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1 CAUTION: THIS DESK GUIDE IS ONLY INTENDED TO BE A QUICK REFERENCE TO ASSIST PRIVATE SECTOR EMPLOYERS IN IDENTIFYING COMMON EMPLOYMENT ISSUES UNDER FLORIDA STATE, NOT FEDERAL, LAW. THIS DESK GUIDE IS NOT INTENDED TO SERVE AS LEGAL OR OTHER ADVICE. YOU SHOULD CONSULT WITH YOUR COUNSEL BEFORE ATTEMPTING TO ADDRESS ANY LEGAL SITUATION OR PROBLEM.
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Leaves of Absence and Time Off

**Family Medical Leave** – Florida follows the federal Family and Medical Leave Act (“FMLA”).

A Miami-Dade County Ordinance, which mirrors the FMLA and applies to employers with 50 or more employees, adds “grandparent” to the FMLA definition of a covered relation.2

**Domestic Violence Leave** – Florida law requires employers with 50 or more employees to provide employees who have worked for a company for three months or longer up to three 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.3 It is in the employer’s discretion to provide paid leave.4 Additionally, an employee must exhaust all annual vacation leave, personal leave, and sick leave before receiving domestic violence leave5

Miami-Dade County legislation mirrors the Florida domestic violence law except that eligible employees may be entitled to up to 30 days of unpaid leave which may be taken intermittently.6

**Jury Duty** – Florida employers are required to provide employees with unpaid leave in order to respond to a jury service summons or serve on a jury, unless local law requires payment. Florida law prohibits any employer from preventing a person from serving as a juror.7

**Vacation** – Florida has no laws requiring employers to provide employees with vacation benefits, either paid or unpaid. If an employer chooses to provide vacation, however, such benefits are considered wages under Florida law. An employer’s written policy and past practice will control where disputes arise over whether an employer must pay an employee accrued vacation leave, such as whether accrued vacation is payable upon cessation of employment. Florida allows “use it or lose it” vacation policies and rollover caps if properly articulated in an employer’s policy. The terms of any vacation policy must be clear and provided to the employee.

Pay & Deductions

**Minimum Wage** – Effective January 1, 2014, the Florida minimum wage is $7.93 per hour.8 Florida law requires the Florida Department of Economic Opportunity to calculate a minimum wage rate each year. The annual calculation is based on the percentage increase in the federal Consumer Price Index for Urban Wage Earners and Clerical Workers in the South Region for the 12-month period prior.9

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2 Miami-Dade Cty., Fla. Code §§ 91-142 and 93-118
3 Fla. Stat. § 741.313(2)(a)
4 Id.
5 Fla. Stat. § 741.313(4)(b)
7 Fla. Stat. § 40.24
Employees exempt from coverage under the Federal Fair Labor Standards Act ("FLSA") are exempt from coverage under the state minimum wage laws.\textsuperscript{10}

Employers of “tipped employees” who meet eligibility requirements for the tip credit, effective January 1, 2014, under the FLSA may count tips actually received as wages under the Florida minimum wage. However, the employer must pay “tipped employees” a direct wage of $4.91 per hour. The direct wage is calculated as equal to the minimum wage minus the 2003 tip credit ($3.02).

\textbf{Overtime} – Florida does not have laws governing the payment of overtime. Thus, the overtime provisions and exemptions of the FLSA apply.\textsuperscript{11}

\textbf{Jury Duty Pay} – In general, Florida law does not require employers to pay employees for time served on juries. Employers may, but are not required to, compensate an employee by payment of the employee’s regular wages while the employee serves on jury duty. If the employer does compensate the employee during jury duty service, the employer is allowed to deduct an amount equal to the State paid juror compensation from the employee’s wages. Jurors who are regularly employed and who continue to receive regular wages while serving as a juror are not entitled to receive compensation from the clerk of the circuit court for the first three days of juror service.\textsuperscript{12}

In Miami-Dade County and Broward County, however, employers are required by county ordinance to pay employees for jury service for a period not to exceed five days, if: (1) the employee is regularly scheduled for work at least 35 hours a week; (2) the employer has at least 10 full-time employees; (3) the employee serves as a juror in Miami-Dade or Broward county; (4) the employer has offices or does business in the County; and (5) the employee gives the employer a copy of the summons and notice of jury service at least five working days prior to absence from work.\textsuperscript{13} Payment under these ordinances does not include commissions. For jury service exceeding five days, employers are required to provide the employee with an unpaid leave of absence.

