) "One-stop career center" means a service site established and maintained as part of the one-stop delivery system under s. 445.009.

(34) "Pay period" means a period of 31 or fewer consecutive days for which a payment or remuneration is ordinarily made to the employee by the person employing him or her.

(36) "Reasonable assurance" means a written or verbal agreement, an agreement between an employer and a worker understood through tradition within the trade or occupation, or an agreement defined in an employer's policy.

(37) "Reimbursement" means a payment of money to the Unemployment Compensation Trust Fund in lieu of a contribution which is required under this chapter to finance unemployment benefits.

(38) "Reimbursing employer" means an employer who is liable for reimbursements in lieu of contributions under this chapter.

(39) "State" includes the states of the United States, the District of Columbia, Canada, the Commonwealth of Puerto Rico, and the Virgin Islands.

(40) "State law" means the unemployment insurance law of any state, approved by the United States Secretary of Labor under s. 3304 of the Internal Revenue Code of 1954.

(41) "Tax collection service provider" or "service provider" means the state agency providing unemployment tax collection services under contract with the Agency for Workforce Innovation through an interagency agreement pursuant to s. 443.1316.

(42) "Temporary layoff" means a job separation due to lack of work which does not exceed 8 consecutive weeks and which has a fixed or approximate return-to-work date.

(43) "Unemployment" means:

(a) An individual is "totally unemployed" in any week during which he or she does not perform any services and for which earned income is not payable to him or her. An individual is "partially unemployed" in any week of less than full-time work if the earned income payable to him or her for that week is less than his or her weekly benefit amount. The Agency for Workforce Innovation may adopt rules prescribing distinctions in the procedures for unemployed individuals based on total unemployment, part-time unemployment, partial unemployment of individuals attached to their regular jobs, and other forms of short-time work.

(b) An individual's week of unemployment commences only after his or her registration with the Agency for Workforce Innovation as required in s. 443.091, except as the agency may otherwise prescribe by rule.

(44) "Wages" means remuneration subject to this chapter under s. 443.1217.

(45) "Week" means a period of 7 consecutive days as defined in the rules of the Agency for Workforce Innovation. The Agency for Workforce Innovation may by rule prescribe that a week is deemed to be "in," "within," or "during" the benefit year that contains the greater part of the week.

443.041 Waiver of rights; fees; privileged communications.—

(1) WAIVER OF RIGHTS VOID.--Any agreement by an individual to waive, release, or commute her or his rights to benefits or any other rights under this chapter is void. Any agreement by an individual in the employ of any person or concern to pay all or any portion of any employer's contributions, reimbursements, interest, penalties, fines, or fees required under this chapter from the employer, is void. An employer may not directly or indirectly make or require or accept any deduction from wages to finance the employer's contributions, reimbursements, interest, penalties, fines, or fees required from her or him, or require or accept any waiver of any right under this chapter by any individual in her or his employ. An employer, or an officer or agent of an employer, who violates this subsection commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(2) FEES.--

(a) Except as otherwise provided in this chapter, an individual claiming benefits may not be charged fees of any kind in any proceeding under this chapter by the commission or the Agency for Workforce Innovation, or their representatives, or by any court or any officer of the court. An individual claiming benefits in any proceeding before the commission or the Agency for Workforce Innovation, or representatives of either, or a court may be represented by counsel or an authorized representative, but the counsel or representative may not charge or receive for those services more than an amount approved by the commission, the Agency for Workforce Innovation, or the court.

(b) An attorney at law representing a claimant for benefits in any district court of appeal of this state or in the Supreme Court of Florida is entitled to counsel fees payable by the Agency for Workforce Innovation as set by the court if the petition for review or appeal is initiated by the claimant and results in a decision awarding more benefits than provided in the decision from which appeal was taken. The amount of the fee may not exceed 50 percent of the total amount of regular benefits permitted under s. 443.111(5)(a) during the benefit year.

(c) The Agency for Workforce Innovation shall pay attorneys' fees awarded under this section from the Employment Security Administration Trust Fund as part of the costs of administration of this chapter and may pay these fees directly to the attorney for the claimant in a lump sum. The Agency for Workforce Innovation or the commission may not pay any other fees or costs in connection with an appeal.

(d) Any person, firm, or corporation who or which seeks or receives any remuneration or gratuity for any services rendered on behalf of a claimant, except as allowed by this section and in an amount approved by the Agency for Workforce Innovation, the commission, or a court, commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(3) PRIVILEGED COMMUNICATIONS.--All letters, reports, communications, or any other matters, either oral or written, between an employer and an employee or between the Agency for Workforce Innovation or its tax collection service provider and any of their agents, representatives, or employees which are written, sent, delivered, or made in connection with this chapter, are privileged and may not be the subject matter or basis for any suit for slander or libel in any court of the state.

443.071 Penalties.--

(1) Any person who makes a false statement or representation, knowing it to be false, or knowingly fails to disclose a material fact to obtain or increase any benefits or other payment under this chapter or under an employment security law of any other state, of the Federal Government, or of a foreign government, either for herself or himself or for any other person, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Each false statement or representation or failure to disclose a material fact constitutes a separate offense.
(2) Any employing unit or any officer or agent of any employing unit or any other person who makes a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact, to prevent or reduce the payment of benefits to any individual entitled to benefits, to avoid becoming or remaining subject to this chapter, or to avoid or reduce any contribution, reimbursement, or other payment required from an employing unit under this chapter commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
(3) Any employing unit or any officer or agent of any employing unit or any other person who fails to furnish any reports required under this chapter or to produce or permit the inspection of or copying of records as required under this chapter, who fails or refuses, within 6 months after written demand by the Agency for Workforce Innovation or its tax collection service provider, to keep and maintain the payroll records required by this chapter or by rule of the Agency for Workforce Innovation or the state agency providing tax collection services, or who willfully fails or refuses to make any contribution, reimbursement, or other payment required from an employer under this chapter commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.
(4) Any person who establishes a fictitious employing unit by submitting to the Agency for Workforce Innovation or its tax collection service provider fraudulent employing unit records or tax or wage reports by the introduction of fraudulent records into a computer system, the intentional or deliberate alteration or destruction of computerized information or files, or the theft of financial instruments, data, and other assets, for the purpose of enabling herself or himself or any other person to receive benefits under this chapter to which such person is not entitled, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
(5) In any prosecution or action under this section, the entry into evidence of the signature of a person on a document, letter, or other writing constitutes prima facie evidence of the person's identity if the following conditions exist:
(a) The document includes the person's name, residence address, and social security number.
(b) The signature of the person is witnessed by an agent or employee of the Agency for Workforce Innovation or its tax collection service provider at the time the document, letter, or other writing is filed.
(6) The entry into evidence of an application for unemployment benefits initiated by the use of the Internet claims program or the interactive voice response system telephone claims program of the Agency for Workforce Innovation constitutes prima facie evidence of the establishment of a personal benefit account by or for an individual if the following information is provided: the applicant's name, residence address, date of birth, social security number, and present or former place of work.
(7) The entry into evidence of a transaction history generated by a personal identification number establishing that a certification or claim for one or more weeks of benefits was made

against the benefit account of the individual, together with documentation that payment was paid by a state warrant made to the order of the person or by direct deposit via electronic means, constitutes prima facie evidence that the person claimed and received unemployment benefits from the state.

(8) All records relating to investigations of unemployment compensation fraud in the custody of the Agency for Workforce Innovation or its tax collection service provider are available for examination by the Department of Law Enforcement, the state attorneys, or the Office of the Statewide Prosecutor in the prosecution of offenses under s. 817.568 or in proceedings brought under this chapter.

History.--s. 18, ch. 18402, 1937; CGL 1940 Supp. 4151(510), 8135(45), (46), (47); s. 16, ch. 20685, 1941; s. 11, ch. 26879, 1951; s. 1, ch. 29770, 1955; ss. 17, 35, ch. 69-106; s. 372, ch. 71-136; s. 2, ch. 75-121; s. 1, ch. 78-295; s. 7, ch. 79-308; ss. 1, 8, 9, ch. 80-95; s. 142, ch. 97-103; s. 22, ch. 2003-36; s. 2, ch. 2005-209.

443.091 Benefit eligibility conditions.--

(1) An unemployed individual is eligible to receive benefits for any week only if the Agency for Workforce Innovation finds that:

(a) She or he has made a claim for benefits for that week in accordance with the rules adopted by the Agency for Workforce Innovation.

(b) She or he has registered for work with, and subsequently continued to report to, the Agency for Workforce Innovation in accordance with its rules. These rules must not conflict with the requirement in s. 443.111(1)(b) that each claimant must continue to report regardless of any appeal or pending appeal relating to her or his eligibility or disqualification for benefits. The Agency for Workforce Innovation may by rule waive this paragraph for individuals attached to regular jobs. These rules must not conflict with s. 443.111(1).

(c)1. She or he is able to work and is available for work. In order to assess eligibility for a claimed week of unemployment, the Agency for Workforce Innovation shall develop criteria to determine a claimant's ability to work and availability for work.

2. Notwithstanding any other provision of this paragraph or paragraphs (b) and (d), an otherwise eligible individual may not be denied benefits for any week because she or he is in training with the approval of the Agency for Workforce Innovation, and such an individual may not be denied benefits for any week in which she or he is in training with the approval of the Agency for Workforce Innovation by reason of subparagraph 1. relating to availability for work, or s. 443.101(2) relating to failure to apply for, or refusal to accept, suitable work. Training may be approved by the Agency for Workforce Innovation in accordance with criteria prescribed by rule. A claimant's eligibility during approved training is contingent upon satisfying eligibility conditions prescribed by rule.

3. Notwithstanding any other provision of this chapter, an individual who is in training approved under s. 236(a)(1) of the Trade Act of 1974, as amended, may not be determined to be ineligible or disqualified for benefits with respect to her or his enrollment in such training or because of leaving work that is not suitable employment to enter such training. As used in this subparagraph, the term "suitable employment" means, for a worker, work of a substantially equal or higher skill level than the worker's past adversely affected employment, as defined for purposes of the Trade Act of 1974, as amended, the wages for which are at least 80 percent of the worker's average weekly wage as determined for purposes of the Trade Act of 1974, as amended.

4. Notwithstanding any other provision of this section, an otherwise eligible individual may not be denied benefits for any week by reason of subparagraph 1. because she or he is before any court of the United States or any state under a lawfully issued summons to appear for jury duty.
(d) She or he participates in reemployment services, such as job search assistance services, whenever the individual has been determined, by a profiling system established by rule of the Agency for Workforce Innovation, to be likely to exhaust regular benefits and to be in need of reemployment services.
(e) She or he has been unemployed for a waiting period of 1 week. A week may not be counted as a week of unemployment under this subsection:
1. Unless it occurs within the benefit year that includes the week for which she or he claims payment of benefits.
2. If benefits have been paid for that week.
3. Unless the individual was eligible for benefits for that week as provided in this section and s. 443.101, except for the requirements of this subsection and of s. 443.101(5).
(f) She or he has been paid wages for insured work equal to 1.5 times her or his high quarter wages during her or his base period, except that an unemployed individual is not eligible to receive benefits if the base period wages are less than $3,400.
(g) She or he submitted to the Agency for Workforce Innovation a valid social security number assigned to her or him. The Agency for Workforce Innovation may verify the social security number with the United States Social Security Administration and may deny benefits if the agency is unable to verify the individual's social security number, if the social security number is invalid, or if the social security number is not assigned to the individual.
(2) An individual may not receive benefits in a benefit year unless, after the beginning of the next preceding benefit year during which she or he received benefits, she or he performed service, regardless of whether in employment as defined in s. 443.036, and earned remuneration for that service of at least 3 times her or his weekly benefit amount as determined for her or his current benefit year.
(3) Benefits based on service in employment described in s. 443.1216(2) and (3) are payable in the same amount, on the same terms, and subject to the same conditions as benefits payable based on other service subject to this chapter, except that:
(a) Benefits are not payable for services in an instructional, research, or principal administrative capacity for an educational institution or an institution of higher education for any week of unemployment commencing during the period between 2 successive academic years; during a similar period between two regular terms, whether or not successive; or during a period of paid sabbatical leave provided for in the individual's contract, to any individual, if the individual performs those services in the first of those academic years or terms and there is a contract or a reasonable assurance that the individual will perform services in any such capacity for any educational institution or institution of higher education in the second of those academic years or terms.
(b) Benefits may not be based on services in any other capacity for an educational institution or an institution of higher education to any individual for any week that commences during a period between 2 successive academic years or terms if the individual performs those services in the first of the academic years or terms and there is a reasonable assurance that the individual will perform those services in the second of the academic years or terms. However, if compensation is denied to any individual under this paragraph and the individual was not offered an opportunity to perform those services for the educational institution for the second of those

academic years or terms, that individual is entitled to a retroactive payment of compensation for each week for which the individual filed a timely claim for compensation and for which compensation was denied solely by reason of this paragraph.
(c) Benefits are not payable based on services provided to an educational institution or institution of higher learning to any individual for any week that commences during an established and customary vacation period or holiday recess if the individual performs any services described in paragraph (a) or paragraph (b) in the period immediately before the vacation period or holiday recess and there is a reasonable assurance that the individual will perform any service in the period immediately after the vacation period or holiday recess.
(d) Benefits are not payable for services in any capacity specified in paragraphs (a), (b), and (c) to any individual who performed those services in an educational institution while in the employ of a governmental agency or governmental entity that is established and operated exclusively for the purpose of providing those services to one or more educational institutions.
(e) Benefits are not payable for services in any capacity specified in paragraphs (a), (b), (c), and (d) to any individual who provided those services to or on behalf of an educational institution, or an institution of higher education.
(f) As used in this subsection, the term:
1. "Fixed contract" means a written agreement of employment for a specified period of time.
2. "Continuing contract" means a written agreement that is automatically renewed until terminated by one of the parties to the contract.
(4) In the event of national emergency, in the course of which the Federal Emergency Unemployment Payment Plan is, at the request of the Governor, invoked for all or any part of the state, the emergency plan shall supersede the procedures prescribed by this chapter, and by rules adopted under this chapter, and the Agency for Workforce Innovation shall act as the Florida agency for the United States Department of Labor in the administration of the plan.
(5) Benefits are not payable to any individual based on service 90 percent or more of which consists of participating in sports or athletic events or training, or preparing to participate, for any week that commences during the period between two successive sport seasons, or similar periods, if the individual performed the service in the first of those seasons, or similar periods, and there is a reasonable assurance that the individual will perform those services in the later of those seasons, or similar periods.

443.101 Disqualification for benefits.--An individual shall be disqualified for benefits:

(1)(a) For the week in which he or she has voluntarily left his or her work without good cause attributable to his or her employing unit or in which the individual has been discharged by his or her employing unit for misconduct connected with his or her work, based on a finding by the Agency for Workforce Innovation. As used in this paragraph, the term "work" means any work, whether full-time, part-time, or temporary.
1. Disqualification for voluntarily quitting continues for the full period of unemployment next ensuing after he or she has left his or her full-time, part-time, or temporary work voluntarily without good cause and until the individual has earned income equal to or in excess of 17 times his or her weekly benefit amount. As used in this subsection, the term "good cause" includes only that cause attributable to the employing unit or which consists of illness or disability of the individual requiring separation from his or her work. Any other disqualification may not be imposed. An individual is not disqualified under this

subsection for voluntarily leaving temporary work to return immediately when called to work by the permanent employing unit that temporarily terminated his or her work within the previous 6 calendar months. For benefit years beginning on or after July 1, 2004, an individual is not disqualified under this subsection for voluntarily leaving work to relocate as a result of his or her military-connected spouse's permanent change of station orders, activation orders, or unit deployment orders.

2. Disqualification for being discharged for misconduct connected with his or her work continues for the full period of unemployment next ensuing after having been discharged and until the individual has become reemployed and has earned income of at least 17 times his or her weekly benefit amount and for not more than 52 weeks that immediately follow that week, as determined by the Agency for Workforce Innovation in each case according to the circumstances in each case or the seriousness of the misconduct, under the agency's rules adopted for determinations of disqualification for benefits for misconduct.

(b) For any week with respect to which the Agency for Workforce Innovation finds that his or her unemployment is due to a suspension for misconduct connected with the individual's work.

(c) For any week with respect to which the Agency for Workforce Innovation finds that his or her unemployment is due to a leave of absence, if the leave was voluntarily initiated by the individual.

(d) For any week with respect to which the Agency for Workforce Innovation finds that his or her unemployment is due to a discharge for misconduct connected with the individual's work, consisting of drug use, as evidenced by a positive, confirmed drug test.

(2) If the Agency for Workforce Innovation finds that the individual has failed without good cause to apply for available suitable work when directed by the agency or the one-stop career center, to accept suitable work when offered to him or her, or to return to the individual's customary self-employment when directed by the agency, the disqualification continues for the full period of unemployment next ensuing after he or she failed without good cause to apply for available suitable work, to accept suitable work, or to return to his or her customary self-employment, under this subsection, and until the individual has earned income at least 17 times his or her weekly benefit amount. The Agency for Workforce Innovation shall by rule adopt criteria for determining the "suitability of work," as used in this section. The Agency for Workforce Innovation in developing these rules shall consider the duration of a claimant's unemployment in determining the suitability of work and the suitability of proposed rates of compensation for available work. Further, after an individual has received 25 weeks of benefits in a single year, suitable work is a job that pays the minimum wage and is 120 percent or more of the weekly benefit amount the individual is drawing.

(a) In determining whether or not any work is suitable for an individual, the Agency for Workforce Innovation shall consider the degree of risk involved to his or her health, safety, and morals; his or her physical fitness and prior training; the individual's experience and prior earnings; his or her length of unemployment and prospects for securing local work in his or her customary occupation; and the distance of the available work from his or her residence.

(b) Notwithstanding any other provisions of this chapter, work is not deemed suitable and benefits may not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

1. If the position offered is vacant due directly to a strike, lockout, or other labor dispute.
2. If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.
3. If as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.
(c) If the Agency for Workforce Innovation finds that an individual was rejected for offered employment as the direct result of a positive, confirmed drug test required as a condition of employment, the individual is disqualified for refusing to accept an offer of suitable work.
(3) For any week with respect to which he or she is receiving or has received remuneration in the form of:
(a) Wages in lieu of notice.
(b)1. Compensation for temporary total disability or permanent total disability under the workers' compensation law of any state or under a similar law of the United States.
2. However, if the remuneration referred to in paragraphs (a) and (b) is less than the benefits that would otherwise be due under this chapter, he or she is entitled to receive for that week, if otherwise eligible, benefits reduced by the amount of the remuneration.
(4) For any week with respect to which the Agency for Workforce Innovation finds that his or her total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment, or other premises at which he or she is or was last employed; except that this subsection does not apply if it is shown to the satisfaction of the Agency for Workforce Innovation that:
(a)1. He or she is not participating in, financing, or directly interested in the labor dispute that is in active progress; however, the payment of regular union dues may not be construed as financing a labor dispute within the meaning of this section; and
2. He or she does not belong to a grade or class of workers of which immediately before the commencement of the labor dispute there were members employed at the premises at which the labor dispute occurs any of whom are participating in, financing, or directly interested in the dispute; if in any case separate branches of work are commonly conducted as separate businesses in separate premises, or are conducted in separate departments of the same premises, each department, for the purpose of this subsection, is deemed to be a separate factory, establishment, or other premise.
(b) His or her total or partial unemployment results from a lockout by his or her employer. As used in this section, the term "lockout" means a situation in which employees have not gone on strike, nor have employees notified the employer of a date certain for a strike, but in which employees have been denied entry to the factory, establishment, or other premises of employment by the employer. However, benefits are not payable under this paragraph if the lockout action was taken in response to threats, actions, or other indications of impending damage to property and equipment or possible physical violence by employees or in response to actual damage or violence or a substantial reduction in production instigated or perpetrated by employees.
(5) For any week with respect to which or a part of which he or she has received or is seeking unemployment benefits under an unemployment compensation law of another state or of the United States. For the purposes of this subsection, an unemployment compensation law of the United States is any law of the United States which provides for payment of any type and in any amounts for periods of unemployment due to lack of work. However, if the appropriate agency

of the other state or of the United States finally determines that he or she is not entitled to unemployment benefits, this disqualification does not apply.

(6) For a period not to exceed 1 year from the date of the discovery by the Agency for Workforce Innovation of the making of any false or fraudulent representation for the purpose of obtaining benefits contrary to this chapter, constituting a violation under s. 443.071. This disqualification may be appealed in the same manner as any other disqualification imposed under this section. A conviction by any court of competent jurisdiction in this state of the offense prohibited or punished by s. 443.071 is conclusive upon the appeals referee and the commission of the making of the false or fraudulent representation for which disqualification is imposed under this section.

