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Florida Employer

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Florida Bans Pregnancy-Based Discrimination

The Florida Legislature has amended the Florida Civil Rights Act ("FCRA") to prohibit discrimination based on pregnancy in employment and places of public accommodation. (Ch. 2015-68, §§ 1-8, Laws of Fla.) The new law went in effect on July 1, 2015. The amendment expressly forbids employers from taking any employment action that adversely affects pregnant employees' terms or conditions of employment, unless the employer falls under one of the FCRA's delineated exceptions. (Fla. Stat. § 760.10 (8) & (9) (2015).) Employment actions now forbidden by the statute include failing to hire an individual because she is or may become pregnant.

Historically, the FCRA's protections have generally paralleled that of Title VII of the Civil Rights Act of 1964. However, when Congress passed the Pregnancy Discrimination Act in 1978, amending Title VII to define pregnancy-based discrimination as a form of sex discrimination, the Florida Legislature failed to follow suit. This prompted more than three decades of uncertainty over whether Florida employees could bring a pregnancy discrimination claim under state law.

The Florida Supreme Court in ***Delva v. Continential Group, Inc.***, 137 So. 3d 371 (Fla. 2014), resolved any conflict among the appellate courts in the state. It ruled that the FCRA should be liberally construed to further its purpose of ensuring that female employees remain free from discrimination based on their gender by including pregnancy in the FCRA's prohibition against sex discrimination. Codifying the Florida Supreme Court's decision, the Florida Legislature removed any remaining traces of doubt by adding "pregnancy" to the list of statuses protected under the FCRA.

This development means that Florida employers must review their employee handbooks, policies, and hiring practices to ensure that none disadvantage employees or applicants affected by pregnancy. Employers also should train their managers and supervisors that pregnancy-related discrimination now is treated no differently than racial or religious discrimination under Florida law, and to be alert to potentially discriminatory conduct. If you have any questions about this amendment or the Supreme Court's opinion, please contact the Jackson Lewis attorney with whom you usually work, or Alicia Chiu, at ChiuA@jacksonlewis.com.

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New Florida Law Offers Employers Leverage Against Employees' Unauthorized Access of Data, Files

Effective October 1, 2015, Florida's Computer Abuse and Data Recovery Act (Fla. Stat. §§ 668.801- 668.805) (CADRA) provides a new remedy to employers and businesses that suffer harm or loss due to unauthorized access to their computers or to information stored on their computers.

CADRA provides a civil cause of action for businesses actually harmed by an individual who knowingly, and with intent to cause harm, obtains information from a covered computer without authorization. In addition to monetary remedies and injunctive relief, CADRA allows a successful employer or business to recover attorney's fees.

While criminal hacking and data breaches by third parties can occur and are the subject of extensive publicity, CADRA was passed to help businesses and employers respond to "inside jobs," that is, unauthorized access to data by employees.

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Matthew Klein is an Associate in the Orlando, Florida, office of Jackson Lewis P.C. Mr. Klein earned his Bachelor of Science in International Business Economics in 2004 and his Juris Doctor in 2007, both from the University of Florida. The majority of his practice is devoted to employment litigation, representing public and private employers in federal and state courts, and arbitration proceedings, as well as before the EEOC and other administrative agencies. He also provides clients with day-to-day advice and counseling on employer policies and various workplace issues. In addition, Mr. Klein serves on Orange County's 2016 Charter Review Commission, which is tasked with performing a comprehensive review of the county's Charter and proposing amendments to the county's voters in 2016. Mr. Klein is a member of the Florida Bar, licensed to practice in all federal and state courts in Florida and before the U.S. Court of Appeals Eleventh Circuit.

How it Works

Protection under CADRA requires the business's computer to be a "protected computer" and access has been effectuated by someone who is not an "authorized user." This means that a business cannot seek protection for its data if the business does not take reasonable measures on its own to protect the data.

The law comes into play only if information from a "protected computer" is taken "without authorization." While it is unclear whether an employee having authority to access certain data at the time the data in issue is accessed violates CADRA if he or she exceeds authority, it is clear that any authorized access terminates upon cessation of employment. Moreover, the owner of the information can expressly revoke an otherwise-authorized person's access if the employee goes beyond the scope of authority.

Litigation Use

Employers often discover in litigation that current or former employees have retained information from their employers' computer systems. For example, employees may email files and other company documents to their personal email accounts. In addition, employees can print from company computers sensitive or even routine documents and bring them home.

CADRA and its remedies and attorney's fees provisions provide an opportunity for forward-thinking employers to gain leverage in lawsuits by counterclaiming against employees who improperly take employer data with them upon termination and fail to return such data. An effective CADRA claim allows an employer to recover or offset the fees it expends seeking relief for a CADRA violation.

However, protection under CADRA is not automatic. Employers must put reasonable measures in place ("technological access barriers") to restrict access to company computer data. Companies should also have clear policies describing authorized access, improper and unauthorized access, and the circumstances that will result in a revocation of authorized access.

Similarly, employers should monitor carefully any violation of their data access policies and make it clear that employees will be disciplined for violations. Finally, companies should address violations in a consistent manner, and train human resources and IT personnel to spot possible violations and how to respond when a violation occurs.

Employers should consider reviewing and revising their handbooks and policies to implement an effective data access policy and appropriate technological access barriers. If you have any questions about CADRA, please contact the Jackson Lewis attorney with whom you usually work, or Mendy Halberstam, at Mendy.Halberstam@jacksonlewis.com.