\textbf{Methods of Payment} – Employers may pay wages by money order, check, draft, note, memorandum, payroll debit card, or other acknowledgment of indebtedness to become due, negotiable and payable in cash without discount, at an establishment within the state, the name of which must appear on the instrument or in the payroll debit card issuing materials\textsuperscript{14}. Sufficient funds or credit for payment must be maintained for at least 30 days.\textsuperscript{15} If payment is made with coupons, tickets, tokens or other devices redeemable in goods or merchandise, the employer is: (1) liable for full face value in U.S. money on and after the 30th day after issuance; (2) liable for payment in U.S. money, notwithstanding any stipulation or provision in the device; and (3) subject to suit on failure to pay.\textsuperscript{16} Employers may also pay wages through direct deposit to a financial institution, if the employee provides authorization and designates the institution. Employers may not terminate employees for refusing to authorize direct deposit. Failure to pay or termination for refusing authorization subjects employers to interest and attorneys’ fees.\textsuperscript{17}
Florida law does not mandate specific pay periods. There is no requirement in Florida that an employer tender a final paycheck immediately upon an employee’s termination. Generally, after an employee has been terminated, his or her final paycheck(s) is due on the next regular payday or days. The employer may not hold the final paycheck as “ransom” in an attempt to force the employee to sign a release or other document. If an employee requests final pay and it is not received within 30 days, Florida Law allows the employee to sue the employer for collection and fees and costs associated with the attempt to collect unpaid wages.

Upon the death of an employee, any wages or travel expenses due may be paid to the employee’s surviving spouse or, if there is none, to the employee’s children over age 18. If there are no children, wages may be paid to the deceased employee’s father or mother.  

**Authorized Deductions** — Except as prohibited by federal law, the employer may make deductions from the final paycheck for monies owed to the employer, advances made to the employee, damaged equipment, other set-offs, reimbursements, etc. To reduce the potential for litigation, employers should consider obtaining advance, written authorization for any such deductions.

**Garnishments** — Judgment creditors often seek to obtain Continuing Writs Against Salary or Wages against judgment debtors. The creditors first file a Motion for Continuing Writ Against Salary or Wages and serve a copy of it on the debtor’s employer. The employer has 20 calendar days to answer the Motion and begin garnishing wages. Florida courts have held that answers to writs of garnishment must be signed and filed by attorneys admitted to practice within the state. Failure to file a timely answer, signed by an attorney, can lead to entry of a default judgment against the employer—essentially requiring the employer to pay the employee’s debt. The employer should file an answer even if the judgment debtor is no longer an employee.

Upon receipt of the Motion, the employer should immediately begin garnishing the employees’ wages by withholding the amount designated by the Court. The employer must hold on to these funds until it receives an Order from the Court instructing that the funds be released—either to the judgment creditor or back to the employee. The garnishment will continue until the entire judgment, plus interest, has been paid.

At the time the Order instructing release of funds is issued, the Clerk of Court will be instructed to send the employer a check for $100 for attorneys’ fees related to filing the answer. This money was paid by the judgment creditor at the time the Motion was filed, and held by the Court.

Employers are also permitted to withhold, for its own administrative costs, $5.00 with the first garnishment and $2.00 with each subsequent garnishment.

Unlike some other states, employers only need to file one Answer to each Motion for Continuing Writ Against Salary or Wages in Florida.

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18 Fla. Stat. § 222.15
19 Brennan v. Veterans Cleaning Service, Inc., 482 F.2d 1362 (5th Cir. 1973)
20 Ch. 77 Fla. Stat.
21 Fla. Stat. §77.081
Commissions – Under Florida common law, an employee is generally entitled to commissions collected post-termination, provided those commissions were “earned” during his or her employment, unless one of the following exceptions applies:

a) an employment contract or policy expressly provides that the right to commissions ceases upon an employee’s termination;

b) an employment contract or policy provides for performance of services as an entirety, meaning that an employee is required not only to make sales as part of his employment, but is also required to service that business as a condition of the right to a commission; and

c) there is a recognized custom in the business that such right to be paid commission terminates with employment.\(^{22}\)

If an employment contract or policy is silent as to when a commission accrues, then commissions are generally deemed “earned” when a sale is made, although the goods or services are delivered after an employee’s termination.\(^{23}\)

Wage Claims – In an action for unpaid wages, the court may award to the prevailing party the costs of the action and a reasonable attorney’s fee.\(^{24}\) Fla. Stat. § 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;\(^{25}\)
2. annual leave credits;\(^{26}\)
3. vested interest in profit sharing plan;\(^{27}\)
4. commissions;\(^{28}\)
5. vacation pay;\(^{29}\) and
5. bonuses.\(^{30}\)

In 2010, Miami-Dade County passed a “Wage Theft Ordinance” which provides that a private sector employer has committed wage theft where the employer fails to pay any portion of wages owed to employees within a “reasonable time” from the date on which the work was performed.\(^{31}\) In 2012, Broward County passed a similar ordinance\(^{32}\). “Reasonable time” is presumed under the ordinances to be: (a) no later than 14 calendar days from the date on which the work is performed; or (b) pursuant to any other pay schedule established by an employer, through policy or practice, whereby employees earn