(7) If the Agency for Workforce Innovation finds that the individual is an alien, unless the alien is an individual who has been lawfully admitted for permanent residence or otherwise is permanently residing in the United States under color of law, including an alien who is lawfully present in the United States as a result of the application of s. 203(a)(7) or s. 212(d)(5) of the Immigration and Nationality Act, if any modifications to s. 3304(a)(14) of the Federal Unemployment Tax Act, as provided by Pub. L. No. 94-566, which specify other conditions or other effective dates than those stated under federal law for the denial of benefits based on services performed by aliens, and which modifications are required to be implemented under state law as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, are deemed applicable under this section, if:

(a) Any data or information required of individuals applying for benefits to determine whether benefits are not payable to them because of their alien status is uniformly required from all applicants for benefits; and

(b) In the case of an individual whose application for benefits would otherwise be approved, a determination that benefits to such individual are not payable because of his or her alien status may not be made except by a preponderance of the evidence.

If the Agency for Workforce Innovation finds that the individual has refused without good cause an offer of resettlement or relocation, which offer provides for suitable employment for the individual notwithstanding the distance of relocation, resettlement, or employment from the current location of the individual in this state, this disqualification continues for the week in which the failure occurred and for not more than 17 weeks immediately after that week, or a reduction by not more than 5 weeks from the duration of benefits, as determined by the Agency for Workforce Innovation in each case.

(8) For any week with respect to which he or she has received, from a base period employer, benefits from a retirement, pension, or annuity program embodied in a union contract or either a public or private employee benefit program, except:

(a) For any week in which benefits from a retirement, pension, or annuity program, as referred to in this subsection, are less than the weekly benefits that would otherwise be due under this chapter, he or she is entitled to receive for that week, if otherwise eligible, benefits reduced by the amount of benefits from the retirement, pension, or annuity program, prorated to a weekly basis;

(b) For any week in which an individual has received benefits from a retirement, pension, or annuity program, as referred to in this subsection, for which program he or she has paid at least one-half of the contributions, the individual is entitled to receive for that week, if otherwise eligible, benefits reduced by one-half of the amount of benefits from the retirement, pension, or annuity program, prorated on a weekly basis; or

(c) For any week in which he or she has received benefits from a retirement, pension, or annuity program under the United States Social Security Act, for which program he or she has paid any contribution, benefits may not be reduced because of the contribution.

For the purpose of this subsection, benefits from the United States Social Security Act, a disability benefit program, or any other similar periodic payment based on the previous work of the individual are considered retirement income, except as provided in paragraph (c).

(9) If the individual was terminated from his or her work for violation of any criminal law punishable by imprisonment, or for any dishonest act, in connection with his or her work, as follows:
(a) If the Agency for Workforce Innovation or the Unemployment Appeals Commission finds that the individual was terminated from his or her work for violation of any criminal law punishable by imprisonment in connection with his or her work, and the individual was found guilty of the offense, made an admission of guilt in a court of law, or entered a plea of no contest, the individual is not entitled to unemployment benefits for up to 52 weeks, under rules adopted by the Agency for Workforce Innovation, and until he or she has earned income of at least 17 times his or her weekly benefit amount. If, before an adjudication of guilt, an admission of guilt, or a plea of no contest, the employer shows the Agency for Workforce Innovation that the arrest was due to a crime against the employer or the employer's business and, after considering all the evidence, the Agency for Workforce Innovation finds misconduct in connection with the individual's work, the individual is not entitled to unemployment benefits.
(b) If the Agency for Workforce Innovation or the Unemployment Appeals Commission finds that the individual was terminated from work for any dishonest act in connection with his or her work, the individual is not entitled to unemployment benefits for up to 52 weeks, under rules adopted by the Agency for Workforce Innovation, and until he or she has earned income of at least 17 times his or her weekly benefit amount. In addition, if the employer terminates an individual as a result of a dishonest act in connection with his or her work and the Agency for Workforce Innovation finds misconduct in connection with his or her work, the individual is not entitled to unemployment benefits.

With respect to an individual disqualified for benefits, the account of the terminating employer, if the employer is in the base period, is noncharged at the time the disqualification is imposed.

(10) Subject to the requirements of this subsection, if the claim is made based on the loss of employment as a leased employee for an employee leasing company or as a temporary employee for a temporary help firm.
(a) As used in this subsection, the term:
1. "Temporary help firm" means a firm that hires its own employees and assigns them to clients to support or supplement the client's workforce in work situations such as employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects. The term also includes a firm created by an entity licensed under s. 125.012(6), which hires employees assigned by a union for the purpose of supplementing or supporting the workforce of the temporary help firm's clients. The term does not include employee leasing companies regulated under part XI of chapter 468.

2. "Temporary employee" means an employee assigned to work for the clients of a temporary help firm. The term also includes a day laborer performing day labor, as defined in s. 448.22, who is employed by a labor pool as defined in s. 448.22.
3. "Leased employee" means an employee assigned to work for the clients of an employee leasing company regulated under part XI of chapter 468.
(b) A temporary or leased employee is deemed to have voluntarily quit employment and is disqualified for benefits under subparagraph (1)(a)1. if, upon conclusion of his or her latest assignment, the temporary or leased employee, without good cause, failed to contact the temporary help or employee-leasing firm for reassignment, if the employer advised the temporary or leased employee at the time of hire and that the leased employee is notified also at the time of separation that he or she must report for reassignment upon conclusion of each assignment, regardless of the duration of the assignment, and that unemployment benefits may be denied for failure to report. For purposes of this section, the time of hire for a day laborer is upon his or her acceptance of the first assignment following completion of an employment application with the labor pool. The labor pool as defined in s. 448.22(1) must provide notice to the temporary employee upon conclusion of the latest assignment that work is available the next business day and that the temporary employee must report for reassignment the next business day. The notice must be given by means of a notice printed on the paycheck, written notice included in the pay envelope, or other written notification at the conclusion of the current assignment.
(11) If an individual is discharged from employment for drug use as evidenced by a positive, confirmed drug test as provided in paragraph (1)(d), or is rejected for offered employment because of a positive, confirmed drug test as provided in paragraph (2)(c), test results and chain of custody documentation provided to the employer by a licensed and approved drug-testing laboratory is self-authenticating and admissible in unemployment compensation hearings, and such evidence creates a rebuttable presumption that the individual used, or was using, controlled substances, subject to the following conditions:
(a) To qualify for the presumption described in this subsection, an employer must have implemented a drug-free workplace program under ss. 440.101 and 440.102, and must submit proof that the employer has qualified for the insurance discounts provided under s. 627.0915, as certified by the insurance carrier or self-insurance unit. In lieu of these requirements, an employer who does not fit the definition of "employer" in s. 440.102 may qualify for the presumption if the employer is in compliance with equivalent or more stringent drug-testing standards established by federal law or regulation.
(b) Only laboratories licensed and approved as provided in s. 440.102(9), or as provided by equivalent or more stringent licensing requirements established by federal law or regulation may perform the drug tests.
(c) Disclosure of drug test results and other information pertaining to drug testing of individuals who claim or receive compensation under this chapter shall be governed by s. 443.1715.

443.111 Payment of benefits.--

(2) QUALIFYING REQUIREMENTS.--To establish a benefit year for unemployment benefits, an individual must have:
(a) Wage credits in two or more calendar quarters of the individual's base period.

(b) Minimum total base period wage credits equal to the high quarter wages multiplied by 1.5, but at least $3,400 in the base period.
(3) WEEKLY BENEFIT AMOUNT.--An individual's "weekly benefit amount" is an amount equal to one twenty-sixth of the total wages for insured work paid during that quarter of the base period in which the total wages paid were the highest, but not less than $32 or more than $275. The weekly benefit amount, if not a multiple of $1, is rounded downward to the nearest full dollar amount. The maximum weekly benefit amount in effect at the time the claimant establishes an individual weekly benefit amount is the maximum benefit amount applicable throughout the claimant's benefit year.
(4) WEEKLY BENEFIT FOR UNEMPLOYMENT.--
(a) Total.--Each eligible individual who is totally unemployed in any week is paid for the week a benefit equal to her or his weekly benefit amount.
(b) Partial.--Each eligible individual who is partially unemployed in any week is paid for the week a benefit equal to her or his weekly benefit less that part of the earned income, if any, payable to her or him for the week which is in excess of 8 times the federal hourly minimum wage. These benefits, if not a multiple of $1, are rounded downward to the nearest full dollar amount.
(5) DURATION OF BENEFITS.--
(a)1. Each otherwise eligible individual is entitled during any benefit year to a total amount of benefits equal to 25 percent of the total wages in his or her base period, not to exceed $7,150. However, the total amount of benefits, if not a multiple of $1, is rounded downward to the nearest full dollar amount. These benefits are payable at a weekly rate no greater than the weekly benefit amount.
2. For the purposes of this subsection, wages are counted as "wages for insured work" for benefit purposes with respect to any benefit year only if the benefit year begins after the date the employing unit by whom the wages were paid has satisfied the conditions of this chapter for becoming an employer.
(b) If the remuneration of an individual is not based upon a fixed period or duration of time or if the individual's wages are paid at irregular intervals or in a manner that does not extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to employment benefits only are determined in the manner prescribed by rule. These rules, to the extent practicable, must secure results reasonably similar to those that would prevail if the individual were paid her or his wages at regular intervals.

443.1215 Employers.--

(1) Each of the following employing units is an employer subject to this chapter:
(a) An employing unit that:
1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or

2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

(b) An employing unit for which service in employment, as defined in s. 443.1216(2), is performed, except as provided in subsection (2).

(c) An employing unit for which service in employment, as defined in s. 443.1216(3), is performed, except as provided in subsection (2).

(d)1. An employing unit for which agricultural labor, as defined in s. 443.1216(5), is performed.

2. An employing unit for which domestic service in employment, as defined in s. 443.1216(6), is performed.

(e) An individual or employing unit that acquires the organization, trade, or business, or substantially all of the assets of another individual or employing unit, which, at the time of the acquisition, is an employer subject to this chapter, or that acquires a part of the organization, trade, or business of another individual or employing unit which, at the time of the acquisition, is an employer subject to this chapter, if the other individual or employing unit would be an employer under paragraph (a) if that part constitutes its entire organization, trade, or business.

(f) An individual or employing unit that acquires the organization, trade, or business, or substantially all of the assets of another employing unit, if the employment record of the predecessor before the acquisition, together with the employment record of the individual or employing unit after the acquisition, both within the same calendar year, is sufficient to render an employing unit subject to this chapter as an employer under paragraph (a).

(g) An employing unit that is not otherwise an employer subject to this chapter under this section:

1. For which, during the current or preceding calendar year, service is or was performed for which the employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment fund.

2. Which, as a condition for approval of this chapter for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required under the federal act to be an employer that is subject to this chapter.

(h) An employing unit that became an employer under paragraph (a), paragraph (b), paragraph (c), paragraph (d), paragraph (e), paragraph (f), or paragraph (g) and that remains an employer subject to this chapter, as provided in s. 443.121.

(i) During the effective period of its election, an employing unit that elects to become subject to this chapter.

(2)(a) In determining whether an employing unit for which service, other than domestic service, is also performed is an employer under paragraph (1)(a), paragraph (1)(b), paragraph (1)(c), or

subparagraph (1)(d)1., the wages earned or the employment of an employee performing domestic service may not be taken into account.

(b) In determining whether an employing unit for which service, other than agricultural labor, is also performed is an employer under paragraph (1)(a), paragraph (1)(b), paragraph (1)(c), or subparagraph (1)(d)2., the wages earned or the employment of an employee performing service in agricultural labor may not be taken into account. If an employing unit is determined to be an employer of agricultural labor, the employing unit is considered an employer for purposes of subsection (1).

(3) An employing unit that fails to keep the records of employment required by this chapter and by the rules of the Agency for Workforce Innovation and the state agency providing unemployment tax collection services is presumed to be an employer liable for the payment of contributions under this chapter, regardless of the number of individuals employed by the employing unit. However, the tax collection service provider shall make written demand that the employing unit keep and maintain required payroll records. The demand must be made at least 6 months before assessing contributions against an employing unit determined to be an employer that is subject to this chapter solely by reason of this subsection.

(4) For purposes of this section, if a week includes both December 31 and January 1, the days of that week through December 31 are deemed a calendar week, and the days of that week beginning January 1 are deemed another calendar week.

443.1216 Employment.--Employment, as defined in s. 443.036, is subject to this chapter under the following conditions:

(1)(a) The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:

1. An officer of a corporation.

2. An individual who, under the usual common-law rules applicable in determining the employer-employee relationship, is an employee. However, whenever a client, as defined in s. 443.036(18), which would otherwise be designated as an employing unit has contracted with an employee leasing company to supply it with workers, those workers are considered employees of the employee leasing company. An employee leasing company may lease corporate officers of the client to the client and other workers to the client, except as prohibited by regulations of the Internal Revenue Service. Employees of an employee leasing company must be reported under the employee leasing company's tax identification number and contribution rate for work performed for the employee leasing company.

3. An individual other than an individual who is an employee under subparagraph 1. or subparagraph 2., who performs services for remuneration for any person:

a. As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, or laundry or drycleaning services for his or her principal.

b. As a traveling or city salesperson engaged on a full-time basis in the solicitation on behalf of, and the transmission to, his or her principal of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations. This sub-subparagraph does not apply to an agent-driver or a commission-driver and does not apply to sideline sales activities performed on behalf of a person other than the salesperson's principal.

4. The services described in subparagraph 3. are employment subject to this chapter only if:

a. The contract of service contemplates that substantially all of the services are to be performed personally by the individual;

b. The individual does not have a substantial investment in facilities used in connection with the services, other than facilities used for transportation; and

c. The services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

(b) Notwithstanding any other provision of this section, service for which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this chapter.

(c) If the services performed during at least one-half of a pay period by an employee for the person employing him or her constitute employment, all of the services performed by the employee during the period are deemed to be employment. If the services performed during more than one-half of the pay period by an employee for the person employing him or her do not constitute employment, all of the services performed by the employee during the period are not deemed to be employment. This paragraph does not apply to services performed in a pay period by an employee for the person employing him or her if any of those services are exempted under paragraph (13)(g).

(d) If two or more related corporations concurrently employ the same individual and compensate the individual through a common paymaster, each related corporation is considered to have paid wages to the individual only in the amounts actually disbursed by that corporation to the individual and is not considered to have paid the wages actually disbursed to the individual by another of the related corporations.

1. As used in this paragraph, the term "common paymaster" means a member of a group of related corporations that disburses wages to concurrent employees on behalf of the related corporations and that is responsible for keeping payroll records for those concurrent employees.

A common paymaster is not required to disburse wages to all the employees of the related corporations; however, this subparagraph does not apply to wages of concurrent employees which are not disbursed through a common paymaster. A common paymaster must pay concurrently employed individuals under this subparagraph by one combined paycheck.

2. As used in this paragraph, the term "concurrent employment" means the existence of simultaneous employment relationships between an individual and related corporations. Those relationships require the performance of services by the employee for the benefit of the related corporations, including the common paymaster, in exchange for wages that, if deductible for the purposes of federal income tax, are deductible by the related corporations.

3. Corporations are considered related corporations for an entire calendar quarter if they satisfy any one of the following tests at any time during the calendar quarter:

a. The corporations are members of a "controlled group of corporations" as defined in s. 1563 of the Internal Revenue Code of 1986 or would be members if paragraph 1563(a)(4) and subsection 1563(b) did not apply.

b. In the case of a corporation that does not issue stock, at least 50 percent of the members of the board of directors or other governing body of one corporation are members of the board of directors or other governing body of the other corporation or the holders of at least 50 percent of the voting power to select those members are concurrently the holders of at least 50 percent of the voting power to select those members of the other corporation.

c. At least 50 percent of the officers of one corporation are concurrently officers of the other corporation.

d. At least 30 percent of the employees of one corporation are concurrently employees of the other corporation.

4. The common paymaster must report to the tax collection service provider, as part of the unemployment compensation quarterly tax and wage report, the state unemployment compensation account number and name of each related corporation for which concurrent employees are being reported. Failure to timely report this information shall result in the related corporations being denied common paymaster status for that calendar quarter.

5. The common paymaster also has the primary responsibility for remitting contributions due under this chapter for the wages it disburses as the common paymaster. The common paymaster must compute these contributions as though it were the sole employer of the concurrently employed individuals. If a common paymaster fails to timely remit these contributions or reports, in whole or in part, the common paymaster remains liable for the full amount of the unpaid portion of these contributions. In addition, each of the other related corporations using the common paymaster is jointly and severally liable for its appropriate share of these contributions. Each related corporation's share equals the greater of:

a. The liability of the common paymaster under this chapter, after taking into account any contributions made.

b. The liability under this chapter which, notwithstanding this section, would have existed for the wages from the other related corporations, reduced by an allocable portion of any contributions previously paid by the common paymaster for those wages.

(2) The employment subject to this chapter includes service performed in the employ of a public employer as defined in s. 443.036, if the service is excluded from the definition of "employment" in s. 3306(c)(7) of the Federal Unemployment Tax Act and is not excluded from the employment subject to this chapter under subsection (4).

(3) The employment subject to this chapter includes service performed by an individual in the employ of a religious, charitable, educational, or other organization, if:

(a) The service is excluded from the definition of "employment" in the Federal Unemployment Tax Act solely by reason of s. 3306(c)(8) of that act; and

(b) The organization had at least four individuals in employment for some portion of a day in each of 20 different weeks during the current or preceding calendar year, regardless of whether the weeks were consecutive and whether the individuals were employed at the same time.

(4) For purposes of subsections (2) and (3), the employment subject to this chapter does not apply to service performed:

(a) In the employ of:

1. A church or a convention or association of churches.

2. An organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or a convention or association of churches.

(b) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by the order.

(c) In the employ of a public employer if the service is performed by an individual in the exercise of duties:

1. As an elected official.

2. As a member of a legislative body, or a member of the judiciary, of a state or a political subdivision of a state.

3. As an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency.

4. In a position that, under state law, is designated as a major nontenured policymaking or advisory position, including a position in the Senior Management Service created under s. 110.402, or a policymaking or advisory position for which the duties do not ordinarily require more than 8 hours per week.

5. As an election official or election worker if the amount of remuneration received by the individual during the calendar year for those services is less than $1,000.

(d) In a facility operating a program of rehabilitation for individuals whose earning capacity is impaired by age, physical or mental deficiency, or injury, or a program providing remunerative work for individuals who cannot be readily absorbed in the competitive labor market because of their impaired physical or mental capacity, by an individual receiving such rehabilitation or remunerative work.

(e) As part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision of a state, by an individual receiving the work relief or work training. This paragraph does not apply to unemployment work-relief or work-training programs for which unemployment compensation coverage is required by the Federal Government.

(f) By an inmate of a custodial or penal institution.

(5) The employment subject to this chapter includes service performed by an individual in agricultural labor if:

(a) The service is performed for a person who:

1. Paid remuneration in cash of at least $10,000 to individuals employed in agricultural labor in a calendar quarter during the current or preceding calendar year.

2. Employed in agricultural labor at least five individuals for some portion of a day in each of 20 different calendar weeks during the current or preceding calendar year, regardless of whether the weeks were consecutive or whether the individuals were employed at the same time.

(b) The service is performed by a member of a crew furnished by a crew leader to perform agricultural labor for another person.

1. For purposes of this paragraph, a crew member is treated as an employee of the crew leader if:

a. The crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act of 1983 or substantially all of the crew members operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment provided by the crew leader; and

b. The individual does not perform that agricultural labor as an employee of an employer other than the crew leader.

2. For purposes of this paragraph, in the case of an individual who is furnished by a crew leader to perform agricultural labor for another person and who is not treated as an employee of the crew leader under subparagraph 1.:

a. The other person and not the crew leader is treated as the employer of the individual; and

b. The other person is treated as having paid cash remuneration to the individual equal to the cash remuneration paid to the individual by the crew leader, either on his or her own behalf or on behalf of the other person, for the agricultural labor performed for the other person.

(6) The employment subject to this chapter includes domestic service performed by maids, cooks, maintenance workers, chauffeurs, social secretaries, caretakers, private yacht crews, butlers, and houseparents, in a private home, local college club, or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of at least $1,000 during a calendar quarter in the current calendar year or the preceding calendar year to individuals employed in the domestic service.

(7) The employment subject to this chapter includes an individual's entire service, performed inside or both inside and outside this state if:

(a) The service is localized within this state; or

(b) The service is not localized within any state, but some of the service is performed in this state, and:

1. The base of operations, or, if there is no base of operations, the place from which the service is directed or controlled, is located within this state; or

2. The base of operations or place from which the service is directed or controlled is not located within any state in which some part of the service is performed, but the individual's residence is located within this state.

(8) Services not covered under paragraph (7)(b) which are performed entirely outside of this state, and for which contributions are not required or paid under an unemployment compensation law of any other state or of the Federal Government, are deemed to be employment subject to this chapter if the individual performing the services is a resident of this state and the tax collection service provider approves the election of the employing unit for whom the services are performed, electing that the entire service of the individual is deemed to be employment subject to this chapter.

