NLRB Allows Employers to Demand Arbitration Agreements with Class and Collective Waivers After a Lawsuit Has Been Filed

By Shane Muñoz, Tampa, and Chandler Armistead, Orlando

In Cordúa Restaurants, Inc., the National Labor Relations Board (Board or NLRB) answered three important questions regarding mandatory arbitration agreements that include class and collective action waivers: (1) whether the National Labor Relations Act (the Act) prohibits employers from promulgating such agreements in response to employees opting into such actions; (2) whether the Act prohibits employers from threatening to discharge an employee who refuses to sign a mandatory arbitration agreement; and (3) whether employers may discipline employees who, in violation of such agreements, participate in class or collective actions.

Background

Prior to the United States Supreme Court’s

The FLSA’s New and Proposed Compensation Regulations

By M. Kristen Allman, Tampa

This has been an extraordinarily active year administratively for the U.S. Department of Labor (DOL) insofar as it has proposed or finalized numerous regulations that impact workplace compensation practices.

Regular Rate Rule Proposal

In late March, the DOL issued a notice of rulemaking with regard to the types of payments that must be included in the nonexempt employee’s regular rate of pay for overtime computation purposes. Except where specifically excluded by law (such as reimbursed expenses and employer contributions to bona fide employee benefit plans), the Fair Labor Standards Act (FLSA) requires that all forms of employee remuneration be included in the regular rate for purposes of calculating overtime compensation due the nonexempt employee at one and a half times that rate for hours worked in excess of forty per workweek.

In propounding modifications to existing regular rate regulations, the DOL states that “current regulations do not sufficiently reflect . . . developments in the 21st-century work-
I hope this letter finds everyone well and ready for the new year.

Our Section has some great events coming up. The 20th Labor and Employment Law Annual Update and Board Certification Review will be held February 6th and 7th at the Hyatt Regency Orlando in conjunction with The Florida Bar Winter Meeting. For more information on the lecture program and hotel reservations, see the brochure on pages 25–26. This event often sells out, so register now.

We also have a number of audio webcasts planned in the new year: Be an Expert in Handling Experts: Best Practices for Expert Designation, Discovery, and Direct and Cross-Examination (January 8th); Flexible Work Arrangements: Legal Implications of a Millennial Must-Have (February 5th); Hot Topics in Public Sector Bargaining (March 11th); New Rules of Reason or Reasons to Rue? NLRB Decisions Changing the Landscape of the Union and Non-Union Workplace (April 8th); and What Employers and Employees Need to Know About the GDPR, CCPA, and Emerging Privacy Laws (May 6th). If you missed our November (Have You Googled It? Website Accessibility Under Title II and Title III of the ADA) and December (We’re at Impasse. Now What? Best Practices for the Impasse and Special Magistrate Process) webcasts, you can order the programs. See page 21 for order information and to register for upcoming webcast CLEs.

In 2016, the Section held a very successful all-day seminar in Tallahassee that provided a unique opportunity to hear from key members of state agencies. For our North Florida L&E members, it was also a rare opportunity to attend a nearby Section-sponsored CLE seminar. Building on that success, we invite you to attend our next Tallahassee seminar, titled Practicing Before State Agencies, which will be held on March 5th.

Finally, Advanced Labor Topics 2020 will take place in Washington D.C. on April 2–3, 2020. This event will include educational and social activities. See the cherry blossoms in bloom and take in some world-class continuing education! Families are welcome to be a part and enjoy the nation’s capital. Come early. Stay late. We have a limited block of rooms at The Madison, a Hilton property, so make your reservations now. See the next page for hotel information.

I wish a happy new year to all.
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A product of the 2018 Florida legislative session, Chapter 2018-6, Laws of Florida, brings several changes to the state’s education system. For those involved in the public-sector labor sphere, the new law’s most significant (and controversial) provision is section 33, codified in subsections 1012.2315(4) (b) and (c), Florida Statutes. The newly enacted provisions, which took effect July 1, 2018, impose certain disclosure obligations on employee organizations representing instructional personnel when such organizations go through the annual process of renewing their registration with the Public Employee Relations Commission (PERC).1

Public-sector labor relations in Florida are governed by the Public Employee Relations Act (PERA), Chapter 447, Part II, Florida Statutes.2 PERA is the statutory implementation of Article I, Section 6 of Florida’s Constitution, which affords employees a constitutional right to bargain collectively and to work regardless of their membership in a labor union.3 PERA recognizes the right of public employees to be represented by an employee organization of their own choosing and to negotiate collectively with their employer, through a certified bargaining agent, regarding the terms and conditions of their employment.4

To become a certified bargaining agent for public employees, an employee organization must first register with PERC.5 A registered employee organization may then be certified as the exclusive bargaining representative for a particular group of employees through either a petition for voluntary recognition or petition for certification, with the latter requiring an election where a majority of the vote determines if the organization becomes the employees’ bargaining representative.5 Once certified as the exclusive bargaining agent for a bargaining unit of employees, the organization can lose such status only if it is displaced by another employee organization through the same certification process6 or if its certification is suspended or revoked.7

Traditionally, an employee organization’s certification is revoked through a “petition to revoke certification” filed by any employee or group of employees who no longer wants to be represented by the organization.8 As a practical matter, PERA’s revocation process is seldom used because many employees are unaware of the process, and the idea of revocation cannot originate with the employer.9 An employee who wishes to file a petition to revoke an incumbent union’s certification must obtain dated statements, signed by at least thirty percent of the employees in the unit, indicating that such employees no longer desire to be represented by the incumbent organization.10 If PERC determines the petition is legally sufficient, an election takes place in which a majority of those employees voting determines the future status of the incumbent certified bargaining agent.11

Hailed by its proponents as an effort to give teachers more control over their bargaining representatives and criticized by its detractors as an attack on public teachers’ unions, subsection 1012.2315(4)(c), Florida Statutes, is fundamentally a reporting provision that places an affirmative obligation on certified bargaining representatives of instructional personnel12 to disclose the composition of their membership.13 Following the amendment, when annually applying to renew PERC certification, employee organizations representing instructional personnel must now provide in their applications (1) the number of employees in the bargaining unit who are eligible for representation, (2) the number of employees who are represented by the employee organization, and (3) a breakdown of dues-paying and non-dues-paying members.14

Those employee organizations with a dues-paying membership of less than fifty percent of the employees eligible for representation in the unit must petition PERC for recertification or face revocation of their certification.15 Only those organizations that receive a majority vote in favor of retention will continue in their representative capacity.

Within a few months of the law’s enactment, the Florida Education Association and several employee organizations (hereinafter referred to collectively as FEA) filed a Complaint for Declaratory and Injunctive Relief against the commissioners of PERC in Leon County Circuit Court seeking to have Chapter 2018-6 declared unconstitutional on a variety of grounds.16 The FEA argued, inter alia, that the law was an unconstitutional abridgment of the right to bargain collectively and—in violation of the Equal Protection Clause—treated K-12 instructional personnel differently than other classes of public employees.

In August of 2019, Circuit Court Judge Angela Dempsey, in an Order denying the FEA’s Motion for Partial Summary Judgment, rejected the FEA’s arguments. Judge Dempsey affirmatively declared that subsection 1012.2315(4)(c), Florida Statutes, “does not abridge workers’ fundamental right to bargain collectively” or “give rise to a claim under the Equal Protection Clause” and found FEA’s arguments to the contrary to be “without merit.”17 Applying the rational basis test rather than the strict scrutiny standard advocated by the FEA, Judge Dempsey noted that the goal of the statute was to afford public school teachers greater control over the collective bargaining process when dues-paying members of a bargaining unit comprise less than fifty percent of teachers and that the statute utilized rational means to achieve that goal.18

By Matt Stefany, Tampa
Because the provisions themselves do not oust the union from its representative position but merely trigger the opportunity for an employee to consider whether to alter the status of the representation, the court found no constitutional infringement. Following the court’s decision, the commissioners filed their own case-dispositive Motion for Summary Judgment. On November 1, 2019, rather than respond to the commissioners’ Motion, the FEA elected to voluntarily dismiss its case without prejudice. The dismissal leaves open the possibility of a future lawsuit, but Judge Dempsey’s holding—that the statute does not violate public employees’ constitutional right to collectively bargain or their right to equal protection—is no longer subject to appeal.

As of the time of this article’s publication, there is no pending challenge to Chapter 2018-6, but public employers of instructional personnel should remain cognizant of their bargaining obligations under PERA. Regardless of whether an employer believes that a certified bargaining agent has the requisite approval of its members, the employer has an affirmative obligation to bargain in good faith with the certified organization in determining wages, hours, and the terms and conditions of employment for those employees within the unit. Employers should also be mindful of their role in any election that results from a recertification under section 1012.2315, Florida Statutes, and should consult legal counsel to ensure any intended course of action accords with the law.