\(^{22}\) See, e.g., Comerford v. Sunshine Network, 710 So.2d 197 (Fla. 5th DCA 1998)
\(^{23}\) Id.
\(^{24}\) Fla. Stat. § 448.08
\(^{25}\) Gulf Solar, Inc. v. Westfall, 447 So. 2d 363 (Fla. 2d DCA 1984)
\(^{26}\) Coleman v. City of Hialeah, 525 So. 2d 435 (Fla. 1st DCA 1988)
\(^{27}\) Speer v. Mason, 769 So. 2d 1102 (Fla. 4th DCA 2000)
\(^{28}\) Gulf Solar, 447 So. 2d 363
\(^{29}\) Coleman, 525 So. 2d 435
\(^{30}\) Gulf Solar, 447 So. 2d 363
\(^{31}\) Miami-Dade Cty., Fla. Code. Chapter 22
\(^{32}\) Broward County Ordinance 2012-32
and are consistently paid wages according to regularly recurring pay periods. “Wages” include pay for daily, hourly, or piece work at a rate no less than the highest applicable rate established under federal, state, or local law. The threshold amount for any claim filed under either ordinance is $60.00 and the potential exists for treble damages plus attorneys' fees for aggrieved employees. The ordinances are enforced through administrative proceedings before the respective County Hearing Examiner; however, once an employee brings a private cause of action for unpaid wages against the employer, his/her administrative complaint is automatically deemed withdrawn.

Personnel Procedures and Job References

**Personnel Files** – Florida has no state-specific regulations regarding an employee’s access to his or her personnel file. As such, employers are free to set any policies restricting or limiting employee access. However, employees and former employees or their representatives have the right to access medical records concerning the employee’s exposure to toxic substances.

**Employee References** – Florida employers that disclose, in good faith, a former employee’s job performance in response to a request from a prospective employer or former employee are generally immune from civil liability for the disclosure’s consequences. The presumption of good faith is rebuttable if the information disclosed by the employer is knowingly false, deliberately misleading, rendered with malicious purpose, or in violation of the former employee’s civil rights. Employers are not required to give references, but if they do, employers should have a consistent policy in place with respect to responding to such requests.

**Background Checks** – Florida has no state-specific restrictions on background checks, so the Federal Fair Credit Reporting Act will apply.

Various Florida statutes provide for mandatory background screenings for certain positions of trust, certain health professions, and positions involving the care of children, the elderly or the disabled. For example, mandatory screening is required for individuals hired to: (1) provide care of developmentally disabled individuals; (2) work directly with students; (3) work in programs for children or youths; (4) work in public safety or security positions; and (5) provide care to the elderly.

**Confidentiality of Personal Information** – Employers must keep employees’ personal information confidential. Under Florida law, personal information is: (1) an individual’s first name or first initial and last name in combination with any one or more data elements: (a) social security number; (b) Driver’s License or Florida Identification Card number; (c) financial account number or credit or debit card number in combination with a required security code, access code, or password; and (d) user name or

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33 Fla. Stat. § 768.095
34 Id.
35 Fla. Stat. § 393.0655
36 Fla. Stat. §§ 1012.32(2)(a), 1012.56(2)(d)
37 Fla. Stat. § 39.001
38 Fla. Stat. § 125.5801
39 Fla. Stat. § 430.0402
email address in combination with a password or security question answer that would permit access to an online account.\textsuperscript{40}

Persons or entities that maintain computerized data in a system that includes personal information must provide notice of a security breach to individuals whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. Notification must be made expeditiously and without unreasonable delay, and generally no later than 30 days following the determination of the breach.\textsuperscript{41} Notification must be provided by one of the following methods: (1) written notice; (2) electronic notice if the person’s primary method of communication with the individual is by electronic means or is consistent with the provisions regarding electronic records and signatures set forth in the electronic signatures in global and national commerce act;\textsuperscript{42} or (3) telephonic notice.\textsuperscript{43} In the event of a data breach affecting 500 or more Floridians, written notice to the Attorney General would be required no later than 30 days after the determination that a breach has occurred or reason to believe one occurred. Additionally, upon request, a covered entity would be required to provide to the Attorney General a copy of its policies in place regarding breaches, steps taken to rectify the breach, and a police report, incident report, or computer forensics report. If more than 1,000 persons are to be notified of a security breach, all nationwide consumer reporting agencies must also be notified, without unreasonable delay, of the timing, distribution, and content of the notices.\textsuperscript{44}

Notification is not required if, after the employer conducts an appropriate investigation and consults with relevant law enforcement agencies, the employer reasonably determines that the breach has not and will not likely result in identity theft or any other financial harm to affected individuals. This determination must be documented in writing, maintained for at least five years, and provided to the Florida Attorney General within 30 days after the determination has been made.

Employers must also maintain the confidentiality of employees’ social security numbers.\textsuperscript{45} Employers may not: (1) print an SSN on any materials not requested by the applicant/employee or part of the documentation of a transaction or service requested by an applicant or employee that are mailed, unless redacted; (2) print an SSN on any card required for an applicant or employee to access products or services provided by the employer; or (3) publicly post or publicly display a document with employees’ SSNs unless the numbers are redacted.

