www.laboremploymentlaw.org.

the Checkoff

The Florida Bar
Vol. LII, No.1
December 2012

A PUBLICATION OF THE FLORIDA BAR LABOR & EMPLOYMENT LAW SECTION

INSIDE:

SAVE THE DATE!!

Advanced Labor Topics 2013
(1523R)

April 5 - 6, 2013
Duck Key, FL

Supreme Court (Partially) Levels the Playing Field for Employers Asserting FLSA Exemptions

By Loren Beer, Tampa

A split between the Ninth and Second Circuits forced the learned hand of the U.S. Supreme Court to determine whether pharmaceutical sales representatives ("PSRs") qualify as "outside salesm[e]n," making them exempt from the minimum wage and overtime requirements of the federal Fair Labor Standards Act ("FLSA" or "the Act").[1] *See Christopher v. SmithKline Beecham Corp.*[2] The Court was also required to decide whether to give controlling deference to the Department of Labor's ("DOL") interpretation of pertinent regulations. Ultimately, on June 18, 2012, in a 5-4 decision, the Court rejected the DOL's interpretation of the FLSA and held that PSRs qualify as "outside salesm[e]n" and are therefore exempt from the Act's overtime and minimum wage requirements.

SmithKline Beecham Corporation ("SmithKline") manufactures, creates, and sells

See "FLSA Exemptions," page 6

New "Union-Relations" Privilege Recognized

By Cynthia May, Tampa

In *Peterson v. State of Alaska*, 280 P. 3d 559 (Alaska 2012), Supreme Court No. S-14233, the Supreme Court of Alaska recently recognized a "union-relations" privilege for communications made in confidence between an employee (or the employee's attorney) and union representatives acting in official representative capacity in anticipated or ongoing disciplinary or grievance proceedings. The court ruled that the privilege was implied in Alaska's Public Employee Relations Act, which expressly recognizes the rights enumerated in Section 7 of the NLRA; establishes certain unfair labor practices; and prohibits an employer from interfering, restraining or coercing an employee in the exercise of rights guaranteed by the statute. The decision was handed down on July 20, 2012, and is the first time a state supreme court has found that such a privilege exists.

The issue arose when Peterson, a state employee, sued for wrongful termination after unsuccessfully challenging his discharge in grievance proceedings, where he was assisted by a union representative. The state subpoenaed the union representative to appear for deposition with the union's grievance file, and the lower court denied Peterson's motion for protection on privilege grounds.

On appeal, the court considered relevant

See "Privilege," page 9

Message from the Chair

I hope that you have all had a chance to review the Labor and Employment Law Section's E-Alerts, published by Jay Lechner and Leslie Langbein, co-chairs of our publications subcommittee. These monthly electronic publications contain short case notes on recent and noteworthy opinions. We are always looking for additional writers so please reach out to either Jay or Leslie, and show your interest.

The first half of the section year has been busy. The 38th Annual Public Employment Labor Relations Forum was held in September in conjunction with The Florida Bar's Midyear Meeting in Orlando. Steve Meck and Michael Grogram served as program co-chairs. In November the section held a seminar on "Litigating Employment Claims" in Fort Lauderdale, which was co-chaired by Robert Kilbride and Robyn Hankins. Both of these events were very well attended and offered our members the opportunity not only to listen to excellent speakers, but network with their colleagues. The section, under the leadership of Frank Brown, also kicked off its CLE audio webcast series on December 18th with a program entitled "What Employment Lawyers Need to Know about Obamacare." For information on upcoming webcasts, see the brochure on page 13. The webcasts are an easy way to keep abreast of changes in the law and earn CLE credit while sitting at your desk during the lunch hour.

Events in the second half of the section year will include the 13th Labor and Employment Law Annual Update and Certification Review on February 14-15 at the Peabody Hotel, Orlando (*make your reservations today because the special group rate expires on January 23rd!*), and Advanced Labor Topics 2013 on April 5-6 at Hawks Cay Resort & Marina, Duck Key. I encourage section members and guests to attend these events and to become involved in the section. Perhaps make it your new year's resolution to become more involved.

On behalf of the Labor and Employment Law Section, I wish you and your families a wonderful holiday season and a very happy, healthy, and prosperous new year.

— Sherril Colombo, Chair

CLEs in this issue:

REGISTER NOW!

13th Labor and Employment Law Annual Update and Certification Review

(Course No. 1445R)

February 14 - 15, 2013
The Peabody Orlando
9801 International Drive
Orlando, FL 32819
407/352-4000

www.peabodyorlando.com

See pages 17-20.

the CHECKOFF

The Checkoff is prepared and published by The Florida Bar Labor and Employment Law Section.

Sherril Colombo, Miami
Chair

Robert S. Turk, Miami
Chair-Elect

Shane T. Muñoz, Tampa
Secretary/Treasurer

Frank E. Brown, Tampa
Legal Education Director

Gregory A. Hearing, Tampa
Immediate Past Chair

Jay P. Lechner, Tampa
Leslie W. Langbein, Miami Lakes
Co-Editors

Angie Froelich, Tallahassee
Program Administrator

Lynn Brady, Tallahassee
Design/Layout

Fifth Circuit Holds Private FLSA Settlement Agreement Enforceable

By Gregory W. Lineberry, Jacksonville

The Fifth Circuit Court of Appeals recently clarified the general rule that court approval is required for settlement agreements that impact FLSA rights.

The appellants in *Martin v. Spring Break '83 Productions, L.L.C.*, 2012 WL 3011004 (5th Cir. July 24, 2012), were lighting and rigging technicians in the filmmaking and video production industry and members of the International Alliance of Theatrical Stage Employees, Local 478 ("Union"). They were employed by appellee Spring Break Louisiana, a film company filming a movie in Hammond, Louisiana, in the fall of 2007.

The Union entered into a collective bargaining agreement ("CBA") with Spring Break Louisiana, which outlined the grievance procedure for violations of the CBA. Toward the end of filming, a number of parties to the CBA, including appellants, filed a grievance alleging that they had not been paid for work performed.

The Union sent a representative to investigate and concluded that it would be impossible to determine whether or not appellants worked on the days they said they did. Thereafter, the Union and Spring Break entered into a settlement agreement pertaining to the disputed hours. Before the settlement agreement was signed by the Union representatives, appellants filed a lawsuit, which was eventually transferred to the United States District Court for the Eastern District of Louisiana.

At some point thereafter, the settlement agreement was signed by the appellants' Union representatives, and the appellants accepted and cashed their settlement checks.

Spring Break moved for summary judgment, which was granted by the district court based on the fact that the parties had entered into the settlement agreement which resolved the appellants' claims.

Appellants appealed and put forth three related arguments: (1) that the settlement agreement was unenforceable because the individuals never signed it nor agreed to it (rather, it was signed by Union representatives); (2) that even if appellants released their rights to pursue their FLSA claims, that release is invalid because individuals may not privately settle FLSA claims; and (3) that because the United States Supreme Court has held that a union cannot waive employees' rights under the FLSA through a CBA, their FLSA claims could not have been settled by the settlement agreement.

The Fifth Circuit Court of Appeals held that, even though the settlement agreement had not been approved by the court, the payments offered to and accepted by the appellants (by virtue of having cashed the settlement checks) under the settlement agreement was an enforceable resolution of those FLSA claims predicated on a bona fide dispute about time worked and not as a compromise of guaranteed FLSA substantive rights themselves.

The distinction made by the court in this case is between a contract or agreement that completely waives or compromises an employee's rights under the FLSA, and an agreement that resolves a "bona fide dispute" under or about those rights. Courts generally must approve settlement agreements to ensure that FLSA rights are not impaired and to ensure that employees are not disadvantaged by unequal bargaining power. The rationale is that FLSA rights cannot be abridged or waived by contract, because that would nullify the purposes of the statute.

However, "a private compromise of claims under the FLSA is permissible where there exists a bona fide dispute as to liability." In this case, the Union did not waive the appellants' FLSA claims. Instead, the individuals—represented by counsel—received and accepted compensation for the disputed hours. The appellants' FLSA rights were therefore validated rather than waived through the settlement of a bona fide dispute.

The appellants have since filed a Petition for Writ of Certiorari asking the United States Supreme Court to review the Fifth Circuit's decision, asserting, inter alia, that it conflicts with rulings from other circuits—including the Eleventh Circuit's decision in *Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. Ga. 1982)*—on the issue of whether FLSA claims may be settled without approval of the court or the Department of Labor.

G. LINEBERRY

***Gregory W. Lineberry** is an attorney with Constangy, Brooks & Smith, LLP in Jacksonville. His practice is focused primarily on employment litigation, including allegations of discrimination, harassment and/or retaliation in every protected category, including race, gender, religion, age, disability, and pregnancy. A graduate of Mercer University School of Law, where he was a member of the Brainerd Currie Honor Society and the Law Review, Mr. Lineberry received his B.A. from the University of North Carolina at Chapel Hill.*

COMMENTARY

Worlds Apart: Why Mediating Sexual Harassment Claims Does Not Make Sense

By Joel H. Feigenbaum, Miami

Many states mandate mediation in certain types of cases, encouraging adversaries to "settle out of court by offering opposing parties equal bargaining power and financial capability."[1] While growing in popularity and easing the burden on an overwhelmed judiciary, this method of dispute resolution may not always be appropriate.