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Endnotes
7. Rival employee organizations are limited in their efforts to displace an incumbent organization. No petition may be filed seeking an election in an existing bargaining unit within twelve months of the effective certification of the incumbent employee organization. § 447.307(d), Fla. Stat. (2019). If there is a collective bargaining agreement in place, a rival organization may petition for certification only during the period extending from 150 days to ninety days immediately preceding the expiration date of the agreement. Id.
9. See, e.g., SEIU Florida Healthcare Union Local 1999 v. Health Care Dist. of Palm Beach Cnty., 33 FPER ¶ 117 (2007) (noting whether an employer commits an unfair labor practice by involving itself in employee revocation of union authorization cards depends on the degree of employer participation in the process, i.e., whether the idea of revocation originates with the employee or employer); see also Jess Parrish Mem’l Hosp. v. PERC, 364 So. 2d 777, 782 (Fla. 1st DCA 1978) (same).
10. § 447.308(1), Fla. Stat. (2019); R. 60CC-1001, Fla. ADMIN. CODE (discussing the process for a “showing of interest”).
12. § 1012.01(2), Fla. Stat. (2019). By statute, “instructional personnel” includes classroom teachers, personnel in student services, librarians/media specialists, and other instructional staff who do not fall into one of the aforementioned categories, such as primary specialists, learning resource specialists, instructional trainers, adjuncts, and educational paraprofessionals. § 1012.01(2)(a)-(e), Fla. Stat. (2019).
16. Plaintiffs challenged the law as violating the “single subject” rule of Article III, Section 6, Florida Constitution (Count I); violating the equal protection requirements of Article I, Section 2, Florida Constitution (Count II); and violating public employees’ right, in general, to collectively bargain (Count III), as well as abridging non-union members’ right to work pursuant to Article 1, Section 6, Florida Constitution (Count IV). See Complaint, Fla. Educ. Assoc. v. Poole, Case No. 2018 CA 1446 (Fla. 2d Cir. Ct. filed July 2, 2018), accessible via https://cvweb.clerk.leon.fl.us/public/online_services/search_courts/search_by_name.asp.
17. Order Denying Plaintiffs’ Motion for Summary Judgment as to Count II of the Complaint, Fla. Educ. Assoc. v. Poole, Case No. 2018 CA 1446, at p. 6 (Fla. 2d Cir. Ct., issued Aug. 9, 2019).
18. Id. at p. 7.
19. Id.
21. § 447.309(1), Fla. Stat. (2019); see, e.g., Hollywood Fire Fighters, Local 1374 v. City of Hollywood, 8 FPER ¶ 13324 (1982) (noting employers are under an obligation to represent the views of the legislative body in negotiations on all mandatory subjects of bargaining as soon as those views can be reasonably determined).
SCOTUS Watch: Employment and Employment-Related Cases to Watch for This Term

By Aaron Tandy, Miami

During its current Term, the Supreme Court of the United States (SCOTUS) will tackle several employment and employment-related cases involving interpretations of ERISA, ADEA, and Title VII, among other statutes. Employment attorneys should closely monitor SCOTUS’s docket as the Court’s final opinions in these cases will have a significant impact on both employees and employers not only in Florida but nationwide.

Title VII: Is sexual orientation discrimination prohibited?

As soon as the third day of its Term, October 8, SCOTUS heard oral argument in three employment cases—Evans v. Georgia Regional Hospital,1 Altitude Express, Inc. v. Zarda,2 and R.G. & G.R. Harris Funeral Homes v. EEOC.3 Each of these cases asked the Court to decide whether Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination on the basis of sexual orientation and gender identity.

The lower courts in Bostock and Zarda reached opposite conclusions on this question. The former found that Title VII encompasses discrimination only on the basis of gender,4 while the latter found that coverage extends also to sexual orientation.5 SCOTUS had sidestepped this question in an earlier Term by denying certiorari in Evans v. Georgia Regional Hospital,6 a case arising out of the Eleventh Circuit. However, with the current split among several federal circuits,7 SCOTUS apparently decided the time was right to provide clear guidance on the reach of Title VII. Spirited argument was held on October 8 between those who want the Court to find that the word “sex” in Title VII encompasses protection from discrimination based also on sexual orientation and gender identity. As this article is being finalized for publication, SCOTUS has not yet issued its opinion.

42 U.S.C. § 1981: Is the lack of “but for” causation fatal to a section 1981 race discrimination claim?

Earlier in November, SCOTUS heard argument also in Comcast Corp. v. National Association of African American-Owned Media.8 Comcast is not an employment case; rather it involves a claim that Comcast refused to contract with a company because of racial bias. In Comcast, the Court was asked to expand the “but for” causation test to section 1981 race discrimination claims. Previously, in Gross v. FBL Financial Services, Inc.,9 SCOTUS ruled that in order to prevail on a claim brought under the Age Discrimination in Employment Act of 1967 (ADEA), the plaintiff was required to prove that age was the “but for” cause of an adverse employment decision. In 2013, SCOTUS expanded this rationale to Title VII retaliation claims, finding in University of Texas S.W. Medical Center v. Nassar10 that a Title VII plaintiff must prove that the retaliation was the “but for” cause of the employer’s adverse action. In Comcast, the petitioner asked SCOTUS to apply the same rationale and find that, where a party offers a race-neutral reason for a contractual action, a section 1981 claim must fail absent a determination that race was the sole motivating factor. The Court’s decision on this question could significantly impact employment claims filed under 42 U.S.C. § 1981.

ERISA: Are there limitations on actions for recovery under ERISA against fiduciaries?

SCOTUS also granted certiorari in three cases seeking clarification regarding the limitations on claims brought under the Employee Retirement Income Security Act (ERISA) for recovery of damages against fiduciaries. In Intel Corp. Investment Policy Committee v. Sulyma,11 the Court is being asked when the three-year statute of limitations under section 413(2) [29 U.S.C. § 1113(2)] bars a claim against plan fiduciaries. The district court found that the plaintiff’s claim was time-barred, but judgment in favor of the plan fiduciaries was reversed by the Ninth Circuit, which found that the period began to run when the plaintiff had actually located the information.12 At issue is when a plan participant has “actual knowledge” of the information sufficient to trigger the statute of limitations. Is it when the plan fiduciaries release the information, even if the participant fails to read the material, or is it only when the plan participant actually reads the information?

Similarly in Thole v. U.S. Bank, N.A.,13 SCOTUS is being asked whether a plan participant or beneficiary can bring an action against a plan fiduciary, either for injunctive relief for misconduct or for restoration of plan losses (both under 29 U.S.C. § 1132(a)), when there is no showing that either the plan or the individual suffered loss. Specifically at issue is whether, in the absence of personal loss, a plan participant has standing to sue the plan fiduciaries. Sulyma was argued on December 4, 2019. SCOTUS will hear argument on Thole in January 2020.
Additionally, on November 6, 2019, SCOTUS heard argument in Retirement Plan Committee of IBM v. Jander.\(^4\) In Jander, the Court is being asked to determine the standard for deciding whether retirement plan fiduciaries breached their obligations to 401K participants by failing to take action when company stock fell after the company sold its microelectronics business. As this article is being finalized for publication, SCOTUS has not yet issued its opinion.

### ADEA: Does ADEA have separate standards for public and private employees?

SCOTUS granted certiorari in Babb v. Wilkie,\(^5\) apparently to resolve a circuit split as to the causation standard to be applied in ADEA cases brought against public-sector employers—in this case, a VA medical center in Florida. As noted above, SCOTUS in Gross determined that in private-sector cases a successful litigant must provide proof that age was the “but for” cause of the employer’s adverse employment action.\(^6\) Because the statutory language regarding federal employees differs from that for the private sector,\(^7\) the circuit courts are split, with certain courts—including the Eleventh Circuit—applying a “but for” causation standard and others applying a more expansive “motivating factor” standard. Given recent decisions seeking to harmonize public- and private-sector employment standards, SCOTUS will likely adopt the reasoning in Gross for public-sector employee claims as well. Oral argument is set for January 15, 2020.

### IRCA: Does the IRCA implicitly preempt a state’s use of information on Form I-9 to prosecute identity theft?

Finally, SCOTUS accepted certiorari from the Supreme Court of Kansas on a preemption question involving use of information collected on Form I-9 pursuant to the Immigration Reform and Control Act (IRCA).\(^8\) In Kansas v. Garcia,\(^9\) the Supreme Court of Kansas found that the prosecution of an unauthorized alien for identity theft under a state statute had been preempted by passage of section 1324a(b)(5) of IRCA. Because prosecution of an alien for identity theft for purposes of establishing work eligibility is not among the purposes for which IRCA allows information on Form I-9 to be used, the Kansas high court found that Congress had implicitly preempted prosecution of employment-related identity theft by the states.\(^10\)

Given the issues presented by these cases, it would be hard to overestimate the impact SCOTUS’s rulings will have on labor and employment law.

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**Endnotes**

5. Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (“[W]e now hold that Title VII prohibits discrimination on the basis of sexual orientation as discrimination ‘because of . . . sex.’”).
7. While the Second, Sixth, and Seventh Circuits have decided that Title VII extends to sexual orientation discrimination claims, the Fifth Circuit earlier this year joined the Eleventh in rejecting that proposition. See Wittmer v. Phillips 66 Co., 915 F.3d 328, 330 (5th Cir. 2019).
20. Id. at 600.
In the United States, nearly 500 homicides occur in workplaces every year, and roughly three-quarters of those homicides involve firearms, according to the Bureau of Labor Statistics. One of the most widely known episodes of workplace violence occurred in 1986 when a postal employee entered his workplace with two semi-automatic weapons and murdered fifteen people while injuring six. In the following thirty years, the phrase “going postal” has become a cultural reference for violent behavior, especially in the workplace. There is even a line of “active shooter” video games called “Postal.”

For employers, “going postal” reflects the reality of workplace violence and of possible liability for negligent hiring, supervision, and security. As discussed below, employers seeking to keep employees safe from workplace violence can be caught in the crosshairs of conflicting laws.

Workplace Violence

According to the Occupational Safety and Health Administration (OSHA):

Findings of a study published in Injury Epidemiology noted:

There were 1553 firearm workplace homicides during the study period. . . . While customers and coworkers who commit these crimes were often armed at the time of the argument, some were not and retrieved a firearm from an unspecified location before committing a homicide. Thus, immediate and ready firearm access was commonly observed in argumentative workplace deaths.

Transportation incidents were the most common fatal workplace events nationally in 2016, with “violence and other injuries by persons and animals” the second most common fatal workplace event nationwide at 17%.