(9) Service is deemed to be localized within a state if:

(a) The service is performed entirely inside the state; or

(b) The service is performed both inside and outside the state, but the service performed outside the state is incidental to the individual's service inside the state. Incidental service includes, but is not limited to, service that is temporary or transitory in nature or consists of isolated transactions.

(10) The employment subject to this chapter includes service performed outside the United States, except in Canada, by a citizen of the United States who is in the employ of an American employer, other than service deemed employment subject to this chapter under subsection (2), subsection (3), or similar provisions of another state's law, if:

(a) The employer's principal place of business in the United States is located within this state.

(b) The employer does not have a place of business located in the United States, but:

1. The employer is a natural person who is a resident of this state.

2. The employer is a corporation organized under the laws of this state.

3. The employer is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any one other state.

(c) The employer is not an American employer, or neither paragraph (a) nor paragraph (b) apply, but the employer elects coverage in this state or the employer fails to elect coverage in any state and the individual files a claim for benefits based on that service under the laws of this state.

(11) The employment subject to this chapter includes all service performed by an officer or member of a crew of an American vessel or American aircraft on, or in connection with, the vessel or aircraft, if the operating office from which the operations of the vessel or aircraft operating inside or both inside and outside the United States is ordinarily and regularly supervised, managed, directed, and controlled within this state.

(12) The employment subject to this chapter includes services covered by a reciprocal arrangement under s. 443.221 between the Agency for Workforce Innovation or its tax collection service provider and the agency charged with the administration of another state unemployment compensation law or a federal unemployment compensation law, under which all services performed by an individual for an employing unit are deemed to be performed entirely within this state, if the Agency for Workforce Innovation or its tax collection service provider approved an election of the employing unit in which all of the services performed by the individual during the period covered by the election are deemed to be insured work.

(13) The following are exempt from coverage under this chapter:

(a) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, except as provided in subsection (6).

(b) Service performed on or in connection with a vessel or aircraft that is not an American vessel or American aircraft, if the employee is employed on and in connection with the vessel or aircraft while the vessel or aircraft is outside the United States.

(c) Service performed by an individual engaged in, or as an officer or member of the crew of a vessel engaged in, the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including service performed by an individual as an ordinary incident to engaging in those activities, except:

1. Service performed in connection with the catching or taking of salmon or halibut for commercial purposes.

2. Service performed on, or in connection with, a vessel of more than 10 net tons, determined in the manner provided for determining the registered tonnage of merchant vessels under the laws of the United States.

(d) Service performed by an individual in the employ of his or her son, daughter, or spouse, including step relationships, and service performed by a child, or stepchild, under the age of 21 in the employ of his or her father, mother, stepfather, or stepmother.

(e) Service performed in the employ of the Federal Government or of an instrumentality of the Federal Government which is:

1. Wholly or partially owned by the United States.

2. Exempt from the tax imposed by s. 3301 of the Internal Revenue Code under a federal law that specifically cites s. 3301, or the corresponding section of prior law, in granting the exemption. However, to the extent that the United States Congress permits the state to require an instrumentality of the Federal Government to make payments into the Unemployment Compensation Trust Fund under this chapter, this chapter applies to that instrumentality, and to services performed for that instrumentality, in the same manner, to the same extent, and on the same terms as other employers, employing units, individuals, and services. If this state is not certified for any year by the Secretary of Labor under s. 3304 of the federal Internal Revenue Code, the tax collection service provider shall refund the payments required of each instrumentality of the Federal Government for that year from the fund in the same manner and within the same period as provided in s. 443.141(6) for contributions erroneously collected.

(f) Service performed in the employ of a public employer as defined in s. 443.036, except as provided in subsection (2), and service performed in the employ of an instrumentality of a public employer as described in s. 443.036(35)(b) or (c), to the extent that the instrumentality is immune under the United States Constitution from the tax imposed by s. 3301 of the Internal Revenue Code for that service.

(g) Service performed in the employ of a corporation, community chest, fund, or foundation that is organized and operated exclusively for religious, charitable, scientific, testing for public

safety, literary, or educational purposes or for the prevention of cruelty to children or animals. This exemption does not apply to an employer if part of the employer's net earnings inures to the benefit of any private shareholder or individual or if a substantial part of the employer's activities involve carrying on propaganda, otherwise attempting to influence legislation, or participating or intervening in, including the publishing or distributing of statements, a political campaign on behalf of a candidate for public office, except as provided in subsection (3).

(h) Service for which unemployment compensation is payable under an unemployment compensation system established by the United States Congress, of which this chapter is not a part.

(i)1. Service performed during a calendar quarter in the employ of an organization exempt from the federal income tax under s. 501(a) of the Internal Revenue Code, other than an organization described in s. 401(a), or under s. 521, if the remuneration for the service is less than $50.

2. Service performed in the employ of a school, college, or university, if the service is performed by a student who is enrolled and is regularly attending classes at the school, college, or university.

(j) Service performed in the employ of a foreign government, including service as a consular or other officer or employee of a nondiplomatic representative.

(k) Service performed in the employ of an instrumentality wholly owned by a foreign government if:

1. The service is of a character similar to that performed in foreign countries by employees of the Federal Government or of an instrumentality of the Federal Government; and

2. The United States Secretary of State certifies to the United States Secretary of the Treasury that the foreign government for whose instrumentality the exemption is claimed grants an equivalent exemption for similar service performed in the foreign country by employees of the Federal Government and of instrumentalities of the Federal Government.

(l) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved under state law, service performed as an intern in the employ of a hospital by an individual who has completed a 4-year course in a medical school chartered or approved under state law, and service performed by a patient of a hospital for the hospital.

(m) Service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all of the service performed by the individual for that person is performed for remuneration solely by way of commission, except for services performed in accordance with 26 U.S.C. s. 3306(c)(7) and (8). For purposes of this section, those benefits excluded from the wages subject to this chapter under s. 443.1217(2)(b)-(f), inclusive, are not considered remuneration.

(n) Service performed by an individual for a person as a real estate salesperson or agent, if all of the service performed by the individual for that person is performed for remuneration solely by way of commission.

(o) Service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, excluding delivery or distribution to any point for subsequent delivery or distribution.

(p) Service covered by an arrangement between the Agency for Workforce Innovation, or its tax collection service provider, and the agency charged with the administration of another state or federal unemployment compensation law under which all services performed by an individual for an employing unit during the period covered by the employing unit's duly approved election is deemed to be performed entirely within the other agency's state or under the federal law.

(q) Service performed by an individual enrolled at a nonprofit or public educational institution that normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, if the institution certifies to the employer that the individual is a student in a full-time program, taken for credit at the institution that combines academic instruction with work experience, and that the service is an integral part of the program. This paragraph does not apply to service performed in a program established for or on behalf of an employer or group of employers.

(r) Service performed by an individual for a person as a barber, if all of the service performed by the individual for that person is performed for remuneration solely by way of commission.

(s) Casual labor not in the course of the employer's trade or business.

(t) Service performed by a speech therapist, occupational therapist, or physical therapist who is nonsalaried and working under a written contract with a home health agency as defined in s. 400.462.

(u) Service performed by a direct seller. As used in this paragraph, the term "direct seller" means a person:

1.a. Who is engaged in the trade or business of selling or soliciting the sale of consumer products to buyers on a buy-sell basis, on a deposit-commission basis, or on a similar basis, for resale in the home or in another place that is not a permanent retail establishment; or

b. Who is engaged in the trade or business of selling or soliciting the sale of consumer products in the home or in another place that is not a permanent retail establishment;

2. Substantially all of whose remuneration for services described in subparagraph 1., regardless of whether paid in cash, is directly related to sales or other output, rather than to the number of hours worked; and

3. Who performs the services under a written contract with the person for whom the services are performed, if the contract provides that the person will not be treated as an employee for those services for federal tax purposes.

(v) Service performed by a nonresident alien for the period he or she is temporarily present in the United States as a nonimmigrant under subparagraph (F) or subparagraph (J) of s. 101(a)(15) of the Immigration and Nationality Act, and which is performed to carry out the purpose specified in subparagraph (F) or subparagraph (J), as applicable.

(w) Service performed by an individual for remuneration for a private, for-profit delivery or messenger service, if the individual:

1. Is free to accept or reject jobs from the delivery or messenger service and the delivery or messenger service does not have control over when the individual works;

2. Is remunerated for each delivery, or the remuneration is based on factors that relate to the work performed, including receipt of a percentage of any rate schedule;

3. Pays all expenses, and the opportunity for profit or loss rests solely with the individual;

4. Is responsible for operating costs, including fuel, repairs, supplies, and motor vehicle insurance;

5. Determines the method of performing the service, including selection of routes and order of deliveries;

6. Is responsible for the completion of a specific job and is liable for any failure to complete that job;

7. Enters into a contract with the delivery or messenger service which specifies that the individual is an independent contractor and not an employee of the delivery or messenger service; and

8. Provides the vehicle used to perform the service.

(x) Service performed in agricultural labor by an individual who is an alien admitted to the United States to perform service in agricultural labor under ss. 101(a)(15)(H) and 214(c) of the Immigration and Nationality Act.

(y) Service performed by a person who is an inmate of a penal institution.

443.1217 Wages.--

(1) The wages subject to this chapter include all remuneration for employment, including commissions, bonuses, back pay awards, and the cash value of all remuneration paid in any medium other than cash. The reasonable cash value of remuneration in any medium other than

cash must be estimated and determined in accordance with rules adopted by the Agency for Workforce Innovation or the state agency providing tax collection services. The wages subject to this chapter include tips or gratuities received while performing services that constitute employment and are included in a written statement furnished to the employer under s. 6053(a) of the Internal Revenue Code of 1954.

(2) For the purpose of determining an employer's contributions, the following wages are exempt from this chapter:

(a) That part of remuneration paid to an individual by an employer for employment during a calendar year in excess of the first $7,000 of remuneration paid to the individual by the employer or his or her predecessor during that calendar year, unless that part of the remuneration is subject to a tax, under a federal law imposing the tax, against which credit may be taken for contributions required to be paid into a state unemployment fund. As used in this section only, the term "employment" includes services constituting employment under any employment security law of another state or of the Federal Government.

(b) Payment by an employing unit with respect to services performed for, or on behalf of, an individual employed by the employing unit under a plan or system established by the employing unit which provides for payment to its employees generally or to a class of its employees, including any amount paid by the employing unit for insurance or annuities or paid into a fund on account of:

1. Sickness or accident disability. When payment is made to an employee or any of his or her dependents, this subparagraph exempts from the wages subject to this chapter only those payments received under a workers' compensation law.

2. Medical and hospitalization expenses in connection with sickness or accident disability.

3. Death, if the employee:

a. Does not have the option to receive, in lieu of the death benefit, part of the payment or, if the death benefit is insured, part of the premiums or contributions to premiums paid by his or her employing unit; and

b. Does not have the right under the plan, system, or policy providing the death benefit to assign the benefit or to receive cash consideration in lieu of the benefit upon his or her withdrawal from the plan or system; upon termination of the plan, system, or policy; or upon termination of his or her services with the employing unit.

(c) Payment on account of sickness or accident disability, or payment of medical or hospitalization expenses in connection with sickness or accident disability, by an employing unit to, or on behalf of, an individual performing services for the employing unit more than 6 calendar months after the last calendar month the individual performed services for the employing unit.

(d) Payment by an employing unit, without deduction from the remuneration of an individual employed by the employing unit, of the tax imposed upon the individual under s. 3101 of the federal Internal Revenue Code for services performed.

(e) The value of:

1. Meals furnished to an employee or the employee's spouse or dependents by the employer on the business premises of the employer for the convenience of the employer; or

2. Lodging furnished to an employee or the employee's spouse or dependents by the employer on the business premises of the employer for the convenience of the employer when lodging is included as a condition of employment.

(f) Payment made by an employing unit to, or on behalf of, an individual performing services for the employing unit or a beneficiary of the individual:

1. From or to a trust described in s. 401(a) of the Internal Revenue Code of 1954 which is exempt from tax under s. 501(a) at the time of payment, unless payment is made to an employee of the trust as remuneration for services rendered as an employee of the trust and not as a beneficiary of the trust;

2. Under or to an annuity plan that, at the time of payment, is a plan described in s. 403(a) of the Internal Revenue Code of 1954;

3. Under a simplified employee pension if, at the time of payment, it is reasonable to believe that the employee is entitled to a deduction under s. 219(b)(2) of the Internal Revenue Code of 1954 for the payment;

4. Under or to an annuity contract described in s. 403(b) of the Internal Revenue Code of 1954, other than a payment for the purchase of an annuity contract as part of a salary reduction agreement, regardless of whether the agreement is evidenced by a written instrument or otherwise;

5. Under or to an exempt governmental deferred compensation plan described in s. 3121(v)(3) of the Internal Revenue Code of 1954;

6. To supplement pension benefits under a plan or trust described in subparagraphs 1.-5. to account for some portion or all of the increase in the cost of living, as determined by the United States Secretary of Labor, since retirement, but only if the supplemental payments are under a plan that is treated as a welfare plan under s. 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974; or

7. Under a cafeteria plan, as defined in s. 125 of the Internal Revenue Code of 1986, as amended, if the payment would not be treated as wages without regard to such plan and it is reasonable to believe that, if s. 125 of the Internal Revenue Code of 1986, as amended, applied

for purposes of this section, s. 125 of the Internal Revenue Code of 1986, as amended, would not treat any wages as constructively received.

(g) Payment made, or benefit provided, by an employing unit to or for the benefit of an individual performing services for the employing unit or a beneficiary of the individual if, at the time of such payment or provision of the benefit, it is reasonable to believe that the individual may exclude the payment or benefit from income under s. 127 of the Internal Revenue Code of 1986, as amended.

443.131 Contributions.--

(2) CONTRIBUTION RATES.--Each employer must pay contributions equal to the following percentages of wages paid by him or her for employment:

(a) Initial rate.--Each employer whose employment record is chargeable with benefits for less than 8 calendar quarters shall pay contributions at the initial rate of 2.7 percent.

(b) Variable rates.--Each employer whose employment record is chargeable for benefits during at least 8 calendar quarters shall pay contributions at the standard rate in paragraph (3)(c), except as otherwise varied through experience rating under subsection (3). For the purposes of this section, the total wages on which contributions were paid by a single employer or his or her predecessor to an individual in any state during a single calendar year shall be counted to determine whether more remuneration was paid to the individual by the employer or his or her predecessor in 1 calendar year than constituted wages.

(3) VARIATION OF CONTRIBUTION RATES BASED ON BENEFIT EXPERIENCE.--

(a) Employment records.--The regular and short-time compensation benefits paid to an eligible individual shall be charged to the employment record of each employer who paid the individual wages of at least $100 during the individual's base period in proportion to the total wages paid by all employers who paid the individual wages during the individual's base period. Benefits may not be charged to the employment record of an employer who furnishes part-time work to an individual who, because of loss of employment with one or more other employers, is eligible for partial benefits while being furnished part-time work by the employer on substantially the same basis and in substantially the same amount as the individual's employment during his or her base period, regardless of whether this part-time work is simultaneous or successive to the individual's lost employment. Further, benefits may not be charged to the employment record of an employer who furnishes the Agency for Workforce Innovation with notice, as prescribed in the agency's rules, that any of the following apply:

1. When an individual leaves his or her work without good cause attributable to the employer or is discharged by the employer for misconduct connected with his or her work, benefits subsequently paid to the individual based on wages paid by the employer before the separation may not be charged to the employment record of the employer.

2. When an individual is discharged by the employer for unsatisfactory performance during an initial employment probationary period, benefits subsequently paid to the individual based on wages paid during the probationary period by the employer before the separation may not be charged to the employer's employment record. The employer must notify the Agency for Workforce Innovation of the discharge in writing within 10 days after the mailing date of the notice of initial determination of a claim. As used in this subparagraph, the term "initial employment probationary period" means an established probationary plan that applies to all employees or a specific group of employees and that does not exceed 90 calendar days following the first day a new employee begins work. The employee must be informed of the probationary period within the first 7 days of work. The employer must demonstrate by conclusive evidence that the individual was separated because of unsatisfactory work performance and not because of lack of work due to temporary, seasonal, casual, or other similar employment that is not of a regular, permanent, and year-round nature.

3. Benefits subsequently paid to an individual after his or her refusal without good cause to accept suitable work from an employer may not be charged to the employment record of the employer when any part of those benefits are based on wages paid by the employer before the individual's refusal to accept suitable work. As used in this subparagraph, the term "good cause" does not include distance to employment caused by a change of residence by the individual. The Agency for Workforce Innovation shall adopt rules prescribing, for the payment of all benefits, whether this subparagraph applies regardless of whether a disqualification under s. 443.101 applies to the claim.

4. When an individual is separated from work as a direct result of a natural disaster declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. ss. 5121 et seq., benefits subsequently paid to the individual based on wages paid by the employer before the separation may not be charged to the employment record of the employer.

(b) Benefit ratio.--

2. For each calendar year, the tax collection service provider shall compute a benefit ratio for each employer whose employment record was chargeable for benefits during the 12 consecutive quarters ending June 30 of the calendar year preceding the calendar year for which the benefit ratio is computed. An employer's benefit ratio is the quotient obtained by dividing the total benefits charged to the employer's employment record during the 3-year period ending June 30 of the preceding calendar year by the total of the employer's annual payroll for the 3-year period ending June 30 of the preceding calendar year. The benefit ratio shall be computed to the fifth decimal place and rounded to the fourth decimal place.

3. The tax collection service provider shall compute a benefit ratio for each employer who was not previously eligible under subparagraph 2., whose contribution rate is set at the initial contribution rate in paragraph (2)(a), and whose employment record was chargeable for benefits during at least 8 calendar quarters immediately preceding the calendar quarter for which the benefit ratio is computed. The employer's benefit ratio is the quotient obtained by dividing the total benefits charged to the employer's employment record during the first 6 of the 8 completed calendar quarters immediately preceding the calendar quarter for which the benefit ratio is

computed by the total of the employer's annual payroll during the first 7 of the 9 completed calendar quarters immediately preceding the calendar quarter for which the benefit ratio is computed. The benefit ratio shall be computed to the fifth decimal place and rounded to the fourth decimal place and applies for the remainder of the calendar year. The employer must subsequently be rated on an annual basis using up to 12 calendar quarters of benefits charged and up to 12 calendar quarters of annual payroll. That employer's benefit ratio is the quotient obtained by dividing the total benefits charged to the employer's employment record by the total of the employer's annual payroll during the quarters used in his or her first computation plus the subsequent quarters reported through June 30 of the preceding calendar year. Each subsequent calendar year, the rate shall be computed under subparagraph 2. The tax collection service provider shall assign a variation from the standard rate of contributions in paragraph (c) on a quarterly basis to each eligible employer in the same manner as an assignment for a calendar year under paragraph (e).

(c) Standard rate.--The standard rate of contributions payable by each employer shall be 5.4 percent.

(d) Eligibility for variation from the standard rate.--An employer is eligible for a variation from the standard rate of contributions in any calendar year only if the employer's employment record was chargeable for benefits throughout the 12 consecutive quarters ending on June 30 of the preceding calendar year. The contribution rate of an employer who, as a result of having at least 8 consecutive quarters of payroll insufficient to be chargeable for benefits, has not been chargeable for benefits throughout the 12 consecutive quarters reverts to the initial contribution rate until the employer subsequently becomes eligible for an earned rate. **THERE'S MORE, MUCH MORE—LET YOUR ACCOUNTANT DEAL WITH IT!**

443.1317 Rulemaking authority; enforcement of rules.--

(1) AGENCY FOR WORKFORCE INNOVATION.--

(a) Except as otherwise provided in s. 443.012, the Agency for Workforce Innovation has ultimate authority over the administration of the Unemployment Compensation Program.

(b) The Agency for Workforce Innovation may adopt rules under ss. 120.536(1) and 120.54 to administer the provisions of this chapter conferring duties upon either the agency or its tax collection service provider.

443.151 Procedure concerning claims.--

(1) POSTING OF INFORMATION.--

(a) Each employer must post and maintain in places readily accessible to individuals in her or his employ printed statements concerning benefit rights, claims for benefits, and other matters relating to the administration of this chapter as the Agency for Workforce Innovation may by rule prescribe. Each employer must supply to individuals copies of printed statements or other materials relating to claims for benefits as directed by the agency's rules. The Agency for

Workforce Innovation shall supply these printed statements and other materials to each employer without cost to the employer.

(b)1. The Agency for Workforce Innovation shall advise each individual filing a new claim for unemployment compensation, at the time of filing the claim, that:

a. Unemployment compensation is subject to federal income tax.

b. Requirements exist pertaining to estimated tax payments.

c. The individual may elect to have federal income tax deducted and withheld from the individual's payment of unemployment compensation at the amount specified in the federal Internal Revenue Code.

d. The individual is not permitted to change a previously elected withholding status more than twice per calendar year.