\textbf{Florida Counterpart to Federal Electronic Communications Privacy Act} – Florida makes it a crime to intercept and disclose wire, oral, or electronic communications.\textsuperscript{46} There is an exception for oral communications made where there is no expectation of privacy, and for public oral communications made at a public meeting.\textsuperscript{47} Florida is an all-party consent state: consent must be obtained from all parties to the interception or disclosure of the communication.\textsuperscript{48} Violation of the criminal statute is a third degree felony.\textsuperscript{49}

\begin{footnotesize}
\textsuperscript{40} Fla. Stat. § 817.5681
\textsuperscript{41} Id.
\textsuperscript{42} 15 U.S. Code § 7001
\textsuperscript{43} Fla. Stat. § 817.5681
\textsuperscript{44} Id.
\textsuperscript{45} Fla. Stat. § 119.071; 42 U.S.C. § 408; 26 U.S.C. § 7213
\textsuperscript{46} Fla. Stat. § 934.03
\textsuperscript{47} Fla. Stat. § 943.02(2)
\textsuperscript{48} Fla. Stat. § 934.03(2)(a)(3)(d)
\textsuperscript{49} Fla. Stat. § 934.03(4)(a)
\end{footnotesize}
**Discrimination** – The Florida Civil Rights Act (“FCRA”) prohibits employers from discriminating against any person on the basis of race, color, religion, sex, national origin, age, handicap, or marital status.\(^{50}\) The FCRA also prohibits retaliation against a person for opposing unlawful employment practices or participating in proceedings under the FCRA.\(^{51}\) FCRA’s protections apply to hiring, discharge, compensation, and virtually all terms, conditions, and privileges of employment. Unlike Title VII, the FCRA also protects employees against discrimination based on marital status, unless the employer has instituted an anti-nepotism policy.

Employees must exhaust administrative remedies through the Florida Commission of Human Relations (“FCHR”) before filing suit. Florida courts generally interpret the FCRA in accordance with federal anti-discrimination laws, such as Title VII, the ADA, and the ADEA.

Florida law also specifically prohibits race discrimination in providing equal pay for equal work; wage rate discrimination based on sex; discrimination based on actual or perceived AIDS/HIV status; and discrimination against persons with sickle-cell traits.\(^{52}\)

Under the Florida Civil Rights Act, a person need not be 40 or older to make an age discrimination claim. There is no reference in the statute to an age threshold.

Several Florida counties, including Broward, Leon, Monroe, Orange, Palm Beach, and Volusia, and cities, including Dunedin, Gainesville, Gulfport, Key West, Lake Worth, Largo, Miami Beach, Neptune Beach, Oakland Park, Tallahassee, Tampa, Venice, and West Palm Beach, also prohibit discrimination on the basis of gender-identity and sexual orientation. The following counties and cities prohibit discrimination on the basis of sexual orientation only: Miami-Dade County, Pinellas County, Sarasota County, and the cities of Delray Beach, Fort Lauderdale, Orlando, Palm Beach Gardens, Sarasota, St. Petersburg, Juno Beach, Jupiter, and Royal Palm Beach.

**Minors in the Workplace**\(^{53}\) – Minors 15 years of age or younger shall not be employed, permitted, or suffered to work before 7:00 a.m. or after 7:00 p.m. when school is scheduled the following day or for more than 15 hours in any one week.\(^{54}\) On any school day, minors 15 years of age or younger who are not enrolled in a career education program shall not be gainfully employed for more than three hours, unless there is no session of school the following day.\(^{55}\)

During holidays and summer vacations, minors 15 years of age or younger shall not be employed, permitted, or suffered to work before 7:00 a.m. or after 9:00 p.m., for more than eight hours in any one day, or for more than 40 hours in any one week.\(^{56}\) Minors 16 and 17 years of age shall not be employed, permitted, or suffered to work before 6:30 a.m. or after 11:00 p.m. or for more than eight hours in any one day when school is scheduled the following day. When school is in session, minors 16 and 17 years of age shall not work more than 30 hours in one week. On any school day, minors 16 and

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\(^{50}\) Fla. Stat. § 760.10  
\(^{51}\) Id.  
\(^{52}\) Fla. Stat. §§ 448.07, 448.075-076, 725.07, 760.10, & 760.50  
\(^{53}\) Fla. Stat. § 450.081  
\(^{54}\) Id.  
\(^{55}\) Fla. Stat. § 450.081(1)(a)  
\(^{56}\) Fla. Stat. § 450.081(1)(b)
17 years of age who are not enrolled in a career education program shall not be gainfully employed during school hours.\textsuperscript{57}

Minors 17 years of age or younger shall not be employed, permitted, or suffered to work in any gainful occupation for more than six consecutive days in any one week.\textsuperscript{58} Minors 17 years of age or younger shall not be employed, permitted, or suffered to work for more than 4 hours continuously without an interval of at least 30 minutes for a meal period. Further, any break period of less than 30 minutes should be compensated.\textsuperscript{59}

Florida's child labor laws may not apply to:

(a) Minors 16 and 17 years of age who have graduated from high school or received a high school equivalency diploma.