In domestic violence cases, for example, mediation has been widely renounced in recent years in favor of traditional adjudication. Nevertheless, despite questions over whether the bargaining power of the parties is truly equal—and despite safety and public policy concerns—victims of sexual harassment continue to find themselves mediating claims.

Victims of sexual harassment in the workplace undergo psychological trauma similar to that experienced by victims of domestic abuse and feel the same range of emotions when coming face-to-face with their abuser. In the case of a female victim, it "should come as no surprise that women should at once like mediation and fare badly in it."[2] Scholars suggest that women are typically socialized to "seek non-confrontational, relational strategies for resolving disputes rather than strategies that emphasize rights-based outcomes."[3] Women who participate in mediation with men may therefore be disadvantaged because men generally are conditioned to pursue self-interest and a favorable outcome in disputes.[4]

Victims of sexual harassment want "the offense to stop, assurances that the conduct will not reoccur and that others will not be treated similarly, protection from retaliation, and the ability to regain the type of work environment they had prior to experiencing the offensive conduct."[5] Viewing harassment as a private shame and fearing personal embarrassment, victims crave the confidential nature of mediation. While mediation is often an appealing instrument to victims of sexual harassment who yearn to keep the abuse private, such endeavors actually may do a disservice to the victim and to the citizenry at large. "Creating a non-judgmental atmosphere and 'win-win' outcomes further disempower an already subordinated person,"[6] robbing the person of public vindication. Public vindication by a neutral third party is paramount in resolving a sexual harassment case because it reestablishes a victim's credibility among his/her peers and supervisors.

Professor Mori Irvine of Georgetown Law Center suggests that mediating sexual harassment grievances is designed to educate offenders as opposed to punishing them. This distinction highlights society's minimization of the harm caused by workplace harassment and "subordinates public acknowledgement of the injury and its impact in the 'guise of . . . reconciliation.'"[7] With mediation, says Irvine, women in particular "have come to depend upon a system and process that enable sexual harassment against them to go unpunished—a system that regulates sexual harassment rather than correcting it in the 'guise of protecting women'—a system that effectively trades justice for harmony."[8]

Whenever "a substantial power disparity" between the disputants exists—in any controversy—mediation should be deemed inappropriate because it "threatens to exploit the apparent powerlessness of one disputant."[9] Power should not be thought of as mere physical strength, but rather emotional, psychological, or financial leverage one person may have over another.[10] The imbalance of power between the abuser and the victim makes it impossible for the weaker party to enter an agreement freely, knowingly and without fear or coercion.[11]

Like a battered woman who believes that if she just tries harder her partner will not hit her again, a female employee is often overcome with the desire to "go along" with male co-workers in a mistaken belief that doing so will cause the harassment to cease.[12] In advocating against mediation in domestic violence cases, a U.S. Civil Rights Commission stated:

> [M]ediation . . . place[s] the parties on equal footing and ask[s] them to negotiate an agreement for future behavior. Beyond failing to punish assailants for their crimes, this process implies that victims share responsibility for the illegal conduct and requires them to modify their own behavior in exchange for the assailants' promises not to commit further crimes.[13]

Most harassers will almost invariably prefer mediation because its confidentiality offers a shield from the impact such conduct may have on their own marriage, other relationships and employment opportunities.[14] Employers nearly unanimously opt for mediation because of the cost savings, minimal diversion from the employer's ordinary business and the avoidance of precedent.[15] We'll be going to the in-laws again, and they're doing steaks! Yum... haven't had a good steak in a long time. Victims may prefer mediation because it is non-adversarial, speedy and confidential. In keeping this increasingly widespread type of discrimination out of the public eye, however, our citizenry is "being deprived of information about what the law actually is, who is violating the law, and what the costs of illegal conduct are."[16] The time for victims' voices to be muffled and rights shunned

COMMENTARY, *from preceding page*

behind closed doors, shrouded in secrecy, has passed. The time for mediating cases of sexual harassment, just like domestic violence, too has passed.

Joel H. Feigenbaum *is the Executive Managing Editor of the National Security & Armed Conflict Law Review, a Health & Elder Law Clinic Fellow, and a University of Miami School of Law J.D. candidate, 2013. He has a B.A. in history from the University of Richmond.*

Endnotes:

1 Boris Y. Milter, *Georgia Delivers the Promise of Self-Determination: A Template for Mediating Cases in the Presence of Domestic Violence*, 4 J. Marshall L. J. 203, 205 (2011).

2 John M. Conley & William M. O'Barr, *Just Words: Law, Language and Power* 132 (1998).

3 Susan K. Hippensteele, *Mediation Ideology: Navigating Space from Myth to Reality in Sexual Harassment Dispute Resolution*, 15 Am. U. J. Gender Soc. Pol'y & L. 43, 63 (2006).

4 *Id.*

5 *Id.* at 56.

6 Jean R. Sternlight, *ADR is Here: Some Preliminary Reflections on Where it Fits in a System of Justice,* 3 Nev. L. J. 289 (2003).

7 Hippensteele, *supra* note 3, at 55.

8 *Id.* at 68.

9 Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances?*, 9 Ohio St. J. on Disp. Resol. 27, 36-37 (1993).

10 *Id.* at 37.

11 *Id.* at 38.

12 *See* Kathleen O. Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, Mediation Q. 303, 305 (Summer 1990); Irvine, *supra* note 9, at 38.

13 *Id.* at 38-39 (quoting United States Commission on Civil Rights, *Under the Rule of Thumb: Battered Women and the Administration of Justice* 2 (1982)).

14 Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 Wake Forest L. Rev. 135, 157 (Spring 1999).

15 *Id.* at 158.

16 *Id.* at 163.

Section Bulletin Board

For more information, contact Angie Froelich:
850-561-5633 / *afroelic@flabar.org*

JANUARY 15, 2013 — AUDIO WEBCAST

"Social Media Issues in Employment Law" (1572R)

FEBRUARY 14-15, 2013

13th Annual Labor and Employment Law Update and Certification Review (1455R)

The Peabody Orlando
9801 International Drive, Orlando, FL 32819
www.peabodyorlando.com

***"13th Annual Update and Certification Review"* —** Feb. 14-15
***Executive Council Meeting* —** Feb. 14, 5:00 p.m. to 6:00 p.m.
***Reception* —** Feb. 14, 6:00 p.m. to 7:30 p.m.

MARCH 19, 2013 — AUDIO WEBCAST

"The Reemployment Assistance Appeal Process" (1573R)

APRIL 5-6, 2013

"Advanced Labor Topics 2013" (1523R)

Hawks Cay Island Resort, Marina & Villas
Duck Key, FL
www.hawkscay.com

***"Advanced Labor Topics 2013"* —** April 5-6
***Executive Council Meeting* —** April 5, 5:00 p.m. to 6:00 p.m.
***Reception* —** April 5, 6:00 p.m. to 6:30 p.m.
***Dinner* —** April 5, 6:30 p.m. to 8:30 p.m.

MAY 14, 2013 — AUDIO WEBCAST

"Immigration Law Issues for the Employment Lawyer" (1574R)

JUNE 4, 2013 — AUDIO WEBCAST

"E-Discovery" (1575R)

JUNE 27, 2013

2013 Annual Florida Bar Convention

Boca Raton Resort & Club
501 East Camino Real, Boca Raton, FL 33432, www.bocaresort.com

***Executive Council Meeting* —** June 27, 5:00 p.m. to 6:00 p.m.

***Reception* —** June 27, 6:00 p.m. to 7:00 p.m.

Find CLE COURSE BROCHURES at *www.laboremploymentlaw.org*.

FLSA EXEMPTIONS, *from page 1*

prescription drugs. Federal regulation requires that prescription medication be dispensed only pursuant to a physician's prescription. Pharmaceutical companies like SmithKline employ PSRs, therefore, to promote its products directly to medical practitioners. In *Christopher,* the petitioners/PSRs received a base salary and incentive pay from SmithKline but were not paid overtime, despite working over forty hours in one workweek.

"Outside salesm[e]n" are exempt from the FLSA's minimum wage and overtime requirements. Congress, however, chose not to define "outside salesm[e]n." Rather, it delegated definitional authority to the DOL. Accordingly, in 1938, 1940 and 1949,[3] the DOL issued certain regulations defining an "outside salesman" as "any employee . . . [w]hose primary duty is . . . making sales within the meaning of [29 U.S.C. §203(k)]."[4] Per 29 U.S.C. §203(k), a "sale" "includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

Relying on this definition, SmithKline, like just about every other pharmaceutical company in America, treated PSRs as exempt employees and did not pay them overtime. The petitioners sued SmithKline, claiming that the failure to pay them overtime violated the FLSA. The district court granted summary judgment in favor of SmithKline. The petitioners appealed, contending that the district court erred by not affording controlling deference to the DOL's interpretation of the pertinent regulations. The Ninth Circuit Court of Appeals affirmed the decision of the district court.