2. Amounts deducted and withheld from unemployment compensation must remain in the Unemployment Compensation Trust Fund until transferred to the federal taxing authority as payment of income tax.

3. The Agency for Workforce Innovation shall follow all procedures specified by the United States Department of Labor and the federal Internal Revenue Service pertaining to the deducting and withholding of income tax.

4. If more than one authorized request for deduction and withholding is made, amounts must be deducted and withheld in accordance with the following priorities:

a. Unemployment overpayments have first priority;

b. Child support payments have second priority; and

c. Withholding under this subsection has third priority.

(2) FILING OF CLAIM INVESTIGATIONS; NOTIFICATION OF CLAIMANTS AND EMPLOYERS.--Claims for benefits must be made in accordance with the rules adopted by the Agency for Workforce Innovation. The Agency for Workforce Innovation must notify claimants and employers regarding monetary and nonmonetary determinations of eligibility. Investigations of issues raised in connection with a claimant which may affect a claimant's eligibility for benefits or charges to an employer's employment record shall be conducted by the Agency for Workforce Innovation as prescribed by rule.

(3) DETERMINATION.--

(a) In general.--The Agency for Workforce Innovation shall promptly make an initial determination for each claim filed under subsection (2). The determination must include a

statement of whether and in what amount the claimant is entitled to benefits, and, in the event of a denial, must state the reasons for the denial. A determination for the first week of a benefit year must also include a statement of whether the claimant was paid the wages required under s. 443.091(1)(f) and, if so, the first day of the benefit year, the claimant's weekly benefit amount, and the maximum total amount of benefits payable to the claimant for a benefit year. The Agency for Workforce Innovation shall promptly notify the claimant, the claimant's most recent employing unit, and all employers whose employment records are liable for benefits under the determination of the initial determination. The determination is final unless within 20 days after the mailing of the notices to the parties' last known addresses, or in lieu of mailing, within 20 days after the delivery of the notices, an appeal or written request for reconsideration is filed by the claimant or other party entitled to notice.

(b) Determinations in labor dispute cases.--Whenever any claim involves a labor dispute described in s. 443.101(4), the Agency for Workforce Innovation shall promptly assign the claim to a special examiner who shall make a determination on the issues involving unemployment due to the labor dispute. The special examiner shall make the determination after an investigation, as necessary. The claimant or another party entitled to notice of the determination may appeal a determination under subsection (4).

(c) Redeterminations.--

1. The Agency for Workforce Innovation may reconsider a determination when it finds an error or when new evidence or information pertinent to the determination is discovered after a prior determination or redetermination. A redetermination may not be made more than 1 year after the last day of the benefit year unless the disqualification for making a false or fraudulent representation in s. 443.101(6) is applicable, in which case the redetermination may be made within 2 years after the false or fraudulent representation. The Agency for Workforce Innovation must promptly give notice of redetermination to the claimant and to any employers entitled to notice in the manner prescribed in this section for the notice of an initial determination. If the amount of benefits is increased by the redetermination, an appeal of the redetermination based solely on the increase may be filed as provided in subsection (4). If the amount of benefits is decreased by the redetermination, the redetermination may be appealed by the claimant when a subsequent claim for benefits is affected in amount or duration by the redetermination. If the final decision on the determination or redetermination to be reconsidered was made by an appeals referee, the commission, or a court, the Agency for Workforce Innovation may apply for a revised decision from the body or court that made the final decision.

2. If an appeal of an original determination is pending when a redetermination is issued, the appeal unless withdrawn is treated as an appeal from the redetermination.

(d) Notice of determination or redetermination.--Notice of any monetary or nonmonetary determination or redetermination under this chapter, together with the reasons for the determination or redetermination, must be promptly given to the claimant and to any employer entitled to notice in the manner provided in this subsection. The Agency for Workforce Innovation shall adopt rules prescribing the manner and procedure by which employers within the base period of a claimant become entitled to notice.

(4) APPEALS.--

(a) Appeals referees.--The Agency for Workforce Innovation shall appoint one or more impartial salaried appeals referees in accordance with s. 443.171(3) to hear and decide appealed claims. A person may not participate on behalf of the Agency for Workforce Innovation as an appeals referee in any case in which she or he is an interested party. The Agency for Workforce Innovation may designate alternates to serve in the absence or disqualification of any appeals referee on a temporary basis. These alternates must have the same qualifications required of appeals referees. The Agency for Workforce Innovation shall provide the commission and the appeals referees with proper facilities and assistance for the execution of their functions.

(b) Filing and hearing.--

1. The claimant or any other party entitled to notice of a determination may appeal an adverse determination to an appeals referee within 20 days after the date of mailing of the notice to her or his last known address or, if the notice is not mailed, within 20 days after the date of delivery of the notice.

2. Unless the appeal is untimely or withdrawn or review is initiated by the commission, the appeals referee, after mailing all parties and attorneys of record a notice of hearing at least 10 days before the date of hearing, notwithstanding the 14-day notice requirement in s. 120.569(2)(b), may only affirm, modify, or reverse the determination. An appeal may not be withdrawn without the permission of the appeals referee.

3. However, when an appeal appears to have been filed after the permissible time limit, the Office of Appeals may issue an order to show cause to the appellant, requiring the appellant to show why the appeal should not be dismissed as untimely. If the appellant does not, within 15 days after the mailing date of the order to show cause, provide written evidence of timely filing or good cause for failure to appeal timely, the appeal shall be dismissed.

4. When an appeal involves a question of whether services were performed by a claimant in employment or for an employer, the referee must give special notice of the question and of the pendency of the appeal to the employing unit and to the Agency for Workforce Innovation, both of which become parties to the proceeding.

5. The parties must be notified promptly of the referee's decision. The referee's decision is final unless further review is initiated under paragraph (c) within 20 days after the date of mailing notice of the decision to the party's last known address or, in lieu of mailing, within 20 days after the delivery of the notice.

(c) Review by commission.--The commission may, on its own motion, within the time limit in paragraph (b), initiate a review of the decision of an appeals referee. The commission may also allow the Agency for Workforce Innovation or any adversely affected party entitled to notice of the decision to appeal the decision by filing an application within the time limit in paragraph (b). An adversely affected party has the right to appeal the decision if the Agency for Workforce

Innovation's determination is not affirmed by the appeals referee. The commission may affirm, modify, or reverse the findings and conclusions of the appeals referee based on evidence previously submitted in the case or based on additional evidence taken at the direction of the commission. The commission may assume jurisdiction of or transfer to another appeals referee the proceedings on any claim pending before an appeals referee. Any proceeding in which the commission assumes jurisdiction before completion must be heard by the commission in accordance with the requirement of this subsection for proceedings before an appeals referee. When the commission denies an application to hear an appeal of an appeals referee's decision, the decision of the appeals referee is the decision of the commission for purposes of this paragraph and is subject to judicial review within the same time and manner as decisions of the commission, except that the time for initiating review runs from the date of notice of the commission's order denying the application to hear an appeal.

(d) Procedure.--The manner that appealed claims are presented must comply with the commission's rules. Witnesses subpoenaed under this section are allowed fees at the rate established by s. 92.142, and fees of witnesses subpoenaed on behalf of the Agency for Workforce Innovation or any claimant are deemed part of the expense of administering this chapter.

(e) Judicial review.--Orders of the commission entered under paragraph (c) are subject to review only by notice of appeal in the district court of appeal in the appellate district in which the issues involved were decided by an appeals referee. Notwithstanding chapter 120, the commission is a party respondent to every such proceeding. The Agency for Workforce Innovation may initiate judicial review of orders in the same manner and to the same extent as any other party.

(5) PAYMENT OF BENEFITS.--

(a) The Agency for Workforce Innovation shall promptly pay benefits in accordance with a determination or redetermination regardless of any appeal or pending appeal. Before payment of benefits to the claimant, however, each employer who is liable for reimbursements in lieu of contributions for payment of the benefits must be notified, at the address on file with the Agency for Workforce Innovation or its tax collection service provider, of the initial determination of the claim and must be given 10 days to respond.

(b) The Agency for Workforce Innovation shall promptly pay benefits, regardless of whether a determination is under appeal, when the determination allowing benefits is affirmed in any amount by an appeals referee or is affirmed by the commission, or if a decision of an appeals referee allowing benefits is affirmed in any amount by the commission. In these instances, a court may not issue an injunction, supersedeas, stay, or other writ or process suspending payment of benefits. A contributing employer may not, however, be charged with benefits paid under an erroneous determination if the decision is ultimately reversed. Benefits are not paid for any subsequent weeks of unemployment involved in a reversal.

(c) The provisions of paragraph (b) relating to charging an employer liable for contributions do not apply to reimbursing employers.

(6) RECOVERY AND RECOUPMENT.--

(a) Any person who, by reason of her or his fraud, receives benefits under this chapter to which she or he is not entitled is liable to repay those benefits to the Agency for Workforce Innovation on behalf of the trust fund or, in the agency's discretion, to have those benefits deducted from future benefits payable to her or him under this chapter. To enforce this paragraph, the Agency for Workforce Innovation must find the existence of fraud through a redetermination or decision under this section within 2 years after the fraud was committed. Any recovery or recoupment of these benefits must be effected within 5 years after the redetermination or decision.

(b) Any person who, by reason other than her or his fraud, receives benefits under this chapter to which, under a redetermination or decision pursuant to this section, she or he is found not entitled, is liable to repay those benefits to the Agency for Workforce Innovation on behalf of the trust fund or, in the agency's discretion, to have those benefits deducted from any future benefits payable to her or him under this chapter. Any recovery or recoupment of benefits must be effected within 3 years after the redetermination or decision.

(c) Recoupment from future benefits is not permitted if the benefits are received by such person without fault on the person's part and recoupment would defeat the purpose of this chapter or would be inequitable and against good conscience.

(d) The Agency for Workforce Innovation shall collect the repayment of benefits without interest by the deduction of benefits through a redetermination or by a civil action.

(7) REPRESENTATION IN ADMINISTRATIVE PROCEEDINGS.--In any administrative proceeding conducted under this chapter, an employer or a claimant has the right, at his or her own expense, to be represented by counsel or by an authorized representative. Notwithstanding s. 120.62(2), the authorized representative need not be a qualified representative.

443.171 Agency for Workforce Innovation and commission; powers and duties; records and reports; proceedings; state-federal cooperation.--

(1) POWERS AND DUTIES.--The Agency for Workforce Innovation shall administer this chapter. The agency may employ those persons, make expenditures, require reports, conduct investigations, and take other action necessary or suitable to administer this chapter. The Agency for Workforce Innovation shall annually submit information to Workforce Florida, Inc., covering the administration and operation of this chapter during the preceding calendar year for inclusion in the strategic plan under s. 445.006 and may make recommendations for amendment to this chapter.

V. CONCLUSION

Parties to an unemployment benefits dispute need not be represented, by counsel or otherwise. Representation is neither encouraged nor discouraged. It is important to know that, at least in the State of Florida, hearings and appellate review will be conducted by highly skilled personnel. They are to be treated with the utmost respect and kept in mind when holiday

greetings are mailed out every year. Seriously, the Office of Appeals and the Unemployment Appeals Commission are dedicated to issuing quality decisions in a reasonable period of time within a process that is fair and impartial. For every employer that has complained that the process is slanted toward claimants, I have received a contrary complaint from a claimant. Actually, the process is slanted toward the party that is prepared to present competent (as opposed to hearsay or speculative) evidence and, in the event of conflicting competent evidence, is able to appear more credible than the other party. Moreover, the employer has the burden of proof in discharge cases and the claimant has the burden of proof in quit and availability cases. It is our responsibility to treat all parties with respect and our hope that the parties will recognize that we are, like Fox News, striving to be "fair and balanced," while acting within the boundaries set by the legislature and the courts.

Fair Labor Standards Act

By

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Fair Labor Standards Act And Florida Wage Claims

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FAIR LABOR STANDARDS ACT

I. INTRODUCTION

In recent years, Fair Labor Standards Act (FLSA) litigation has become one of the fastest growing aspects of labor and employment law practice. These materials will address the general principles that are at issue in these disputes, and will also assist attorneys representing both employers and employees in advising their clients regarding compliance and enforcement issues under the FLSA.

II. COVERAGE

The issue of coverage must be addressed in two parts. The first consideration is whether the employer a covered enterprise. If so, all of the employer's employees are presumed to be covered by the FLSA. If not, some (and perhaps, all) of the employer's employees may nonetheless be subject to the FLSA under individual coverage.

A. Enterprise Coverage

A company is subject to enterprise coverage if it has annual dollar volume of sales or receipts in the amount of $500,000 or more and at least two employees who are engaged in commerce or the handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person.

Hospitals or institutions primarily engaged in the care of the sick, the aged, the mentally ill or the mentally handicapped who live on the premises (it does not matter if the hospital or institution is public or private, or is operated for profit or not-for-profit) are also subject to enterprise coverage.

Pre-schools; elementary or secondary schools or institutions of higher learning (e.g., college); or schools for mentally or physically handicapped or gifted children (it does not matter if the school or institution is public or private or operated for profit or not-for-profit) are also subject to enterprise coverage.

Also subject to "enterprise coverage" are all Federal and local government agencies. States are not subject to FLSA coverage. Alden v. Maine, 119 S.Ct. 2240 (1999).

B. Individual Coverage

The FLSA applies to many employees on an individual basis notwithstanding that they do not work for a covered enterprise. Employees are subject to "individual coverage" if they are "individually engaged in handling or producing goods for interstate commerce." This term is applied broadly, and has been extended to employees who utilize the "instrumentalities" of interstate commerce, including such minor interstate activities as processing payments via credit cards.

There are several categories of workers who, notwithstanding that they may work for covered enterprises, are not deemed to be "employees" covered by the FLSA. Examples are as follows:

C. Independent Contractors

In addressing the issue of whether workers are employees or independent contractors for the purposes of the FLSA, several factors set forth in guidelines established by the Department of Labor's Wage and Hour Division and the United States Supreme Court must be considered. No single factor is determinative.

The factors utilized to make this determination (often referred to as the "economic realities" test are as follows:

1. The extent to which the worker's services are an integral part of the employer's business.

2. The permanency of the relationship.

3. The amount of the worker's investment in the facilities and equipment necessary to perform the work.

4. The nature and degree of control over the worker by the business.

5. The worker's opportunities for profit and loss.

6. The level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise.

D. Trainees

The question of whether a trainee (or student worker) is an "employee" under the FLSA depends upon whether the worker has already been hired and is receiving on-the-job training or has not yet been hired, but rather is being provided with training so that he or she might some day be hired as an employee.

Under the Department of Labor's test for non-employee trainee status, all of the following criteria must apply:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;

2. The training is for the benefit of the trainees or students (as opposed to being more for the benefit of the employer);

3. The trainees or students do not displace regular employees, and work under close supervision;

4. The employer that provides the training receives no immediate advantage from the activities of the trainees or students and, on occasion, his operations may even be impeded;

5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and

6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

E. Volunteers

Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable or similar non-profit organizations that receive their services.

There are also circumstances in which two or more companies may be deemed (1) to be a single integrated enterprise or (2) to be joint employers.

F. Integrated Enterprise

Two or more companies or corporations may be an "integrated enterprise" if the following factors are present:

1. Common ownership;

2. Common management;

3. Centralized control of labor relations; and

4. Common offices and interrelated operations.

G. Joint Employers

Two or more companies or corporations may be deemed to jointly employ a worker or workers if the following factors are present:

1. The companies share the employees' services and/or interchange employees;

2. Once company works in the direct interest of the other; and

3. Employees are under the common control of both companies.

III. EXEMPTIONS

There are several exemptions that exclude otherwise covered employees from various aspects (minimum wage, overtime, recordkeeping requirements) of the FLSA.

A. "White Collar" Exemptions

The executive, administrative and professional exemptions are generally referred to as the "white collar" exemptions to the FLSA. As these exemptions, for the most part, require the payment of a bona fide salary, the first issue that should be addressed is whether the employee in question is, in fact, compensated on a salary basis.

Salary Basis Test: A salaried employee must generally be paid his or her full salary for any week in which he or she performs any work, regardless of the number of days or hours he actually works (if no work whatsoever is performed in a week, no salary need be paid).

The following deductions from salary may be made, however, without destroying the salary basis of pay:

- ► deductions for absences of a day or more for personal reasons other than sickness or accident (Note: deductions cannot be made for partial day absences, they can ordinarily be made *only* for absences of a full day or more);

- ► deductions for absences of a day or more caused by sickness or disability, if the company maintains a plan which provides compensation for loss of salary caused by sickness and disability and the employee has exhausted his or her "bank" of leave;

- ► disciplinary deductions which are made as penalties imposed in good faith for violation of safety rules of major significance;

- ► deductions to offset any amounts received by an employee as jury or witness fees or military pay; however, beyond these offsets, deductions may <u>not</u> be made for absences caused by jury duty, attendance as a witness, or temporary military leave;

- ► for partial weeks worked during the initial or final weeks of employment (if the employee resigned in the middle of a workweek, it would be permissible to pay him on a prorated basis only for the days actually worked in that week), and;

- ► in some cases, when a salaried-exempt employee is working a reduced or intermittent work schedule pursuant Family and Medical Leave Act (it is permissible to convert a salaried employee to an hourly rate during the time he is utilizing intermittent or reduced work week FMLA leave without destroying the person's exempt status).

- ► disciplinary deductions for suspensions of one day or more for violations of code of conduct policies, such as sexual harassment policies.

While the regulations suggest that even a single improper deduction might destroy the salary basis, the Courts have been reluctant to impose such a harsh penalty, often instead requiring proof of an established practice of improper deductions.

Window of Correction/Safe Harbor for Salary Deductions

This "window of correction" concept, which has long been applied by the courts, was codified by the 2004 Fair Pay Amendments to the FLSA's regulations. Under the new regulations, the impact of an improper deduction depends on the circumstances. The general rule remains that the deduction will be lost if the employer has an "actual practice" of making improper deductions. This is determined by considering the number improper deductions, the time period during which the deductions were made, the number and location of employees impacted by the deductions and the managers responsible, and whether the employee has a policy permitting or prohibiting improper deductions. However, if the improper deductions are isolated or inadvertent, the employer may preserve the exemption by reimbursing the employees for the improper deductions.

There also is a "safe harbor" provision that protects the salary basis if the employer (1) has a clearly communicated policy prohibiting improper deductions which includes a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future. Such a policy will not protect an employer, however, that continues to willfully violate the policy and make improper deductions after receiving employee complaints.

1. Executive Exemption

To establish this exemption, the following elements must be present:

a. The employee must be paid on a salary basis in an amount of at least $455 per week;

b. The employee's primary duty must be managing the enterprise or a customarily recognized department or subdivision of the enterprise;

c. The employee must customarily and regularly direct the work of at least two other full time employees or their equivalent; and

d. The employee must have the authority to hire and fire, or the employee's recommendations relating to hiring, firing, advancement, promotion or other change of status must be given particular weight.

Business Owners Rule: Any business owner (defined as any person with at least a bona fide 20 percent equity interest in the enterprise) who is actively engaged in the management of the business is automatically considered exempt under the executive exemption.

2. Administrative Exemption

To establish this exemption, each of the following elements must be present:

a. The employee must be paid on a salary or fee basis in an amount of at least $455 per week;

b. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

c. The employee's primary duties include the exercise of discretion and independent judgment with respect to matters of significance.

Examples: The following positions generally meet the duties requirements for the administrative exemption: insurance claims adjusters, financial analysts, project or team leaders, executive or administrative assistants to business owners, human resources managers and purchasing agents.

3. Professional Exemption

To establish this exemption, the following elements must be present:

Learned Professions: All of the following criteria must be met:

a. The employee must be paid on a salary or fee basis in an amount of at least $455 per week;

Caveat: The salary or fee requirement is inapplicable to employees in the professions of law, medicine or teaching.

b. The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

c. The advanced knowledge must be in a field of science or learning; and

Note: The term "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations. Also generally included are:

- Registered or certified medical technologists who have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association.

- Registered nurses.

- Dental hygienists who have completed four years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association.

- Physician assistants who have completed four years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants.

- Certified public accountants.

- Chefs with a four-year specialized academic degree in culinary arts.

- Athletic trainers who have completed four years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification.

- Licensed funeral directors and embalmers working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Education.

Generally not included are licensed practical nurses, clerks, bookkeepers, cooks and paralegals.

d. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Note: This criteria is met if the position requires an advanced degree as a prerequisite. However, the exemption may also apply to employees who have substantially the same knowledge level and perform substantially the same work as degreed co-workers.

Creative Professions: All of the following criteria must be met:

a. The employee must be paid on a salary or fee basis in an amount of at least $455 per week; and

b. The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor, including music, writing, acting and the graphic arts.