“Bring Your Gun to Work”

One apparent way to reduce fatal workplace violence is to ban firearms from the premises, since the vast majority of incidents are firearm-related. However, a 2008 Florida law—section 790.251, Florida Statutes—specifically allows employees, customers, and invitees to have firearms near an employer’s place of business:

(4) Prohibited acts. — No public or private employer may violate the constitutional rights of any customer, employee, or invitee as provided in paragraphs (a)-(e):

(a) No public or private employer may prohibit any customer, employee, or invitee from possessing any legally owned firearm when such firearm is lawfully possessed and locked inside or locked to a private motor vehicle in a parking lot and when the customer, employee, or invitee is lawfully in such area.

(b) No public or private employer may violate the privacy rights of a customer, employee, or invitee based upon verbal or written statements of any party concerning possession of a firearm stored inside a private motor vehicle in a parking lot for lawful purposes. A search of a private motor vehicle in the parking lot of a public or private employer to ascertain the presence of a firearm within the vehicle may only be conducted by on-duty law enforcement personnel, based upon due process and must comply with constitutional protections.

This subsection applies to all public sector employers, including those already prohibited from regulating firearms under the provisions of [section] 790.33.

This Florida statute, commonly called the “bring your gun to work” law, is really more of “leave your lawful concealed weapon in your car” law. Shortly after section 790.251 was introduced, a leasing agent for an apartment community in Florida sued his employer for wrongful termination, alleging violation of public policy—specifically, the right to bear arms in self-defense—after he was fired for carrying a gun to the sight of a shooting on community premises.

In granting summary judgment in favor of the employer, the court reiterated Florida’s “at-will” employment doctrine with no public policy exception.

In its ruling, the court also rejected the employee’s reliance on newly enacted section 790.251, Florida Statutes. The court cited three reasons for finding such reliance to be “misplaced.” First, the employee did not have the gun in his car, but rather carried his firearm across company property.

Second, the statute was enacted more than a year after the employee’s termination and could not be applied retroactively. Finally, the legislature had not created an exception for the specific facts presented by the case, evidencing a strong
intention not to create the exception to at-will employment. The court said: “The Legislature had the opportunity to create such an exception when it enacted [section 790.251] and chose not to do so, making clear Florida has no general ‘right to bear arms on employer property’ exception to at-will discharge.”

“Stand Your Ground”

Employers cannot stop employees or customers from possessing a firearm in their cars at the business, so long as the firearm remains in the vehicle and does not enter the employer’s physical building. But what happens when violence occurs in the parking lot or another location onsite? By way of example in a non-employment context, Michael Drejka fatally shot unarmed Markeis McGlockton in the parking lot of a Clearwater convenience store in July 2018. Both were customers of the store. Ultimately, a jury convicted Drejka of manslaughter and sentenced him to twenty years in prison. The shooting occurred in a parking lot, precisely where employers are required to allow guns that are lawfully possessed. Drejka, who had a concealed weapons license, was not charged for over a month due to Florida’s “stand your ground law.” The statute provides that deadly force is justified when “necessary to prevent imminent death or great bodily harm to [oneself] or another or to prevent the imminent commission of a forcible felony.”

Employers can seek to protect themselves from liability by preventing employees from bringing firearms inside the workplace, but employers must permit lawfully possessed firearms in locked vehicles in the parking lot. Moreover, it would appear employers cannot stop someone from attempting to “stand the ground” with that gun in a parking lot. Given the different outcomes in the Drejka case and the case involving George Zimmerman (which preceded Drejka by several years and where the “stand your ground” argument was successful), juries may be retreating from affirming vigilante-style defenses.

Employer Immunity and Liability

Florida Statute 790.251, the “bring your gun to work” law, affords employers some measure of protection from liability when they comply with the statute:

(5) DUTY OF CARE OF PUBLIC AND PRIVATE EMPLOYERS; IMMUNITY FROM LIABILITY—

(a) . . . [A] public or private employer has no duty of care related to the actions prohibited under such subsection.

(b) A public or private employer is not liable in a civil action based on actions or inactions taken in compliance with this section. The immunity provided in this subsection does not apply to civil actions based on actions or inactions of public or private employers that are unrelated to compliance with this section.

(c) Nothing contained in this section shall be interpreted to expand any existing duty, or create any additional duty, on the part of a public or private employer, property owner, or property owner’s agent.

At first glance, Florida employers are seemingly off the hook from liability when their employees engage in violence involving firearms; however, that is not the case. Employers may still face liability from suits under negligent hiring and negligent retention theories. The Amber Guyger case in Texas has garnered national attention in this regard. Guyger, a female police officer, shot and killed an unarmed man after she mistakenly entered his apartment (thinking it was her own) and mistook him for an intruder. In defense, Guyger asserted the “castle-doctrine.” That defense failed, and she was convicted of first-degree murder and sentenced to ten years in prison.

Guyger was off duty at the time of the shooting; however, she was in uniform and allegedly issued verbal commands. In the civil suit, Jean v. City of Dallas, Texas and Amber Guyger, plaintiffs pled multiple claims for relief against the City of Dallas, including excessive use of force, failure to properly train officers on use of force, and failure to properly supervise and discipline Guyger. The plaintiffs’ complaint alleged that Guyger’s Pinterest postings served as warnings of her views towards violence:

26. . . . Defendant Guyger’s Pinterest account demonstrates that she is
a dangerous individual with highly violent and anti-social propensities. Defendant, Guyger’s posts include statements like “Personally I think I deserve a medal for getting through this week without stabbing someone in the neck with a fork”; “People are so ungrateful. No one ever thanks me for having the patience not to kill them”; “I wear all black to remind you not mess with me, because I’m already dressed for your funeral (saved to love to laugh with comment "yah I got meh a gun a shovel and gloves if I were u back da f**k up and get out of meh f**k**king ass.”); “Stay low, go fast, kill first, die last, one shot, one kill, no luck, all skill” was saved to her quotes for inspiration. Such post were available to the public and violated DPD’s social media polices however Defendant Guyger was never reprimanded for the same.  

Daryl K. Washington, attorney for the Jean plaintiffs, stated: “As we allege in our pleadings and as we have always argued, Amber Guyger was clearly on duty. The great majority of the evidence, and the presentation by Amber Guyger’s side, was that she was a police officer and that she acted as a police officer would behave.” It would be, Washington said, “totally awful in situations like this” to “simply release the city from liability when there’s an officer [who] takes the life of someone.” The magistrate judge in the Jean case was unmoved, recommending that the city be dismissed from the suit: 

As we all know, the city be dismissed from the suit: 

Plaintiffs’ assertions that Officer’s actions resulted from a lack of training, supervision, and/or discipline are too vague and conclusory to support the causation element for municipal liability. They are not sufficient to state a claim. Accordingly, Plaintiffs have also failed to allege sufficient facts to support an inference of causation.  

The district judge will now decide whether the case will be allowed to proceed against the City of Dallas, but allegations that the city failed to properly supervise and train Guyger should serve as a warning to employers. 

A Strong Offense Is the Best Defense 

As discussed, Florida law protects employers from some liability relating to workplace violence as a result of allowing employees to keep firearms in their cars. Generally, workers’ compensation laws are the sole remedy for injuries in the workplace, with the exception of intentional torts. With juries showing less sympathy toward “stand your ground” defenses, it may be harder for employers to defend these cases. 

Additionally, while the State of Florida prevents those convicted of felonies from owning firearms and carrying licenses, it does not conduct a full background check on those who apply for licenses. Instead, Florida requires only that the applicant is over the age of twenty-one, a citizen or legal resident, not a felon; that three years have elapsed since the applicant has had a conviction or withholding of adjudication for a lesser offense; and that the applicant has not been convicted of misdemeanor domestic violence. Also, an employee background check would not necessarily reveal that a person has had anger or other mental health issues not culminating in an arrest or conviction, but the background check might, to some extent, shield employers from liability for negligent hiring. 

In the hiring process, the employer cannot lawfully ask if the person owns a firearm. The employer may or may not have access to information regarding past violence. However, an employer who turns a blind eye to the actions of an employee and does not act when signs of danger and violence are apparent may find itself a defending party to a negligent retention case. Employers should implement strong violence prevention and response training, engage in stricter supervision of employees, and focus on problem employees with known violence issues. While simply watching case law develop might be advisable in some areas of the law, it is not wise here. Once tragedy strikes for an organization, the effects can be lasting. Employers should proactively seek to improve hiring and pre-employment background checks, ensure strict policies of preventing workplace violence and disciplining offenders, and closely monitor dangerous social media postings. With more than thirty years of history lessons involving workplace firearm violence, the goal of employers should not be simply to avoid liability, but to avoid tragedy.

Endnotes
2 Postal, Postal 2, Postal III, and Postal Redux are video games created by Running with Scissors (an American video game developer company).
4 Id.
5 Economic News Release, supra note 1 at Table 2.
were attributed to “[a]ll other” fatal occupational injuries nationally in 2016. Id.

8 FLA. STAT. § 790.251(4)(a)–(b) (2019).


10 Id. at 1384–85.

11 Id. at 1386.

12 Id.

13 Id. at 1386–87.

14 Id. at 1387.


18 FLA. STAT. § 776.013(1)(b) (2019).


20 Id.


22 Id.


27 FLA. STAT. § 790.06 (2019).
decision in Epic Systems Corp. v. Lewis, the Board’s position was that a waiver of the right to bring or participate in class and collective actions—even if the waiver was part of an otherwise valid arbitration agreement—violated the Act. Federal appellate courts split on the issue. SCOTUS resolved the dispute in Epic Systems, holding that “agreements containing class- and collective-action waivers and stipulating that employment disputes are to be resolved by individualized arbitration do not violate the Act and must be enforced as written pursuant to the Federal Arbitration Act.”