Ultimately, the Supreme Court agreed with SmithKline and and held that PSRs are exempt from the FLSA overtime requirement under the outside sales exemption. In reaching this decision, the Court rejected the DOL's argument—offered for the first time in an amicus brief filed in a similar action in the Second Circuit in 2009—that there is no "sale" unless a transfer of title occurs. The Court noted it is not required to defer to a regulatory

agency's interpretation "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'"[5]

The Court ruled that to defer to the DOL's interpretation would drastically undercut the principle that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires."[6] To decide otherwise, the Court reasoned, would impose massive liability on SmithKline for conduct that occurred well before that interpretation was announced—which, in this case, was 2009. Prior to 2009, the pharmaceutical industry had little reason to suspect that its longstanding practice of exempting PSRs as outside salesmen violated the FLSA. The Court found that "while it may be 'possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing, [the] more plausible hypothesis is that the Department did not think the industry's practice was unlawful."[7] Further, the DOL's practice of statutory interpretation via amicus brief allowed no outlet for public comment and resulted in unfair surprise. Finally, the interpretation was "flatly inconsistent with the FLSA," as a "sale" does not require the transfer of title under the express language of the FLSA.[8]

After rejecting the DOL's interpretation, the Court analyzed the text of the FLSA, the accompanying DOL regulations, and the particular industry in which the petitioners worked.

Upon analyzing the text of the FLSA, the Court found that the general rule that exemptions are construed narrowly against employers does not apply when construing one of the FLSA's general definitions (in this case, the definition of a "sale"). The Court acknowledged previously stating "that exemptions to the FLSA must be 'narrowly construed against the employer seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit,'" but found such reasoning "inapposite, where, as here, we are interpreting a general definition that applies throughout the FLSA."[9]

Applying this new standard, the Court determined that obtaining a nonbinding commitment from a physician to prescribe a company's drugs falls under the "catchall" category of "other disposition" and therefore constitutes making a "sale" under the Act.

Further, the Court determined that the outside sales exemption is premised on the belief that exempt employees (1) earn salaries well above the minimum wage; (2) perform a type of work that is difficult to standardize to a particular time frame; and (3) perform a type of work that cannot be easily reallocated to another employee to avoid a work week of over forty hours. All of these factors were present in the case of PSRs.

The Court also examined the unique regulatory environment under which pharmaceutical companies operate. When, as here, an entire industry is restricted by federal regulation "from selling its products in the ordinary manner, an employee who functions in all relevant respects as an outside salesman should not be excluded from that category based on technicalities."[10] Thus, the Court was persuaded that PSRs are "outside salesm[e]n" and should be exempt from the FLSA overtime requirements.

Clearly, this decision is a huge victory for employers in the pharmaceutical industry, as it allows them to continue their longstanding practice of classifying PSRs as exempt from FLSA overtime requirements. Further, the Court's analysis essentially redefines the crux of this case from involving the relatively narrow issue of the application of the outside sales exemption in a specific context, to involving the very broad question of the standard that should be applied when construing the FLSA's general definitions as they relate, at least potentially, to every exemption. It is likely that the partial elimination of the rule of strict construction against employers seeking to establish FLSA exemptions will make it easier for employers in other industries to classify their employees as exempt. More generally, this decision suggests the Supreme Court's unwillingness to allow agencies such as the DOL to control regulated parties through the use of amicus briefs.

How the Supreme Court, and other courts, apply *Christopher* in different contexts in the future will be interesting to watch.

L. BEER

***Loren Beer** represents management in employment matters including disputes arising under Title VII, the Florida Civil Rights Act, the Americans with Disabilities Act, and the Fair Labor Standards Act. She graduated cum laude from the University of Florida College of Law and is a senior associate with Ford Harrison in Tampa.*

Endnotes:

1 The "outside salesman" exemption of 29 U.S.C. § 213(a)(1) is an exemption from both overtime and minimum wage requirements. However, the *Christopher* Court focused its decision on the exemption as it applied to overtime compensation. This is because petitioners alleged only that they were not paid overtime in accordance with the FLSA. The Court noted multiple times in the opinion that PSRs, such as petitioners, are "well compensated" and "typically earn[] salaries well above the minimum wage." Despite this, the *Christopher* holding makes PSRs "outside salesmen" who are exempt from both the overtime *and* minimum wage requirements of the FLSA.

2 132 S. Ct. 2156 (2012).

3 In 2004, following notice-and-comment procedures, the DOL reissued the regulations with minor amendments. *See* 69 Fed. Reg. 22122 (2004).

4 §541.500(a)(1)-(2).

5 132 S. Ct. 2166 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

6 *Id.* at 2167 (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F. 2d 154, 156 (CADC 1986)).

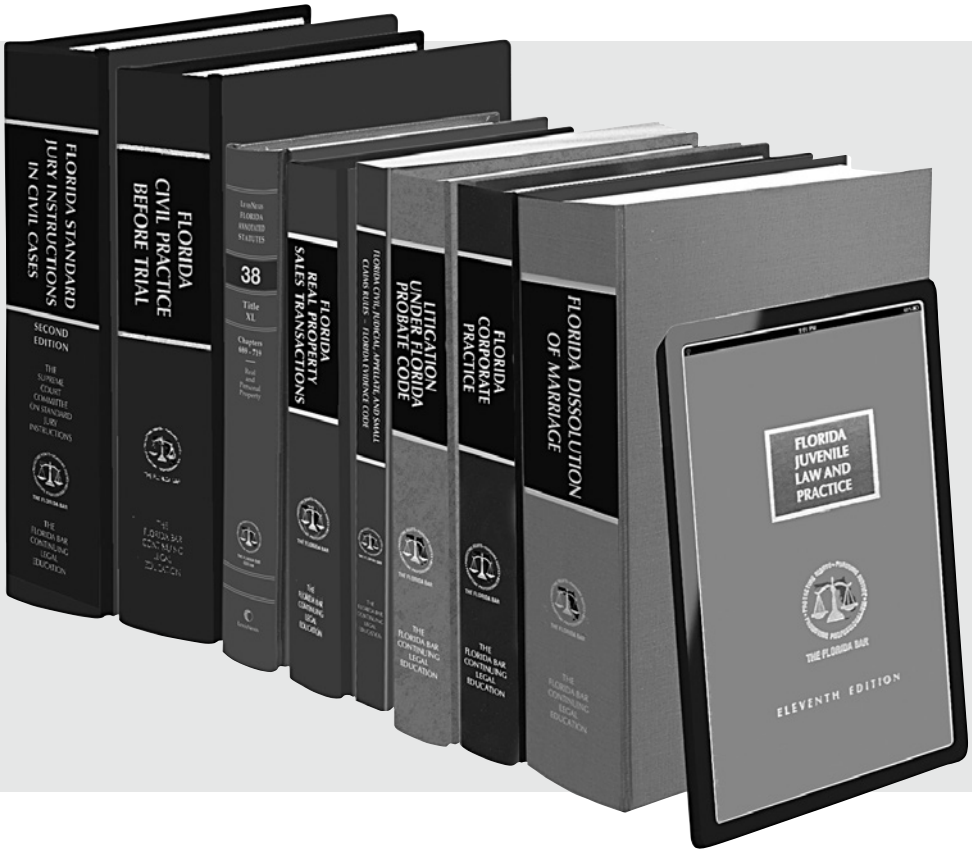
7 *Id.* at 2168 (quoting *Yi v. Sterling Collision Centers, Inc.*, 480 F. 3d 505, 510-11 (2007)).

8 *Id.* at 2169.

9 *Id.* at 2171, FN 21 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

10 *Id.* at 2172.

The Florida Bar covers the areas of Florida law that matter to your practice!



Jury Instructions

Trial Practice

Primary Law

Real Property

Rules of Procedure

Estate Planning & Administration

Business Law

Family Law

Stay current with the latest developments in Florida by consulting The Florida Bar's CLE Publications. Written by veterans of the Florida courts, these publications offer expert advice shaped by the special considerations of Florida law. Most of our titles are now available in eBook format.

Visit our online bookstore to find the titles you need now!

DON'T DELAY—ORDER TODAY!

GO TO www.lexisnexis.com/flabar
CALL toll-free **800.533.1637**

Satisfaction Guarantee:
Examine and return your publication(s) within 30 days of receipt, at your expense, for a full credit of the advertised price, less shipping and handling fees and any other discount credits.

PROTECTING RIGHTS • PURSUING JUSTICE • PROMOTING PROFESSIONALISM

LexisNexis®

The Florida Bar and LexisNexis . . . working together for Florida's attorneys.

Orders for The Florida Bar publications are processed by and shipped directly from LexisNexis.

LexisNexis eBooks are available in epub format for use on devices like the Apple® iPad® and mobi format for use on devices like the Amazon® Kindle®.