Computer-related Professions: All of the following criteria must be met:

a. The employee must be paid on a salary or fee basis in an amount of at least $455 per week **or** paid an hourly rate of at least $27.63 per hour;

b. The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled position; and

c. The employee's primary duty must consist of:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

- The design, development, documentation, analysis, creation testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

- The design, documentation testing, creation or modification of computer programs related to the machine operating systems; or

- A combination of the aforementioned duties the performance of which requires the same level of skills.

Note: Not included are employees in the manufacture or repair of computer hardware and related equipment

4. Highly Compensated Worker Exemption

This exemption is applicable to certain employees who receive total annual compensation of at least $100,000,, but may fall short of the duty requirements of the individual white collar exemptions. To qualify for this exemption, the following criteria must be met:

a. The employee must receive “total compensation” of at least $100,000 per year;

b. The employee must receive at least $455.00 per week on a salary basis;

c. The employee's primary duty must involve office or non-manual work; and

d. The employee must customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative or professional employee.

The total compensation includes commissions, nondiscretionary bonuses and other nondiscretionary compensation, but does not include board, lodging, insurance, retirement benefits or other fringe benefits.

If an employee who would otherwise qualify for this exemption falls short of the $100,000 threshold, the employer may make a single "make up" payment within one month of the end of the year to bring the compensation up to $100,000 and thereby preserve the exemption.

B. Sales Exemptions

1. Outside Sales

To establish this exemption, the following elements must be present:

a. Primary duty of making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.

b. Customarily and regularly engaged away from the employer's place of business or places of business in performing such primary duty.

Note: The term "outside sales" does not include sales by mail, telephone or internet, unless such contact is used merely as an adjunct to personal sales calls. Any fixed site, whether at home or office, used by a salesperson as a headquarters or for telephone solicitation is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.

2. Commissioned Sales

For the most part, “inside” salespersons are not exempt employees. A limited exception exists for salespersons who:

a. are employed by a retail establishment (75% of establishment’s gross annual dollar volume of sales or services is not for resale or is provided to the end user);

b. receive more than half of their compensation in a representative period of no less than a month from commissions; and

c. receive at least one and one-half times the minimum wage for all hours worked.

Note*:* Although no agreement is required to utilized this pay method, the regulations provide that employers must include in their pay records a notation indicating that they are utilizing the “7(i)” or “retail commissioned sales” exemption.

This is a partial exemption that only impacts the requirement of paying overtime compensation. Commissioned salespersons must keep time records and receive the (modified) minimum wage.

D. Excepted Occupations

The regulations specifically provide that the "white collar" and sales exemptions are not applicable to the following occupations:

1. Blue Collar Workers

Non-management employees in production, maintenance, construction similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to overtime, no matter how highly paid they might be.

2. Veterans

No amount of military training will satisfy the requirements of the learned profession exemption.

3. First Responders

Police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous material workers and similar employees are not subject to the "white collar" or sales exemptions.

E. Special Exemptions

1. Motor Carriers

An exemption applies to any worker:

a. employed by carriers who are engaged in transporting passengers or property across state lines (or are part of an unbroken line of interstate commerce), or

b. who maintain vehicles engaged in interstate transport of passengers or property in safe working condition.

Note: As a result of recent amendments to the Motor Carrier Act, it appears that the exemption is currently applicable only to operators of vehicles having a “gross vehicle weight rating” or “gross vehicle weight” of at least 10,001 pounds (whichever is greater).

2. Agricultural Workers

Generally, farm workers are exempt from the FLSA’s overtime requirements. This exemption generally also applies to functions that are incidental to an agricultural operation (e.g. packaging produce grown on a farm owned by the employer and adjacent to the packaging plant).

3. Seasonal Recreational Workers

Employees of recreational establishment are exempt from the FLSA’s minimum wage, overtime and recordkeeping requirements if:

a. the establishment does not operate for more than seven months in any calendar year; or

b. during the preceding year, the establishment's average receipts for any six month period did not exceed 33 1/3 % of its average receipts for the other six months of that year. It should be noted, however, that the exemption does not apply to individuals employed in the administrative office of the establishment.

IV. WORKING TIME

The general definition of the term "employ" under the FLSA is "to suffer or permit to work." The practical meaning of this broad and somewhat cryptic definition is that, if work is performed on an employer's behalf, the employee must receive compensation, regardless of whether the employer expected, requested or authorized the specific number of hours worked.

The most common areas in which working time issues arise are as follows:

A. Waiting Time

The key distinction is that an employee who is "engaged to wait" is working. An employee merely "waiting to be engaged," is not.

B. On-Call Time

In determining whether "on-call" time is working time, the key issue is the degree of restriction placed upon the employee while on-call. Factors that impact this issue are as follows:

1. What are the terms of the employment agreement, if any, requiring on-call periods?

2. What physical restrictions are placed upon the employee?

3. Is the employee subject to a specific response time of a short duration?

4. Is the employee required to respond to all calls and, if he or she does not, is he or she subject to disciplinary action?

5. How often is the employee actually called while on-call?

6. How does the employee, in practice, use his or her time while on-call?

C. Preliminary and Postliminary Activities

If preliminary and postliminary activities are integral or indispensable to the employee's principal activities, or primarily for the employer's benefit, the time spent in these activities is working time. Examples include:

1. Maintaining, cleaning or repairing tools or equipment used in the job;

2. Changing clothing (if the change is required and cannot be made prior to arriving – e.g. putting on safety jackets and helmets that stay at the workplace);

3. Washing or showering (if required due to the nature of the work – e.g. food preparation).

NOTE: "The Continuous Workday" Concept
In 2005, the U.S. Supreme Court in IBP, Inc. v. Alvarez reiterated the notion of a "continuous workday," meaning that once an employee engages in an activity that constitutes working time, the workday "clock" will generally run continuously until the final compensable act is performed.

D. Lunch Periods

A lunch period of 30 minutes or longer may be treated as non-working time provided that the employee is completely relieved of duty.

E. Break Periods

Break periods of 20 minutes or less must be counted as working time.

F. Sleeping Time

Employees working a shift of less than 24 hours who are permitted to sleep while not engaged must be paid for the sleeping time.

With respect to employees working 24 hour shifts, an employer may deduct up to eight hours of sleeping time for such employees if:

1. the employer and employee have an express or implied agreement to exclude sleeping time;

2. the employee is provided with adequate sleeping facilities to allow uninterrupted sleep;

3. at least five hours of sleep is possible during scheduled sleeping periods; and

4. if employee is interrupted to perform duties, the time of the interruption is treated as working time.

G. Travel Time

1. Commuting: Generally, an employee is not entitled to be compensated for time spent commuting from home to a worksite.

2. During workday: Travel during the workday between worksites is generally considered working time.

3. Out of Town: An employee that is required to travel out-of-town (e.g. for a special assignment) for a single day must be compensated for travel from their home to the out-of-town location and back home. This is an exception to the general rule relating to commuting.

4. Overnight: An employee traveling overnight must be compensated for all time spent traveling during normal business hours. This is true even if the travel is done on a non-working day (e.g. traveling between 9:00 a.m. and 5:00 p.m. on a Sunday).

H. Training and Meetings

Time spent in training and meetings normally must be compensated as working time. An exception exists if each of the following is true:

1. the training or meeting is held outside of normal working hours;

2. attendance is voluntary;

3. the employee performs no productive work during the training or meeting; and

4. the training or meeting is not directly related to the employee's job (unless it is provided by an independent and bona fide institution of learning rather than by the employer itself).

V. MINIMUM WAGES

A. The Concept Of The "Regular Rate"

The minimum wage under the FLSA is currently $6.55 per hour.[1] Typically, employers satisfy this requirement by paying an hourly wage equal or in excess of this amount. However, it is possible to lawfully pay a base wage that is lower than the minimum, provided that the employee's total weekly compensation divided by the hours worked in the week (this calculation produces the employee's "regular rate") is equal to or in excess of the minimum.

B. Calculating The Regular Rate

The following examples of forms of compensation can (and for the purposes of determining overtime, must) be included in the calculation of the regular rate:

1. On-call pay;

2. Non-discretionary bonuses (e.g. based upon attendance, objective productivity or seniority);

3. Employee meal expenses paid by employer (unless the employee is present during meal time only due to unusual circumstances, such as out-of-town travel or working after hours).

4. Shift differentials;

5. Travel expenses incurred for employee's benefit; and

6. Certain board and lodging expenses.

7. Tips: In certain circumstances, tips can be counted toward the minimum wage, requiring a cash wage of $2.13 per hour. The requirements for a valid "tip credit" toward the minimum wage are as follows:

[1] On July 24, 2009, it will be increased to $7.25 per hour.

a. The employee must receive tip income of more than $30 per month;

b. All tips must be retained by the employee unless there is a valid pooling agreement. Such agreements may only allow employees that customarily participate in tip pooling (e.g. waiters and waitresses, bellhops, busboys and bartenders) to share in the tips. If other employees (e.g. managers) share in the tips, the tip credit cannot be applied (and the tipped employees are entitled to the full $6.55 per hour wage); and

c. In the event that wages, including tips, do not equal at least $6.55 per hour, the employer must provide sufficient compensation to bring the employee up to the minimum wage.

C. Permissible Deductions

Certain deductions from pay are permissible notwithstanding the fact that they result in a "take home" hourly wage of less than the minimum. For example, lawful deductions for federal and state payroll taxes, Social Security and unemployment insurance all typically bring take home pay below the minimum.

Other permissible deductions that "cut into" the minimum wage include voluntary deductions for employee shares of insurance premiums, voluntary contributions to retirement plans, monies paid to third parties through garnishment.

Deductions made for the employer's benefit or due to employer-imposed expenses, on the other hand, may not "cut into" the minimum wage. For example, if an employer requires employees to wear a uniform (or if uniforms are required by law – e.g. public safety personnel), the employer cannot require that employees bear the cost of purchasing, cleaning or maintaining uniforms if such expenses "cut into" the minimum wage.

VI. OVERTIME

A. General Issues

Under the FLSA, nonexempt employees are entitled to receive one and one-half times their regular rate of pay for all hours worked in excess of forty per workweek. In this basic definition, there are two crucial points:

1. Overtime must be calculated on a workweek basis (except for certain public sector positions).

2. Overtime is calculated from the regular rate, not the base rate. Other forms of compensation, such as non-discretionary bonuses and shift differentials may raise the regular rate and, consequently, the overtime rate. However, there are forms of compensation that do not increase the regular rate. These include:

   a. Vacation pay;

   b. Sick pay;

   c. Holiday pay;

   d. Entirely discretionary bonuses; and

   e. Health and welfare benefits.

B. Salaried Non-Exempt Employees

For salaried non-exempt employees, there are two methods of calculating overtime compensation:

1. General Method ("Time and one-half")

A nonexempt employee paid a salary for a forty hour workweek is entitled to be paid overtime calculated as follows:

Salary ÷ 40 = regular rate
Regular rate x 1.5 = overtime rate
Overtime rate x overtime hours = overtime compensation

2. Fluctuating Rate Pay Plan ("Half-time")

The fluctuating rate pay plan (in the past, termed, in a somewhat politically incorrect manner, "Chinese overtime") provides a more employer-friendly method of calculating overtime due to salaried nonexempt employees who frequently work in excess of 40 hours per workweek. Pursuant to this method, overtime is calculated as follows:

Salary ÷ hours worked in workweek = regular rate (fluctuates each week)
Regular rate x .5 = overtime rate
Overtime rate x overtime hours = overtime compensation

In order to utilize the fluctuating rate pay plan, the following criteria must met:

a. there must be a mutual understanding that the salary is meant to cover all hours worked;

b. the salary may not be reduced if the employee works less than forty hours; and

c. the salary must be large enough to ensure that the regular rate never falls below the minimum wage.

C. Calculating Overtime For Employees With Multiple Rates

If a nonexempt employee performs different tasks at different rates, the weighted average is used to determine overtime. For example, if an employee works 30 hours at $10 per hour ($300) and 20 hours at $20 per hour ($400), his or her regular rate is $14 per hour ($300 + $400 ÷ 50 hours), his or her overtime rate is $7 per hour, and he or she is entitled to $70 in overtime compensation.

D. Day Rate Workers

An employee may be paid a different day rate on different days of the week. Again, the regular rate in such a case is determined by simply adding up all of the day rates paid in the workweek and dividing the total by the number of hours worked.

E. Piecework

An employee paid a piece rate can receive overtime compensation pursuant to one of two methods of calculation.

1. The total piece rate earnings may be divided by the hours worked in the week to derive a regular rate (from which a half-time overtime premium is derived); or

2. If the employee agrees, the regular rate may be set as the piece rate paid during overtime hours. For example, if the piece rate is $10 per piece completed (and the employee agrees) the employee may be paid $15 per piece after 40 hours of work are completed in the workweek.

VII. RECORDKEEPING

Employers must maintain the following information and records:

A. employee's full name and social security number (exempt and nonexempt);

B. employee's address, including zip code (exempt and nonexempt);

C. birth date, if younger than nineteen (exempt and nonexempt);

D. sex and occupation (exempt and nonexempt; this requirement is related to Equal Pay Act compliance);

E. time and day of the week when the employee's workweek begins (exempt and nonexempt);

F. hours worked each workday (nonexempt only);

G. total hours worked each workweek (nonexempt only);

H. basis on which employee is paid (nonexempt only);

I. regular hourly pay rate (nonexempt only);

J. total daily or weekly straight-time earnings (nonexempt only);

K. total overtime earnings for the workweek (nonexempt only);

L. all additions to or deductions from employee's wages (nonexempt only);

M. total wages paid each period (exempt and nonexempt); and

N. date of payment and pay period covered by the payment (exempt and nonexempt).

The FLSA requires employers to keep the following records for at least three years:

A. individual employment contracts;

B. collective bargaining agreements;

C. records of employees' wages and hours of work (payroll records); and

D. records reflecting employees' sales and purchases.

The following records must be kept for a minimum of two years:
{tc \l2 "The following records must be kept for a minimum of two years:}

A. basic employment and earnings records;

B. wage-rate records (for example, time cards, piece work tickets, wage rate tables, work and time schedules);

{tc \l2 "Field result goes here wage-rate records (for example, time cards, piece work tickets, wage rate tables, work and time schedules)}

C. order, billing and shipping records

{tc \l2 "Field result goes here order, billing and shipping records}

D. records of deductions from or additions to wages paid

{tc \l2 "Field result goes here records of deductions from or additions to wages paid }

VIII. ENFORCEMENT

A. Enforcement By The Department Of Labor

The DOL's Wage and Hour Division has the power to investigate and remedy violations of the FLSA. While the DOL may investigate an employer on its own initiative, typically investigations are prompted by employee complaints.

If the DOL finds that a violation has occurred, it will usually attempt to conciliate the claim for the parties. If the DOL and the employer reach an agreement on the infraction and the damages owed, the DOL prepares a settlement agreement for the employee to sign. By participating in this form of settlement, the employer typically limits its liability to the actual amount of wages or overtime compensation due, and avoids the potential for assessment of liquidated damages, attorney's fees, and the costs of an employee suit. The only exception is a situation in which the DOL imposes civil money penalties (up to $1,000 per employee) as a result of repeated or willful violations. Such civil money penalties go into the U. S. Treasury and are separate from any back wages that are paid to employees.

B. Enforcement Through Private Lawsuits

In practice, most FLSA violations are not resolved by the DOL, but rather are addressed through private lawsuits. Unlike discrimination claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act and the Age Discrimination in Employment Act, FLSA claims may be brought without first filing a claim with a government agency.

Private suits may be brought within two years of a violation, or three years if the violation is alleged to be willful. Suits can seek backpay (unpaid minimum wages or overtime), liquidated damages (double damages – again, applicable if there is a willful violation), and attorney's fees and costs.

The FLSA also contains a "collective action" provision. Similar to a class action, a collective action is a mechanism by which a single employee that believes that he or she has been subjected to a violation of the FLSA, and that others similarly situated have been subjected to the same violation, may bring an lawsuit and request that the Court allow a notice to be sent to all similarly situated employees (and former employees) advising them of their right to "opt-in" to the suit (in this regard, a collective action differs from a class action, which allows claimants to "opt-out").

C. Retaliation Claims

Section 15(a)(3) of the FLSA [29 U.S.C. 215(a)] makes it unlawful to "discharge or in any other manner discriminate against an employee" who:

- files a complaint or institutes a proceeding under the FLSA;
- testifies (or is about to testify) in such a proceeding; or
- serves (or is about to serve) on an industry committee.

Retaliation claims under the FLSA are addressed through the same burden shifting analysis utilized in discrimination actions. The plaintiff must first establish a prima facie case by demonstrating (1) that he or she engaged in protected activity, (2) that he or she subsequently suffered an adverse employment action, and (3) a causal connection between the protected activity and the adverse action. Wolf v. Coca-Cola Co., 200 F.3d 1337, 1342-43 (11th Cir. 2000).

Employees are deemed to have "instituted a proceeding under the FLSA" and, thereby, engaged in protected activity, even if they have only made informal, verbal, complaints to their employer. See, e.g., Debrecht v. Oceola County, 243 F.Supp.2d 1364, 1374 (M.D.Fla. 2003).

Once a prima facie case is established, the employer must articulate a legitimate reason for its actions. The employee must then prove that the employer would not have taken the action "but for" the assertion of FLSA rights. Wolf, 200 F.3d at 1343.

In addition to damages arising from lost wages, an employee may seek compensatory damages for emotional distress and mental anguish arising from violations of the FLSA's anti-retaliation provision. Bogacki v. Buccaneers, Ltd. Partnership, 370 F.Supp.2d 1201 (M.D.Fla. 2005). Punitive damages are not available. Snapp v. Unlimited Concepts, Inc., 208 F.3d 928 (11th cir. 2000).

A prevailing plaintiff is also entitled to recover attorney's fees and costs in a retaliation action.

FLORIDA MINIMUM WAGE

In November 2004, the Florida Constitution was amended by referendum to provide a minimum wage of $6.15 in the State of Florida. The Amendment further provides for annual inflation reviews and adjustments. The most recent of these reviews resulted in an increase of the minimum wage to $7.21, commencing in January 2009.

Employees aggrieved may file a private action to enforce the Amendment. The limitations period for such actions is four years, five for willful violations. As is the case under the FLSA, employees can obtain backpay, liquidated damages (in the absence of a showing of employer good faith) and attorney's fees.

Unlike the FLSA, the Amendment does not contain a "collective action" procedure. Rather, multiple employee claims are maintainable as traditional class actions under the Florida Rules of Civil Procedure.

The Florida Legislature has passed implementing legislation (Florida Statute 448.110) that, among other things, requires employees to make a pre-suit demand and provide employers with fifteen (15) days to resolve the issue.

At least one court has found this statute to be unconstitutional, as the Amendment is self-implementing and, consequently, cannot be modified by statute. Throw v. Republic Enterprise Systems, Inc., 2006 U.S. Dist. LEXIS 46215; 11 Wage & Hour Cas. 2d (BNA) 1711 (M.D.Fla. 2006), while two recent opinions have upheld the notice provisions: Dominguez v. Design by Nature Corp., 2008 U.S. Dist. LEXIS 83467 (S.D.Fla. 2008); Resnick v.Oppenheimer & Co., 13 Wage & Hour Cas. 2d (BNA) 271 (S.D.Fla. 2008).

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OTHER NON-FLSA WAGE CLAIMS

I UNPAID WAGES/FLORIDA STATUTE 448.08

A. The Statute

Employees seeking recovery of unpaid wages often cite to Florida Statute 448.08, which provides that:

> The court may award to the prevailing party in an action for unpaid wages costs of the action and a reasonable attorney's fee.

B. Wages Covered

Florida Statute 448.08 only covers claims for accrued and unpaid wages. It does not apply to claims for back pay accruing after termination or front pay claims.

The following types of compensation have been found to constitute "unpaid wages":

1. Unpaid compensation under employment contract or at-will employment;

2. Annual leave credits;

3. Vested interest in profit sharing plan;

4. Commissions; and

5. Bonuses.

See, e.g., Elder v. Islam, 869 So.2d 600 (Fla. 5th DCA 2004); Strasser v. City of Jacksonville, 655 So.2d 234 (Fla. 1st DCA 1995); D.G.D., Inc. v. Berkowitz, 605 So.2d 496 (Fla. 3rd DCA 1992); Woods v. United Indus. Corp., 596 So.2d 801 (Fla. 1st DCA 1992); Coleman v. City of Hialeah, 525 So.2d 435 (Fla. 3rd DCA 1988).