In Cordúa, the employer “maintained an arbitration agreement that required employees to waive their ‘right to file, participate or proceed in class or collective actions . . . in any civil court or arbitration proceeding.’” In January 2015, in violation of that agreement, a group of employees, including Steven Ramirez, initiated a collective action against Cordúa. Other employees opted into the lawsuit. Cordúa discharged Ramirez for discussing wage issues with co-workers and filing the collective action. Cordúa also formulated a new arbitration agreement and waiver, adding a prohibition on opting into collective actions. During a pre-shift meeting in December 2015, Cordúa Assistant Manager Alex Nguyen disseminated the revised arbitration agreement, told employees they would be removed from the schedule if they did not sign the revised agreement, and cautioned employees who objected to signing the agreement that he “wouldn’t bite the hand that feeds me.”

An unfair labor practice action was brought, and on December 9, 2016, Cordúa went before an NLRB Administrative Law Judge (ALJ). The NLRB’s General Counsel argued that the revised arbitration agreement was unlawful in substance and was promulgated in response to employees’ protected activity of opting into the collective action, that Nguyen’s comment to employees violated the Act, and that Cordúa’s discharge of Ramirez violated the Act. Applying the Board’s decision in Murphy Oil USA, Inc., the ALJ agreed that the revised agreement was unlawful in substance; he therefore did not reach the General Counsel’s alternative argument concerning the motive for promulgation of the revised agreement. The ALJ also found that Nguyen’s comment was unlawful and that Cordúa unlawfully discharged Ramirez. After the Board issued an initial decision in the matter, and the employer filed a petition for review in the United States Court of Appeals for the Fifth Circuit, the Supreme Court issued its decision in Epic Systems. The Board then vacated, for reconsideration in light of Epic Systems, its decision in Cordúa.

**Board Reconsideration**

On reconsideration, the Board addressed two issues of first impression: (1) whether the Act prohibits employers from promulgating arbitration agreements with class and collective action waivers in response to employees opting into a collective action, and (2) whether the Act prohibits employers from threatening to discharge an employee who refuses to sign a mandatory arbitration agreement. The Board found the answer to both questions in Epic Systems’ holding: “[A]n agreement requiring that employment-related claims be resolved through individual arbitration, rather than through class or collective litigation, does not restrict Section 7 rights in any way.”

In its ruling, the Board assumed, without deciding, that an individual employee engages in protected concerted activity when he or she opts into a collective action. As to the first question, because the agreement promulgated by Cordúa did not restrict Section 7 rights “in any way,” its promulgation did not violate Section 7—regardless of whether it was promulgated in response to protected activity. The Board noted that it had sometimes held in other cases that an employer violated the Act when it promulgated an otherwise lawful rule in response to protected activity, but the Board distinguished those as cases where the rule did restrict the exercise of Section 7 rights. The Board also pointed out that there was nothing in Cordúa’s agreement that suggested that employees would be disciplined for failing to abide by its provisions. Instead, the employer’s remedy was to seek enforcement of the agreement, an action which, under Epic Systems, would be entirely lawful.

The Board also reversed the judge’s finding that Nguyen unlawfully threatened employees with discipline. Despite the revised agreement’s prohibition on employees opting into a collective action, the effect of the prohibition was only to require employees to resolve their employment-related claims through individual arbitration. As the Board explained, Epic Systems held that employers are allowed to condition employment on an employee signing an individual arbitration agreement. Nguyen’s statements during the pre-shift meeting were interpreted by the Board to have only “amounted to an explanation of the lawful consequences of failing to sign the agreement.” Furthermore, the Board held that the “don’t bite the hand that feeds me” comment could not be reasonably construed as a “threat for reprisals for ‘raising concerns’ about the revised agreement.” Accordingly, the Board reversed the judge’s finding that Nguyen’s statements violated Section 8(a)(1).

However, the Board affirmed the ALJ’s original finding that Ramirez engaged in Section 7 protected activity not only when he discussed his wages with co-workers, but also when he filed the collective action, even though he violated the arbitration agreement by doing so. According to the Board, nothing in Epic Systems changed longstanding precedent that Section 7 protects “employees when they pursue legal claims concertedly.” So, while an employer is permitted, in response to opt-in activity, to promulgate arbitration agreements that include class and collective action waivers and to enforce these agreements in court or in arbitra-
tion, an employer may not discipline an employee for joining and filing a collective action in violation of such an agreement, according to the Board’s new decision in Cordúa.20

Looking Ahead

The holding that an employer may promulgate an arbitration agreement with class and collective action waivers in response to employees opting into a collective action would seem to be equally applicable to promulgation of such agreements in response to other similar events, such as the filing of a class or collective action or threatening to file a class or collective action. Also, while the issue was not presented in Cordúa, the Board’s decision seems to clearly indicate that the Board would find unlawful an arbitration agreement with a class and/or collective action waiver if the agreement provides for discipline of employees who file or participate in such actions.

Finally, it seems reasonable to expect that the Board’s three key holdings in Cordúa—that an employer may, in response to employees opting into a collective action, promulgate an arbitration agreement with class and collective action waivers, that an employer may explain the lawful consequences of not signing such an agreement, and that an employer may not discipline an employee for filing a collective action in violation of an arbitration agreement—will eventually be considered by federal courts of appeals and perhaps by the Supreme Court.

Conclusion

Overall, the Cordúa decision is favorable for employers and clarifies the limits of lawful employer conduct surrounding mandatory arbitration agreements that include class and collective action waivers. However, it is important to keep in mind that the Board’s position could change as the composition of the Board changes and as Cordúa is revisited in the courts.

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Endnotes
1. 368 N.L.R.B. No. 43, slip op. at 1 (2019).
3. Murphy Oil USA, Inc., 361 N.L.R.B. 774, 775 (2014) (finding that the respondent violated Sec- tion 8(a)(1) by revising an arbitration agreement in response to protected activity of opting into an FLSA collective action).
4. See, e.g., Owen v. Bristol Care, Inc., 702 F.3d 1050, 1054 (8th Cir. 2013); Contra D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 349 (5th Cir. 2013).
5. See Cordúa, 368 N.L.R.B. No. 43, slip op. at 4.
6. Id. slip op. at 2.
7. Id.
8. Id.
9. Id. slip op. at 4.
10. Id. slip op. at 2.
11. Id.
12. Id. slip op. at 3 (citing Epic Systems, 138 S. Ct. at 1626 (emphasis added)).
13. Id.
14. Id. slip op. at 4 (citations omitted).
15. Id.
16. Id.
17. Id. at n.14. (The dissent suggested that this conduct denied employees the opportunity to consult an attorney; however, Lewis testified that she consulted with two attorneys before signing the agreement.).
18. Id. slip op. at 4-5.
19. Id. slip op. at 5.
place” like fitness, nutrition, weight loss, smoking cessation and stress reduction programs, health goal coaching, paid time off, paid sick leave, and penalty payment scheduling. The DOL’s proposed rule, which is estimated to save over $280 million in litigation costs over the next decade, clarifies when unused paid time off (PTO), ancillary benefits, and the like may be excluded from the regular rate. As currently proposed, these modifications to the regular rate regulations are business friendly.

Among other things, in its notice of rulemaking the DOL proposes that the following be excluded from regular rate calculations: (1) payments in lieu of taking holiday, vacation, sick, or paid time off; (2) payments for bona fide meal periods where no work is done unless an agreement or course of conduct establishes that the employer and employee have treated such as “hours worked”; and (3) payments for travel expenses incurred by the employee in furtherance of the employer’s interests, even if they benefit the employee in addition to the employer, provided such are “reasonable” in line with the Federal Travel Regulation or within the realm of “reasonable” business and industry norms. Other employee perks that the DOL proposes to exclude from regular rate calculations because they promote health or raise morale include: (1) the cost of on-site treatments from chiropractors, massage therapists, personal trainers, counselors, employee assistance programs, or physical therapists; (2) on-site or off-site gym access, fitness classes, or gym memberships; and (3) wellness programs such as health risk assessments, biometric screenings, vaccinations, nutrition classes, weight loss programs, smoking cessation programs, exercise classes, stress reduction programs, and coaching programs. So long as they are not linked to a particular level of hours worked or services rendered, employee discounts on goods or services would also be excludable from the regular rate. The DOL also notes that certain employer tuition programs like online courses, continuing education programs, modest tuition reimbursement programs, and assistance repaying college debt, would be excludable from the regular rate as employer gifts or similar payments since they are not directly connected to the employee’s day-to-day duties for the employer.

The DOL further proposes to eliminate the requirement that show-up and call-back pay be “infrequent and sporadic” to be excludable from the regular rate but clarifies that it should be “without prearrangement” so that it does not occur regularly, such as when an employee is called in six out of eight Saturday evenings due to customer demand or employee no-shows. Employer contributions to employee accident, unemployment, and legal services benefit plans would also be excluded from regular rate determinations for overtime compensation purposes.

The DOL states that particular bonuses—like employee-of-the-month bonuses and severance bonuses—may be excluded from the regular rate. Interestingly, the DOL suggests that employee bonuses for unique or extraordinary effort not given pursuant to preestablished criteria, paid solely at the employer’s discretion close in time to the period to which they correspond, and not paid pursuant to a promise, agreement, expectation, or regular practice, could be excludable from the regular rate. This proposal appears to open the door, just a crack, to the possibility that a narrow group of bonuses related to performance, albeit not to preestablished criteria, could be excluded from regular rate calculations while, historically, bonuses based on the quality or quantity of performance were deemed “nondiscretionary” and includable in the regular rate for overtime purposes.