PRIVILEGE, *from page 1*

privileges adopted in other jurisdictions. These included a limited union-relations privilege recognized by the NLRB in *Cook Paint & Varnish*, 258 N.L.R.B 1230 (1981), applicable in situations involving a steward's representational status and overreaching employer questioning, and *City of Newburgh v. Newman*, 421 N.Y.S. 2d 673 (N.Y. App. Div. 1979), where the court affirmed the Board's action in finding the city's demand to discover grievance-related confidential communications between an employee and his union representative interfered with the employee's right to union representation.

In addition to invoking the statutory protection against unfair labor practices, the *Peterson* court, in reversing the lower court's decision, reasoned that the union-relations privilege would further the strong interest employees have in communicating fully and frankly with their union representative to ensure accurate advice and effective union representation. It is likely that public sector unions in other states, perhaps including Florida, will rely on this decision in litigating for recognition of this privilege in their jurisdictions. Because the interests underlying the court's decision apply equally to the rights guaranteed by the NLRA to private sector employees, it is possible that private sector unions may also attempt to obtain recognition of the union-relations privilege.

C. MAY

***Cindy May** is Of Counsel with Greenberg Traurig in Tampa. She received her J.D., with highest honors, from the Florida State University School of Law. Before attending law school, she was the Director of Employment for a 3,500-employee chain of department stores. Ms. May has been Board Certified in Labor and Employment Law since 2001 and has represented management in employment matters since 1994.*

Share with a colleague!

LABOR & EMPLOYMENT LAW SECTION
MEMBERSHIP APPLICATION

NAME: _____ FL BAR# _____

FIRM NAME: _____

OFFICE ADDRESS: _____

CITY/STATE/ZIP: _____

EMAIL ADDRESS: _____

BUSINESS PHONE: _____ FAX: _____

PAYMENT BY CHECK:

Return this form completed with your check payable to "THE FLORIDA BAR" with your payment of:

_____ $40.00 (Florida Bar Members) (Item # 8151001)
_____ $40.00 (Law Professor or Authorized House Counsel) (Item # 8151002)
_____ $20.00 (Students) (Item # 8151002)

Mail with check to: The Florida Bar
Angela Froelich
651 E. Jefferson Street
Tallahassee, FL 32399-2300.

CREDIT CARD:

Fax form with credit card information to 850-561-9427 (secure fax).

Name: _____ Attorney No: _____

Billing Address _____

City/State Zip _____

❑ MasterCard ❑ Visa Discover ❑ AmEx

Name on Card: _____

Card No. _____ Exp. Date _____/_____
(MO/YR)

Signature: _____

Please note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues cover the period of July 1 to June 30.

CASE NOTES

ADA – Protected medical information.

EEOC v. Thrivent Financial for Lutherans (7th Cir. Nov. 20, 2012).

Plaintiff was a temporary employee who failed to appear for work without notice to his worksite employer. Plaintiff's employment agency emailed him to find out why he had missed work and asked plaintiff to contact his worksite employer. Plaintiff responded via email to both the agency and his worksite employer that he had a migraine, and it was the most severe one he had experienced in six years. Plaintiff then quit his job a month later. When plaintiff had a difficult time finding new employment, he suspected that the former worksite employer might be releasing information about his medical condition and engaged an on-line service to perform a reference check. The former employer revealed to the on-line service that plaintiff had not called in when he was out sick. Plaintiff filed an EEOC charge under the ADA due to employer's alleged release of confidential medical information. The Seventh Circuit found that because the worksite employer did not obtain its knowledge of plaintiff's migraine condition through "medical examinations or inquiries" as envisioned by the ADA, it had no duty to treat the information as a confidential medical record.

FLSA – Advertisement for "witnesses" in collective action.

Gerondidakis v. BL Restaurant Operations, 2012 U.S. Dist. LEXIS 97015 (M.D. Fla. July 12, 2012).

The United States District Court for the Middle District of Florida held that an advertisement placed by plaintiffs' counsel in the "Jobs Wanted" category on "craigslist.org" in a collective FLSA action seeking "witnesses" but promising "money damages if case is successful" was misleading. Noting that courts cannot prevent attorneys from exercising their First Amendment rights to advertise, the judge ruled that further advertising by plaintiffs' counsel must comply with Florida Bar rules. *Cf. Hamm v. TBC Corp*., 345 Fed. Appx 406 (11th Cir. 2006) disqualifying a law firm whose employee called potential witnesses but then solicited them to join pending collective case.

FLSA – Change to workweek to reduce overtime hours.

Abshire v. Redland Energy Servs., 2012 U.S. App. LEXIS 20977 (8th Cir. Oct. 10, 2012).

The Eighth Circuit held that an employer did not violate the FLSA when it changed its designation of the workweek from Tuesday-Monday to Sunday-Saturday in order to reduce the number of overtime hours worked by its employees. Plaintiffs had asserted that the change violated a Department of Labor ("DOL") rule interpreting the FLSA as follows: "The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act." 29 CFR § 778.105. The plaintiffs did not challenge that the change was intended to be permanent. The only issue was whether the change to a Sunday-Saturday workweek was "designed to evade the overtime requirements of the Act." The plaintiffs argued that because the change was intended to reduce the number of overtime hours worked by employees, it ipso facto was "designed to evade the overtime requirements of the Act." The court rejected this reasoning, finding that the purpose of the FLSA was not to maximize the payment of overtime rates, but rather to discourage overtime work and "have an appreciable effect in the distribution of available work" among workers.

NLRA – Concerted protected activity.

Fresenius USA Manufacturing and IBT, Local 445 (NLRB Sept. 19, 2012).

An employee who was an avid union supporter left hand-written statements in the breakroom that used sexually derogatory terms to draw attention to an upcoming decertification election. Female employees who saw the statements complained to management about the sexually offensive terms. Management suspended the employee, investigated the complaint and determined that the employee had violated its sexual harassment policy. As a result, it terminated the employee. He filed an unfair labor practice charge. The NLRB held that because the offensive remarks were part of the "res gestae" of concerted protected activity, the employee's suspension and termination violated Section 7 of the NLRA.

SANCTIONS – Motion to Compel Arbitration.

Multiband Corp. v. Block, 2012 U.S. Dist. LEXIS 70468 (E.D. Mich. 2012).

A managerial employee sold his business and entered into two agreements with buyer. The employment agreement contained the following arbitration provision: "If any controversy or claim arising out of this Agreement cannot be settled by the parties or through mediation within 90 days after written notice invoking this section, then it shall be submitted to and settled by arbitration." The second agreement contained an arbitration provision that applied to any "disputes that relate in any manner whatsoever to this Agreement." When the employer discovered that the employee was competing against it, it filed a lawsuit against the employee for breach of fiduciary duties. The employee filed motions to compel arbitration and for sanctions. The District Court for the Eastern District of Michigan ruled that the test to be used was whether the legal action could be maintained without reference to the contract at issue. Because the employee's duties were defined in the contracts, the employer was sanctioned for opposing arbitration since the tort claim of breach of fiduciary duty clearly "relates" to the contract.

TITLE VII – Sex-stereotyping theory of same-sex harassment.

EEOC v. Boh Brothers Construction Co., 2012 U.S. App. LEXIS 15594 (5th Cir. July 27, 2012).

The plaintiff, a member of an all-male construction crew, was not homosexual or effeminate. Nevertheless, his male supervisor called him a "faggot" and a "princess," approached him from behind and simulated sexual intercourse, and exposed himself to the plaintiff numerous times. There was no evidence the supervisor was homosexual or attracted to homosexuals. The plaintiff complained to management, but no action was taken. The EEOC's theory was that the plaintiff was "sexually stereotyped" because he did not conform to the harasser's view of how a man should act and that such stereotyping constituted sexual harassment under Title VII. Distinguishing *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), the Fifth Circuit found insufficient evidence to show that plaintiff did not conform to a gender stereotype and therefore concluded that there was insufficient evidence to establish that the alleged harasser "acted on the basis of gender." Because it found insufficient evidence of gender stereotyping, the court declined to rule on whether same-sex stereotyping can constitute sexual harassment when it does not involve one of Oncale's three methods of proving same-sex sexual harassment: 1) proposals for sexual activity; 2) general hostility to the presence of same-sex employees; or 3) comparative evidence of harasser's treatment of members of one sex over the other sex.

Also of interest:

May Employers Require Job Applicants To Provide Home Addresses?

Some employment applications require job applicants to provide a physical home address, and state that a post office box will not be accepted. This may be (or may soon become) illegal under the latest development in employment law: laws prohibiting discrimination against the homeless.

Earlier this year, Rhode Island adopted the first "Homeless Bill of Rights." Included in its protections was a provision that makes it unlawful to discriminate against an employee or applicant "due to his or her lack of a permanent mailing address, or his or her mailing address being that of a shelter or social service provider." In other words, an applicant cannot be refused employment simply because he or she does not provide an actual home address. Homeless advocates are pushing for similar legislation in other states. For instance, a California town recently passed a resolution urging the state legislature to enact a law that incorporates Rhode Island's protections and to go a step further by expressly prohibiting discrimination against an applicant or employee for providing a P.O. Box as his or her address. It would not be surprising if other states follow suit.