Conversely, the following types of compensation fall outside the definition of "unpaid wages":

1. Unpaid disability benefits;

2. Unvested pension benefits;

3. Workers' compensation benefits;

4. Sick leave.

C. What Is The Statute Of Limitations For An Unpaid Wage Claim Grounded Upon A Contractual Breach?

Florida Statute 95.11 limits claims for "unpaid wages" to two years. However, while, for the purposes of Florida Statute 448.08, the term "unpaid wages" is broadly defined, it appears that the same term is more narrowly defined under Florida Statute 95.11. For example, in Nealon v. Right Human Resource Consultants, Inc., 669 So.2d 1120 (Fla. 3rd DCA), the court held that a claim for an unpaid bonuses (which it found to be akin to a salary) does not constitute a claim for "unpaid wages" for the purpose of the two year limitation period set forth in Florida Statute 95.11 (though, presumably, such a claim can result in the recovery of fees under Florida Statute 448.08).

This inconsistency can also create an issue in a situation in which unpaid wages due under a contract that does not contain a fee provision are sought. In such a circumstance, the employee will wish to treat the claim as one for "unpaid wages" for the purpose of invoking 448.08, but also apply the four year statute of limitations for contractual claims (rather than the two year limitation period under 95.11 applicable to claims for "unpaid wages"). The question of whether an employee can "have his cake" (invoke the four year statute of limitations) and "eat it too" (obtain fees under 448.08) has not been addressed in any reported decisions. However, it would seem that, as a last resort, an employee could bring a two-count claim and, upon prevailing, assert that fees are due on the case as a whole because the work performed on the two counts cannot be segregated.

D. Class Action For Unpaid Wages

In November 2004, Florida's First District Court of Appeals ruled that a class action (if framed to an appropriate scope) could proceed on behalf of hourly employees seeking recovery of unpaid wages for "off the clock" work. Oullette v. Wal-Mart Stores, Inc., 2004 WL 2726099 (Fla. 1st DCA 2004).

II. POST-TERMINATION COMMISSIONS

A. Are Employees Entitled To Post-Termination Commissions?

Employees who work for commissions typically are not paid until their sales close and/or their employer receives payment from the customer. As a result, upon separation, the question frequently arises: are employees entitled to receive commissions based upon sales made prior to separation when the deals do not close and/or the money is not collected until after separation?

The answer? It depends.

1. The General Rule: Commissions "Earned" During Employment Are Payable Post-Termination Upon Collection By Employer

The case of Cornell Computer Corp. v. Damion, 530 So.2d 497 (Fla. 3rd DCA 1988), is frequently cited for this general rule, derived from 56 C.J.S. *Master and Servant* § 92 (1948), that an employee does not ordinarily forfeit his or her right to payment of commissions by the termination of his or her employment. See, also, Comerford v. Sunshine Network, 710 So.2d 197 (Fla. 5th DCA 1998). However, this general rule only applies where (1) the commissions were truly "earned" prior to termination and (2) no exception applies.

2. Were The Commissions "Earned" Prior To Termination?

In some cases, the employee's role begins and ends with the sale of a product or service. Under those circumstances, the general rule of entitlement to payment of post-termination commissions will typically apply.

However, in other circumstances, payment of commissions are premised upon the performance of "services as an entirety." For example, a real estate salesperson may be required, subsequent to the signing of a contract for sale, to handle the closing. Similarly, some employees who sell advertising have a continuing role in servicing the account until the advertisements are published or aired. In situations of this type, commissions are not earned merely by making a sale prior to termination and, consequently, they are not payable post-termination. See, e.g., Gulfstream Homes of Tampa, Inc. v. Crawford, 583 So.2d 704 (Fla. 2nd DCA 1991) (salesperson who made sales, but did not complete deals through closing, was not entitled to post-termination commissions); Cueto v. John Allmand Boats, Inc., 334 So.2d 30 (Fla. 3rd DCA 1976) (employee

not entitled to post-termination commissions where job required servicing of customers after sales were made).

Assuming that a commission is "earned" prior to termination, it must be paid upon collection of the funds by the employer.

Unless, of course, an exception applies…

3. Is There A Contract, Policy Or Written Pay Plan?

Typically, where employers have advised employees in writing that earned, but unpaid, commissions are forfeited upon termination, courts have not permitted employees to recover post-termination commissions. See, e.g., Barr. v. Sun Life Assurance Company of Canada, 20 So. 240 (Fla. 1941); Comerford, 710 So.2d at 198. This is true even where the result seems Machiavellian (i.e. where an employee is terminated on the eve of the closing of a large deal that, absent termination, would have resulted in a significant commission).

D. Is There A Recognized Industry Practice?

Courts have recognized that, even where the employer has not advised employees in writing that earned, but unpaid, commissions are to be forfeited upon termination, employers are permitted to present evidence showing a "recognized custom in the trade, business or industry that the right to be paid a commission terminates with the employment." Comerford, 710 So.2d at 198.

For example, in Glickman v. Sears, Roebuck and Co., 2005 U.S. App. LEXIS (11th Cir. 2005) (unpublished), the Eleventh Circuit, applying Florida law, upheld summary judgment entered in an employer's favor on an unpaid post-termination commissions claim based upon uncontested testimony of an industry custom and practice of withholding commissions until the products were delivered to the customer.

III. UNPAID BONUSES

Claims for unpaid bonuses are typically based upon the law of unilateral contracts and/or unjust enrichment/*quantum meruit.* The key question is whether the employer's bonus policy is entirely discretionary as to both entitlement and amount or if, instead, an employees' right to payment of a bonus can vest and become actionable.

The following cases are illustrative:

Schram v. Emmer Development Corp., 541 So.2d 1292 (Fla. 1st DCA 1989). There, the court accepted the premise that the consistent payment of a "discretion bonus" over an extended period of time could ultimately create an implied contract. However, the court upheld the dismissal of the claim for unpaid bonuses on the ground that the plaintiffs had failed to present evidence sufficient to calculate the amounts to which they were entitled.

Community Design Corporation v. Antonell, 459 So.2d 343 (Fla. 3rd DCA 1984). There, the court found that where the criteria for entitlement to a bonus is objective (in this case, a bonus was promised if a project was completed to all employees still employee at Christmastime), the lack of a clear formula for determining the amounts due would not defeat a claim for unpaid bonuses. Rather, the jury could resolve the issue of the proper amounts due. [Note: the court also found the claim to be subject to Florida Statute 448.08.]

The Fair Labor Standards Act

An Ordered Approach

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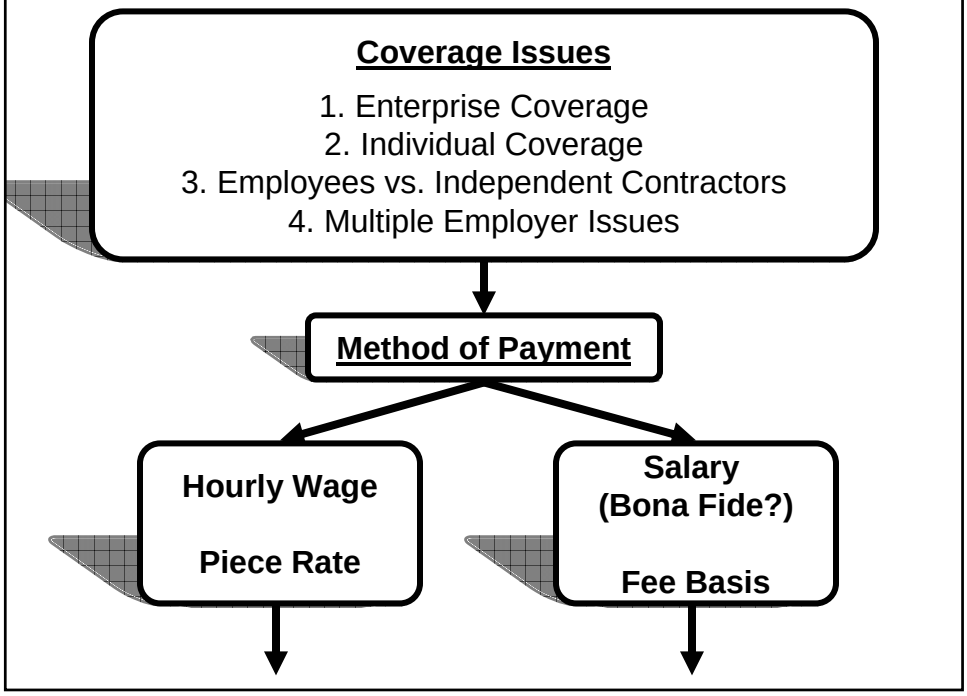

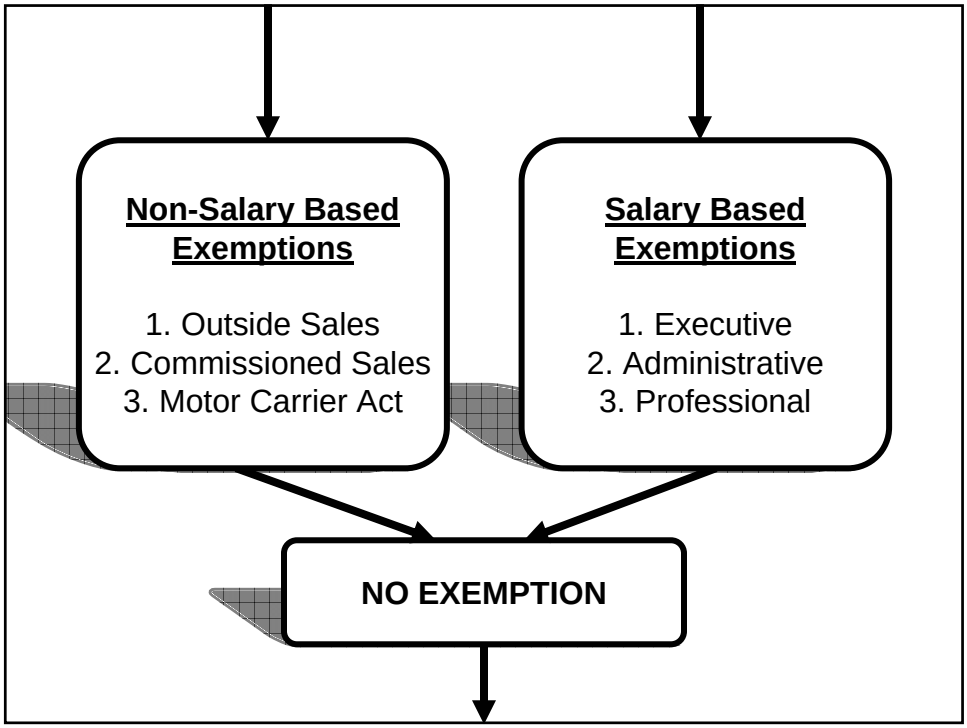
Non-Salary Based Exemptions
1. Outside Sales
2. Commissioned Sales
3. Motor Carrier Act
Salary Based Exemptions
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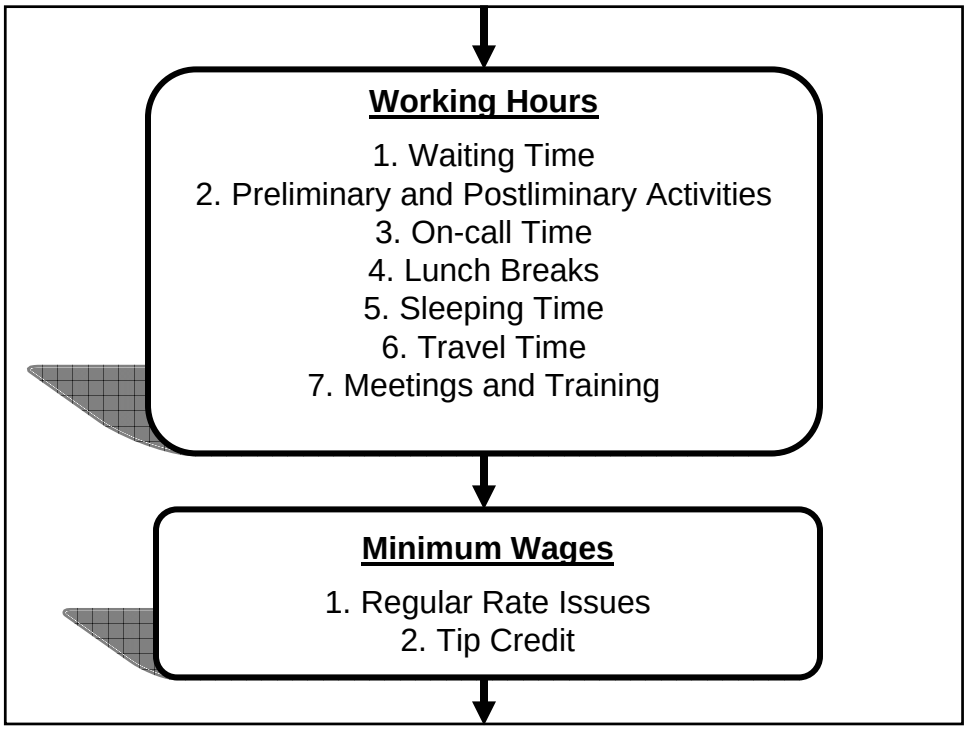
2. Administrative
3. Professional
NO EXEMPTION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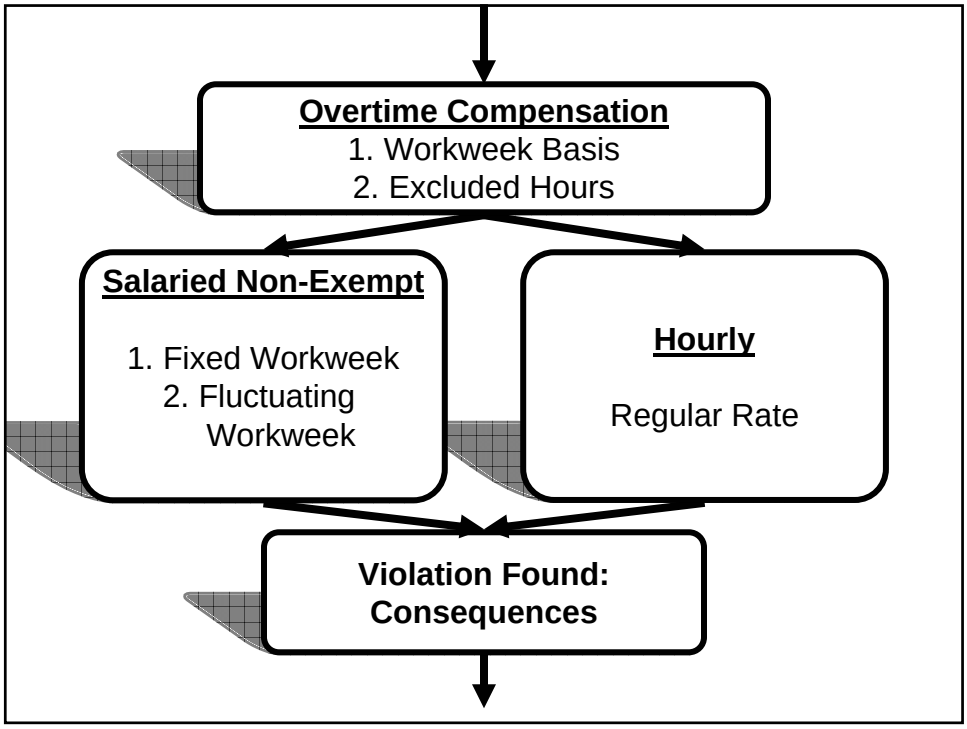
2. Preliminary and Postliminary Activities
3. On-call Time
4. Lunch Breaks
5. Sleeping Time
6. Travel Time
7. Meetings and Training
Minimum Wages
1. Regular Rate Issues
2. Tip Credit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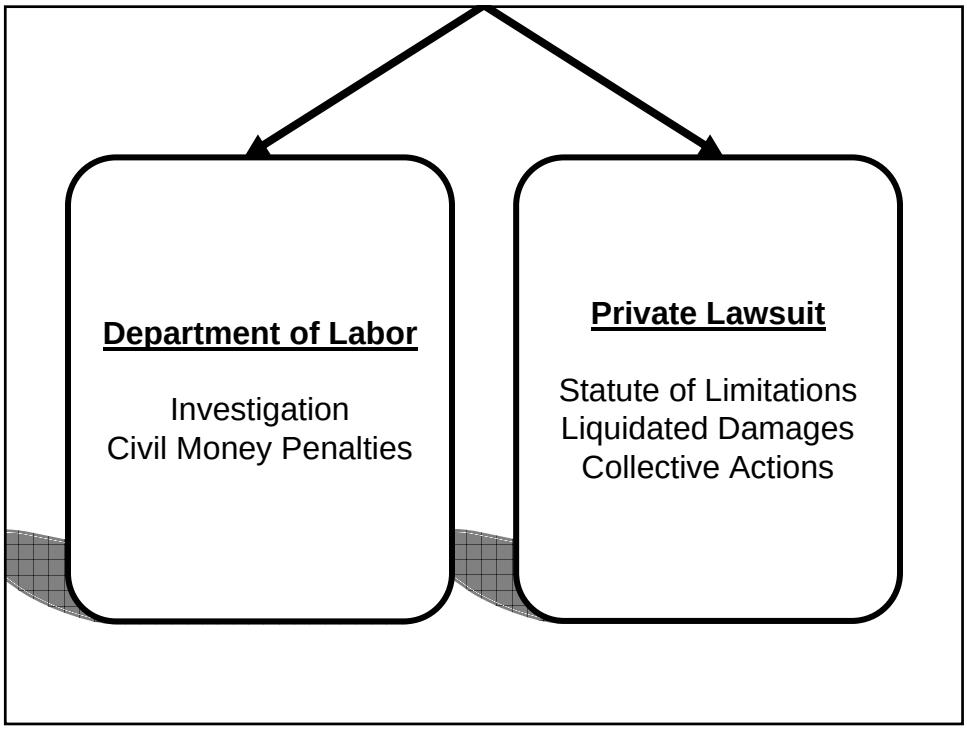
2. Excluded Hours
Salaried Non-Exempt
1. Fixed Workweek
2. Fluctuating Workweek
Hourly
Regular Rate
Violation Found: Consequences


Department of Labor
Investigation
Civil Money Penalties
Private Lawsuit
Statute of Limitations
Liquidated Damages
Collective Actions

Statutory and Common Law Protection of Business Interests

By

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STATUTORY AND COMMON LAW PROTECTION OF BUSINESS INTERESTS

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An important aspect of the practice of Labor and Employment Law is understanding the extent to which the law affords protection to certain "business interests." Specifically, businesses will often turn to the law to seek protection from unfair competition or from use of certain information by former employees. Similarly, former employees will seek remedies in law in situations where they believe that they are being unfairly restricted in their ability to pursue their careers and livelihood. This section of the Certification Review course addresses the historical development, statutory provisions and case law governing two significant issues encompassed in this area of the law: Covenants Not to Compete and Trade Secrets.

COVENANTS NOT TO COMPETE

Covenants not to compete, or "Non-Compete Agreements," are a form of restrictive covenant that typically limit a former business owner, executive or employee's ability to compete against his/her former business entity and/or employer. Employers often rely on such covenants to protect themselves from what they perceive as unfair competition by a former employee and, conversely, former employees will often challenge such covenants believing them to be unfair restrictions on their right to pursue their own business interests.

The State of Florida has attempted to balance these competing interests as evidenced by the legislative history of the Florida statute regarding non-compete agreements and the case law interpreting that statute. That legislative history and accompanying case law are most easily understood when viewed in three phases: 1) historical common law and the original version of the statute in effect prior to 1990; 2) the 1990 amendments to the statute; and 3) the 1996 amendments to the statute through to the present. Knowledge of the historical development of Florida's statute regulating non-compete agreements is not only helpful in gaining a full understanding of the law, but it is a necessary requirement for any labor and employment practitioner as the validity of non-compete agreements in Florida is determined *by the law that was in effect at the time the parties entered into the agreement*. *See, American Residential Services, Inc. v. Event Technical Services, Inc.*, 715 So.2d 1048, 1049 (Fla. 3rd DCA 1998) (noting that legal rules applicable to a particular non-compete agreement depend on when the agreement was signed); *See also, Gupton*

v. Village Key & Saw Shop, Inc., 656 So.2d 475 (Fla. 1995) (holding that the amendments to the non-compete statute were substantive in nature and therefore can only be applied prospectively, not retroactively). As such, this section provides a detailed analysis of the statute, and the case law interpreting its enforcement, at each stage of its development.

*Which Statute Applies

Prior to June 28, 1990:

The portions of the Anti-Trust Act governing employer/employee non-compete agreements, as written prior to June 28, 1990, still apply to non-compete agreements entered into before the act was amended effective on that date.

After June 28, 1990 and Before July 1, 1996:

Section 542.33

After July 1, 1996:

Section 542.335

Practice Pointer: The date the agreement was entered controls, not the date of enforcement or the breach.

