

THE FLORIDA EMPLOYER

A BULLETIN ON EMPLOYMENT, LABOR, BENEFITS AND IMMIGRATION LAW FOR CLIENTS AND FRIENDS OF JACKSON LEWIS P.C.

Courts Split on Employees' Proof of Violation of Florida's Private-Sector Whistleblower Law

A Florida appellate court has held that Florida's private-sector Whistleblower's Act (Florida Statute Section 448.102) ("FWA"), which prohibits private-sector employers from retaliating against employees who report employers' legal violations to the authorities or who refuse to participate in violations of the law, protects only those employees who can show an actual violation of a law, rule, or regulation. *Kearns v. Farmer Acquisition Co., d/b/a Charlotte Honda*, No. 2D12-6388 (Fla. 2d DCA Feb. 11, 2015). This standard makes it easier for an employer to defend against an employee's claim. However, the court's interpretation conflicts with the views of a sister District Court of Appeals, making it likely the State Supreme Court or Legislature will be called upon to resolve the split. (The Second District Court of Appeals covers central Florida's west coast from Pasco County in the north to Collier County in the south.)

In 2013, Florida's 4th District Court of Appeals (covering the east coast from Indian River County in

the north to Broward County in the south) held that an employee becomes eligible for protection under the FWA merely by showing he had a good-faith belief that the employer was violating a law, rule, or regulation. *Aery v. Wallace Lincoln-Mercury, LLC*, 118 So. 3d 904, 916 (Fla. 4th DCA 2013). Since then, federal courts have adopted this holding.

Under the Fourth District standard, if an employee refuses to engage in an activity at work because he or she mistakenly believed the activity is illegal, the employee likely will enjoy whistleblower protections from any discipline that would arise out of not performing his or her job. This frustrates Florida status as an at-will employment state.

Jackson Lewis attorneys are monitoring developments under this law. If you have any questions about the FWA or require assistance with other workplace issues, please contact the Jackson Lewis attorney with whom you usually work, Matthew Klein at Matthew.Klein@jacksonlewis.com, or Lillian Moon, at MoonL@jacksonlewis.com.

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Jackson Lewis News

Florida Employment Bills on Radar

Florida's legislative session started in March with many employment-related measures being introduced. They include:

SB 98, HB 25: Employment Discrimination

Creating the Helen Gordon Davis Fair Pay Protection Act; recognizing the importance of the Department of Economic Opportunity and the Florida Commission on Human Relations in ensuring fair pay; creating the Governor's Recognition Award for Pay Equity in the Workplace; and requiring that the award be given annually to employers in Florida who have engaged in activities that eliminate barriers to equal pay for equal work for women.

SB 114, HB 47: State Minimum Wage

Increasing the state's hourly minimum wage to \$10.10.

SB 156, HB 33: Prohibited Discrimination

Revising the Florida Civil Rights Act to include sexual orientation and gender identity or expression as protected characteristics; and prohibiting discrimination based on perceived race, color, religion, sex, national origin, age, sexual orientation, gender identity or expression, handicap, or marital status.

SB 192, SB 246, HB 1: Texting While Driving

Revising penalties for violations of the Florida Ban on Texting While Driving Law to include enhanced penalties when the violation is committed in a school zone and removing requirement that provisions be enforced as secondary action by law enforcement.

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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.

SB 214, HB977: Discrimination in Employment Screening ("Ban the Box")

Prohibiting an employer from inquiring into or considering an applicant's criminal history on an initial employment application, unless required to do so by law.

SB 356, HB 121: Employment of Felons

Providing incentives for employment of person previously convicted of felony.

SB 456, HB 325: Labor Pools

Revising the methods by which labor pools are to compensate day laborers.

SB 528, HB 683: Medical Use of Marijuana

Permitting medical use of marijuana and providing licensure requirements for growers and retailers.

SB 890, HB 455: Florida Overtime Act of 2015

Requiring payment of time-and-one-half an employee's regular rate of pay for all hours worked over eight in a day, over 40 in a work week, or on the seventh day of any workweek.

SB 892, HB 297: Safe Work Environments

Subjecting employees to an "abusive work environment" is made an unlawful employment practice, and retaliation for reporting the practice is prohibited.

SB982, HB 625: Discrimination Based on Pregnancy

Amending the Florida Civil Rights Act to prohibit discrimination based on pregnancy, childbirth, or related medical conditions. (The Florida Supreme Court in 2014 held that the Act protects against pregnancy discrimination.)

SB1318, HB 589: State Minimum Wage

Making it a third degree felony to procure labor for less than minimum wage, i.e., "with intent to defraud or deceive a person."

SB1396, HB 433: Employment Discrimination

Amending the Florida Civil Rights Act to include unpaid interns within the definition of "employee."

SB1490, HB 1185: Florida Healthy Working Families Act ("Mini FMLA")

Requiring employers to provide sick and safe leave to employees and creating a complaint procedure, plus a civil cause of action for damages and fees in the event of a violation. Employers of more than nine employees must provide *paid* sick and safe leave; employers of nine or fewer employees must provide unpaid sick and safe leave.