WANTED: ARTICLES

The Section needs articles for *the Checkoff* and *The Florida Bar Journal*. If you are interested in submitting an article for *the Checkoff,* contact Jay P. Lechner (*lechnerj@gtlaw.com*) or Leslie W. Langbein (*langbeinpa@bellsouth.net*). If you are interested in submitting an article for *The Florida Bar Journal,* contact Frank Brown (813-273-4381) (*feb@macfar.com*) to confirm that your topic is available.

REWARD: $150*

(*For each published article, a $150 scholarship to any section CLE will be awarded.)

Article deadline for the next *Checkoff* is March 1, 2013.

Labor and Employment Law Section Hall of Fame

Nomination Form

for 2013-2014 Hall of Fame Class

***Eligibility Guidelines for Nominating a Candidate*:** Hall of Fame recognition is a posthumous honor, granted only after death. Ordinarily, individuals nominated will have had significant involvement in both the Section and the active practice of labor and employment law in Florida for a substantial portion of his or her career. An individual who had a clear affinity with or connection to the Section but who was not a member may be considered if, on the whole, the individual is otherwise recognized as having had a profound and positive impact on the profession and the field of labor and employment law. **Send form to: Angela Froelich, Section Administrator, The Florida Bar, 651 East Jefferson St., Tallahassee, FL 32399-2300.**

About the Nominee (please print)

Name: _____

Year Nominee Passed Away: _____

Was nominee an attorney? ❑ Yes ❑ No Was nominee a Section member? ❑ Yes ❑ No

Last Known Employment Affiliation Before Death (i.e., firm name, employer, etc.): _____

_____

Other Honors, Awards, or Affiliations: _____

_____

_____ _

Criteria for Admission

To be selected for the Hall of Fame, a candidate must meet the following criteria:

- The candidate must have excelled in the field of labor and employment law and/or must have had a profound positive influence on the field during his or her professional career.
- The candidate's professional success and significant contributions must be recognized by his or her peers as having reached and remained at the pinnacle of his or her field.
- Evidence that the articulated criteria have been met may come from detailed information about the candidate's credentials, achievements, the impact and implications of those accomplishments, public awards and honors, leadership roles within the Section, published articles, speaking engagements, and reported litigation.

A description of the manner in which the nominee met the criteria for inclusion (i.e., why the nominee should be honored) must be attached to this application.

About the Nominator (please print) NOTE: Nominator must be Section member

Name: _____ Phone: _____

Institution/Affiliation: _____

Address: _____

City/State/Zip: _____

Your Relationship to Nominee: _ _____

The Florida Bar Continuing Legal Education Committee and
The Labor and Employment Law Section present

Labor and Employment Law Section Audio Webcast Series 2012-2013

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Audio Webcast Presentation Dates:

December 18, 2012, January 15, 2013, March 19, 2013, May 14, 2013, June 4, 2013

12:00 noon - 12:50 p.m. EST

Course No's. 1571, 1572, 1573, 1574, 1575, 1576

December 18, 2012

12:00 noon – 12:50 p.m. (50 minutes)
What Employment Lawyers Need to Know About Obamacare (1571R)
Andrew W. McLaughlin, Macfarlane, Ferguson & McMullan, Tampa

This webinar will cover topics such as: An Introduction to Healthcare Reform and the "Play or Pay" Mandate; Who Must Be Offered Coverage and What Type?; The Penalties Provisions; Issues for Employment Attorneys; The definition of "employees"; The penalties landmine; and Ideas to protect clients and minimize risk of penalties.

January 15, 2013

12:00 noon – 12:50 p.m. (50 minutes)
Social Media Issues In Employment Law (1572R)
Gregory A. Hearing, Thompson, Sizemore, Gonzalez & Hearing, Tampa
This webinar will cover issues such as: Explosion of Social Media and Its Impact on the Workplace; Labor & Employment Law Claims Impacting Use of Social Media; NLRA/PERA; First Amendment; Fourth Amendment; Potential Employer Liability for Employee Use; Title VII and other EEO Discrimination and Harassment Claims; and Defamation and other Tort Claims.

March 19, 2013

12:00 noon – 12:50 p.m. (50 minutes)
The Reemployment Assistance Appeal Process (1573R)
The Honorable Alan Orantes Forst, Reemployment Assistance Appeals Commission, Palm City
This webinar will cover issues such as: Overview of the Reemployment Assistance Claims and Appeals Process; The Reemployment Assistance Appeals Hearing; Preserving the Record for an Appeal to the Commission; and Practice Before the Reemployment Assistance Appeals Commission.

May 14, 2013

12:00 noon – 12:50 p.m. (50 minutes)
Immigration Law Issues for the Employment Lawyer (1574R)
Federico M. Macia, Macia Law Firm, Coral Gables
This webinar will introduce the employment lawyer to current practices and emerging issues in the field of immigration employment compliance, such as: IRCA documentation requirements and discrimination provisions; Form I-9 recordkeeping requirements; prospects for E-Verify; and The H1-B visa procedures and documentation requirements.

June 4, 2013

12:00 noon – 12:50 p.m. (50 minutes)
E-Discovery (1575R)
Adam B. Landa, Greenburg Traurig, Orlando
This webinar will cover issues such as: Procedural and Ethical Requirements for Electronic Discovery; Preparing and Responding to Electronic Discovery; and Potential Areas for Electronic Discovery in Employment Cases.

WEBCAST CONNECTION

Live audio webcast attendees receive course materials and audio via the Internet. Connection instructions will be emailed two days prior to scheduled course; or contact The Florida Bar Order Entry Department at 850-561-5831 for instructions two days prior to the event.

REFUND POLICY: A $25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid.

CLE CREDITS

CLER PROGRAM
(Max. Credit: 5 hours for the Entire Series)

General: 1.0 hour *(per program)*
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 5 hours for the Entire Series)

Labor and Employment Law: 1.0 hour *(per program)*
Immigration & Nationality: 1.0 hour *(May 14 program only)*

TO REGISTER	ON-LINE: www.floridabar.org/CLE	MAIL: Completed form with check	FAX: Completed form to 850/561-9413

TO REGISTER OR ORDER AUDIO CD BY MAIL, SEND THIS FORM TO: The Florida Bar, Order Entry Department, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name _____ Florida Bar # _____

Address _____ Phone: ( ) _____

City/State/Zip _____ E-mail* _____

E-mail address required to transmit electronic course materials and is only used for this order. **ABF**

ELECTRONIC COURSE MATERIAL NOTICE: Florida Bar CLE Courses feature electronic course materials for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable electronic material can be downloaded and printed and is available via e-mail several days in advance of the live presentation or thereafter for purchased products. The Course Book can be purchased separately. Effective July 1, 2010.

REGISTRATION FEE (CHECK WHICH APPLY):

What Employment Lawyers Need to Know About Obamacare – December 18, 2012 (1571R350)

- Member of Labor and Employment Law Section: $50
- Non-section member: $90

Social Media Issues In Employment Law – January 15, 2013 (1572R350)

❑ Member of Labor and Employment Law Section: $50
❑ Non-section member: $90

The Reemployment Assistance Appeal Process – March 19, 2013 (1573R350)

❑ Member of Labor and Employment Law Section: $50
❑ Non-section member: $90

Immigration Law Issues for the Employment Lawyer – May 14, 2013 (1574R350)

❑ Member of Labor and Employment Law Section: $50
❑ Non-section member: $90

E-Discovery – June 4, 2013 (1575R350)

❑ Member of Labor and Employment Law Section: $50
❑ Non-section member: $90

Audio CD for All 5 (Five) Audio Webcasts (1576R350)

Early Registration by January 15, 2013

❑ Member of Labor and Employment Law Section: $160
❑ Non-section member: $200

METHOD OF PAYMENT (CHECK ONE):

❑ Check enclosed made payable to The Florida Bar
❑ Credit Card (Advance registration only. Fax to 850/561-9413.)
☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

Signature: _____ Exp. Date: _____/_____ (MO./YR.)

Name on Card: _____ Billing Zip Code: _____

Card No. _____

❑ Enclosed is my separate check in the amount of $40 to join the Labor and Emloyment Law Section. Membership expires June 30, 2013.