Common Law and the Original Statute in Effect Prior to 1990

Florida law has historically found non-compete agreements to be contrary to public policy. *See, Flammer v. Patton,* 245 So.2d 854 (Fla. 1971) ("Contract provisions restraining or hindering a man's right to follow his calling were considered as void against public policy.").[1]

In an apparent attempt to reconcile this long-standing public policy with industry's need to protect itself from unfair competition, the Florida Legislature, in 1953, enacted Fla. Stat. §542.12.[2] The statute reiterated the principle that all contracts that restrain an individual's ability to engage in a lawful trade or business were void, but also expressly provided that Florida courts could enforce restrictive covenants in two circumstances: 1) when an agent or employee agreed to refrain from carrying on or engaging in a similar business and from soliciting his/her former employer's customers within a reasonably limited time period and geographic area; and 2) when partners, in anticipation of the dissolution of a partnership agreed that all or some of the partners would refrain from carrying on a similar business within a reasonably limited time period and geographic area.

[1] *See also,* Florida's Anti-Trust Act, *Fla. Stat. §542.18*, which establishes that "Every contract, combination, or conspiracy in restraint of trade in this state is unlawful."

[2] The statue was transferred/recodified as Fla. Stat. §542.33 in 1980.

From its inception through 1990, Florida's non-compete statute focused essentially on the reasonableness of the time period and geographic scope of the non-compete agreement in dispute. Florida courts interpreting the statute presumed irreparable injury in cases where an employee breached a valid covenant not to compete, without the necessity for the employer's alleging or proving any such irreparable injury. *See, Capraro v. Lanier Business Products, Inc.*, 466 So.2d 212 (Fla. 1985).

The 1990 Amendments and Interpreting Case Law

In 1990, the Florida Legislature amended Fla. Stat. §542.33. The effective date of the 1990 amendment was June 28, 1990, which means that, as explained above, non-compete agreements entered into *prior to June 28, 1990*, are governed by the 1953 version of the statue and the case law interpreting it.

The 1990 amendments effected several significant changes to the law regulating non-compete agreements. The amendments prevent courts from enforcing non-compete agreements against employees, independent contractors or agents when the agreements are contrary to public health, safety or welfare; unreasonable; or not supported by a showing of irreparable injury. Also, the 1990 amendments eliminated the judicially created presumption that a breach of a covenant not to compete will cause irreparable injury. Instead, the amendments expressly stated that such a presumption would only arise in three specific circumstances: 1) use of trade secrets; 2) use of customer lists; or 3) direct solicitation of existing customers. Moreover, in the event a seller of the goodwill of a business or a shareholder selling or otherwise disposing of all of his/her shares in a corporation breaches an agreement to refrain from carrying on or engaging in a similar business, irreparable injury under these circumstances is also presumed. In all other cases involving alleged violations, the employer had to plead and prove irreparable harm before obtaining injunctive relief. Notably, a contractual provision stipulating that a breach of a covenant not to compete would necessarily lead to irreparable injury will not satisfy the requirement of the 1990 amendments that an employer allege and prove such injury. *Spencer Pest Control Co. of Florida v. Smith*, 637 So.2d 292 (Fla. 5th DCA 1994).

After the enactment of the 1990 amendments, Florida courts applied the presumptions expressly stated in the statute. *See, e.g., Lovell Farms v. Levy,* 641 So.2d 103 (Fla. 3rd DCA 1994) (court acknowledged use of specific "trade secrets" would create a presumption of irreparable injury); *Merrill Lynch v. Hagerty,* 808 F. Supp. 1555 (S.D. Fla. 1992), aff'd 2 F.3d 405 (11th Cir. 1993) (use by a former account representative of his client list after his termination was sufficient to justify entry of a preliminary injunction); *Dyer v. Pioneer Conceptions, Inc.*, 667 So.2d DCA 1996) (where use of confidential business information is proven, the court properly enjoined competition by former employee); *Kephart v. Hair Returns, Inc.,* 685 So. 2d 959, 961 (Fla. 4th DCA 1996) (Employer denied enforcement of a covenant not to compete where there was no showing of irreparable injury. The former employer was serving the employers customers who came to her, but she was not directly soliciting their business. ***Direct solicitation is required to raise the presumption of***

irreparable injury.); *King v. Jessup*, 698 So. 2d 339 (Fla. 5th DCA 1997) (Although placing an advertisement in local newspaper was certainly a form of solicitation, it was not a form of "direct solicitation" of past patients; the fact that past patients voluntarily sought out appellee at his new practice did not establish direct solicitation; and the record contained sufficient competent evidence to support the conclusion that appellant failed to establish he had suffered irreparable injury by appellee's breach of the covenant not to compete. An employee soliciting its customers does not by itself establish the irreparable injury that is required under the statute); *Sun Elastic Corporation v. O.B*, 603 So. 2d 516 (Fla. 3d DCA 1992) (The court granted relief to the employer where the former employee directly solicited its customers).

Notwithstanding the more specific provisions of the amendments, there remained several ambiguities in interpreting the statute. Ultimately, these ambiguities, and the absence of clearly defined guidelines, led to a series of judicial decisions which attempted to create a more workable standard to determine the enforceability of non-compete agreements in Florida. This effort, and the conflict it precipitated, is exemplified by the decision in *Hapney v. Central Garage, Inc.*, 579 So.2d 127 (Fla. 2d DCA 1990), *rev. denied*, 591 So.2d 180 (Fla. 1991), and the subsequent rulings addressing that decision.

In *Hapney*, the Plaintiff had nearly seven (7) years of prior experience working in the business of installation and repair of car and truck air conditioning systems. He worked for Central Garage for 91/2 months, during which time he signed a non-compete agreement. Notably he executed the agreement prior to the effective date of the 1990 amendments. While he was employed by Central Garage, Mr. Hapney received little or no additional training, he had no access to the company's trade secrets or confidential information, and he developed no significant relationships with Central Garage's customers. Ultimately, Mr. Hapney left his employment with Central Garage and began working for a competitor. Central Garage then sought and obtained an injunction to enforce Mr. Hapney's covenant not to compete. On appeal, however, the Second District Court of Appeal reversed the trial court, and refused to uphold the injunction.

In arriving at its decision, the Second DCA adopted a "legitimate business interest test" – a test that was not expressly set out in the statute. Under this test, a court had the power to extend its analysis of reasonableness beyond simply examining the time and geographic restrictions contained in the non-compete agreement. Rather, the *Hapney* court examined whether the covenant as a whole was reasonable. More specifically, the court required Central Garage to demonstrate that the non-compete agreement it sought to enforce was based on the need to protect a "legitimate business interest," aside from merely restraining Mr. Hapney from competing with the former employer.

In the aftermath of *Hapney*, several other District Courts of Appeal in Florida questioned the 2nd DCA's analysis. Courts ruled that the 1990 amendments did not apply to non-compete agreements executed prior to their enactment and that there was no requirement of a "legitimate protectible interest" prior to those amendments. *See, Gupton v. Village Key*

and Saw Shop, Inc., 656 So.2d 475 (Fla. 1995); *Chandra v. Gadodia*, 610 So.2d 15 (Fla. 5th DCA 1992). Moreover, the 5th DCA also held that no such requirement for a "legitimate protectible interest" exists under the 1990 amendments at all. *See, Jewett Orthopaedic Clinic PA v. White*, 629 So.2d 922 (Fla. 5th DCA 1993). In *Jewett*, an orthopedic surgeon sought a declaratory judgment regarding the enforceability of a non-compete covenant that he had executed with his former employer. In reaching its decision, the 5th DCA ruled that courts must balance "the employer's interest in preventing competition against the oppressive effect of the covenant on the employee." *Id*. at 926. Conspicuously absent from the 5th DCA's ruling in *Jewett* was any analysis of the "legitimate business interest" test employed by the 2nd DCA in *Hapney*. In addition, the *Hapney* test was also not utilized by the 3rd DCA in *Sun Elastic Corp. v. O.B. Industries*, 603 So.2d 516 (Fla. 3rd DCA 1992). In that case, the Court ruled that when there is a direct solicitation of a former employer's customers by a former employee (which is presumed to constitute irreparable injury under the 1990 amendments), it is not necessary to consider the direct holding of *Hapney*.

Given the decisions in *Hapney* and the cases that followed, a situation had clearly developed wherein the same non-compete agreement could be analyzed under different standards within the state of Florida.

"Blue Pencil Rule"

In the case of *Health Care Financial Enterprises v. Levy*, 715 So.2d 341 (Fla. 4th DCA 1998), the court can modify a covenant or "blue pencil" an agreement. "If an unreasonable geographical area is modified to be reasonable, enforcement of the modified covenant would not violate the statute. The statute does not, accordingly, require court to refuse to enforce merely because the geographic area is unreasonable.

<u>The 1996 Amendments and the Current State of the Law</u>

In 1996, the Florida Legislature again revisited its statute regulating non-compete agreements and, at that time, enacted Fla. Stat. §542.335 which now governs enforcement of all restrictive covenants entered into or having an effective date *on or after July 1, 1996.*

The new statute represents an attempt to bring more clarity to this area of the law, both for employers and employees. It retains the "legitimate business interest" requirement articulated in *Hapney*, but it supplements this approach with a set of explicit guidelines for determining "reasonableness" and a less restricted view of which business interests are worthy of restrictive covenant protection.

Section 542.335 is broadly "aimed at making enforcement of bona fide restrictive covenants easier and more certain." See John A. Grant & Thomas Steele, Restrictive Covenants: Florida Returns to the Original "Unfair Competition" Approach to the 21st Century, 70 Fla. B.J. 53, 53-56 (Nov. 1996); see also § 542.335(1)(h) ("A court shall

construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement.").

1. General Provisions

The 1996 statute first generally provides that enforcement of contracts that restrict or prohibit competition is not prohibited so long as they are reasonable in time, area, and line of business. Fla. Stat. §542.335(1). As a preliminary matter, the statute also expressly establishes that a court shall not enforce any non-compete agreement that is not in writing and signed by the person against whom enforcement is sought. Fla. Stat. §542.335(1)(a). Sections 542.335(1)(b) – (e) of the statute go on to mandate that the person seeking enforcement of a restrictive covenant *plead and prove*: 1) the existence of one or more "legitimate business interests"; and 2) that the contractually specified restraint is "reasonably necessary" to protect such interests.

Under the 1996 statute, the violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant. *JonJuan Salon, Inc. v. Acosta*, 922 So.2d 1081, 1084 (Fla. 4th DCA 2006) (quoting § 542.335(1)(j), Fla. Stat.); *Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C.,* 939 So. 2d 268, 271 (Fla. 4th DCA 2006); *Don King Prods., Inc. v. Chavez*, 717 So. 2d 1094 (Fla. 4th DCA 1998). The presumption is rebuttable. *See Litwinczuk*, 939 So. 2d at 271. However, *see Variable Annuity Life Ins. Co. v. Hausinger*, 927 So. 2d 243, 245 (Fla. 2nd DCA 2006) (that employer was able to demonstrate actual financial losses as to seven specific clients did not preclude entry of injunction and this evidence did not rebut the presumption of irreparable harm); *North American Products Corp. v. Moore*, 196 F. Supp. 2d 1217, 1230-31 (M.D. Fla. 2002) (The focus of preliminary injunctive relief is on maintaining long standing relationships and preserving the goodwill of a company built up over the course of years of doing business. . . .Plaintiff's argument that there is no irreparable harm because Plaintiff's injuries, if any, are subject to a monetary judgment, is equally without merit and has been rejected by other courts, where, as here, there is a statutory presumption of irreparable harm); *JonJuan Salon, Inc. v. Acosta*, 922 So.2d 1081, 1085 (Fla. 4th DCA 2006) (characterizing argument as flawed where employee claimed that because a solicitation was unsuccessful, the presumption of irreparable injury was rebutted).

2. Legitimate Business Interest

Section 542.335(1)(b) establishes the requirement to plead and prove a "legitimate business interest" in order to enforce a non-compete agreement and specifically identifies a non-exhaustive list of such "interests" that warrant protection under the statute:

1. Trade secrets, as defined in § 688.002(4), Fla. Stat.
2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.

3. Substantial relationships with specific prospective or existing customers, patients, or clients.
4. Customer, patient or client goodwill associated with: a) an ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress"; b) a specific geographic location; or c) a specific marketing or trade area.
5. Extraordinary or specialized training.

This section of the statute explicitly mandates that any restrictive covenant not supported by a "legitimate business interest" is "unlawful and is void and unenforceable." Fla. Stat. §542.335(1)(b).

3. Reasonableness

Sections 542.335(1)(c) and (d) establish the secondary requirement to plead and prove "reasonableness" and they also provide a list of presumptions regarding durations for which a restrictive covenant will be found to be enforceable. Specifically, Section 542.335(d) expressly provides that:

1. In the case of a restrictive covenant sought to be enforced against a former employee, agent or independent contractor, a court shall *presume reasonable in time any restraint 6 months or less* in duration and shall presume *unreasonable in time any restraint more than 2 years in duration.*[1]

2. In the case of a restrictive covenant against a former distributor, dealer, franchisee, or licensee of a trademark or service mark, a court shall presume *reasonable in time any restraint 1 year or less in duration* and shall presume *unreasonable in time any restraint more than 3 years in duration.*[2]

3. In the case of a restrictive covenant sought to be enforced against the seller of all or a part of: a) the assets of a business or professional practice, or b) the shares of a corporation, or c) a partnership interest, or d) a limited liability company membership, or e) an equity interest, of any other type, in a business or professional practice, a court shall presume *reasonable in time any restraint 3 years or less in duration* and shall presume *unreasonable in time any restraint more than 7 years in duration*.[3]

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[1] This provision applies to restrictive covenants not predicated upon the protection of trade secrets and not associated with the sale of all or a part of: a) the assets of a business or professional practice, or b) the shares of a corporation, or c) a partnership interest, or d) a limited liability company membership, or e) an equity interest, of any other type, in a business or professional practice.

[2] This provision applies to restrictive covenants not predicated upon the protection of trade secrets and not associated with the sale of all or a part of: a) the assets of a business or professional practice, or b) the shares of a corporation, or c) a partnership interest, or d) a limited liability company membership, or e) an equity interest, of any other type, in a business or professional practice.

[3] This provision applies to restrictive covenants not predicated upon the protection of trade secrets.

In addition, Section 542.335(1)(e) establishes that, in determining the reasonableness in time of a restrictive covenant predicated upon the protection of trade secrets, a court shall presume *reasonable in time any restraint of 5 years or less* and shall presume *unreasonable in time any restraint of more than 10 years*.

Notably all of the specific presumptions regarding time restraints in Sections 542.335(1)(d) and (e) are rebuttable presumptions. *See, Flickenger v. R.J. Fitzgerald & Co., Inc.*, 732 So.2d 33 (Fla. 2nd DCA 1999) (holding it is error for a court to enforce a restrictive covenant beyond the two year period of the statutory presumption in the absence of evidence showing necessity for a longer period); *Southernmost Foot and Ankle Specialists v. Torregrosa*, 891 So.2d 591(Fla. 3rd DCA 2004), *reh'g denied*, 2005 Fla. App. LEXIS, *rev. dismissed*, 901 So.2d 121 (Fla. 2005) (trial court erred in narrowing geographic scope and two-year term of agreement; term not unreasonable).

With respect to the "reasonableness" of geographic scope, the 1996 statute does not prohibit or prevent enforcement of nationwide non-compete agreements, as long as they can satisfy the "reasonably necessary" test. Similarly, under the prior versions of the statute, an employer was permitted to enforce a nationwide non-compete restriction so long as the restriction being enforced was reasonable in nature. *See, Auto Club Affiliates v. Donahey*, 281 So.2d 239 (Fla. 2nd DCA 1973).

4. Shifting Burdens and the "Blue Pencil" Rule

Once the party seeking to enforce a restrictive covenant establishes a "legitimate business interest" and proves that the restriction at issue is "reasonably necessary" to protect that interest, the party opposing enforcement then bears the burden of establishing that the restriction is "overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests." Fla. Stat. sec. 542.335(1)(c). Notably, under Section 542.335(1)(c), if a court finds that a restriction is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest(s) at issue, that court cannot simply refuse to enforce the restrictive covenant in its entirety. Rather, Section 542.335(1)(c) mandates that, upon making such a finding, "a court *shall* modify the restraint and grant only the relief reasonably necessary to protect such interest or interests." Although the process whereby a court may modify or "blue pencil" a particular restriction is codified in Section 542.335(1)(c), courts historically applied the "blue pencil" practice to its predecessor, Section 542.33. *See, Health Care Financial Enterprises v. Levy*, 715 So.2d 341, 342 (Fla. 4th DCA 1998) ("If an unreasonable geographic area is modified to be reasonable, enforcement of the modified covenant would not violate the statute. The statue does not, accordingly require courts to refuse to enforce merely because the geographic area is unreasonable").

5. Third-Party Beneficiaries, Assigns and Successors

The 1996 statute also expressly addresses the issue of enforcement of restrictive covenants where the party seeking enforcement is a third-party beneficiary of such covenant or is an assignee or successor to a party to the covenant. Specifically, Section 542.335(1)(f)(1) states that a court "shall not refuse enforcement" of a restrictive covenant on the grounds that the party seeking enforcement is a third-party beneficiary where the restrictive covenant expressly identified the party as a third-party beneficiary and expressly stated that the restrictive covenant was intended for the benefit of that party. Similarly, Section 542.335(1)(f)(2) states that a court "shall not refuse enforcement" of a restrictive covenant on the grounds that the party seeking enforcement is an assignee or successor where the restrictive covenant expressly authorized enforcement by such parties. Subsequent to the 1996 statute, Florida courts addressed – and disagreed over -- issues regarding the necessity for an "expressly authorized" assignment in cases involving asset purchases, stock purchases, corporate mergers and name changes. *Compare*, *Sears Termite & Pest Control, Inc. v. Arnold*, 745 So.2d 485, 486 (Fla. 1st DCA 1999)(no assignment necessary where plaintiff acquired the defendant's former employer through a total stock purchase) *and*, *Phillips v. Corporate Express Office Products, Inc.* 800 So.2d 618, 621 (5th DCA 2001), *rev. gr.,* 821 So.2d 294 (Fla. 2002) (where companies acquired through asset purchases, stock purchases, mergers and name changes, surviving corporation could not enforce non-compete agreements without provisions binding successors and assigns). Upon review of *Phillips,* the Florida Supreme Court resolved the issue holding that, in contrast to an asset purchase, neither a 100 percent purchase of corporate stock, nor a corporate merger or name change affects the enforceability of non-compete agreements. *Corporate Express Office Products v. Phillips*, 847 So.2d 406 (Fla. 2003).

See also Wolf v. James G. Barrie, P.A., 858 So.2d 1083 (Fla. 2nd DCA 2003):

> Veterinarian employee signed restrictive covenant in 1992 with predecessor. In 2002, predecessor sold the assets of the practice to successor with whom employee worked as an independent contractor. Shortly after asset sale, employee opened his own vet practice. The predecessor and successor agreed to rescind asset sale. Subsequent to the rescission, predecessor attempted to revive non-compete with former employee and sued him to prevent him from practicing on his own. The court held that Phillips controlled and that the ***non-compete was unenforceable*** since the predecessor sold its assets to the successor which required the employee's consent to a transfer of the non-compete. Moreover, the predecessor and successor's agreement to rescind their asset sale could not unilaterally resurrect the non-compete between the predecessor and the employee which had terminated upon the date of the asset sale.

6. Defenses

Section 542.335(1)(g) of the 1996 statute specifically addresses certain defenses to enforcement which are, or expressly are not, available. That Section first states that a court "shall not" consider any individualized or other economic hardship that might be caused to the person against whom enforcement is sought. Fla. Stat. § 542.335(1)(g)(1). The Section does allow courts to consider as a defense the fact that the person seeking enforcement no longer continues in business in the area or line of business that is the subject of the enforcement action provided that such discontinuance of business is not the result of a violation of the restriction. Fla. Stat. sec. 542.335(1)(g)(2). Section 542.335(1)(g)(3) specifically mandates that courts "shall consider all other pertinent legal and equitable defenses." These may include, but are not limited to, lack of a legitimate business interest, prior material breach by the employer and the doctrine of unclean hands. *See Benemerito & Flores, M.D.'s, P.A. v. Zeidy Roche, M.D.*, 751 So.2d 91 (Fla. 4th DCA 1999) (court upheld denial of temporary injunction where evidence supported trial court's finding that the party seeking to enforce did not pay entire bonus due to former employee.); *Bradley v. Health Coalition*, *Inc.* 687 So.2d 329 (Fla. 3rd DCA 1997)(court ruled that it was error for trial court to not consider employee's defense that former employer wrongfully withheld commissions.); *Harrison v. Palm Harbor MRI, Inc.*, 703 So.2d 1117 (Fla. 2nd DCA 1997) (court reversed the grant of a temporary injunction enforcing a non-compete agreement where the trial court refused to allow the former employee to introduce evidence of sexual harassment by the employer's principal as an affirmative defense to enforcement of the agreement). Finally, Section 542.335(1)(g)(4) also requires that a court consider "the effect of enforcement upon the public health, safety and welfare." *See*, *Torregrosa*, 891 So.2d at 592 (court erred in reducing term and geographic scope of injunction enjoining podiatrist from certain competing activities, but it was in the public interest to allow him to maintain staff privileges at certain hospitals where he was the only podiatrist on staff).