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DOL Proposes Changes to 'White Collar' Overtime Exemptions

The U.S. Department of Labor's proposed changes to the Fair Labor Standards Act's "white collar" overtime exemptions to the overtime regulations for executive, administrative, and professional employees finally have been issued. The DOL proposes to more than double the minimum weekly salary needed to qualify for these exemptions. It estimates that the increased salary threshold would extend eligibility for overtime pay to 4.6 million currently exempt workers within the first year.

Overtime pay in Florida is governed entirely by the FLSA; there is no state law specifically addressing the issue. The FLSA provides exemptions to the overtime requirements for certain executive, administrative, and professional workers. To qualify for these exemptions, employees must meet particular job duties tests and receive a minimum weekly salary. The current minimum weekly salary level, last updated in 2004, is $455 per week (or $23,660 per year). The proposed changes would hike the minimum salary to $970 a week (or $50,440 a year), with annual increases thereafter. Other proposed changes include increasing the annual threshold for exempt highly compensated employees from the current level of $100,000 to $122,148.

After a public comment period, the DOL is expected to issue its proposed Final Rule in September 2015. The DOL's website provides the Notice of Proposed Rulemaking, Overtime Resources, Frequently Asked Questions, and a Fact Sheet on Proposed Rule, at www.dol.gov/whd/overtime/NPRM2015/.

Florida employers should begin preparing for the anticipated changes to the "white collar" exemptions by:

- analyzing the possible impact the changes will have on operations and the overall business;
- evaluating the different options of meeting the new salary thresholds, such as increasing the salary of currently exempt employees or reclassifying employees from exempt to non-exempt;
- determining the pay structure and work schedules for any employees converted from exempt to non-exempt;
- reviewing current job descriptions for accuracy; and
- developing overall contingency plans.

Jackson Lewis' Wage and Hour practice group has prepared a complimentary 45-minute webinar, "Understanding the Proposed Changes to the 'White Collar' Overtime Exemptions," available at www.jacksonlewis.com/event/understanding-proposed-changes-white-collar-overtime-exemptions. The webinar covers the changes contemplated by the proposed rule, the timing of further steps, opportunities that exist for submitting comments, and what employers should be doing in the meantime.

If you have any questions about the DOL proposal, please contact the Jackson Lewis attorney with whom you usually work, or Nicole Sbert, at SbertN@jacksonlewis.com.

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EEOC Declares Sexual Orientation Discrimination in Employment Illegal

Discrimination against employees based on sexual orientation is prohibited under Title VII of the Civil Rights Act of 1964, according to a July 16, 2015, ruling from the federal Equal Employment Opportunity Commission. The EEOC enforces the nation's federal anti-discrimination laws and conducts investigations of employers alleged to have violated those laws.

An air traffic controller claimed he was denied a managerial position because of his sexual orientation. He alleged that his supervisor, who was involved in the hiring process, made negative comments about his sexual orientation during his employment. The EEOC determined the employee asserted a violation of Title VII.

The EEOC ruled that sexual orientation is inherently a sex-based consideration. It explained:

> *[W]e conclude that sexual orientation is inherently a "sex-based consideration," and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. A complainant alleging that an [employer] took his or her sexual orientation into account in an employment action necessarily alleges that the [~~employer] took his or her~~ sex into account. Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. . . . It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations.*

Although EEOC rulings are not binding on federal courts, they often are considered persuasive. Existing federal court rulings do not make employers liable for alleged sexual orientation discrimination, but the EEOC may be expected to argue this should change. Best practices, however, dictate an assumption that sexual orientation is prohibited as to avoid unnecessary legal battles.

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The EEOC's ruling may add yet another protected category to the list of those who may fall under the anti-discrimination laws in Florida. Before the EEOC's ruling, only certain local governments in Florida had laws protecting against sexual orientation discrimination. Florida's state-wide anti-discrimination law (Fla. Stat. 760.01, *et seq.*) does not currently protect against sexual orientation, despite several attempts in the Florida legislature to add sexual orientation to the list of protected categories. The EEOC's ruling should prompt employers in the state to carefully review their handbook and other policies to ensure compliance.

If you have any questions about the EEOC ruling or local prohibitions against discrimination based on sexual orientation, contact the Jackson Lewis attorney with whom you usually work, Jessica Berman, at Jessica.Berman@jacksonlewis.com, or Matthew Klein, at Matthew.Klein@jacksonlewis.com.

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Jackson Lewis News

Attorneys Recognized

We are pleased to announce 137 of the firm's attorneys have been listed in ***The Best Lawyers in America© 2016***. Among them are the following from our Florida offices:

- David E. Block
- Pedro P. Forment
- Ralph C. Losey
- Richard N. Margulies
- Laura E. Prather
- Thomas Royall Smith
- Donald C. Works, III

The firm's presence in this publication has grown steadily each year, with the number of attorneys listed more than tripling since the 2010 edition.

Jackson Lewis Adds Attorneys to Growing Florida Offices

We are pleased to welcome the following associates:

- Jessica L. Berman (Miami)
- Andrew Lincoln (Tampa)
- Amanda Simpson (Orlando)
- Jesse Unruh (Orlando)

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Employment Class Action Summit

– October 27, 2015 –

Seminole Hard Rock Hotel & Casino Hollywood
Hollywood, Florida

Presented by attorneys with a wide range of class action experience, this full-day CLE program will dive into key strategies for defending and avoiding class actions and discuss new trends and challenges facing employers.

Registration Fee: $95.00 • CLE: 6.0 • HRCI: 6.0

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