AUDIO WEBCAST CD

Private recording of this program is not permitted. **Delivery time for individual webcast CDs is 4 to 6 weeks after the individual webcast; delivery time for entire webcast series CD is 4 to 6 weeks after 06/04/13. TO ORDER AUDIO WEBCAST CD,** fill out the order form above, including a street address for delivery. **Please add sales tax. Tax exempt entities must pay the non-section member price.** Those eligible for the fee waiver may order a complimentary audio CD in lieu of live attendance upon written request and for personal use only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the media must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ **AUDIO WEBCAST CD (1572C)**
(includes Electronic Course Material)
$50 plus tax (section member)
$90 plus tax (non-section member)
TOTAL $ _____

❑ **AUDIO WEBCAST CD (1575C)**
(includes Electronic Course Material)
$50 plus tax (section member)
$90 plus tax (non-section member)
TOTAL $ _____

❑ **AUDIO CD FOR ALL 5 (FIVE) AUDIO WEBCASTS (1576C)**
(includes Electronic Course Material for all 5 programs)
$160 plus tax (section member)
$200 plus tax (non-section member)
TOTAL $ _____

The Florida Bar Labor and Employment Law Section presents

Advanced Labor Topics 2012

COURSE CLASSIFICATION: ADVANCED LEVEL

– Audio CD –

Recorded on April 13-14, 2012 at the El San Juan Resort & Casino Carolina, Puerto Rico

Course No. 1466C

AUDIO CD ORDER FORM

Friday, April 13, 2012

12:00 noon – 12:25 p.m. **Late Registration**

12:25 p.m. – 12:30 p.m.
Welcome and Introductory Remarks
James M. Craig, James M. Craig, P.A., Tampa – Program Co-Chair
Luis A. Cabassa, Wenzel, Fenton & Cabassa, P.A., Tampa – Program Co-Chair

12:30 p.m. – 1:45 p.m.
Supreme Court Employment Cases Update, 2010-2011 Term and Amendments to the Federal Removal and Venue Rules
Professor Joel Wm. Friedman, Tulane University School of Law, New Orleans, LA

1:45 p.m. – 2:55 p.m.
National Labor Relations Board (NLRB) Update and Trends – The Obama Board
Tammie L. Rattray, Ford & Harrison L.L.P., Tampa

2:55 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 4:30 p.m.
Practicing Labor and Employment Law– The In-House Lawyer's Perspective
Michael M. Hernandez, Walgreen Co., Miami
Ernesto Mayor, Verizon, Tampa

5:00 p.m. – 6:00 p.m.
Labor & Employment Law Executive Council Meeting (all invited)

6:00 p.m. – 6:30 p.m.
Reception (included in registration)

6:30 p.m. – 8:30 p.m.
Dinner (included in registration)

Saturday, April 14, 2012

8:40 a.m. – 8:50 a.m.
Welcome and Introductory Remarks
James M. Craig, James M. Craig, P.A., Tampa – Program Co-Chair
Luis A. Cabassa, Wenzel, Fenton & Cabassa, P.A., Tampa – Program Co-Chair

8:50 a.m. – 10:20 a.m.
Best Strategies for Handling Fair Labor Standards Act (FLSA) Litigation by the Plaintiff and the Defendant
Marlene Quintana, GrayRobinson, Miami
Andrew Frisch, Morgan & Morgan, P.A., Davie

10:20 a.m. – 10:35 a.m. **Break**

10:35 a.m. – 11:30 a.m.
The Recent Equal Employment Opportunity Commission (EEOC) Regulations on the Americans with Disabilities Act Amendments Act (ADAAA)
Robyn Hankins, Hankins Ator, Jupiter

11:30 a.m. – 12:30 p.m.
Ethical Issues in District Court Practice
The Honorable Marcia Morales Howard, United States District Judge, Middle District of Florida, Jacksonville Division
The Honorable Timothy J. Corrigan, United States District Judge, Middle District of Florida, Jacksonville Division

CLE CREDITS

CLER PROGRAM
(Max. Credit: 9.0 hours)
General: 9.0 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Max. Credit: 9.0 hours)
Labor & Employment Law: 9.0 hours

ELECTRONIC COURSE MATERIAL NOTICE: Florida Bar CLE Courses feature electronic course materials for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable electronic material can be downloaded and printed and is available via e-mail several days in advance of the live presentation or thereafter for purchased products. The Course Book can be purchased separately. Effective July 1, 2010.

REFUND POLICY: A $25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid.

TO ORDER AUDIO CD BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department: 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

Email Address _____

E-mail address is required to receive electronic course material and will only be used for this order. **ABF: Course No. 1466C**

METHOD OF PAYMENT (CHECK ONE):

❑ Check enclosed made payable to The Florida Bar

❑ Credit Card – Fax to 850/561-9413. ☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX

Signature: _____ Exp. Date: ____/____ (MO./YR.)

Name on Card: _____ Billing Zip Code: _____

Card No. _____

TO ORDER AUDIO CD, which will be available 4 to 6 weeks after 4/14/12, fill out the order form above, including a street address for delivery. **Please add sales tax to the price of audio CD. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the audio CD must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ **AUDIO CD** (includes Electronic Course Material) **(1466C)**
$240 plus tax (section member)
$280 plus tax (non-section member)
TOTAL $ _____

The Florida Bar Continuing Legal Education Committee and
The Labor and Employment Law Section present

Labor and Employment Law Section Webinar Series 2011-2012

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

– Audio CD –

Presentation Dates: November 17, 2011, January 24, 2012, March 20, 2012, May 15, 2012 and June 12, 2012
12:00 noon – 1:00 p.m. EST

Course No. 1421C

AUDIO CD ORDER FORM

The Florida Bar Labor and Employment Law Section is pleased to offer the audio cd of its 2011-2012 Labor and Employment Law Webinar Series. Included with the audio cd is electronic course materials. This audio cd will provide an easy and affordable manner to earn CLE credits and listen to presentations from the comfort of your home or office.

November 17, 2011

12:00 noon – 1:00 p.m.
NLRA and PERA Update: What Every Employment Lawyer Needs to Know About Recent Developments in Labor Law (1415R)
Richard P. Siwica, Egan, Lev & Siwica, P.A., Orlando
Tobe M. Lev, Egan, Lev & Siwica, P.A., Orlando

January 24, 2012

12:00 noon – 1:00 p.m.
Whistleblower & Retaliation Update: A Review of the Expanding Employee Protections and Employer Obligations, Including Best Practices (1416R)
Kimberly P. Walker, Williams Parker Harrison Dietz & Getzen, Sarasota

March 20, 2012

12:00 noon – 1:00 p.m.
FLSA Update: Dionne (Floormasters) and its Progeny, Calculating Back Pay in Failed Exemption Cases, Recent Decisions Applying Lynn's Food Stores, Disclosure Obligations and Other Emerging Issues in Wage and Hour Law (1417R)
Phyllis J. Towzey, Law Office of Phyllis J. Towzey, P.A., Saint Petersburg

May 15, 2012*

12:00 noon – 1:00 p.m.
Ethical Dilemmas Facing the Employment Law Practitioner (1418R)
Leslie Langbein, Langbein & Langbein, P.A., Miami Lakes

June 12, 2012**

12:00 noon – 1:00 p.m.
The ADA, FMLA, and Workers' Compensation: Analysis of the Interaction Between the Three Statutes and Practical Information on Maintaining Compliance in Administering Employer Leave Policies (1419R)
Michael Malfitano, Constangy Brooks & Smith L.L.C., Tampa

CLE CREDITS

CLER PROGRAM

General: 1.0 hour (per program)
Ethics: 1.0 hour (May 15 Webinar Only)*

CERTIFICATION PROGRAM

Labor and Employment Law: 1.0 hour (per program)
Workers' Compensation: 1.0 hour (June 12 Webinar Only)**

ELECTRONIC MATERIALS: Every CLE course will feature an electronic course book in lieu of a printed book for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable, downloadable, printable material will be available via e-mail several days in advance of the live course presentation or thereafter for purchased products. We strongly encourage you to purchase the book separately if you prefer your material printed but do not want to print it yourself. Effective July 1, 2010.

REFUND POLICY: A $25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid.

TO ORDER AUDIO CD BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department: 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

Email Address _____

E-mail address is required to receive electronic course material and will only be used for this order. **ABF: Course No. 1421C**

METHOD OF PAYMENT (CHECK ONE):

❑ Check enclosed made payable to The Florida Bar

❑ Credit Card – Fax to 850/561-9413. ☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX

Signature: _____ Exp. Date: ____/____ (MO./YR.)

Name on Card: _____ Billing Zip Code: _____

Card No. _____

TO ORDER AUDIO CD, fill out the order form above, including a street address for delivery. **Please add sales tax to the price of audio CD. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the audio CD must be mailed to that organization

❑ **AUDIO CD** **(1421C)**
(includes Electronic Course Material for all 5 programs)
$210 plus tax (section member)
$250 plus tax (non-section member)

The Florida Bar Continuing Legal Education Committee and
The Labor and Employment Law Section present

13th Labor and Employment Law Annual Update and Certification Review

COURSE CLASSIFICATION: ADVANCED LEVEL

February 14 - 15, 2013

The Peabody Orlando
9801 International Drive
Orlando, FL 32819
407-352-4000
www.peabodyorlando.com

Course No. 1445R

This two-day seminar discusses the latest developments in labor and employment law, bringing you the most up-to-date information on relevant statutes and case law. This course could also help those who plan on taking the exam for Board Certification in Labor and Employment Law.

[Please note that the course is developed and conducted without any endorsement by the BLSE and/or Certification committees. Those who have developed the program have no information regarding the examination content other than the information contained in the exam specifications which are also provided to each examinee. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination or that the examination will cover all topics in the course material.]

