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March 2016

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LEGISLATIVE UPDATE

What's happening in Florida's 2016 legislative session

by Robert J. Sniffen and
Jeffrey D. Slanker
Sniffen & Spellman, P.A.

The legislative session has once again begun in Florida, and several bills before the House and Senate, if passed and signed into law by the governor, will influence the way Florida businesses and entities hire and manage their workforces. Some of the 2016 bills are repeats of similar legislation that wasn't passed during previous legislative sessions, and there have already been some surprises, including the failure in committee of a bill amending the Florida Civil Rights Act (FLCRA) to protect LGBT individuals from employment discrimination. Nevertheless, many major bills are still pending. Let's look at some of the proposals currently before the senate.

Senate bills being considered

Senate Bill (SB) 188 addresses the eligibility for unemployment benefits of employees who leave their jobs because of domestic abuse. Under the bill, such individuals would not be disqualified from receiving benefits.

SB 384 would radically change the requirements for how Florida employers treat new parents in the workplace. The bill would amend the FLCRA to enhance the protections for new parents and provide leave time for parents to bond with a new child.

SB 448 establishes statewide "ban-the-box" requirements in line with a movement that's gaining popularity throughout the country and in some Florida municipalities. The proposal would forbid employers from seeking out criminal background information on initial employment applications as a way to ensure that job applicants are not excluded from consideration for employment solely because of their past criminal history.

SB 1024 would provide incentives for hiring a person previously convicted of a felony. Under the proposal, an employer that hires someone who was convicted of certain felonies would receive an incentive tax credit. The bill is similar to legislation proposed in past years that didn't make it to the governor's desk.

SB 1648 revises the Florida Public Whistleblower Act, which prohibits public-sector employers from retaliating against employees for reporting misfeasance, malfeasance, or similar issues in governmental agencies. The bill makes some perfunctory modifications to the law's language and defines concepts and terms that have been subject to interpretation by Florida courts, such as what constitutes misfeasance.

Stay tuned

This is just a sampling of the employment-related bills before the senate

this term, many of which have corollaries in the house of representatives. Employers should keep an eye on the progress of these bills because even if they don't make it out of the legislature, they portend the potential shifts in Florida labor and employment law that may someday occur.

Robert J. Sniffen is the founder and managing partner of the Tallahassee firm of Sniffen & Spellman, P.A. He can be reached at 850-205-1996 or rsniffen@sniffenlaw.com. Jeff Slanker is an attorney with Sniffen & Spellman, P.A., in Tallahassee. He can be reached at 850-205-1996 or jslanker@sniffenlaw.com. ✤

TIPPED EMPLOYEES

Florida court reviews the rules for valid tip credits and tip pools

by Tom Harper
The Law and Mediation Offices of
G. Thomas Harper, LLC

In 2012, a group of servers that eventually included 220 employees who worked at two St. Augustine seafood restaurants sued their employers, claiming unpaid wages and overtime under Florida law and the federal Fair Labor Standards Act (FLSA). The Florida federal court's recent decision in the case illustrates some of the issues associated with wages paid to tipped employees.

Everybody into the pool!

Two St. Augustine restaurants, Saltwater Cowboys and Creekside Dinery, required their servers to contribute to a "tip pool" that included the table busers, dishwashers, kitchen helpers, cooks, and bartenders at each restaurant. As they were allowed to do under Florida and federal law, both restaurants took a "tip credit" against their minimum wage obligations based on a portion of the tips each server received.

According to the court, "At the end of every shift, each server would obtain a server checkout showing that server's sales, payments, number of items ordered, tips required to be paid into the [buser]/bartender tip pool, cash owed to the restaurant (to pay into the pool), and credit-card tips." Both restaurants required employees to fill out a "tip-allocation form" before leaving work each day. The form required the server to report tips received and amounts to be paid to the members of the tip pool.

After receiving the tip payments from the servers each night, a kitchen manager would put the tips in an envelope. The money was regularly paid to the employees in the pool.