Joint Employment Rule Proposal

In early April, the DOL issued a notice of proposed rulemaking to revise and clarify the responsibilities of joint employers with respect to their mutual employees for compensation purposes where the employers are “not completely disassociated” with respect to the employees’ employment. For the most part, the DOL’s joint employer proposal codifies the four-point balancing test first set forth in the Ninth Circuit’s decision in Bonnette v. California Health and Welfare Agency as to when employers are “joint employers” with regard to their common employees. Specifically, the DOL’s proposed rule focuses on whether the reputed joint
employer actually exercises power to hire or fire the employee; supervises or controls the employee’s employment conditions and schedule; determines the employee’s pay rate and method; and maintains the individual’s employment records. The DOL notes that if, apart from the employer, another party benefits simultaneously from the employee’s work and is acting, directly or indirectly, in the employer’s interest with regard to the employee, this other party is a joint employer for FLSA purposes.

The DOL’s proposal makes clear the DOL’s intent to render irrelevant the employee’s economic dependence on the potential joint employer—including any consideration of the employee’s job specialty or skill, profit or loss opportunity, managerial skill, or investment in helpers, equipment or materials required for work—to a joint employer determination. This proposed rule further states that any person, including an organized group, partnership, corporation, association, trust, individual, or legal representative, may be a joint employer. The DOL’s proposal elucidates that operating as a franchisor/franchisee, running a business on another business’ premises, participating in an association’s health or retirement plans, or having a business agreement with another that requires the establishment and maintenance of certain employment law compliance policies, does not make joint employer status more or less likely.

Significantly, the proposed joint employment FLSA regulations specifically address, by example, an entity’s use of a staffing company to procure workers daily. Under that example, the packaging company requests from the agency differing number of workers every day depending upon its sophisticated analysis of expected customer demand. The packaging company, which sets the hourly workers’ pay rate and supervises their work, sends workers home when the workload is insufficient to support their use. The DOL states that in this particular scenario, the packaging company is a joint employer with the staffing agency as to these employees because it exercises sufficient control over the workers.

The DOL also suggests that there are circumstances under which a franchisor is not a joint employer of the franchisee’s employees. In the example given, the franchisor is a global hospitality brand with thousands of hotels operating under franchise agreements. The franchisor provides the franchisee with a sample employment application and handbook and with other forms and documents related to the franchisee’s operation. Under the parties’ standard industry licensing agreement, the franchisee is solely responsible for all day-to-day operations including hiring, supervising, and firing employees; setting employees’ pay rates and pay methods; and maintaining all required employment records. In this situation, the DOL decrees that the franchisor does not directly or indirectly exercise sufficient control to be deemed a joint employer.

Nothing in the proposed joint employer rule alters the DOL’s longstanding practices with regard to “multiple employers who suffer, permit, or otherwise employ an employee to work separate sets of hours in the same workweek” by design. They are joint employers, and the employee’s total working hours are aggregated for overtime compensation purposes.

Lastly, as expected, the proposed rule holds joint employers jointly and severally liable for all wages due to the employee.

Section 13(a) Exemptions’ New Threshold Salary Requirement and Highly Compensated Employees’ Increased Compensation Obligation

While not determinative of an employee’s exempt status, an employee’s salary has long been one of the key considerations in assessing the individual’s eligibility for the FLSA’s executive, administrative, and professional (EAP) exemptions from minimum wage and overtime compensation. Effective January 1, 2020, the DOL Wage Hour Division’s (WHD) final overtime compensation rule changes the threshold standard salary level for EAP exemption eligibility. Indicating that the 2004 regulations were substantively comprehensive and expressing a reluctance to return to the ambiguities associated with the 2004 regulations, the DOL decrees that the franchisor does not directly or indirectly exercise sufficient control to be deemed a joint employer.
with the pre-2004 long duties test, the DOL made no changes to the EAP exemptions’ duties in this 2019 rule.34

The DOL estimates that these new overtime regulations will impact 1.3 million employees who will now be eligible for overtime compensation unless their employers raise their compensation.35 This September 2019 overtime compensation rule was crafted as a direct result of Nevada v. U.S. Dept. of Labor, which invalidated the DOL’s final 2016 overtime rule that the WHD never enforced.36 In Nevada, the federal district court granted summary judgment against the government regarding the 2016 overtime rule’s implementation because it found the rule “made” overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee’s job duties.37 In its issuance of the final 2019 overtime compensation rule, the DOL acknowledged that the 2016 rule’s minimum standard weekly salary jump from $455 to $913 “was inappropriate because it excluded from exemption 4.2 million employees whose duties would have otherwise qualified them for [the EAP] exemption.”38 The 2019 overtime rule formally rescinds the controversial 2016 overtime rule.39

Currently, pursuant to the 2004 FLSA regulations, the minimum standard salary an employee must have to be considered for the executive, administrative, professional, and non-hourly computer professional minimum wage and overtime exemptions is $455 per week or $23,660 per year.40 In drafting the 2019 rule and resetting the EAP exemptions’ standard salary level, the DOL looked to the 20th percentile of full-time salaried workers in the lowest wage census region, the South, and the retail industry.41 Effective January 1st, the DOL has set the minimum standard salary for the EAP exemptions at $684 per week or $35,568 per year.42 Employers are permitted to convert this required salary to equivalent amounts for longer periods: biweekly pay of at least $1368; semi-monthly pay of at least $1482; or monthly pay of at least $2964.43 Additionally, the highly compensated employee (HCE) exemption, which set such individual’s compensation at a minimum of $100,000 per year in 2004, including any catch-up pay, rises to $107,432 annually under this 2019 overtime rule.44 As with the EAP exemptions, the HCE’s total annual compensation of $107,432 must include, at a minimum, $684 per week paid on a salary or fee basis.45 This HCE amount of $107,432 is significantly less than the $147,414—the 90th percentile of all full-time salaried workers nationally—that the DOL had initially suggested in March 2019.46 At present, the DOL estimates that only 101,800 employees nationwide are classified as exempt HCEs.47 Pursuant to this new rule, any final catch-up payment made to the HCE after the end of the 52-week period will count only toward the prior year’s annual compensation total and not the current compensation year in which it is paid.48

The 2019 rule also sets EAP salary levels in U.S. territories. Specifically, as of January 1, 2020, $455 per week is the special salary level for Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of Northern Mariana Islands, and $380 per week is the special salary level for American Samoa.49 The 2019 rule increases the weekly base rate for exempt motion picture-producing employees to $1043 (exclusive of board, lodging, and other facilities) or a proportionate amount based on the number of days worked.50 There is no “salary basis” requirement for this exempt motion picture industry employee.51

There is one compensation change in the 2019 rule that indicates that the DOL is moving toward integrating certain workplace realities in its policy decisions. The new rule allows employers to count nondiscretionary bonuses (i.e., those that are based on the quality or quantity of work), incentive payments, and commissions toward meeting up to 10% of the exempt EAP’s standard salary level or the U.S. territories’ special salary levels if such monies are paid to employees at least annually or on a more frequent basis.52 In practical terms, in order to maintain the exemption, employers must pay EAP employees at least 90% of the standard salary—$615.60 in the U.S. states—for every workweek during the pay period.53 EAP employees’ bonuses, incentives, and commissions may be paid toward the remaining 10% of the standard salary throughout the designated 52-week year or, if necessary, during the catch-up period.54 Under the 2019 rule, employers will be allowed to make a final catch-up payment to bring the exempt executive’s, administrative’s, and/or professional’s pay to the required level within one pay period after the designated 52-week period.55 An employer can use a previously identified calendar or fiscal year, or the employee’s work anniversary, as the 52-week period for catch-up purposes.56 If the employer fails to designate a 52-week period for catch-up in advance, then the calendar year will be the default 52-week period.57 Where a catch-up payment is made for the previous 52-week period’s shortfall, it cannot be counted toward the 52-week period in which it was paid.58 The 2019 rule also allows an employer to pay an EAP employee a prorated amount of his or her annual compensation based upon the number of weeks worked where the employee does not work the entire 52-week period due to the start or end of employment.59 The employer also has the ability to make a catch-up payment to preserve the exemption of the EAP employee who does not work a full year provided that it is paid no later than the next scheduled pay period.60

The DOL further signaled that it intends to update salary levels and Highly Compensated Employee (HCE) compensation requirements through its rulemaking authority on a more frequent basis than in the past but in its final 2019 regulation, the DOL backed off its 2016 rule requiring a salary update every three years and its 2019 proposal of every four years.61 After review of public comments, the DOL reasoned that it was best to allow “prevailing economic conditions . . . [to]
drive future [exempt salary or compensation] updates."62

The DOL rejected a number of suggestions that these new compensation requirements be phased in for certain employers, including nonprofits.63 The DOL also rebuffed the suggestion that EAP salary thresholds and HCE compensation requirements be determined on a region-by-region or industry basis using Bureau of Labor Statistics data.64 Rather, the DOL deemed any such multiple-level salary or compensation requirements too administratively and practically difficult, especially with regard to employers doing business in more than one geographic area.65

The 2019 overtime compensation rule also addresses the effect, on the exempt status of EAP employees, of minimum guarantees plus extras. Specifically, if an EAP is guaranteed at least the minimum weekly amount required to meet the salary basis test, such employee can receive additional compensation without losing the exemption or violating the exemption’s salary requirement.66 Additional compensation includes flat sums, bonuses, straight-time hourly pay, time and a half for hours over forty, and paid time off.67 Therefore, in addition to a salary of at least $684 weekly, an executive, administrative, professional, or nonhourly computer professional employee may receive 2.5% commissions on sales, or an additional amount for work above and beyond the EAP’s “normal” workweek, without losing the EAP exemption.68 This regulation provides employers additional and welcome flexibility to secure and retain critical management and operational personnel in a competitive environment.