(b) Minors who are within the compulsory school attendance age limit who hold a valid certificate of exemption issued by the school superintendent or his or her designee pursuant to the provisions of Fla. Stat.\textsuperscript{60} § 1003.21(3).

(c) Minors enrolled in a public educational institution who qualify on a hardship basis such as economic necessity or family emergency. Such determination shall be made by the school superintendent or his or her designee, and a waiver of hours shall be issued to the minor and the employer. The form and contents thereof shall be prescribed by the department.

(d) Children in domestic service in private homes, children employed by their parents, or pages in the Florida Legislature.\textsuperscript{60}

**Record Keeping Requirements**

**Reporting New Employees to Florida State Directory** – Employers must report to a state directory all employees who reside or work in the State of Florida to whom the employer anticipates paying earnings.\textsuperscript{61}

**Record Retention** – Based on the statutes of limitations for Florida employment laws, an employer should maintain the following records on each employee for the specified period of time:

Five years – all records related to payment for services, including: name, social security number, beginning and end dates for each pay period, dates on which work was performed during each pay period, date and amount of wages paid, dates of hire, re-hire, or return to work after some period of separation, and any special payments as required by Florida’s Unemployment Compensation Law.

Four years – all employment-related records such as: applications, promotional or hiring criteria, job descriptions, performance evaluations, results from background screening and/or pre-employment

\textsuperscript{57} Fla. Stat. \textsuperscript{§} 450.081(2)
\textsuperscript{58} Fla. Stat. \textsuperscript{§} 450.081(3)
\textsuperscript{59} Fla. Stat. \textsuperscript{§} 450.081(4)
\textsuperscript{60} Fla. Stat. \textsuperscript{§} 450.081(5)
\textsuperscript{61} Fla. Stat. \textsuperscript{§} 409.2576
testing, documents describing and relating to the selection process for a position, names and applications of all who applied for a promotion, records of discipline, records considered when deciding to award or deny a promotion, and any other relevant documents to employment decisions that may be challenged under the Florida Civil Rights Act.

Employers that employ minors must keep on file: (1) a copy of any partial waiver of the restrictions imposed by the child labor law for a minor employee during the entire period of employment for which the waiver applies;62 (2) proof of the child’s age during the entire period of employment; 63 and (3) if applicable, copies of each student learner agreement pursuant to an authorized youth vocational training program. Farm operators who employ 14- or 15-year old workers to drive farm tractors must keep on file for the duration of the minor’s employment a certificate of completion by the minor of a training course in tractor operation sponsored by a recognized agricultural or vocational agency.64

Employers must also keep all records regarding workplace injuries for at least two and a half years.

Rest Periods

**Meal & Rest Periods for Minors** – Florida employers must grant a meal period of at least 30 minutes to employees under the age of 18 who work for more than four hours continuously.65 Florida does not have any laws requiring an employer to provide a meal period or breaks to employees 18 years of age or older.66

**Rest Periods for Lactation Accommodation** – Florida follows the Patient Protection and Affordable Care Act requirement, which amended Section 7 of the FLSA, providing that employers are required to provide “reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.”67 Employers are required to provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks needed to express milk as well as the duration of each break will likely vary. Employers are also required to provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”68 Employers are not required under the FLSA to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time. In addition, if the employee is not completely relieved from duty during the break time, then the employee must be compensated.

In addition, under state law, a nursing mother may not be prohibited from breastfeeding her baby in any location, public or private, where the mother is otherwise authorized to be, regardless “of whether the nipple of the mother’s breast is uncovered during or incidental to the breastfeeding.”69

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62 Fla. Admin. Code Ann. § 61L-2.007
63 Fla. Stat. § 450.045
64 Fla. Stat. § 450.061
65 Fla. Stat. § 450.081(4)
67 29 U.S.C. § 207(r)
68 Id.
69 Fla. Stat. § 383.015
Restrictive Covenants

Non-Compete Agreements

With certain exceptions, Florida law prohibits restraints on trade. One of the exceptions is non-compete agreements that meet the requirements of Fla. Stat. § 542.335 for non-competes entered into after 1996 and the requirements of Fla. Stat. § 542.33 for non-competes entered into before then. These requirements can be summarized as follows:

- the non-compete must be reasonable in time, area, and line of business;
- legitimate business interests must exist that justify the restrictive covenant; and
- the non-compete must be reasonably necessary to protect the legitimate business interests.

While non-competition agreements are generally enforceable in Florida, some professionals, such as attorneys, are exempt from certain types of restrictions for various public policy reasons.

Safety & Health

Florida Drug-Free Workplace Act

There is no legal duty to test, but employers with drug-free workplace programs that include notice, education, and procedural requirements may qualify for workers’ compensation rate discounts. Notice of the drug-free workplace policy must be posted in an appropriate, conspicuous location on the employer’s premises.

One time only, prior to testing, an employer must give all employees and job applicants a written policy statement that contains specific items, including a general policy statement, notice of drug-free workplace law, confidentiality, procedures, list of medications that may impact drug test results, consequences of refusing testing, list of representative local EAP and drug rehab programs, procedures for contesting or explaining positive results or consulting with a medical review officer regarding prescription medications, employee responsibilities to inform testing lab of any civil actions, list of drugs for which the employer will test, and any applicable collective bargaining agreement.