The servers who brought the lawsuit alleged that the restaurants "operated an invalid tip pool," which prevented them from using the tip credit to satisfy their minimum wage obligations. They also claimed that the restaurants unlawfully took a tip credit by requiring them to participate in a tip pool with employees who didn't customarily receive tips, including cooks and dishwashers. The servers claimed the restaurants owed them back pay for the difference between their wages and the full minimum wage.

Consider the benefits of having employees sign off on tip-sharing policies.

The servers argued that the kitchen tip pools at both restaurants weren't valid "voluntary" tip pools because they weren't based on a mutual agreement between the employees. In addition, the servers claimed the tip pool amounted to an unlawful agreement to transfer ownership of tips to the restaurants in violation of U.S. Department of Labor (DOL) regulations. Finally, they argued that the restaurants' exercise of possession and control over the tip pool before any money was paid out prevented them from retaining all of their tips, in violation of the FLSA.

Florida and federal wage and hour law

Under Florida and federal law, an employer can pay an employee who regularly receives tips a wage below the minimum wage as long as the employer supplements the difference with the employee's tips. In other words, the employer can take a "tip credit."

The FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required wage (at least $2.13 an hour) and the federal minimum wage (currently, $7.25 an hour). Thus, the maximum tip credit an employer can claim under the FLSA is $5.12 per hour

(the minimum wage of $7.25 minus the minimum required directly paid wage of $2.13).

Because Florida's minimum wage is higher than the federal rate, employers in Florida are required to pay the higher minimum wage. Effective January 1, 2016, the minimum wage in Florida is $8.05 per hour, with a minimum directly paid wage of at least $5.03 per hour for tipped employees (in addition to tips). Thus, in Florida, the employer can claim $3.02 toward the $8.05 minimum

ANDY'S IN-BOX

You can't sue me . . . I sued you! Liability for HR employees

by Andy Rodman
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.

I've been asked by HR representatives no fewer than three times in the past month: "Can our employee sue *me* for this?" Of course, the answer to that question depends on the situation and the type of claim at issue.

An HR representative may be found personally liable for statutory violations under the Family and Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA). On the other hand, many courts have held that individual employees cannot be held personally liable for violations of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA)— only the employer bears responsibility for breaches of those laws.

I recently stumbled upon an "individual liability" decision from a federal court in Texas that may be of interest to the HR community. Let's look at the particulars of that case.

Is there something you forgot to mention?

As the HR director at Business Partners in Healthcare, Nicole Clarke-Smith was responsible for administering employee benefits. While she was out on FMLA leave, the company learned that she had concealed the fact that the U.S. Department of Labor (DOL) was investigating her alleged failure to issue COBRA notices to former employees and that she hadn't made timely deposits into employees' 401(k) retirement accounts.

The company terminated Clarke-Smith's employment because of the COBRA and 401(k) issues. She then sued Business Partners for race discrimination, retaliation, and violation of the FMLA. The company didn't simply defend against those claims; it turned around and sued Clarke-Smith for breach of fiduciary duty, among other things.

From there, things didn't get much better for Clarke-Smith. The court granted summary judgment in favor of Business Partners, dismissing her claims of discrimination, retaliation, and FMLA interference without a trial. Moreover, the court rejected her request for summary dismissal of the company's breach of fiduciary duty claim.

In denying Clarke-Smith's request for dismissal, the court held that (1) there was a fiduciary duty between her and the company with respect to her handling of the employee benefit issues, (2) she didn't disclose the DOL investigation to the company, and (3) her failure to disclose the DOL investigation damaged the company and caused it to have to engage attorneys to assist it with the previously unknown and undisclosed DOL investigation.

What's the upshot of the court's decision? Clarke-Smith's claims against her former employer were thrown out, while its breach of fiduciary duty claim against her survived (and may end up going to trial). *Nicole Clarke-Smith v. Business Partners in Healthcare.*

Bottom line

HR representatives can now add "breach of fiduciary duty" to the list of claims for which they may be personally liable. And it's a claim that can be brought against the HR representative *by her own company.* Of course, if you perform your job diligently—as I'm sure you all do—then you should have nothing to worry about.

Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like Andy to address, e-mail arodman@stearnsweaver.com or call him at 305-789-3256. Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making any personnel decisions. ✤

wage as long as the employee actually receives $3.02 in tips per hour. The minimum wage rate in Florida is recalculated each year on September 30, based on the Consumer Price Index (CPI).

DOL rules for using tip credits

An employer must provide the following information to a tipped employee before the employer may use the tip credit:

(1) The amount of direct hourly wages it is paying a tipped employee, which must be at least $5.03 in Florida;

(2) The additional amount it claims as a tip credit, which cannot exceed $3.02 (the difference between the minimum required directly paid wage of $5.03 and the current Florida minimum wage of $8.05);

(3) An explanation that the tip credit it claims cannot exceed the amount of tips actually received by the tipped employee;

(4) A statement that all tips received by the tipped employee are to be retained by her unless the employer has a valid tip-pooling arrangement limited to employees *who customarily and regularly receive tips;* and

(5) An explanation that the tip credit will not apply to any tipped employee unless the employee has been informed of the tip credit provisions.

Tips belong to the employee

DOL Fact Sheet #15, which is applicable to tipped employees, provides in part:

> A tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit. The FLSA prohibits any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer. For example, even where a tipped employee receives [the full minimum wage] in wages directly from the employer, the employee may not be required to turn over his or her tips to the employer.

As the court noted in this case, the requirement that an employee must retain all tips doesn't preclude a valid tip-pooling or tip-sharing arrangement among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, counter personnel (who serve customers), busers, and service bartenders.

The DOL regulations go on to state that a valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors. However, employees can voluntarily agree to share their tips with anyone, as long as their agreement isn't coerced by the employer.

According to the fact sheet, common problems that arise in tip-pooling arrangements include:

- An employer not making up the difference when an employee doesn't receive sufficient tips to account for the tip credit amount;
- An employee who receives only tips as compensation not being paid the full minimum wage;
- Deductions for walkouts, breakage, or cash register shortages reducing an employee's wages below the minimum wage; and
- An employer taking a larger tip credit for an overtime hour than for a straight-time hour (Employers must calculate overtime using the full minimum wage rate, not the lower directly paid wage rate.)

Participation and control issues

Everyone agreed that nontipped employees at Saltwater Cowboys and Creekside Dinery (i.e., cooks, dishwashers and even kitchen managers) were included in the tip pool. Thus, participation in the tip pool couldn't be mandatory. The court had to decide whether the tip pool used by the restaurants was mandatory (and therefore unlawful) or voluntary (and lawful).

Although the restaurants stacked up 55 sworn statements from servers who claimed the tip pool was voluntary, contrary statements from a number of other servers and witnesses led the court to decide that the voluntary nature of the arrangement was a disputed fact that should be decided by a jury at trial. The restaurants' request that the court dismiss the claim without a trial was therefore denied.

Turning to an examination of how the tip pool was operated, with kitchen managers collecting and distributing the tip money, the court noted, "Without question, even if the kitchen tip pool was voluntary, if [the restaurants] themselves received any portion of the proceeds of the tips, the [tip pool] would violate the retention requirement of the FLSA. This is so because the FLSA prohibits any agreement whereby the employees' tips become property of the employer." After reviewing the evidence presented by the parties, the court concluded that there was insufficient proof that either the restaurants or their owners had ever received a portion of the kitchen tip pool.

The court found no evidence that the restaurants "ever acted as if or believed they had the right to use kitchen tip pool proceeds for any purpose other than that directed by the server—to be distributed to the kitchen staff." As the court saw it, at most, kitchen managers had the discretion to distribute the money in the pool as they saw fit—but that didn't make the tips the property of the restaurant. "Rather," said the court, "the undisputed evidence reflects that, once the kitchen tip pool was established, [the restaurants] were not directly

involved in its operation. Instead, the kitchen managers were solely responsible for distributing kitchen tip pool proceeds among the kitchen staff."