SB 126: Social Media Privacy

Among other things, prohibiting an employer from requesting or requiring access to a social media account of an employee or prospective employee under certain circumstances.

SB 1096: Unemployment Compensation

Prohibiting disqualification of victims of domestic violence from receiving benefits if they leave work voluntarily.

If you have any questions about any of these bills, contact the Jackson Lewis attorney with whom you usually work or Donald C. Works, at WorksD@jacksonlewis.com.

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Jackson Lewis P.C. represents management exclusively in workplace law and related litigation. Our attorneys are available to assist employers in their compliance efforts and to represent employers in matters before state and federal courts and administrative agencies. For more information, please contact the attorney(s) listed or the Jackson Lewis attorney with whom you regularly work.

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Florida's Same-Sex Marriage Ban Ruled Unconstitutional

Ordering Florida court clerks to issue marriage licenses to same-sex couples, U.S. District Judge Robert L. Hinkle, in Tallahassee, announced that his August 2014 decision finding Florida's 2008 same-sex marriage ban violated the U.S. Constitution applied to all marriage-license applicants, not only to the couples named in the lawsuit. In his August ruling, Judge Hinkle wrote, "The Florida provisions that prohibit the recognition of same-sex marriages lawfully entered elsewhere, like the federal provision, are unconstitutional. So is the Florida ban on entering same-sex marriages." *Brenner et al. v. Scott*, 999 F. Supp.2d 1278 (N.D. Fla. 2014).

This ruling has far-reaching implications for employers in Florida in terms of employee benefits, permitted reasons for leave, and possible discrimination claims, among other things. Employers must ensure compliance by uniformly applying their policies and procedures to both same-gender and opposite-gender married couples.

Court clerks across the state began issuing marriage licenses to same-sex couples on January 6, 2015.

If you have any questions about or require assistance with this or other workplace issues, please contact the Jackson Lewis attorney with whom you normally work or Scott Allen, Scott.Allen@jacksonlewis.com.

DOL Updates Regulations on Definition of Spouse

The U.S. Department of Labor issued a Final Rule expanding the regulatory definition of “spouse” under the Family and Medical Leave Act. Under the revised regulations, effective March 27, 2015, a spouse is a husband or wife as defined or recognized in the state where the individual was married (“place of celebration”), and specifically includes individuals in same-sex and common law marriages. The Final Rule also defines spouse to include a husband or wife in a marriage that was validly entered into outside of the United States, if it could have been entered into in at least one state.

The DOL website containing the regulations, a Fact Sheet and FAQs: <http://www.dol.gov/whd/fmla/spouse/>

This change arose out of the U.S. Supreme Court’s June 2013 decision in *United States v. Windsor*, declaring section 3 of the federal Defense of Marriage Act (DOMA) unconstitutional. Section 3 of DOMA defined spouse for purposes of federal law, which included the FMLA, as a person of the opposite sex. As a result, prior to *Windsor*, an employee was not entitled to take FMLA leave to care for a same-sex spouse with a serious health condition.

After the *Windsor* decision, the definition of “spouse” extended only to employees in same-sex marriages recognized in their “state of residence.” Therefore, if an employee was lawfully married in a state that recognized same-sex marriage, but lived in a state that

did not recognize same-sex marriage, the employee was not a spouse for purposes of FMLA. By looking to the place where the marriage was entered into (referred to as a “place of celebration” rule), rather than the employee’s state of residence, the Final Rule will extend FMLA coverage to more employees.

The new definition of spouse makes FMLA leave available to all eligible employees who are legally married, regardless of where they live, but does not substantively alter other provisions of the FMLA. The revised regulatory definition of spouse also encompasses a husband or wife in a common law marriage, as long as the common law marriage was validly entered into in a state that permits the formation of common law marriages, regardless of the state in which the employee currently resides. Additionally, the revised definition of spouse includes individuals in a same-sex marriage entered into outside of the United States, as long as the marriage is valid in the place where it was entered into, and could have been entered into in at least one state of the United States (a state that authorizes same-sex marriages). Keep in mind, however, that “civil unions” are not considered marriages under the FMLA. Therefore, employees in same-sex civil unions, as well as opposite-sex civil unions, are not guaranteed the rights of a spouse under the FMLA.

To the extent that an employer’s FMLA policy includes the definition of spouse, the policy should ensure it reflects the new regulatory definition. Employers also must revise template forms to conform family relationships to the new regulatory definition.

If you have any questions about this topic or others, contact the Jackson Lewis attorney with whom you usually work or Tasos Paindiris, Tasos.Paindiris@jacksonlewis.com.

JACKSON LEWIS NEWS

Laura E. Prather Becomes Managing Shareholder of Tampa

We are pleased to announce **Laura E. Prather** has joined the Tampa office as Managing Shareholder, succeeding Barnett Brooks, who decided to relocate his practice. Ms. Prather is joined by Associate **Matthew L. Ransdell**.

Ms. Prather has represented employers in such industries as healthcare and hospitality in labor and employment law matters. She has defended employers in complex litigation cases and class actions related to employment discrimination under Title VII of the Civil Rights Act, wage and hour matters, non-compete issues, Americans with Disabilities Act issues, and whistleblower actions before federal and state courts, various government agencies and arbitrators.