In a further nod to today’s business practices, an exempt EAP’s earnings may be computed on an hourly, daily, or shift basis, without voiding the exemption or violating the salary basis requirement, provided two conditions are met: (1) the employee is guaranteed, without regard to the number of hours, shifts, or days worked, at least the exemption’s minimum salary basis amount; and (2) a “reasonable relationship” exists between the amount guaranteed the employee and the amount the employee actually earns during his or her normal workweek, i.e., that they are “roughly equivalent.”69 According to the DOL, if the EAP employee is guaranteed at least $725 per week in which the employee performs any work, typically works four or five shifts per week, and is paid $210 per shift, such would not violate the exemption’s salary basis requirement.70 The reasonable relationship requirement applies only when the exempt employee’s pay is calculated on an hourly, daily, or shift basis and not on a salary basis.71

Proposed Modifications to Tipped Employees’ Regulations

Apart from its final overtime compensation rule on September 27, 2019, the DOL issued a notice of proposed rulemaking as to tipped employees on October 8, 2019, to account for needed regulatory changes in light of the Consolidated Appropriations Act of 2018 (CAA) amendment of the FLSA regarding tipped employees.72 In doing so, the DOL withdrew its proposed 2017 tip regulations.73 In March 2018, the CAA amended Section 3(m) of the FLSA to prohibit employers, whether or not they take tip credit, from retaining employee tips.74 Pursuant to the CAA’s alteration of the FLSA, employers, managers, and supervisors are no longer allowed to keep or share in employee tips, including in tip pooling arrangements, under any circumstances.75 For purposes of these proposed tip regulations, the manager or supervisor must be an exempt executive employee under the FLSA’s Section 13(a)(1) or a management employee who owns at least a 20% interest in the enterprise.76 Neither the CAA nor the proposed tip rule prohibits tip pools under the FLSA where tips are shared only by those employees who customarily and regularly receive tips, such as wait staff and bartenders.77 As to tipped employees for whom the employer takes tip credit, the proposed regulation retains the notification requirements for tip pool contributions and continues to limit tip credit to the amount of tips the employee actually receives.78 The new proposed tip regulation, in accord with recent DOL guidance, further allows an employer to take tip credit for any amount of time that a tipped employee performs non-tipped duties contemporaneously with, or within a reasonable time immediately before or after, performed tipped duties.79 The DOL’s previous guidance had stated that there was a 20% time limit on tipped employees’ performance of non-tipped tasks.80 Non-tipped duties include cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses.81

On the other hand, as a result of the CAA and the new proposed rule, employers who do not take tip credit will be permitted to establish mandatory, nontraditional tip pools that benefit both tipped employees receiving full minimum wage (or more) from the employer and employees—such as cooks, dishwashers, and janitors—who do not traditionally receive tips.82 The tipped employees in this mandatory tip sharing pool must receive a direct cash wage of at least $7.25 per hour.83 An employer’s pay records will have to denote by symbol, letter, or other notation those employees receiving tips for which the employer takes no tip credit, as well as the weekly or monthly tip amount each such employee receives.84

In order to avoid unlawfully “keeping” tips, an employer with a mandatory tip pool must fully redistribute the collected tips when it pays employees their wages or as soon as practicable thereafter.85 The proposed tip regulation thus captures the WHD’s guidance in its Field Operations Handbook (FOH) that an employer cannot hold tips, regardless of processing times for credit card transactions, but must distribute tips in the pay period they are earned, on the scheduled payday, or if impossible to ascertain, as soon as practicable thereafter.86

In sum, aside from determining the required tip percentage contribution to a mandatory tip pool, the only control an employer may lawfully exert over tips is in their distribution pursuant to a legitimate tip pool, whether traditional or nontraditional in nature.87

Pursuant to the CAA’s amendment of

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the FLSA, the DOL and private parties are permitted to recover in an administrative or civil proceeding against the employer the amount of tip credit taken by the employer, the sum of tips the employer unlawfully withheld from tipped employees, and an equal amount in liquidated damages. Likewise, the DOL, in its discretion, may now impose civil money penalties up to $1100 per instance when an employer impermissibly retains employee tips in violation of the FLSA, where the employer is a repeat or willful FLSA offender.

The DOL estimates that if the proposed tip rule is implemented in its current form, approximately $107 million in tips may be transferred, via mandatory tip pools, from the tipped employees who are paid at least the $7.25 hourly federal minimum wage to back-of-the-house employees. Interestingly, the DOL suggests in this notice of proposed rulemaking that employers could capture some of this monetary transfer by reducing back-of-the-house employee wages so long as employees still receive at least the requisite minimum wage.

Proposed Rule Changes to Fluctuating Workweek Overtime Compensation Alternative

The fluctuating workweek (FWW) method of overtime compensation is an accepted alternative to the standard one and a half times the regular rate overtime for nonexempt employees. Currently, under the FWW method, a fixed salary is paid to a nonexempt employee and that salary is intended to compensate the individual for all straight-time hours worked in a particular workweek without regard to whether the employee actually works more or less than forty hours. In application, the fixed salary must be calculated to pay the nonexempt employee for all hours actually worked at minimum wage or greater. Under the FWW, the employee would then be due half-time overtime for those hours worked in excess of forty that week (i.e., by dividing the fixed salary by the number of hours worked that particular week and multiplying by half). The upward cap of what a nonexempt employee may legally work is limited to the employee’s fixed salary divided by the minimum wage. Among other things, failure to pay the employee at least minimum wage via the fixed salary jeopardizes the FWW and subjects the employer to liability to the employee for traditional time and a half overtime.

The DOL is now proposing a key clarification regarding application of the FWW overtime method, which is estimated to involve approximately 1.4 million employees. Namely, the DOL proposes to amend the existing regulation to plainly state that bonuses, premium payments, or other kinds of compensation paid to an employee, in addition to the fixed salary, are compatible with the FWW overtime method but must be included in the regular rate calculation for purposes of determining the half-time overtime due. In so stating, the DOL acknowledges that some agency verbiage in 2011 could have been misinterpreted to suggest that additional payments to an employee, beyond the fixed salary, were incompatible with the FWW. Likewise, the DOL notes that since 2011, there has been an unintended, growing dichotomy among courts as to the effect of productivity-based payments (e.g., commissions) and “hours-based” supplemental payments (e.g., night shift differentials) on the employer’s ability to claim the FWW overtime method. The suggested modifications to the FWW regulation make clear that such additional payments of any nature will not, standing alone, jeopardize an employer’s and employee’s mutual understanding to apply the FWW method to the computation of that employee’s overtime.

Conclusion

The final or proposed regulatory changes discussed above should be welcome news, perhaps for different reasons, to both employers and employees. The FLSA rule proposals aim to reduce misunderstanding, and ultimately litigation, in the workplace as to particular compensation practices. Moreover, where implemented, these regulatory modifications will, in part, result in greater compensation for employees and continue to encourage employers to provide ancillary workplace health and insurance benefits.
32 Section 13(a)(1) of the FLSA, 29 U.S.C. § 213(a)(1), exempts bona fide executive, administrative, professional (including non-hourly computer professionals), and outside sales employees from minimum wage and overtime requirements.
34 Defining and Delimiting the Exemptions at 51233–4, 51244.
35 Id. at 51231, 51240. Pursuant to 29 U.S.C. § 207(a), employers are generally required to pay non-exempt employees one and a half times their regular rate of pay for hours worked over forty in a workweek. See Nevada v. U.S. Dept. of Labor, 275 F.Supp.3d 795 (E.D. Tex. 2011) [hereinafter Nevada I]; Defining and Delimiting the Exemptions at 51235. The government appealed the Nevada I decision to the Fifth Circuit Court of Appeals; the appeal was subsequently dismissed. See Nevada v. U.S. Dept. of Labor, Case No. 16–41606, Dkt. #10 (Sept. 6, 2017) [hereinafter Nevada II].
36 Nevada I, 275 F.Supp.3d at 806.
37 Defining and Delimiting the Exemptions at 51231, 51240.
38 Id. at 51235, 51246.
39 Id.
40 29 C.F.R. § 541.100(a)(1) (2004); 29 C.F.R. § 541.200(a)(1) (2004); 29 C.F.R. § 541.300(a)(1) (2004); 29 C.F.R. § 541.400(a)–(b) (2004). Effective January 1, 2020, exempt administrative and professional employees (including non-hourly computer professionals), but not executive employees, can also be compensated on a fee basis of not less than $684 per week. See 29 C.F.R. §§ 541.200(a)(1), 541.300(a)(1), 541.400(a)–(b) and 605 (2019). A fee payment meets the minimum salary threshold if the fee paid to the administrative or professional employee, when converted to an hourly amount per hours worked, equals or exceeds the weekly threshold salary had the employee worked forty hours. 29 C.F.R. § 541.605(b) (2019). Therefore, if an accountant was paid a fee of $350 to prepare a SEC disclosure and took twenty hours to do so, then the accountant would meet the administrative or professional exemption’s required threshold salary because in converting the fee to an hourly amount for a forty-hour workweek, the employee would have received $700, an amount in excess of the exemption’s standard salary requirement. Id.
41 Defining and Delimiting the Exemptions at 51231.

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Defining and Delimiting the Exemptions at 51235; 29 C.F.R. §§ 541.100(a)(1), 541.200(a)(1), 541.300(a)(1) and 541.400(a)(2) (2019).


Defining and Delimiting the Exemptions at 51235; 29 C.F.R. § 541.601(b)(1), (2019). While the HCE’s total annual compensation includes commissions, nondiscretionary bonuses, and other nondiscretionary compensation, it does not include board, lodging, medical insurance payments, life insurance payments, retirement plan contributions, or other fringe benefit costs. Id.

Defining and Delimiting the Exemptions at 51231.

Defining and Delimiting the Exemptions at 51235, 51246; 29 C.F.R. §§ 541.100(a)(1), 541.200(a)(1), 541.300(a)(1), 541.400(b)(1) (2019).