Drug testing policies/procedures must apply equally to all employee classifications and must include job applicant drug testing, reasonable-suspicion drug testing, routine fitness-for-duty drug testing, follow-up drug testing. Such policies may include random testing for safety-sensitive positions. Employers may establish reasonable work rules for employee drug activity and take action based upon violation of such rules, including discharge/discipline for refusing to be tested. Discharge or discipline imposed in compliance with drug-free workplace provisions is “for cause.” No adverse action may be taken based solely on unconfirmed positive test result or on an employee’s voluntarily seeking

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70 Fla. Stat. § 542.335 and § 542.33
71 Fla. Stat. § 440.101(2)
72 Fla. Stat. § 440.102(2)
73 Fla. Stat. § 440.102(3) and 112.0455(6)
74 Id.
75 Fla. Stat. § 440.102(14)
76 Fla. Stat. § 440.102(4)(5)(7)
77 Fla. Stat. § 440.102(7)
treatment, while employed, for a drug-related problem if the employee has not previously tested positive, or entered EAP or rehab for drug-related problems.\textsuperscript{78}

If the initial test is negative, employers have sole discretion to seek a confirmation test.\textsuperscript{79} Employers must inform employees of confirmed positive test results, their consequences, and available options within five working days. Upon request, a copy of the test results must be provided to the employee/applicant. Positive test results and supporting documentation, including grounds for reasonable suspicion testing, must be kept confidential by the employer and retained for at least one year.\textsuperscript{80} Employers may not release any information concerning drug test results without written consent or administrative or court order.\textsuperscript{81}

The Act permits testing for numerous categories of drugs (including alcohol).\textsuperscript{82} Administrative regulations require urine samples to be used for drug tests and blood samples to be used for alcohol tests.\textsuperscript{83}

\textbf{Florida Clear Indoor Air Act}\textsuperscript{84} – A person may not smoke in an enclosed indoor workplace. “Enclosed Indoor Workplace” means any place where one or more persons engages in work, and which place is predominantly or totally bounded on all sides and above by physical barriers, regardless of whether such barriers consist of or include, without limitation, uncovered openings; screened or otherwise partially covered openings; or open or closed windows, jalousies, doors, or the like.\textsuperscript{85}

\textbf{Firearms} – Florida’s “guns-at-work” law provides that no employer may prohibit any customer, employee, or invitee from possessing any legally owned firearm when such firearm is lawfully possessed and locked inside or locked to a private motor vehicle in a parking lot and when the customer, employee, or invitee is lawfully in such area.\textsuperscript{86} This includes independent contractors, volunteers, interns, or other similar individuals.\textsuperscript{87}

Additionally, employers may not make a verbal or written inquiry regarding the presence of a firearm inside or locked to a private motor vehicle in a parking lot or by an actual search of a private motor vehicle in a parking lot to ascertain the presence of a firearm within the vehicle. Further, no employer may take any action against a customer, employee, or invitee based upon verbal or written statements of any party concerning possession of a firearm stored inside a private motor vehicle in a parking lot for lawful purposes.\textsuperscript{88}

Employers also cannot condition employment upon either the fact that an employee or prospective employee holds or does not hold a license to carry a concealed weapon; or any agreement by an employee or a prospective employee that prohibits an employee from keeping a legal firearm locked inside or locked to a private motor vehicle in a parking lot when such firearm is kept for lawful purposes.\textsuperscript{89}

\begin{footnotesize}
\footnote{78 Fl. Stat. § 440.102(5)}
\footnote{79 Fl. Stat. § 440.102(6)}
\footnote{80 Fl. Stat. §§ 440.102(5) and 112.0455(8)}
\footnote{81 Fl. Stat. §§ 440.102(8) and 112.0455(11)}
\footnote{82 Fl. Stat. § 440.102(1)(c) & (2)}
\footnote{83 See Fla. Admin. Code R. 59A-24.004}
\footnote{84 Fl. Stat. § 386.204}
\footnote{85 Fl. Stat. §§ 386.203 and 386.204}
\footnote{86 Fl. Stat. § 790.251(4)(a)}
\footnote{87 Fl. Stat. § 790.251(4)}
\footnote{88 Fl. Stat. § 790.251(4)(6)}
\footnote{89 Fl. Stat. § 790.251(4)(c)}
\end{footnotesize}
Finally, an employer cannot terminate the employment of or otherwise discriminate against an employee, or expel a customer or invitee, for exercising his or her right to keep and bear arms or for exercising the right of self-defense as long as a firearm is never exhibited on company property for any reason other than lawful defensive purposes.\(^90\)

**Florida Workers’ Compensation Act** – Workers’ compensation is a state program requiring employers to have an insurance policy covering employees for work-related injuries.\(^91\)