13th Labor and Employment Law Annual Update and Certification Review

Thursday, February 14, 2013

8:00 a.m. – 8:20 a.m.
Late Registration

8:20 a.m. – 8:30 a.m.
Opening Remarks
Mary Ruth Houston, Shutts & Bowen LLP, Orlando – Program Co-Chair
David H. Spalter, Jill S. Schwartz & Associates, P.A., Winter Park – Program Co-Chair

8:30 a.m. – 9:20 a.m.
Fair Labor Standards Act
David H. Spalter, Jill S. Schwartz & Associates, P.A., Winter Park

9:20 a.m. – 10:20 a.m.
Constitutional Employment Claims
Michael Spellman, Sniffen & Spellman, P.A., Tallahassee

10:20 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 12:00 noon
National Labor Relations Act
James G. Brown, Ford & Harrison, Orlando

12:00 noon – 1:00 p.m.
Lunch (included in registration fee)

1:00 p.m. – 2:00 p.m.
Public Employees Relations Act
Richard P. Siwica, Egan Lev & Siwica, Orlando

2:00 p.m. – 2:40 p.m.
Worker Adjustment and Retraining Notification Act
Kevin D. Johnson, Thompson Sizemore Gonzalez & Hearing, P.A., Tampa

2:40 p.m. – 2:50 p.m. **Break**

2:50 p.m. – 4:00 p.m.
Common Law Employment Claims
Jill S. Schwartz, Jill S. Schwartz & Associates, P.A., Winter Park

4:00 p.m. – 5:00 p.m.
Employee Retirement Income Security Act of 1974/ COBRA
Frank E. Brown, MacFarlane Ferguson, Tampa

5:00 p.m. – 6:00 p.m.
Labor & Employment Law Section Executive Council Meeting (all invited)

6:00 p.m. – 7:30 p.m.
Reception (included in registration fee)

Friday, February 15, 2013

8:30 a.m. – 9:00 a.m.
Unemployment Appeals
Hon. Alan Orantes Forst, Chairman, Reemployment Assistance Appeals Commission, Palm City

9:00 a.m. – 10:15 a.m.
EEO Substantive Law
Mary Ruth Houston, Shutts & Bowen LLP, Orlando

10:15 a.m. – 10:25 a.m. **Break**

10:25 a.m. – 11:10 a.m.
EEO Laws: Administrative Procedures
J. Ray Poole, Constangy Brooks & Smith LLC, Jacksonville

11:10 a.m. – 12:00 noon
Statutory and Common Law Protection of Business Interests
Karen M. Buesing, Akerman Senterfitt, Tampa

12:00 noon – 12:55 p.m.
Drug Testing Statutes
Christopher C. Sharp, Sharp Law Firm, P.A., Plantation

12:55 p.m.– 1:25 p.m.
Lunch (included in registration fee)

1:25 p.m. – 2:15 p.m.
Workplace Privacy: Polygraph Protection Act; Fair Credit Reporting Act; Invasion of Privacy; Employer Regulation of Private Employee Conduct
Thomas (Tad) Delegal, Delegal Law Offices, Jacksonville

2:15 p.m. – 3:10 p.m.
Whistleblower Statutes and Workers' Compensation Retaliation Claims
Shane T. Muñoz, Ford & Harrison, Tampa

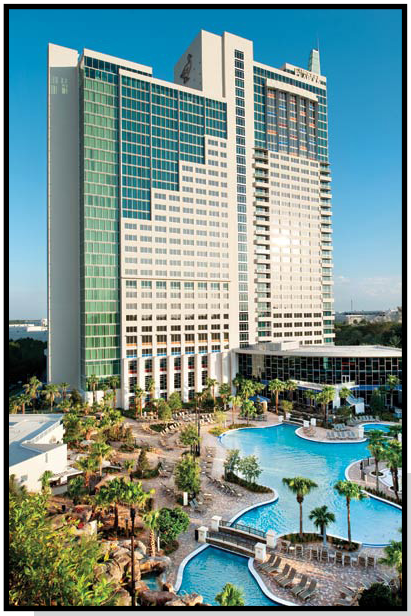
3:10 p.m. – 3:25 p.m. **Break**

3:25 p.m. – 4:15 p.m.
Family and Medical Leave Act
David E. Block, Jackson Lewis LLP, Miami

4:15 p.m. – 4:45 p.m.
OSHA
Eric J. Holshouser, Fowler White Boggs, P.A., Jacksonville

4:45 p.m. – 5:15 p.m.
USERRA
Janet E.Wise, Law Offices of Cynthia N. Sass, P.A., Tampa

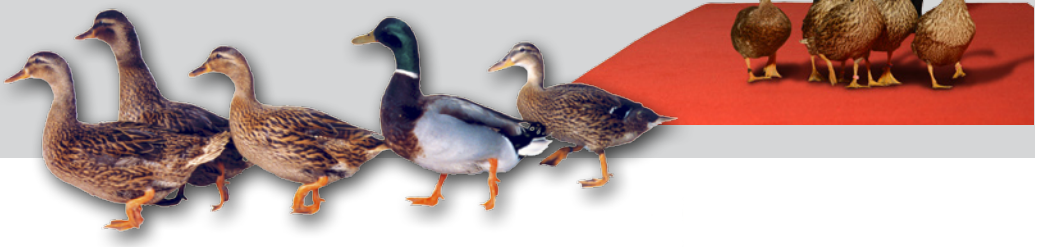
HOTEL RESERVATION INFORMATION



A block of rooms has been reserved at **The Peabody Orlando**, at the rate of **$199** single/double occupancy. To make reservations, call The Peabody Orlando at **(407) 345-4488.** Reservations must be made by **01/23/2013** to ensure the group rate and availability. After that date, the group rate will be granted on a "space available basis."

As one of only two Forbes Four-Star, AAA Four-Diamond hotels in the entire city, the Peabody Orlando offers luxurious accommodations within a short drive of Disney World, Sea World, and Universal Studios.

And you won't want to miss those famous Peabody ducks!



REFUND POLICY

A $25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. Registrants who do not notify The Florida Bar by 5:00 p.m., February 8, 2013, that they will be unable to attend the seminar, will have an additional $170 retained. Persons attending under the policy of fee waivers will be required to pay $170.

CLE CREDITS

CLER PROGRAM
(Maximum Credit: 17.5 hours)

General: 17.5 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Maximum Credit: 17.5 hours)

Labor & Employment Law: 17.5 hours

Register me for the "13th Labor and Employment Law Annual Update and Certification Review" Seminar

ONE LOCATION: (126) THE PEABODY ORLANDO (FEBRUARY 14 -15, 2013)

TO REGISTER OR ORDER COURSE BOOKS OR AUDIO CD BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone: ( ) _____

E-mail* _____

***E-mail address required to transmit electronic course materials and is only used for this order.** **ABF: Course No. 1445R**

ELECTRONIC COURSE MATERIAL NOTICE: Florida Bar CLE Courses feature electronic course materials for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable electronic material can be downloaded and printed and is available via e-mail several days in advance of the live presentation or thereafter for purchased products. Effective July 1, 2010.

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Labor & Employment Law Section: $480
- ❑ Non-section member: $520
- ❑ Full-time law college faculty or full-time law student: $345
- ❑ Persons attending under the policy of fee waivers. Fee waivers are only applicable for in-person attendance: $170

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-9413.)
  ☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX

Exp. Date: ___/___ (MO./YR.)

Signature: _____

Name on Card: _____

Billing Zip Code: _____

Card No. _____

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

❑ Enclosed is my separate check in the amount of $40 to join the Labor and Employment Law Section. Membership expires June 30, 2013.

COURSE BOOK – AUDIO CD

Private recording of this program is not permitted. **Delivery time is 4 to 6 weeks after 02/15/13. TO ORDER AUDIO CD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax. Tax exempt entities must pay the non-section member price.** Those eligible for the above mentioned fee waiver may order a complimentary audio CD in lieu of live attendance upon written request and for personal use only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the media must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ **COURSE BOOK ONLY (1445M)**
Cost $60 plus tax
(Certification/CLER credit is not awarded for the purchase of the course book only.)
TOTAL $ _____

❑ **AUDIO CD (1445C)**
(includes electronic course material)
$310 plus tax (section member)
$350 plus tax (non-section member)
TOTAL $ _____

MEMBER BENEFITS

The Florida Bar • 651 East Jefferson Street • Tallahassee, Florida 32399-2300
www.floridabar.org/memberbenefits • 850/561-5600 • 800/342-8060

LEGAL RESEARCH

ABA PUBLICATIONS ***www.ababooks.org***

100's of books in a variety of formats. Rigorously reviewed to offer highest quality information & presentation.

ref. #PAB6EFLB for 15% discount

CCH ASSOCIATION
http://tax.cchgroup.com/members/tfb

Savings up to 30% off industry-leading tax and accounting books.

Use ref. #Y5604 at check out.

FASTCASE NATIONAL LAW LIBRARY
866-77-FASTCASE

Comprehensive 50 state and federal case law databases. Unlimited dual column printing. 80% discount off retail.

FREE FLORIDA CASE LAW at
www.floridabar.org

LEXISNEXIS **866-836-8116**
www.lexis.com/flabar

Flexible research and big savings. Shepard's® and exclusive content make research easier. Unique offerings,affordably priced and easy to customize.