Defining and Delimiting the Exemptions at 51252.

Defining and Delimiting the Exemptions at 51234–5.

Defining and Delimiting the Exemptions at 51239.

51 C.F.R. § 541.604(a) (2019).

51 C.F.R. § 541.604(b) (2019).

51 C.F.R. § 541.604(c) (2019).


Tip Regulations at 53960–1, 53963; Proposed 29 C.F.R. § 531.52(b)(2) (2019).

Tip Regulations at 53956–7; 29 U.S.C. § 203(m)(2)(A) (2018). Previously, the WHD has identified tipped occupations as wait staff, counter personnel engaged in serving customers, bellhops, busboys, service helpers, service bartenders, chefs who have direct contact with customers and prepare or serve meals to them in a designated area, bar backs who support the bartender and receive tips from him or her, and sommeliers who explain the wine list, bring selected wine to the table and serve customers wine. Field Operations Handbook, Ch.30, § 30d04(b). Conversely, the WHD finds janitors, non-performance chefs, dishwashers, laundry room attendants, salad preparers, and prep cooks to be non-tipped employees. Id.

Tip Regulations at 53962; Proposed 29 C.F.R. § 531.54(c) (2019); Proposed 29 C.F.R. § 10.28(e) (2019).

Tip Regulations at 53961; Proposed 29 C.F.R. § 531.56(e) (2019); Proposed 29 C.F.R. § 10.28(b)(2) (2019).

Tip Regulations at 53963.

Tip Regulations at 53957, 53960; Proposed 29 C.F.R. § 531.54(b)–(d) (2019). In order to be a tipped employee, the individual must be engaged in an occupation that customarily and regularly receives tips of at least $30 per month. 29 U.S.C. §203(l) (2018).

Tip Regulations at 53960; Proposed 29 C.F.R. § 531.54(b) (2019).

Proposed 29 C.F.R. § 516.28 (2019).

Tip Regulations at 53960; Proposed 29 C.F.R. § 531.54(b)(1) (2019).


Tip Regulations at 53961–2; Proposed 29 C.F.R. §§ 531.52(b)(2), 531.54(a) and 10.28(e) (2019).


Tip Regulations at 53957.


Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id. Other conditions that must be met to utilize the FWW method of overtime compensation include: (1) the employee’s work hours fluctuate week to week; (2) the fixed salary is paid regardless of the variance in hours worked week to week; and (3) the employee and employer have a clear, mutual understanding that the employee is paid a fixed salary, not subject to deduction, for all straight-time hours worked regardless of the number of such hours. Id.


Fluctuating Workweek Method at 59593.

Fluctuating Workweek Method at 59593–4.
November 20, 2019
12:00 p.m. – 1:00 p.m.
Have You Googled It? Website Accessibility Under Title II and Title III of the ADA (3573)
This seminar will explore the recent trends and litigation regarding website accessibility under Title II and Title III of the ADA as well as discuss best practices for handling these cases from both governmental entity and private business perspectives.
Anastasia Protopapadakis, GrayRobinson, P.A., Miami
Available Options: ON DEMAND DOWNLOADABLE AUDIO PODCAST

December 11, 2019
12:00 p.m. – 1:00 p.m.
This seminar will discuss the impasse process as well as provide best practices for handling your case before the special magistrate.
Thomas W. Young, III, Special Magistrate
Stephanie M. Marchman, GrayRobinson, P.A., Gainesville
Available Options: ON DEMAND DOWNLOADABLE AUDIO PODCAST

January 8, 2020
12:00 p.m. – 1:00 p.m.
Be an Expert in Handling Experts: Best Practices for Expert Designation, Discovery, Direct and Cross-Examination (3575)
This seminar will explore the best practices in federal and state court for designating experts, conducting discovery, and handling the direct and cross-examinations of experts in labor and employment matters.
Samuel J. Horovitz, Rogers Towers P.A., Jacksonville
Eric J. Holshouser, Rogers Towers P.A., Jacksonville

February 5, 2020
12:00 p.m. – 1:00 p.m.
Flexible Work Arrangements: Legal Implications of a Millennial Must-Have (3576)
Hear the latest on flexible work arrangements and the legal and practical considerations attorneys need to know in advising clients on adopting or electing to participate in such programs.
Deborah C. Brown, Brown Law and Consulting, PLLC, Tampa

March 11, 2020
12:00 p.m. – 1:00 p.m.
Hot Topics in Public Sector Bargaining (3577)
This seminar will discuss the recent developments in public sector bargaining and the cutting-edge issues that employers and unions will face at the bargaining table as well as discuss best practices for addressing those issues.
Nathan J. Paulich, GrayRobinson, P.A., Tampa

April 8, 2020
12:00 p.m. – 1:00 p.m.
New Rules of Reason or Reasons to Rue? NLRB Decisions Changing the Landscape of the Union and Non-Union Workplace (3578)
This seminar will explore why all employers must be cognizant of the NLRB and the impact of recent NLRB decisions on all workplaces.
Lisa K. Berg, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami
Robert S. Turk, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami

May 6, 2020
12:00 p.m. – 1:00 p.m.
What Employers and Employees Need to Know About the GDPR, CCPA, and Emerging Privacy Laws (3572)
This seminar will explore the recent legislation regarding privacy and discuss best practices for employees and employers in addressing these recent developments in privacy legislation.
Kevin M. Levy, GrayRobinson, P.A., Miami

To register, log into The Florida Bar Members Portal at www.member.floridabar.org, click CLE Events/Meetings and scroll to the desired course, OR click on a title above.
Where an employee failed to disclose his FLSA claims in his bankruptcy proceedings, made numerous amendments without including the claims, and then listed a claim other than his FLSA claims, judicial estoppel was appropriate under the Slater test.


In this FLSA case, the Eleventh Circuit affirmed summary judgment and an order awarding costs to the employer on the grounds that the employee’s FLSA claims were barred by the doctrine of judicial estoppel because of his failure to include the claims in his bankruptcy filings with the intent to mislead the bankruptcy court.

The employee alleged that his employer had violated the overtime provisions of the FLSA and had retaliated against him for complaining about the alleged violations. Prior to filing his FLSA action, the employee, represented by legal counsel, filed for Chapter 13 bankruptcy. The employee amended his property schedule on multiple occasions to list a potential personal injury claim against a different defendant and to add creditors. Plaintiff, pro se, also converted his Chapter 13 petition to a Chapter 7 petition on the same day that he filed his lawsuit under the FLSA. None of the amendments to the bankruptcy petition included the FLSA claims against the employer.

To determine whether the district court abused its discretion in ruling that judicial estoppel barred the employee’s FLSA claims, the Eleventh Circuit applied the two-part test of Slater v. United States Steel Corp., 871 F.3d 1174 (11th Cir. 2017), which considers (1) whether the party took inconsistent positions under oath in separate proceedings, and (2) whether those inconsistent positions were “calculated to make a mockery of the judicial system.” The Eleventh Circuit found that the first step was satisfied because the employee failed to disclose in the bankruptcy proceeding his FLSA claims against the employer and then pursued those claims in court. In determining that the second step was satisfied, the Eleventh Circuit reasoned that several factors indicated that the employee intended to mislead the bankruptcy court, including the fact that he “was specifically asked on his property schedule to list any claims ‘whether or not [he had] filed a lawsuit or made a demand for payment’” and the fact that he listed a separate personal injury claim in a subsequent amendment but omitted the FLSA claims (thus demonstrating he understood he was required to amend his disclosures to list any pending claims). The Eleventh Circuit took into account the employee’s lack of sophistication but ultimately concluded that the other factors weighed in favor of a finding that the employee “intended to make a mockery of the judicial system by pressing his [FLSA] claims in one forum while denying their existence in another.”

Because the Eleventh Circuit determined that there was no abuse of discretion by the district court in applying judicial estoppel to the employee’s FLSA lawsuit, it did not address the question of standing raised in the appeal. The Eleventh Circuit also affirmed the award of costs and found that the employer was the prevailing party, even if it had prevailed on an affirmative defense.

A reasonable juror could conclude that the proffered reasons for termination were pretextual in a Title VII action for retaliation, where there was circumstantial evidence beyond temporal proximity between the protected activity and the termination, including the fact that all events serving as reasons for termination occurred after the employer learned of the employee’s protected activity.


In this Title VII, 42 U.S.C. § 1983, and Florida Civil Rights Act (FCRA) case, the employee alleged she was discriminated against because of her gender and retaliated against for sending a letter to the EEOC regarding the employer’s alleged discriminatory conduct. The Eleventh Circuit affirmed summary judgment in favor of the employer on the employee’s gender discrimination claim, finding that the employee failed to rebut the employer’s non-discriminatory reasons for her termination, including that the employee undermined her supervisor, failed to obey the supervisor’s orders, and used an unauthorized email account. Whether the employer erred as to the reasons for the employee’s termination or whether the employee “actually” engaged in the behaviors that led to the termination was “not relevant” to the court’s inquiry because the “inquiry into pretext centers on the decision maker’s head.”

However, the Eleventh Circuit reversed and remanded the summary judgment for the employer on the retaliation claim, finding it relevant that all the reasons for the employee’s termination arose from conduct that occurred or was discovered after the
employer learned of the employee’s EEOC complaint. The Eleventh Circuit found the employee established a prima facie case of retaliation and created a jury question as to whether the employer’s proffered reasons for termination were pretextual. The Eleventh Circuit reasoned that the close temporal proximity of merely thirty-two days between the employee’s protected activity and the termination, combined with the fact that all of the events serving as alleged reasons for the termination followed the employee’s protected activity, supported reversal of the summary judgment for the employer. The Eleventh Circuit concluded that a jury could reasonably infer that the employer was looking for reasons to terminate the employee after learning of the EEOC complaint, which showed retaliation.