The law covers all accidental injuries and occupational diseases arising out of and in the course and scope of employment. This includes diseases or infections resulting from such injuries. The law also covers death resulting from such injuries within specified periods of time.\(^92\)

Workers’ compensation entitles an employee to all reasonable and necessary medical care related to the injury. This includes visits to an approved health care provider, surgery, hospital and dental care, prescription drugs, braces, crutches, and other medical supplies ordered by an approved physician.\(^93\) An injured employee may also be entitled to payment for lost wages. If, as a result of the injury, the employee is unable to return to work after more than seven days, the employee is entitled to a portion of the lost income.\(^94\) An employee is also entitled to lost wages and benefits if he or she is able to work, but earns less than 80 percent of his or her pre-injury wages, or has suffered a permanent loss of a bodily function as a result of the injury.\(^95\) If an employee dies as result of a work-related injury, the employee’s spouse, dependent children, or dependent parents are entitled to death benefits of up to $150,000 (with certain exceptions).\(^96\)

If an employee is injured on the job, he or she must notify the employer within 30 days of either the date of the injury, the date when the injury’s effects first become apparent, or the date when a medical expert first discovers the injury.\(^97\) Within seven days after actual knowledge of injury or death, the employer shall report such injury or death to its carrier, in a format prescribed by the Department of Financial Services, and shall provide a copy of such report to the employee or the employee’s estate.\(^98\) The carrier is then required to send notice to the Department of Financial Services within 14 days of being notified that the worker has been disabled for more than six days.\(^99\)

An injured employee may lose the right to receive benefits if the employer has implemented a drug-free workplace program and the employee tests positive for drugs.\(^100\) Benefits may also be jeopardized if an employee fails to follow safety rules and is consequently injured.

Florida’s workers’ compensation statute also prohibits retaliatory termination of an employee for filing a workers’ compensation claim.\(^101\)

\(^90\) Fla. Stat. § 790.251(4)(e)
\(^91\) Fla. Stat. §§ 440.02; 440.105(4)(2)
\(^92\) Fla. Stat. §§ 440.02(l) and 440.16
\(^93\) Fla. Stat. § 440.13(2)
\(^94\) Fla. Stat. § 440.12
\(^95\) Fla. Stat. § 440.491(6)(b)
\(^96\) Fla. Stat. § 440.16
\(^97\) Fla. Stat. § 440.185(1)
\(^98\) Fla. Stat. § 440.185(2)
\(^99\) Fla. Stat. § 440.185(2)
\(^100\) Fla. Stat. § 440.09(7)(a); Fla. Stat. §§ 440.101 and 440.102
\(^101\) Fla. Stat. § 440.205
Termination Process

Employment-At-Will – The default rule in Florida is that, in the absence of a labor agreement or contract for employment for a specified term, employment is at-will. Employers have the right to discharge an employee at any time, for any lawful reason, or for no reason. Notably, personnel policy statements in handbooks do not create an express or implied contract between an employer and an employee. An unambiguous written disclaimer in an employee handbook, however, stating that employment is at-will is beneficial to preserving the at-will employment relationship.

Florida’s Mini-COBRA - For Small Employers – Whereas COBRA applies to employers with groups of 20 or more employees, Florida’s Mini-COBRA applies to groups with 2-19 employees. The Florida Health Insurance Coverage Continuation Act is the state law that provides employees and their dependents the opportunity to extend group health coverage through their employer’s health plan due to certain qualified events if they are not eligible for the federal COBRA program due to the size of the group. A qualified beneficiary must give notice to the insurance carrier within 63 days after the occurrence of a qualifying event.

Whistleblower & Witness or Juror Protections

Florida Private Sector Whistleblower Law – The Florida Whistleblower Act (“FWA”) prohibits retaliation and applies to “any private individual, firm, partnership, institution, corporation, or association that employs ten or more persons.”

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;”

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;” 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.”

To prove a violation of the FWA, the employee must show that he “blew the whistle” based on a reasonable belief that an actual violation of a law, rule, or regulation by the employer occurred.

102 See, e.g., DeMarco v. Publix Super Markets, Inc., 384 So.2d 1253, 1254 (Fla. 1980)
103 Id.
104 Fla. Stat. § 627.6692
106 Fla. Stat. § 448.101(3)
107 Fla. Stat. § 448.102(1)
108 Fla. Stat. § 448.102(2)
109 Fla. Stat. § 448.102(3)
110 Aery v. Wallace Lincoln Mercury, LLC, Case No. 4D12-1615 (Fla. 4th DCA 2013)
**Florida False Claims Act** – Florida has a counterpart to the federal False Claims Act which allows a whistleblower to keep a percentage of money recovered as a result of a person, government vendor, or contractor defrauding the government. The Act also protects employees from retaliation for either acting on their own behalf or on behalf of others to make a claim under the Act or assisting in an action filed under the False Claims Act.\(^{111}\)

**Termination of Employment of Witness or Juror Prohibited** – A person who testifies in a judicial proceeding in response to a subpoena may not be dismissed from employment because of the nature of the person’s testimony or because of absences from employment resulting from compliance with the subpoena.\(^ {112}\)