It's also notable that the restaurants didn't take a tip credit for any of the kitchen employees but instead paid them a direct wage without using the tip pool money to satisfy the minimum wage obligation. As a result, the court dismissed the servers' claim that the employers controlled and used the tips. *David Kubiak, et al. v. S.W. Cowboys, d/b/a Saltwater Cowboys, et al.*, Case No. 3:12-cv-1306-J34-JRK (M.D. Fla., February 18, 2016).

Takeaway

The servers didn't contend that the restaurants failed to provide them with notice of their intent to take the tip credit. The FLSA requires employers to inform each employee of the provisions of Section 203(m), which explains that an employee must receive in tips the amount credited toward her employer's minimum wage obligation and that she is entitled to keep all of her tips unless she participates in a legal tip pool.

There was also no mention in the opinion about whether the restaurants asked servers and tipped employees to sign a written agreement affirming their participation in the tip pool. Employers with tipped employees should consider the benefits of having employees sign off on their tip-sharing policies.

The court considered and discussed other issues involved in operating a tip pool. If you have tipped employees, you may want to read the entire court decision and consult with your wage and hour attorney. For a copy of the order, send an e-mail to tom@employmentlawflorida.com. ✤

JOINT EMPLOYERS

DOL guidance ushers in new era in understanding joint employment

New guidance from the U.S. Department of Labor (DOL) should put employers in potential joint-employment relationships on notice that the changing economic forces that have caused them to move to nontraditional business models also are spurring new compliance issues. In a January 20 announcement of new joint-employment guidance, David Weil, administrator of the DOL's Wage and Hour Division (WHD), made a point of saying that under federal wage laws, "it is possible for a worker to be jointly employed by two or more employers who are both responsible, simultaneously, for compliance."

As the nature of work has changed, joint employment has become more common and the "need to address it more pressing," Weil said, meaning employers sharing employees or using third-party management companies, independent contractors, staffing agencies, or other labor providers may have more responsibility than they bargained for.

What does joint employment look like?

In conjunction with Weil's administrator's interpretation on joint employment under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), the DOL released fact sheets that explain that joint employment exists when an employee is employed by two or more employers such that they "are responsible, both individually and jointly, to the employee for compliance with a statute." Both the FLSA and the MSPA share the same broad definition of employment, which includes "to suffer or permit to work."

The DOL outlines two likely scenarios for joint employment:

(1) Where the employee has two or more technically separate but related or associated employers; or

(2) Where one employer provides labor to another employer and the workers are economically dependent on both employers.

In the first scenario, joint employment exists when two or more employers benefit from an employee's work and the employers are sufficiently associated with each other. The focus of that type of joint employment is the degree of association between the employers and is sometimes called "horizontal" joint employment, the DOL fact sheet states.

The fact sheet details some facts to consider in determining horizontal joint employment:

- Who owns or operates the possible joint employers?
- Do the employers have any overlapping officers, directors, executives, or managers?
- Do the employers share control over operations?
- Are the operations of the employers intermingled?
- Does one employer supervise the work of the other?

AGENCY ACTION

DOL grants to create jail-based employment centers. The U.S. Department of Labor's (DOL) Employment and Training Administration in January 2016 announced the availability of approximately $5 million for 10 grants of up to $500,000 each to put specialized American Job Centers within county, municipal, or regional correctional facilities. The "Linking to Employment Activities Pre-Release" initiative aims to help the more than nine million people released from county and local jails each year find employment. Many of those individuals have few job skills and face difficult barriers to stable employment, the DOL said in announcing the program.

DOL issues guidance on joint employers. The DOL released guidance in January detailing when workers are considered jointly employed by two or more employers. David Weil, administrator of the DOL's Wage and Hour Division (WHD), said in a blog post that his new administrator's interpretation addresses who is an employer by providing guidance on joint employment under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). In his blog, Weil said the administrator's interpretation "reflects existing policy, and provides all stakeholders with clear guidance, including examples of how WHD considers joint employment in its enforcement of these laws." Administrator's Interpretation No. 2016-1 states that the possibility of joint employment should be regularly considered in FLSA and MSPA cases, "particularly where (1) the employee works for two employers who are associated or related in some way with respect to the employee; or (2) the employee's employer is an intermediary or otherwise provides labor to another employer." For detailed coverage of this guidance, see our article on pg. 5.