The EEOC brought this claim on behalf of the employee, alleging the employer violated the ADA by terminating the employee after she refused to cancel her trip to Ghana. The employer’s reason for termination was its fear that the employee might contract and develop Ebola due to her Ghana travel. The Eleventh Circuit found that the meaning of “impairment” in the “regarded as” prong requires a plaintiff to demonstrate that the employer knew the employee had an actual impairment or perceived the employee to have such an impairment at the time of the adverse employment action. The plain language of the ADA prohibits action based only on an impairment that exists at the time of the alleged discrimination. The “regarded as” prong cannot be read in isolation. Statutory construction requires “that ‘impairment’ in the ‘regarded as’ statutory prong, § 12102(1)(C), [be afforded] the same meaning as ‘impairment’ in the actual disability prong.” Moreover, the Eleventh Circuit has held that a predisposition to develop an illness is not a physical impairment. The court rejected the EEOC’s argument regarding the applicability of the Dictionary Act (“words used in the present tense include the future as well as the present”), finding that although there are present tense verbs in the statute, the ADA’s plain language and context preclude a finding that “the ADA is broad enough to prohibit an employer from firing an employee because the employer perceives that the employee will imminently contract a disease in the near future.” Even interpreting the statutory definition of “disability” broadly, the Eleventh Circuit concluded that the terms of the ADA protect only those individuals who experience discrimination because of a current, past, or perceived disability, not a disability that could possibly develop in a healthy person in the future.

Summary judgment is denied where a jury question exists regarding cat’s paw theory of liability on employee’s sexual harassment claim; summary judgment is granted in favor of employer on Title VII retaliation claim where comparators had very different employment roles and did not engage in the “same basic misconduct.”


In this Title VII case out of the Northern District of Alabama, the court denied the employer’s motion for summary judgment as to the employee’s sexual harassment claim but granted summary judgment as to the employee’s retaliation claim. The employee was a municipal worker who alleged she was terminated from her employment because she refused the advances of her immediate supervisor. Although the employee was not terminated by her immediate supervisor, the employee alleged the firing supervisor served as the immediate supervisor’s “cat’s paw.” The employee also alleged the termination was retaliation for filing an EEOC charge.

In the sexual harassment claim, the court found there was a jury question as to whether the employer’s tangible employment action against the employee was linked to the alleged sexual harassment. The employee prevailed on her cat’s paw theory by presenting deposition testimony that her immediate supervisor had informed her his recommendation would impact whether she would be retained and said, “If you would have did [sic] what I told you to do, then you would have had your permanent position.” The court noted that the employer focused its argument on whether the immediate supervisor had the power to terminate the employee, ignoring the notion that the immediate supervisor’s recommendation could ultimately result in her termination, and failed to assert a proper defense to the employee’s tangible employment action theory.

In the retaliation claim, the employee asserted the causal connection prong was met because she was treated differently from her immediate supervisor, who she asserts was “similarly situated.” In light of Lewis v. City of Union City, 918 F.3d 1213 (11th Cir. 2019), where the Eleventh Circuit explained that
“at the prima facie stage, a plaintiff must show she and any ‘proffered comparators were “similarly situated in all material respects,’” the court considered whether the immediate supervisor had (1) “engaged in the same basic conduct (or misconduct) as the plaintiff,” (2) “been subject to the same employment policy, guideline, or rule as the plaintiff,” (3) “been under the jurisdiction of the same supervisor as the plaintiff,” (4) and shared “the plaintiff’s employment or disciplinary history.” The court reasoned that because the plaintiff was a temporary line employee and her supervisor was a permanent manager, they had very different employment roles. Moreover, the employee and her immediate supervisor did not engage in the “same basic misconduct” because the supervisor’s misconduct pertained to his supervisory duties, which the employee did not have. The plaintiff’s argument that her immediate supervisor was “unqualified and incompetent” as a manager did not speak to how the employer treated her because the employee was not a manager. In sum, the employee failed to demonstrate she and her immediate supervisor were “similarly situated in most material respects, let alone all,” under Lewis.

State Case Note

The Florida Public Sector Whistleblower’s Act does not preclude noneconomic compensatory damages or other applicable recoverable damages not explicitly identified within the statute. Iglesias v. City of Hialeah, No. 3D18-639, 2019 Fla. App. LEXIS 11652 (Fla. 3d DCA July 24, 2019).

In this case, the Third District Court of Appeal of Florida reversed the trial court’s denial of noneconomic damages for the appellant/cross-appellee, finding that noneconomic compensatory damages are not barred under the Florida Public Sector Whistleblower’s Act (FPWA), and affirmed the denial of the appellee’s/cross-appellant’s motion for summary judgment. Iglesias, a member of the Hialeah Police Department, alleged that the police department had continued to enforce ticket quotas, which had been banned by the Florida legislature. He brought a claim in the trial court against the city pursuant to the FPWA, alleging that the city retaliated against him for complaining about ticket quotas. The trial court ruled that Iglesias could not seek noneconomic compensatory damages under the FPWA.

The Third DCA held that the remedies section of the FPWA does not preclude the availability of noneconomic damages not explicitly listed in the provision, reasoning that the provision creates a “floor, rather than a ceiling, on the types of relief that a party can seek” under the statute. The court cited O’Neal v. Fla. A&M Univ. ex rel. Bd. of Trs. for Fla. A&M Univ., 989 So. 2d 6, 14 n.5 (Fla. 1st DCA 2008), a First District Court of Appeal case, which found that relief “must include” the remedies set out in the statute but is not limited only to those remedies.

Melissa Castillo is a third-year law student at the University of Florida Levin College of Law.
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See next page for program and hotel information.
Lecture Program

Thursday, February 6, 2020
8:10 AM–8:20 AM  Opening Remarks
8:20 AM–9:00 AM  Whistleblower Statutes/Workers’ Compensation Retaliation
                   Deborah Brown, Brown Law & Consulting, PLCC, Tampa
9:00 AM–9:25 AM  Unemployment Appeals
                   Katie Sabo, Florida Reemployment Assistance Appeals Commission, Tallahassee
9:25 AM–9:35 AM  Break
9:35 AM–10:45 AM Family and Medical Leave Act
                   Cathy Beveridge, Buchanan Ingersoll & Rooney, PC, Tampa
10:45 AM–11:35 AM Common Law Employment Claims
                   Tad Delegal, Delegal and Poindexter, P.A., Jacksonville
11:35 AM–12:35 PM Lunch
12:35 PM–1:05 PM  USERRA
                   Eric Gabrielle, Stearns Weaver Miller, Fort Lauderdale
1:05 PM–1:30 PM  Constitutional Employment Claims
                   Robert Eschenfelder, Florida Gulf Coast University, Fort Myers
1:30 PM–2:35 PM  Public Employee Relations Act
                   James Craig, McFarlane Ferguson McMullen, Tampa
2:35 PM–2:45 PM  Break
2:45 PM–3:35 PM  Fair Labor Standards Act
                   Mandy Halberstam, Jackson Lewis P.C., Miami
3:35 PM–4:10 PM  Affordable Care Act
                   Melanie Hancock Brown, Hill Ward Henderson, Tampa
4:10 PM–4:40 PM  Workplace Privacy/FCRA
                   Shane Muñoz, Ford & Harrison LLP, Tampa
5:00 PM–6:00 PM  Labor and Employment Law Executive Council Meeting
6:00 PM–7:30 PM  Reception

Friday, February 7, 2020
8:00 AM–8:05 AM  Opening Remarks
8:05 AM–8:35 AM  Drug Testing
                   Nikhil Joshi, Hultman Sensenig + Joshi, Sarasota
8:35 AM–9:25 AM  National Labor Relations Act
                   Bill Andrews, Gray Robinson, Jacksonville
9:25 AM–10:15 AM Worker Adjustment and Retraining Notification Act
                   Sarah Smith Kuehnel, Ogletree Deakins, Tampa
10:15 AM–10:30 AM Break
10:30 AM–12:20 PM EEO – Substantive
                   Susan Potter Norton, Allen Norton & Blue, Miami
12:20 PM–1:40 PM  Lunch
                   M. Sean Moyle, Langston Hess Hussey Greenhill & Moyle, Clearwater
1:40 PM–2:30 PM  EEO – Procedural
                   Yvette Everhart, Sass Law Firm, Tampa
2:30 PM–3:30 PM  Statutory and Common Law Protection of Business Interests
                   M. Sean Moyle, Langston Hess Hussey Greenhill & Moyle, Clearwater
3:30 PM–3:35 PM  Break
3:35 PM–4:05 PM  OSHA
                   Phillip B. Russell, Ogletree, Deakins, Nash, Smoak, Stewart, Tampa
4:05 PM–4:35 PM  ERISA
                   John Tucker, Tucker Law Group, P.A., St. Petersburg

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<table>
<thead>
<tr>
<th>CLER Program</th>
<th>Certification Program</th>
</tr>
</thead>
<tbody>
<tr>
<td>General: 16.5 hours</td>
<td>Labor and Employment Law: 16.5 hours</td>
</tr>
</tbody>
</table>

HOTEL INFORMATION

The Florida Bar has reserved a block of rooms at the special group rate of $229 single/double occupancy. The rate is available until January 14, 2020 or until the block is sold out, whichever comes first. Reserve your room online or call 402-593-5048 and refer to The Florida Bar Winter Meeting.

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There is a daily optional resort fee of $25. Take advantage of this special benefit during check-in. The fee covers several amenities including: fitness center access (fitness classes, pool activities and bike rental), 15% discount on spa treatments and merchandise, I-Ride Trolley tickets (two), local and toll-free calls, incoming and outgoing faxes, and two bottles of water per day. (Covered amenities are subject to change.)
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