7. Rules of Construction and Public Policy

Sections 542.335(1)(h) and (i) also contain specific mandates regarding enforcement. Specifically, Section 542.335(h) requires that courts construe restrictive covenants in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement. That Section also prohibits courts from employing any rule of construction that would require the court the construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract. Section 542.335(1)(i) also expressly prohibits courts from refusing to enforce an otherwise enforceable restrictive covenant on "public policy" grounds, unless such public policy is articulated specifically by the court and the court finds that the specified public policy requirements outweigh the need to protect the legitimate business interests established by the party seeking enforcement.

8. Injunctive Relief

The 1996 statute also authorizes courts to enforce restrictive covenants by any "appropriate and effective remedy" which includes temporary and permanent injunctions. Fla. Stat. sec. 542.335(1)(j). This Section of the statute also states unequivocally that the violation of an enforceable restrictive covenant creates a "presumption of irreparable injury" to the person seeking enforcement for purposes of obtaining relief. As such, a party seeking to enforce a restrictive covenant is not required to present specific evidence regarding exactly how the conduct will cause injury. *See*, *America II Electronics v. Smith*, 830 So.2d 906, 908 (Fla. 2nd DCA 2002). Section 542.335(1)(j) also instructs courts that no temporary injunction shall be entered unless the person seeking enforcement gives a proper bond and prohibits courts from enforcing any contractual provision purporting to waive such requirement or to limit the amount of such bond. *See*, *Diaz v. Adcock Ins. Agency*, 729 So.2d 465, 466 (Fla. 2nd DCA 1999)(1996 statute expressly requires employers seeking a temporary injunction to post a bond).

9. Attorney's Fees

The 1996 statute also clarified another issue left uncertain by the 1990 version – attorney's fees and costs. Specifically, the 1990 version did not contain a provision authorizing an award of attorney's fees to the prevailing party in actions involving enforcement of restrictive covenants. As a result, unless the contract itself had such a provision, the issue was left unaddressed. Section 542.335(1)(k) of the 1996 statute however, specifically authorizes an award of attorney's fees and costs to the prevailing party in any action seeking the enforcement of, or challenging the enforceability of, a restrictive covenant. Notably, this Section also prohibits courts from enforcing any contractual provision which purports to limit the court's authority in this regard.

10. Decisions Interpreting 1996 Statute

Since the enactment of the 1996 statute Florida courts have addressed several issues requiring analysis and interpretation of the specific provisions in that statute. A review of some of those decisions provides insight into how, and to what extent, restrictive covenants are being enforced under the current state of the law.

In *Anich Industries, Inc. v. Raney*, 751 So.2d 767 (Fla. 5th DCA 2000), the Court addressed the issue of whether a former employer had met its burden to plead and prove a "legitimate business interest." In that case, an industrial tool and equipment supplier appealed the trial court's denial of an order to enjoin a former employee, Raney, from violating the terms of an employment contract containing a non-compete covenant. In that case, the employee signed the non-compete agreement just three days after she began her employment, and she resigned her position after less than three months, wherein she then began working for one of Anich Industries' competitors. *Id.*, at 768. In seeking to enforce the restrictive covenant provision, the company argued that it had established several "legitimate

business interests," including: trade secrets, valuable confidential information and substantial relationships with specific customers which Raney derived through her work with Anich. *Id*., at 770. The appellate court, however, found that Anich did not prove that Raney possessed trade secrets or valuable confidential information, and that Raney's knowledge of the company's costs, profits and pricing structure was disputed. *Id*., at 771. Additionally, the court ruled that Raney's knowledge of the company's customers' purchasing history, needs and specifications was disputed, and that the company's customers were commonly known. As such the court rejected the former employer's contention that it had a "legitimate protectible business interest" and ruled that the trial court was correct in not granting a temporary injunction to enforce the non-compete agreement.

In addition to trade secrets, confidential information and customer relationships, Florida courts have also addressed the "specialized training" provision in the 1996 statute's list of "legitimate business interests." In *Balasco v. Gulf Auto Holding, Inc.*, 707 So.2d 858 (Fla. 2nd DCA 1998), the court held that a restrictive covenant was reasonably necessary to protect the employer's "substantial investment" in specialized training for its sales staff. The court also held that promoting employee productivity (by means of preventing former employees from raiding staff) and maintaining a competent and specialized sales team were "legitimate business interests" worthy of protection. *See also*, *Aero Kool Corporation v. Oosthuzien*, 736 So.2d 25 (Fla. 3rd DCA 1999) (the court reversed the denial of a temporary injunction against a former employee who had signed a six (6) month covenant not to compete, and who had received training in aircraft component repair).

Notably, the decision in *Balasco* also illustrates a Court's exercise of its authority to modify a restrictive covenant found to be "overlong." In *Balasco* the Court ruled that the non-compete agreement's 36-month restriction on employee solicitation was not reasonable under the circumstances, and the court thus modified the restriction to the presumptively reasonable 2-year duration provided for under Section 542.335. Similarly, in *Open Magnetic Imaging, Inc. v. Nieves-Garcia*, 826 So.2d 415 (Fla. 3rd DCA 2002), the Court utilized the "blue pencil" rule as codified in Section 542.335(1)(c) to narrow the scope of the proposed geographic region down to the one county (Miami-Dade) where the employee had actually worked, as opposed to enforcing the restriction as drafted, which encompassed the three counties (Miami-Dade, Broward and Palm Beach) where the employer operated MRI centers. *Id*., at 418. Moreover, in *Nieves-Garcia*, the court reversed the trial court's refusal to enforce the non-compete agreement on the grounds that Nieves-Garcia was not informed at the outset of her employment (in her offer letter) that she would be required to sign the non-compete agreement. The court specifically ruled that, "where employment is terminable at will by either the employer or the employee, Florida courts have routinely enforced non-compete agreements even where an employee has been requested to execute such agreement after the commencement of employment." *Id*., at 417, *citing*, *Costal Unilube v. Smith*, 598 So.2d 200 (Fla. 4th DCA 1992)(holding that an employee's continued employment was adequate consideration to support a covenant not to compete entered into after the employee had begun his employment).

In *Austin v. Mid State Fire Equipment of Central Florida, Inc.*, 727 So.2d 1097 (Fla. 5th DCA 1999), Austin appealed a temporary injunction which enforced the terms of a non-compete agreement entered into with his former employer. More specifically, the agreement prohibited Austin from: 1) working for a competing business; 2) soliciting any of Mid State's customers; and 3) disclosing any pricing information to any third party. *Id.*, at 1098. In challenging the injunction, Austin argued that the agreement did not further a "legitimate business interest" and that, even if it did, the injunction was overbroad. The 5th DCA found no error in the trial court's determination that Mid State had established a legitimate business interest and, therefore, the court affirmed the temporary injunction to the extent that it enjoined Austin from soliciting customers and from disclosing pricing information. *Id*. However, the court found no evidence that Mid Sate would be irreparably harmed by Austin's merely working for another fire equipment company so long as he agreed not to divulge price information or to approach Mid State's customers.[1] As such, the court reversed and remanded the case back to the trial court to limit the injunction accordingly. *Id*.

Finally, in *Tusa v. Roffe*, 791 So.2d 512 (Fla. 4th DCA 2001), the Court was presented with the issue of enforcement with respect to a third-party beneficiary. Plaintiff Tusa executed a ten (10) year business lease with Roffe, which included a restrictive covenant that prohibited Roffe from leasing space to other parties who intended to sell pizza on the same premises. Shortly after entering into a lease with Tusa, Roffe leased a space in the same building to a restaurant that sold pizza. Tusa then filed suit against Roffe, as well as the other tenant, when Roffe refused to remedy the situation. *Id.*, at 513. The court ruled that Tusa had no cause of action against the other tenant because Section 542.335(1)(f)(1) requires that the restrictive covenant expressly identify an intended third-party beneficiary and state that the restrictive covenant was intended for the benefit of such person or entity. *Id.*, at 514. The court held that Tusa and the other tenant had no privity of contract with one another and that the lease between Roffe and the other tenant did not identify Tusa as a third-party beneficiary. *Id*. Notwithstanding, the court did hold that Tusa was entitled to injunctive relief with respect to Roffe. More specifically, the court held that the restrictive covenant in the lease protected Tusa from losing customers to another restaurant that sold pizza on the same premises, and that this was a "legitimate business interest."

In *Leighton v. First Universal Lending, LLC*, 925 So. 2d 462 (Fla. 4th DCA 2006), the court held that a non compete can be enforceable against a third party, but third party must be provided with notice.

In *Gray v. Prime Mgmt. Group, Inc.*, 912 So. 2d 711 (Fla. 4th DCA 2005), former employees started a new company after the left the former employer. One of the former

[1] The court also noted that this was not a case where Austin had received "specialized training" or other "specialized knowledge" from the employer, and the court further observed that Austin had been in the industry for 16 years, and that he had previously worked for Orlando Fire Equipment Company (the competitor who was currently employing Austin, thus triggering Mid State to enforce its non-compete agreement) prior to his employment with Mid State. *Id.*, at 1098.

employees had signed an employment contract with covenant not to compete and nondisclosure of information clauses. The term of employment under the contract was to end five years from the commencement date unless extended by the mutual agreement of the parties. The restrictive covenant prohibited the former employee from competing with the former employer and from soliciting the business of its clients for 18 months following termination of the agreement. The trial court found that after the expiration date the former employee continued to work for the former employer as if the agreement continued in full force and effect. Thus, it concluded that an implication arose that the parties had mutually assented to a new contract containing the same provisions as the old. The appellate court found that where a written employment contract expired and the employee continued working under an oral contract, a covenant not to compete could not always be enforced. The Statute of Frauds, Fla. Stat. ch. 725.01, required the written renewal of the former employee's fully performed contract.

See also Edwards v. Harris, 964 So. 2d 196 (Fla. 1st DCA 2007)

> Covenant unreasonable when it inflicts an unduly harsh or unnecessary result upon the employee. Reversed trial court's order enjoining former employee from working with a competing employer in any capacity. There was no evidence that the employer would be harmed simply by the former employee's employment with a competitor. Instead, the injunction should have only prevented the employee from engaging in activities harmful to the legitimate business interest

Alvarez v. Rendon, 953 So. 2d 702 (Fla. 5th DCA 2007)

> Jury verdict finding that professional association was not justified in terminating physician for cause, and yet finding that physician was bound by non-compete clause of buy-sell agreement, was inconsistent, where professional association never offered to buy physician's shares at "termination without cause" price, thus failing to purchase physician's stock as required by the agreement.

H & M Hearing Associates, LLC v. Nobile, 950 So. 2d 501 (Fla. 2nd DCA 2007)

> Former employer failed to establish irreparable harm arising out of former employee's acceptance of employment with a competitor, but trial court's failure to consider whether former employee's loan of funds to competitor and guaranty of competitor's account with a supplier constituted ongoing violations of covenant required reversal.

COMPARE:

Florida Hematology & Oncology v. Tummala, 927 So. 2d 135 (Fla. 5th DCA 2006)

> Relying on "express language of the statute", court refused to recognize as a "legitimate business interest" justifying a non-compete agreement the cultivation of ***referral relationships***, even though evidence was clear that employer (and most other medical specialists) receive the significant share of their new patients from referring physicians and expend effort, money and energy to cultivate referral relationships. "What referring physicians supply is a stream of unidentified prospective patients with whom employer had no prior relationship."

Southernmost Foot and Ankle Specialists, P.A. v. Torregrosa, 891 So. 2d 591 (Fla. 3rd DCA 2004)

> Legitimate business interests include "patient base, ***referral doctors***, specific prospective and existing patients, and patient goodwill."

TRADE SECRETS

As noted above, the Florida Legislature has expressly recognized the protection of trade secrets as a "legitimate business interest" in the 1996 amendments to its statute regulating restrictive covenants. *See* Fla. Stat. § 542.335(1)(b)(1). Although that statute affords certain protections in this regard, the State of Florida has also established an independent statutory provision specifically for the purpose of protecting against the misappropriation of legitimate "trade secrets." The statute consists of nine (9) separate sections and is collectively referred to as the Florida Uniform Trade Secrets Act ("FUTSA"). *See* Fla. Stat. § 688.001 – § 688.009

Prior to the enactment of the Florida Uniform Trade Secrets Act, courts relied in large part on the Restatement (First) of Torts, Section 757, as a legal basis for enjoining an individual from use or disclosure of trade secrets. *See, Lee v. Cercoa, Inc.*, 433 So.2d 1, 2 (Fla. 4th DCA 1988) (court relied on several sources, including the Restatement of Torts, in finding that "as a property right, the trade secret is protected against its appropriation or use without the owner's consent); *Detolo v. Schouten*, 426 So.2d 1013, 1015 (Fla. 2nd DCA 1983)("The misappropriation and continuing use of a trade secret constitutes a continuing tort"), *citing*, 55 Am. Jur. 2d, *Monopolies, Restraint of Trade, and Unfair Trade Practices*, Section 713. However, in 1979 the National Conference of Commissioners on Uniform State Law approved and recommended the Uniform Trade Secrets Act ("UTSA") in order to codify and make uniform the basic common law principles of trade secret protection. In 1988, Florida enacted its version of UTSA, the Florida Uniform Trade Secrets Act. The Legislature expressly stated that the general purpose of the statue was "to make uniform the law with respect to the subject of this act among states enacting it." Fla. Stat. sec. 688.009. The Legislature also made clear within the statute that the provisions of FUTSA "displace conflicting tort, restitutory and other law of this state providing civil remedies for misappropriation of a trade secret." Fla. Stat. sec. 688.008.

The Florida Uniform Trade Secrets Act

1. Trade Secret

In order to secure relief under FUTSA, a party must first establish that the information at issue meets each element of the statute's definition of a "trade secret." The determination of whether certain information constitutes a recognizable "trade secret" as defined by the Act is a question of fact. *See*, *DelMonte Fresh Produce Co. v. Dole Monte Fresh Fruit Co.*, 136 F.Supp.2d, 1271, 1292-93 (S.D. Fla. 2001). Under Florida law, the claimant in a trade secret action bears the burden of demonstrating that the information for which protection is sought meets the statute's definition. *See*, *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998), *citing, Lee* 433 So.2d at 2; *RX Solutions, Inc. v. Express Pharmacy Services, Inc.*, 746 So.2d 475 (Fla. 2nd DCA 1995). Section 688.002(4) defines "trade secret" to mean:

> information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

2. Misappropriation

In addition to establishing that the information at issue meets this definition, a claimant must also demonstrate that the information was "misappropriated" as that term is defined by the statute. Section 688.002(2) defines "misappropriation" in terms of two distinct causes of action, acquisition and disclosure:

> (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
>
> (1) used improper means to acquire knowledge of the trade secret; or;
>
> (2) at the time of disclosure or use knew or had reason to know that her or his knowledge of the trade secret was:
>
> (a) derived from or through a person who had utilized improper means to acquire it;

(b) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(c) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(3) before a material change of her or his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

If the party seeking relief under FUTSA fails to meet any element of the statutory definition of "trade secret" -- or fails to establish that the information at issue was the subject of a "misappropriation" as defined by the statute -- that party will not prevail. In *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F.Supp.2d 1064 (S.D. Fla. 2003), the Court granted Defendant's *Fed. R. Civ. P.* 12(b)(6) motion to dismiss where Plaintiffs failed to meet their burden with respect to both definitions in the statute. Specifically, Plaintiffs (1) failed to allege that the information at issue had economic value from not being generally known to others and that they undertook measures to keep it confidential and (2) failed to allege that the hospital knew the information was a trade secret or that it knew that it was acquired through improper means. *See also*, *Liberty Am. Ins. Group, Inc. v. Westpoint Underwriters, L.L.C.*, 199 F.Supp.2d 1271 (M.D. Fla. 2002) (court found that mobile home insurance company's list of mobile home parks and data file was not a "trade secret" since they consisted of publicly available information which was easily obtainable and the company shared the information with others); *Tedder Boat Ramp Sys., Inc. v. Hillsborough County*, 54 F.Supp.2d 1300, 1303 (M.D. Fla. 1999) (finding that Plaintiff's deposit of its plan for a boat ramp into the copyright registry destroyed any claim the Plaintiff may have had to trade secret protection), *quoting*, *Skoog v. McCray Refrigerator Co.*, 211 F.2d 254, 257 (7th Cir. 1957) ("knowledge cannot be placed in the public domain and still be retained as a 'secret'"); *RX Solutions, Inc.* 746 So.2d at 475 (company did not meet its burden to establish misappropriation of a trade secret because the system at issue was not unique to the company or industry, there was no proof that the former employees threatened to use the system at their new company, and the former employees could have learned how to implement the system without constituting a "misappropriation"). Conversely, where a plaintiff can meet its burden and establish both a "trade secret" and a "misappropriation" he or she will be entitled to relief under FUTSA. In *Four Seasons Hotels and Resorts B.V. v. Consoricio Barr, S.A.* 267 F.Supp.2d 1268 (S.D. Fla. 2003), *aff'd in part, reversed in part by* 138 Fed. Appx. 297, 2005 U.S. App. LEXIS 17030 (2005), the Court held the owner of physical installations of a luxury hotel liable for damages under FUTSA finding that (1) the hotel's detailed customer profiles qualified as "trade secrets" under the statute, as the information had economic value, was not generally known or readily available to others, and was the subject of reasonable efforts by the hotel to preserve its secrecy; and (2) the owner acquired this customer information through improper means, namely by theft and electronic espionage.

3. Relief

Sections 688.003, 688.004 and 688.005 delineate the remedies available to a prevailing party in a trade secrets action.

Section 688.003 authorizes courts to grant injunctive relief. Under the statute an injunction may be granted for the duration of time it would have taken the defendant to discover the trade secret through any other lawful means. In "exceptional circumstances" an injunction may condition future use upon payment of a reasonable royalty. Such circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge of or reason to know of misappropriation that renders a prohibitive injunction unreasonable. Notably, Section 688.003 expressly states that "[A]ctual or threatened misappropriation may be enjoined." As such, in pursuing a claim under FUTSA a party need not prove actual use or disclosure; threatened misappropriation may be enjoined. *See*, *Thomas v. Alloy Fasteners, Inc.*, 664 So.2d 59 (Fla. 5th DCA 1995)("Clearly a threatened misappropriation of trade secrets may be enjoined").[1] However, the party seeking to protect information under this theory does bear the burden to demonstrate the existence of a legitimate threat. See, Del Monte, 148 F.Supp.2d at 1322.

In addition to injunctive relief, Section 688.004 of the statue also provides that in an action under the statute, "[D]amages can include both the actual loss caused by the misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss." Under the statute, when a party proves that some damage has been suffered, recovery of these damages may be had if there is proof of a reasonable basis from which an amount can be approximated. See, Perdue Farms v. Hook, 777 So.2d 1047 (Fla. 2nd DCA 2001) (court affirmed $25 million actual damage award, finding that there was evidence by which a jury could value the rights the defendant has obtained). This Section of the statute also provides that, "If willful and malicious misappropriation exists, the court may award exemplary damages." Exemplary damages, however, may not exceed twice the amount of any award of actual loss and unjust enrichment pursuant to this Section.

FUTSA also expressly provides for an award of attorneys fees to a prevailing party under certain circumstances. Specifically, Section 688.005 provides, "If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party."

1 This provision stands in contrast to the law interpreting Florida's restrictive covenant statute discussed above which requires proof of actual use or disclosure of the trade secret. *See Dyer v. Pioneer Concepts*, 667 So.2d 961, 965 (n. 2) (Fla. 2nd DCA 1996).

4. Preserving the "Secrecy"

Section 688.006 states that a court "shall preserve the secrecy of an alleged trade secret by reasonable means." Examples of such means delineated by the statute include granting protective orders, holding in-camera hearings, sealing records and ordering non-disclosure of such information without prior court approval. Along these lines, it is significant to note that establishing information as a legitimate "trade secret" may provide protection from disclosure in other actions pursuant to Rule 1.280(c)(7) of Florida's Rules of Civil Procedure and Section 90.506 of the Florida Evidence Code. Where a party resists production of information on the grounds that such information is a trade secret, the court must determine whether the information does, in fact, constitute a "trade secret" and, if so, whether the necessity for production outweighs the interest in maintaining confidentiality.

5. Statute of Limitations

Finally, Section 688.007 establishes that an action for misappropriation under the statute must be brought within three (3) years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For purposes of this section a continuing misappropriation constitutes a single claim.

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