

Morgan Lewis

Labor and Employment Summer Webinar Series: State Employment Law Road Trip Across the United States

Florida

July 24 | 1–2 pm ET

Presenters

Anne Marie Estevez

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Avoiding Employment Law Traps in Florida:
What Every Florida Employer Needs to Know

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At-will Employment

- Right to work state
- Florida courts have held firm to the employment at-will doctrine
- Small union population



Florida Civil Rights Act of 1992

- Florida Commission – Work-sharing agreement with the EEOC; 365 days to file a charge and up to 4 years to file a suit if there is no determination by the EEOC that is adopted by the Florida Commission
- Covers all employers with 15 or more employees for each working day of 20 or more weeks
- Prohibits discrimination on the basis of race, color, religion, gender, national origin, handicap, (any) age, and marital status
- Capped punitive damages at \$100,000
- Prohibits discrimination on the basis of HIV status, and prohibits testing for HIV unless the absence of HIV infection is a qualification for the job

Equal Employment Opportunity Commission and The Florida Commission

- The EEOC
 - New Pattern and Practice Division at the EEOC
 - New Director mandates review of settlement agreements
 - AD program
- National origin discrimination
 - Hispanics (various)
 - Indian (various)
 - Haitian
- Other popular charges
 - Age discrimination
 - Gender discrimination
 - Language issues
 - Religious discrimination
- Florida Commission and local agencies
- Diversity training is a must for all companies

Florida Whistleblower Act

- An employer may not take any retaliatory action against an employee because the employee has:
 - Disclosed, or threatened to disclose, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. Employee must bring the activity, policy, or practice in writing to the attention of a supervisor or the employer and allow the employer a reasonable opportunity to correct the activity, policy, or practice
 - Provided information to, or testified before, any appropriate governmental agency or person conducting an inquiry regarding the violation of a law or rule or regulation by the employer
 - Objected to, or refused to participate in, any activity, policy, or practice of the employer that is in violation of a law, rule, or regulation
- *Farragher* increasingly used as a common way to consider defenses

Workers' Compensation

- Retaliation
 - Can we ever get rid of an employee?

Bankruptcy

- Retaliation
 - Unreported claims

448.08 Unpaid Wages

- Provides for award of attorneys' fees for unpaid wages
- Used in contract, overtime, and other wage claims
- Chapter 448 also includes an Equal Pay Act cause of action

- Two-year statute of limitations

Florida's Minimum Wage Act

- January 1, 2012 – minimum wage raised to \$7.67
- Broad retaliation provision
- Overtime not addressed, *but see* Chapter 448
- *Resnick et. al v. Oppenheimer* (required to “notify the employer alleged to have violated this section, in writing, of an intent to initiate such an action.”) Fla. Stat. §48.110(6)(b). Notice must provide:
 - *the minimum wage to which the aggrieved person claims entitlement;*
 - *actual or estimated work dates;*
 - *hours for which payment is sought; and*
 - *total amount of alleged unpaid wages through the date of the notice*
- Employer has 15 days to resolve the claim before the employee may file suit
- Middle District – No notice requirement
- Rule 23 and state opt-out class actions

Fair Labor Standards Act (FLSA)

- We're number one!
 - Since 2003, federal court filings of wage and hour collective actions have surpassed employment discrimination class actions
 - In 2011 alone, 1,206 new FLSA cases were filed in the Southern District (including Miami, Fort Lauderdale, Palm Beach, and the Florida Keys), followed by 611 in the Middle District (including Orlando, Tampa, Jacksonville, Ft. Myers, and Ocala)

Law firm “mills” and firms bringing state and nationwide collective actions

- Shavitz Law Group, P.A. 16.7%
- Remer & Georges-Pierre, PLLC 5.3%
- Card & Glenn, P.A. 5.1%
- Morgan & Morgan, P.A. 3.5%
- Robert S. Norell, P.A. 3.5%
- J.H. Zidell, P.A. 3.4%
- Whitelock & Associates, P.A. 2.7%
- Bober & Bober 2.7%
- Law Offices of Levy & Levy, P.A. 2.7%
- Other law firms 54.4%

Industry Distribution and Trends, July 2010 to July 2012

- Services 15.8%
- Healthcare 9.7%
- Construction 8.8%
- Retail 8.5%
- Business Services 8.2%
- Food and Agriculture 7.3%
- Leisure 6.2%
- Financial Services 5.7%
- Transportation 5.0%
- Other Industries 24.8%

Key Issues

- “Off the clock”/Call center claims
- Misclassification problems
- Failure to include commissions, bonuses, and other forms of nondiscretionary compensation in the regular rate of pay
- Mistakes in payroll processing from major third-party vendors
- Expanding definition of “work time”
- Independent contractors
- Motion for conditional certification filed with the complaint or shortly thereafter
- Fluctuating workweek

Restrictive Covenants

- Pro-enforcement
- Protects legitimate business interests
- Restrictive covenant against former employee, agent, or independent contractor not including trade secrets:
 - Six months or less presumed reasonable
 - More than two years presumed unreasonable
- Restrictive covenant protecting trade secrets:
 - Five years or less presumed reasonable.
 - More than 10 years presumed unreasonable.
- “Blue Pencil”
- Federal v. state courts

Judges and Juries – The United Nations

- Southern District of Florida
- Middle District of Florida
- Northern District of Florida
- Various state courts
- Pro hac admission limited in many courts

Miami-Dade County Family Leave Ordinance

- 50 or more employees working in Miami-Dade County on each workday for 20 consecutive workweeks in the current or preceding calendar year.
- Very similar to FMLA: Allows eligible employees to take up to 12 workweeks of unpaid leave each year for family or medical reasons, including:
 - To care for an immediate family member with a serious health condition, including a grandparent.
- File with Miami-Dade EOB (charge).

Leave of Absence

- Domestic Leave – 30 days
(Miami-Dade)

Vacation

- Use it or lose it



Wage Deductions

- No per se deduction laws

Background Checks and Personnel Files

- Limited constraints on obtaining information on arrests or convictions
- No law requiring employee access to personnel files

WARN (Worker Adjustment and Retraining Notification Act)

- No private mini-WARN law

Workplace Violence and Our Employees' Constitutional Rights

- Gun Law
 - Employee with a lawfully owned firearm must keep his or her firearm locked inside or locked to a private motor vehicle on the employer's premises, and cannot brandish or carry his or her firearm anywhere on the employer's premises unless used for lawful defensive purposes
 - Concealed weapons permit

References and Defamation

- Statutory protection (but only qualified privilege)
- Absolute privilege when information is provided to certain agencies (e.g., unemployment)

Required Postings: Do You Have Them Up?

- Florida Minimum Wage
- Florida Civil Rights Act
- Florida Workers' Compensation
- Florida Unemployment Compensation
- Child Labor

Miscellaneous Laws That Could Affect Your Workplace in Florida

- Florida Wiretapping – two-party consent required
- Smokers have no protection
- No meal or rest period requirements (with limited exceptions)
- Jury duty pay
- Approval for direct deposit must be in writing – law contains antiretaliation provision
- Child Labor laws
- Florida military leave – 17 days of leave; no negative job action or refusal to hire based on military status (including the reserves)

Questions?

What is on your mind about
Florida employment Law?

Presenters



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