EEOC evaluating input on proposed retaliation enforcement guidance. The Equal Employment Opportunity Commission (EEOC) in January announced that it would seek public input on proposed enforcement guidance addressing retaliation and related issues under federal employment discrimination laws. The EEOC's last guidance update on retaliation was issued in 1998. Since that time, the U.S. Supreme Court and lower courts have issued numerous significant rulings regarding retaliation under employment discrimination laws, the EEOC said. The input period was to end February 24. All of the laws the EEOC enforces make it illegal to fire, demote, harass, or otherwise "retaliate" against applicants or employees because they complained to their employer about discrimination on the job, filed a charge of discrimination with the EEOC, participated in an employment discrimination proceeding (such as an investigation or lawsuit), or engaged in any other "protected activity" under employment discrimination laws. For detailed coverage of the EEOC's guidance, see our article on pg. 7. ✤

- Do the employers share supervisory authority over the employees?
- Do the employers treat the employees as a pool of workers available to both of them?
- Do they share clients or customers?
- Are there any agreements between the employers?

The fact sheet says the other type of joint employment—often referred to as vertical joint employment—occurs when a worker is economically dependent on two employers: (1) an intermediary employer (such as a staffing agency, farm labor contractor, or other labor provider) and (2) another employer that engages the intermediary to provide workers. The workers are employees of the intermediary, and the issue is whether they also are employed by the employer that engaged the intermediary to provide labor.

The fact sheet says with vertical joint employment, factors must be considered that show whether a worker is economically dependent on not just the intermediary employer but also the other employer. A nonexhaustive list of factors to consider includes the following questions:

- Does the other employer direct, control, or supervise (even indirectly) the work?
- Does the other employer have the power (even indirectly) to hire or fire the employee, change employment conditions, or determine the rate and method of pay?
- How permanent or lengthy is the relationship between the employee and the other employer?
- Does the employee perform repetitive work or work requiring little skill?
- Is the employee's work integral to the other employer's business?
- Is the work performed on the other employer's premises?
- Does the other employer perform functions for the employee typically performed by employers, such as handling payroll or providing tools, equipment, or workers' compensation insurance or, in agriculture, providing housing or transportation?

Joint employment and the FMLA

The DOL has issued a fact sheet detailing joint employers' responsibilities under the federal Family and Medical Leave Act (FMLA). The fact sheet states that when an individual is employed by two employers in a joint-employment relationship under the FMLA, in most cases one employer will be the primary employer while the other will be the secondary employer.

The primary employer is responsible for giving required notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same job or an equivalent job upon return from leave. Also, the primary employer is prohibited from interfering with a jointly employed employee's exercise of or attempt to exercise her FMLA rights.

The secondary employer, whether an FMLA-covered employer or not, also is prohibited from interfering with a jointly employed employee's exercise of FMLA rights and is responsible in certain circumstances for restoring the employee to the same or equivalent job upon return from FMLA leave. ✤

EMPLOYEE SAFETY

How to address business travel and the Zika virus

The World Health Organization (WHO) recently declared the Zika virus a "public health emergency of international concern." According to the WHO, the virus is transmitted by mosquitos and is linked to a spike in birth defects in cases in which the mother contracted the virus during pregnancy, and a study in Brazil suggests there is a link between the virus and a rise in incidents of Guillain-Barré syndrome, which can cause temporary paralysis.

Travel warnings

The Centers for Disease Control and Prevention (CDC) has issued travel notices related to the Zika virus for the Pacific Islands, the Caribbean, Central America, South America, Cape Verde, and Mexico. Individuals traveling to these areas are advised to take precautions to avoid being bitten by mosquitos that may carry the virus.

In addition, there is strong evidence, according to the WHO and the CDC, that infection with the Zika virus during pregnancy can result in babies born with microcephaly, a very serious disease that leaves newborns with small heads because their brains haven't developed properly. Because of this threat, pregnant women and those who may become pregnant are advised not to travel to affected areas. If they must travel to these areas, they are advised to consult with their doctors first and to strictly follow precautions to avoid mosquito bites.