In addition, Ms. Prather provides day-to-day advice, counseling and training on labor and employment law compliance, including the development of employee policies and handbooks. She is

AV-rated by Martindale-Hubbell and Board Certified by The Florida Bar in Labor and Employment Law. Ms. Prather received her B.S.B.A. in Business Administration from the University of Florida and her J.D. from the University of Miami School of Law.

Mr. Ransdell represents management in employment litigation matters, including under Title VII, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Florida Civil Rights Act, as well as whistleblower and retaliation claims. He works with clients on employee handbooks, including non-compete and non-disclosure provisions, and drafts employment agreements for employers. Mr. Ransdell has performed Foreign Corrupt Practices Act assessments, counseling, and investigations for international companies, including a Fortune 50 company. Mr. Ransdell received his B.A. from Western Kentucky University and his J.D. from the Stetson University College of Law, where he sat on the Moot Court Board and was a member of Law Review.

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Orlando Office Continues to Expand

Stephanie Segalini has joined our Orlando office as a Shareholder. Ms. Segalini brings with her over a decade of experience in all aspects of employee benefits litigation, including coverage, breach of fiduciary duty, statutory penalty and benefits claims. Ms. Segalini has experience in both federal and state courts with all types of benefit disputes, especially pension, health, life, and disability claims under ERISA. Her background strengthens our ERISA and employment litigation offerings both in Florida and nationally.

Miami Office Fills its Ranks

The Miami office welcomes three Associates: **Ariadna Hernandez, Michael Kantor,** and **Naveen Paul.**

Ariadna Hernandez is admitted to practice in Florida and the U.S. District Court for the Southern, Middle, and Northern Districts of Florida. Ms. Hernandez received her B.A. in political science, Phi Beta Kappa, from Florida International University and her J.D. from the University of Florida Levin College of Law. Prior to joining Jackson Lewis, Ms. Hernandez worked at top Florida law firms and as in-house corporate counsel for two civil engineering companies in Florida and New England. Ms. Hernandez is fluent in Spanish.

Michael Kantor is admitted to practice in Florida, the U.S. District Courts for the Southern, Middle, and Northern Districts of Florida, the U.S. Courts of Appeals for the Eleventh Circuit, in Atlanta, and for the First Circuit, in Boston. Mr. Kantor received his J.D. from Nova Southeastern University, where he was admitted to the Order of Barristers by the faculty in recognition of his advocacy skills. He earned his Bachelor of Science degree in finance from the University of Central Florida. Mr. Kantor is active in the South Florida Jewish community and has worked in the offices of several elected officials on the local, state, and federal levels in South and Central Florida.

Naveen Paul is admitted to practice in Florida, the U.S. District Court for the Southern District of Florida, and the U.S. Court of Appeals for the Eleventh Circuit. Ms. Paul received her B.A. in philosophy, politics and law, summa cum laude, her M.B.A. from Binghamton University, and her J.D. from Boston University, where she was on the Public Interest Law Journal. Ms. Paul speaks Urdu and Hindi fluently.

In addition, **Zahira Diaz-Vazquez** was elevated to Shareholder and has transferred from our Orlando office to the Miami office. She is admitted to practice in Florida and Puerto Rico courts, as well as the U.S. District Courts for the Middle and Southern Districts of Florida and Puerto Rico, and the U.S. Court of Appeals for the First Circuit, in Boston. Mrs. Diaz-Vazquez graduated from the University of Puerto Rico with a Bachelor's Degree in Labor Relations. After completing her undergraduate studies, Mrs. Diaz-Vazquez worked as a Field Examiner in the Anti-Discrimination Unit of Puerto Rico's Department of Labor and in a leading employment defense law firm in Puerto Rico. She has extensive litigation employment defense experience before state and federal courts, as well as administrative forums.

David Gobeo of the Miami Office also was elevated to Shareholder. Mr. Gobeo has been recognized as a "Rising Star" by *Florida Super Lawyers* in 2012, 2013, 2014, and 2015. He is a member of the Broward County Bar Association and is admitted to practice all Florida courts, all federal courts in Florida, and the U.S. Court of Appeals for the Eleventh Circuit. Mr. Gobeo received his B.S. in Political Science, cum laude, from Stetson University, graduating from the Honors Program with Distinction, and his J.D. from the University of Florida Levin College of Law.

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Jackson Lewis P.C. represents management exclusively in employment, labor, benefits and immigration law and related litigation.

The firm has more than 800 attorneys practicing in 54 locations throughout the U.S. and Puerto Rico.

Jackson Lewis represents employers before state and federal courts and administrative agencies on a wide range of issues, including discrimination, wrongful discharge, wage/hour, affirmative action, immigration, and pension and benefits matters. Jackson Lewis negotiates collective bargaining agreements, participates in arbitration proceedings and represents union-free and unionized employers before NLRB and other federal and state agencies. The firm counsels employers in matters involving workplace health and safety, family and medical leaves and disabilities

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