BANK PROGRAMS

BANK OF AMERICA **800-932-2775**
www.bankofamerica.com/floridabar

Apply Online or toll-free! Affinity credit card. CD's, Money Market, free checking.

LAWPAY **866-376-0950**
www.affiniscape.com/floridabar

Law Firm Merchant Account. Members can save up to 25% off credit card processing fees.

INSURANCE

BUSINESS PLANNING CONCEPTS, INC.
800-282-8626 ***www.memberbenefits.com***

Medical, disability, life, hospital, AD&D, long term care, retirement programs, workers' comp., pet insurance & more.

CELEDINAS INSURANCE GROUP
www.celedinas.com/florida-bar

Offers excess personal liability coverage, up to 60% discount.

FLORIDA LAWYERS MUTUAL (FLMIC)
800-633-6458 • *www.flmic.com*

Lawyer-created liability carrier.

GEICO **800-368-2734** ***www.geico.com***

The GEICO Auto Insurance Program offers car insurance with 24-hour service. Bar members may qualify for additional discounts.

JURISCO **800-274-2663**
www.jurisco.com

Civil court bonds by phone in 24 hrs.

BUSINESS

ABI ***www.ABIToday.com***
Association Benefits International

Over 90% of searches for products or services today are performed on-line.

From the largest more established firms to the newest attorney, ABI has the right marketing strategy for you.

FORMSPASS **877-389-0141 X.111**
www.formspass.com/flbar-partnership

Unlimited access to a library of high-quality legal practice forms for low yearly or monthly rate, with no timed usage fees, per form fees, printing fees or other hidden charges.

PRODOC **800-759-5418**
www.prodoc.com

ProDoc legal forms software. Family, Estate Planning, Probate & more.

STAPLES **800-3STAPLE**
www.floridabar.org/memberbenefits

Office supplies, furniture and technology.

SUBSCRIPTION SERVICES, INC.
800-289-6247 • *www.buymags.com*

TABS3 TRUST ACCOUNTING SOFTWARE
www.tabs3.com/floridabar

Members of the Florida Bar are entitled to exclusive pricing for Tabs3 Trust Accounting Software (handles up to 5 billable timekeepers). The member benefit price is $99 – over a 40% savings!

APPAREL / HOME / GIFTS

THE BILLABLE HOUR COMPANY
www.thebillablehour.com/flabar.php

Wide selection of gifts for lawyers and legal professionals. Save 10% with code: **FLABAR.**

BROOKS BROTHERS **866-515-4747**
membership.brooksbrothers.com

Enroll for **Corporate Membership Card** and **Save 15%** on regular and everyday value priced merchandise. Enter Organization ID #**10320** and your Pin Code #**97352**.

FTD **1-800-SEND FTD**
www.ftd.com/corporatepartner15
Code: 30646

JOS. A. BANK CLOTHIERS **800-285-2265**
***www.josbank.com* • Code: 91861**

Specializing in men's clothing. Save 20% with the JoS. A. Bank Corporate Discount Card. (Sale items excluded). Call for FREE Corporate Card.

SEARS COMMERCIAL MARKETPLACE
www.floridabar.org/memberbenefits

Save 5-50%* off everyday items to furnish your home! (*Discount reflects savings off regular price. Program not available in Sears retail stores.)

MAILING & DELIVERIES

FEDEX **800-636-2377**
www.1800members.com/flb

Save up to 26% on Fed Ex shipping services.

UPS **800-325-7000**
www.savewithups.com/floridabar

Discounts on services.

AUTOMOBILE RENTALS

ALAMO ***www.alamo.com*** **• 800-354-2322**

Year round discounts from Alamo!

ref. #93718

AVIS ***www.avis.com*** **• 800-331-1212**

Avis Preferred Renter fees waived.

ref. #A421600

BUDGET ***www.budget.com*** **• 800-527-0700**

Year round discounts from Budget.

ref. # Y067600

HERTZ **www.hertz.com • 800-654-2200**

Hertz #1 Club Gold fees waived.

ref. #152030

NATIONAL **www.nationalcar.com**
800-227-7368

National Emerald Club fees waived.

ref. #5650262

MEDICAL EVACUATION AND REPATRIATION

MEDJET **800-527-7478**
www.Medjet.com/TFB

Enroll prior to travel with Medjet rates reduced up to 18% for domestic & international "hospital of choice" protection, personal & business travel. Reference The Florida Bar.

For information on ALL Bar Membership Services, visit www.floridabar.org/memberbenefits

Advertise in *the Checkoff!*

Advertising Policy: *The Checkoff* will accept all legal advertisements and professional announcements that are in keeping with the publication's standards of ethics, legality, and propriety, so long as such advertising is not derogatory or demeaning. Advertising in which the advertiser violates or enables another to violate the Rules of Professional Conduct of The Florida Bar or the Florida Code of Judicial Conduct will not be accepted. While advertising copy is reviewed, publication herein does not imply endorsement of any advertiser's goods, services or opinions. The *Checkoff* is distributed electronically to the 2,200 members of the Labor & Employment Law Section, including attorneys, judges, students, other legal professionals, and subscribers.

Ad Size	Cost
Standard	$ 150.00
1/4 page	$ 350.00
1/2 page	$ 600.00
Full Page	$ 1,000.00

Classified Advertisements

50 words* or less:	$50 per insertion
51-75 words:	$65 per insertion
Classified box:	$75 per insertion (up to 75 words)

**** * * Full payment must be received by Submission Deadline * * ****

Issue	Ad Deadline
February	January 25th

For further information, contact Cathleen Scott 561-653-0008 or Email:CScott@FloridaLaborLawyer.com

Advertiser's Name: _____

Address: _____

Contact: _____ Phone No: ( ) _____–_____

E-mail: _____

Ad size: _____

METHOD OF PAYMENT (CHECK ONE):

❑ Check enclosed made payable to The Florida Bar. (Payment amount: $_____.)

❑ Credit Card. Fax to 850/561-9413.)

__ MASTERCARD __ VISA __ DISCOVER __ AMEX Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____Billing Zip Code: _____

Card No. _____

#8150003

I hereby agree to comply with all of above procedures and policies as set forth by the Labor & Employment Law Section of The Florida Bar

_____ _____

Contact Signature Date

Send form to: *Cathleen Scott*
Cathleen Scott, P.A.
250 S. Central Boulevard, Suite 104
Jupiter, FL 33458-8812

E-mail: cscott@floridalaborlawyer.com

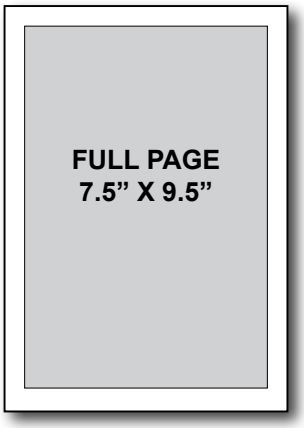
Fax: 561-653-0020

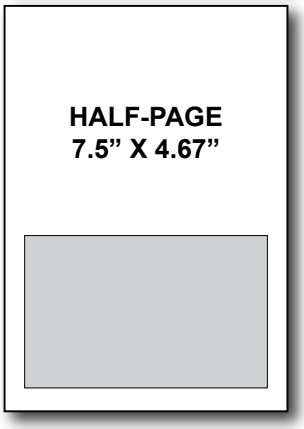
All ads must be camera-ready, in high resolution—at least 300 dpi—and in one of the following formats:

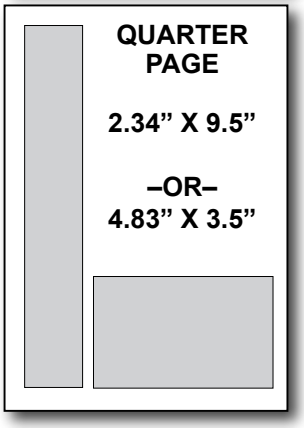
- Print optimized PDF (preferred) (MAC or PC)
- JPEG, EPS or TIF, 300 dpi (MAC or PC)
- Adobe Photoshop 6.0 - 8.0 (MAC or PC)
- Adobe Illustrator CS2 or before

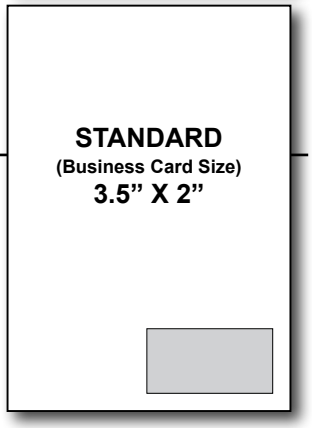
All fonts must be imbedded. Please *do not use an image from the web* (typically 72 dpi and not acceptable for print media). We reserve the right to refuse low resolution or poor quality images. Every effort will be made to utilize files sent to us, but ads that have to be resized or reformatted (this includes Word files) will be charged a set-up charge: $50.00 for a full-page ad; $35.00 for all other ads.

*** Position requests are not guaranteed**









The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

PRESORTED
FIRST CLASS
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43