Recommendations for employee travel

Employers may want to consider expressly stating that their position is that travel to affected areas should be avoided or even consider suspending all nonessential travel to these areas. They also should be very lenient with changes to travel plans to affected areas and encourage alternatives to travel when appropriate. Employees who must travel to these areas should be provided with information on how to avoid the disease and any necessary resources so they can remain safe.

Pregnancy issues

Given the CDC travel notice, employers should not force or require a pregnant employee to travel. Doing so could place the employee and her unborn child at risk, and the employer could be liable if the employee is infected with the Zika virus and her child is hurt as a result. However, a full prohibition on pregnant employees traveling to these areas isn't a good idea. If nonpregnant employees are permitted to travel to these areas, the employer could find itself faced with a pregnancy discrimination claim if it treats pregnant women or women who might become pregnant differently.

Instead, if appropriate, employers should consider issuing a strongly worded statement, signed by the head of the organization, notifying employees that it is the employer's preference that employees not conduct business travel to areas affected by the Zika virus until the CDC has lifted its travel warnings. The statement should apply to all employees (i.e., it shouldn't be limited to pregnant employees or employees intending to become pregnant). ✤

EMPLOYER RETALIATION

EEOC releases new guidance on retaliation claims

According to the Equal Employment Opportunity Commission (EEOC), in 2015, retaliation claims made up 45 percent of all private-sector charges filed with the agency. In recognition of the growth in the number of these claims and the fact that the EEOC hasn't updated its guidance on retaliation since 1998, it released a proposed enforcement guidance on retaliation claims in January.

What the guidance says

The guidance sets out the standards for proving retaliation under the various civil rights laws, including Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the

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Rehabilitation Act, and the Equal Pay Act (EPA). To establish a claim of retaliation, the employee must show that:

(1) She engaged in protected activity either by participating in equal employment opportunity activity or by opposing discrimination;

(2) The employer took an adverse action against her; and

(3) There is a causal connection between the protected activity and the adverse action.

The guidance explains each of these elements and provides examples of conduct that is and isn't retaliatory in the view of the EEOC. The guidance also makes clear that an employee need not prove an underlying discrimination claim to be successful on a retaliation claim.

The EEOC states an "employer will prevail if it produces credible unrebutted evidence that the adverse action was based on a legitimate reason" (e.g., excessive absenteeism) and "the employee cannot show other evidence of retaliation." On the other hand, the EEOC states that an employee can "discredit" the employer's explanation and "demonstrate a causal connection between prior protected activity and the challenged adverse action" by presenting a "convincing mosaic" of "circumstantial evidence that would support" an inference of retaliatory animus. According to the EEOC, the "mosaic" may include the timing of the adverse action, oral or written statements, comparative evidence, and any other "bits and pieces" from which an inference of retaliatory intent could be drawn.

Best practices

The EEOC provides in the guidance what it calls "best practices" for employers to prevent and address retaliation claims. These best practices include maintaining a written, plain-language retaliation policy that features a complaint procedure and reviewing all policies to make sure they don't include language that might deter employees from reporting suspected discrimination or harassment.

Other best practices include training on the policy for *all*, providing antiretaliation information and advice to everyone involved in an investigation of a discrimination complaint, and a proactive follow-up after a complaint is made to ensure any concerns about retaliation are addressed immediately. Finally, the EEOC recommends that HR or in-house legal counsel review proposed employment actions to make sure they are based on legitimate nondiscriminatory and nonretaliatory reasons. ✤

FLORIDA EMPLOYMENT LAW LETTER (ISSN 1041-3537) is published monthly for $447 per year plus sales tax by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

Editorial inquiries should be directed to G. Thomas Harper at The Law and Mediation Offices of G. Thomas Harper, LLC, 1912 Hamilton Street, Suite 205, Post Office Box 2757, Jacksonville, FL 32203-2757, 904-396-3000. Go to www.EmploymentLawFlorida.com for more information.

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