An employer may not dismiss from employment or threaten to dismiss from employment a person who has been summoned to serve on any grand or petit jury in Florida or has been accepted to serve on any grand or petit jury in Florida because of the nature or length of service upon such jury.\(^ {113}\) An aggrieved employee may be awarded actual damages, punitive damages, and attorney’s fees under either statute.\(^ {114}\)

**Miscellaneous**

**Posting Requirements** – In addition to the federal labor law posting requirements, the following are the specific notice posting requirements for Florida:

- Minimum Wage Law Poster (English)\(^ {115}\)
- Broward County Living Wage Poster\(^ {116}\)
- Child Labor Laws Poster\(^ {117}\)
- Florida Drug-Free Workplace Poster (if applicable)\(^ {118}\)
- Workers' Compensation "Broken Arm" Poster\(^ {119}\)
- Anti-Fraud Notice\(^ {120}\)
- Unemployment Compensation Benefits Poster (English)\(^ {121}\)
- Unemployment Compensation Benefits Poster (Spanish)

Employers must post and keep posted in conspicuous places upon their premises a notice, provided by the Commission on Human Relations, that states the general provisions concerning unlawful employment practices and how/where complaints may be filed.\(^ {122}\)

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111 Fla. Stat. § 68.088  
112 Fla. Stat. § 92.57  
113 Fla. Stat. § 40.271 (1)&(2)  
114 Fla. Stat. §§ 92.57 and 40.271 (3)  
115 Fla. Stat. § 448.109(2)  
116 Broward Cty., Fla. Code. § 26-102(f)  
117 Fla. Stat. § 450.045  
118 Fla. Stat. § 440.102(3); Fla. Stat. § 112.0455(6)  
119 Fla. Stat. § 440.055  
120 Id.  
121 Fla. Stat. § 443.151(1)  
Presumption of No Negligence in Hiring in Intentional Tort Action if Proper Background Check is Conducted – In situations where an employer is the subject of a civil action for wrongful death, personal injury, or damage to a third person caused by the intentional tort of the employer’s employee, the employer is entitled to a presumption that it was not negligent in hiring the employee if it had conducted a pre-employment background investigation of the employee and “the investigation did not reveal any information that reasonably demonstrated that the person was either unsuitable for the particular work or for the employment in general.”  

A background investigation under the statute must include:

- Obtaining a statutorily compliant criminal background investigation on the prospective employee;
- Making a reasonable effort to contact references and former employers of the prospective employee regarding whether he or she is suitable for employment;
- Requiring the prospective employee to complete a job application form including questions relating to criminal convictions, including details concerning the type of crime, the date of conviction, the penalty imposed, and whether the prospective employee has ever been a defendant in a civil action for an intentional tort, including the nature of the intentional tort and the disposition of the action;
- If relevant to the prospective employee’s position with the company, obtaining, with written authorization from him or her, a check of the prospective employee’s driver’s license record; or
- Interviewing the prospective employee.

An employer who chooses not to perform a background check in accordance with the statutory requirements above will not be presumed in the civil action brought by the third party to have negligently hired the employee at issue.

Florida Counterpart to the NLRA/ Right-to-Work – Under Florida’s counterpart to the NLRA, employees have the right to refrain from joining a labor union/organization, and employers may not deny or discriminate in employment based on non-membership.

Independent Contractors – A worker providing services for pay is generally considered an employee by Florida regulatory agencies unless the worker meets the requirements of an independent contractor. Failure to properly classify a worker as an employee potentially can result in tax penalties and liability for back wages and overtime under federal law only.

123 Fla. Stat. § 768.096
124 Fla. Stat. § 768.096(3)
125 Fla. Const. Art. 1, § 6
126 Fla. Stat. § 447.03
An independent contractor or consultant is not considered an employee of the employer. Instead, an individual independent contractor is self-employed, and payments made to the independent contractor are considered contract payments rather than wages. The U.S. Internal Revenue Service ("IRS") and other governmental agencies have a variety of tests for determining whether a worker is an employee or an independent contractor, which, despite variations among the tests, tend to share the same primary factors. Essentially, workers who are performing the same job and performing under the same supervision as regular employees are usually deemed to be employees. Additional factors shared by the various tests include: the degree of control the employer exercises over the worker’s hours and manner of performance; whether the employer provides the worker’s tools and/or employee benefits (e.g., medical insurance, vacation pay); the length of service; and the method of payment (e.g., is the worker paid hourly or on a project basis).

The consequences of incorrectly classifying an employee as an independent contractor can be far-reaching and expensive (e.g., liability for unpaid payroll taxes and penalties, administrative claims for benefits provided to regular employees, liability for unpaid unemployment insurance and workers’ compensation premiums, increased exposure to governmental audits, and potential exposure to employment-related civil suits and administrative claims).

For more information, please contact the attorney listed or the Jackson Lewis attorney with whom you regularly work.
We hope you find this manual useful in navigating Florida’s state-specific employment laws.

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