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IN THIS ISSUE

The Inside Scoop on the Outside Salesperson Exemption

By Leslie W. Langbein, Miami Lakes

What self-respecting employment practitioner has not answered the door at home to find a person soliciting the purchase of some home improvement and silently thought, "Ah, the outside salesperson exemption." After all, the quintessential job function of an outside salesperson is to travel about and secure orders for goods and services. So, one can only imagine the level of panic that set in for business owners who long depended on this engrained channel of commerce when the COVID-19 pandemic forced customers to shutter doors. "We can just set up our outside salesforce with Zoom and some other online platforms, right? They'll still be able to interact with customers face-to-face."

Employers soon discovered (either in advance through advice of counsel or afterwards upon service of process) that the answer to this question was a flat "no." The Fair Labor Standards Act (FLSA) contains no "safe harbor" that preserves the outside sales exemption (OSE) during acts of force

See "The Inside Scoop," page 16

Eleventh Circuit Distinguishes "Service Charges" From "Tips" Under the FLSA

By Benjamin Lagos, Tallahassee

While applying a mandatory service charge to a customer's bill in the service industry is not new, the COVID-19 pandemic led to the practice becoming more common. The justification given was to assist service workers, who were arguably the hardest hit by lockdowns and capacity limitations. However, it was yet to be determined whether mandatory service charges are "tips" under federal employment law.

In *Compere v. Nusret Miami, LLC*, a case of first impression, the United States Court of Appeals for the Eleventh Circuit recently addressed the question of whether mandatory service charges imposed by restaurants are "tips" under the Fair Labor Standards Act (FLSA).[1] If the mandatory service charges were found to be tips, federal law would prohibit restaurants from using the fees to pay minimum and overtime wages to employees, but if the charges were not considered tips, establishments would be able to apply the fees toward employee wages.[2]

The Eleventh Circuit case involved Nusret Miami, LLC (Nusret), a steakhouse in Miami.[3]

See "Service Charges," page 19

CHAIR'S MESSAGE

Sacha Dyson

Welcome, Section Members! On behalf of the Executive Council, it is my honor and privilege as Chair to welcome you to the 2022-2023 Bar year. Thank you for your membership in the Section and being part of the greatest network of labor and employment lawyers in the country. This year, we hope to build on our strong network and fulfill our mission to serve and support you and others through opportunities for education, leadership, networking, professionalism, and public service. Our mission is and will remain our steadfast focus.

As we all know, the last few years have been challenging, to say the least, and we have learned many lessons that will stay with us. For me, one of those lessons is that together is better. We all know that we live in divisive and partisan times. But our Section remains a beacon of hope where we can cross that divide—whether we represent individuals, union, or management, or serve in a neutral capacity—to work together, become stronger as a Section, and provide better representation to our clients and service to the public as a whole. Our Section has a long history of overcoming partisan division to work together and, as our Hall of Fame so aptly demonstrates, we all stand on the shoulders of giants in labor and employment law.

Working together, we will have five live events this year—in September and October 2022, and January, March, and April 2023. Our first event will be the return of our **litigation skills program in Tampa on September 16, 2022**. As we return to court for jury trials, this CLE will provide invaluable ideas, tips, and guidance for navigating our "new normal" in a post-COVID era. I hope you can join us for one or all of these events. Each of these events will have a reception where we can gather, network, and continue to get to know and learn from one another. Of course, part of our "new normal" is that we are not always able to attend live events. In recognition of that, each of these events also will be available by live webcast or recording.

Additionally, we are working together on our 2022–2023 webinar series. For the first time, the Executive Council has authorized that these webinars be made available free to L&E Section members via Zoom. We will be publishing our webinar schedule shortly. We hope you can join us to learn from experts on cutting-edge issues facing our practices and be an active participant in these important conversations on hot topics in labor and employment law.

We cannot accomplish our goals and serve our mission without your help. Will you be part of our journey this year? You can start by following us on social media. You can join us on Facebook, LinkedIn, and Twitter. We also will have an Executive Council meeting during each of our live events this year, so come join us for a meeting or, even better, volunteer for a committee! Shortly, you will be receiving a survey asking for volunteers for our committees. I hope you will consider joining your fellow members to make a difference for our Section.

I want to thank our outgoing Chair, Scott Atwood, for his dedicated and outstanding leadership over the past year. He brought us back to in-person events and led us through challenging and changing times with tenacity, determination, and humor. If you see him at an upcoming event, please thank him for his great service to the Section. I also want to thank my fellow officers—Gregg Morton (Chair-Elect), Yvette Everhart (Secretary/Treasurer), and Robert Eschenfelder (Legal Education Director)—for their dedication and partnership in accomplishing our goals for the Section. Finally, I want to thank Jennifer Fowler for her years of dedicated service to the Executive Council and welcome Jim Craig and Janeia Ingram to the Executive Council.

We are so grateful for all of the volunteers who give their energy, talent, and countless hours for the betterment of our Section. Thank you for all of your many contributions.

Please reach out to me (sacha.dyson@gray-robinson.com) or any member of the Executive Council if you want to speak on a topic, write an article, or have an idea to further the mission of the Section. If you want to get involved and don't know where to start, email me! We are very excited about our next year together!

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The Gig Isn't Up: Florida's Classification Shield for Gig Economy Workers and What's Ahead for the FLSA

By Carly Stein, Washington D.C.

On May 11, 2022, Florida Governor Ron DeSantis signed into law Senate Bill 542, "Evidentiary Standards for Actions Arising During an Emergency," which adds Section 448.111 to the Florida Statutes.[1] In the wake of the COVID-19 pandemic, the bill represents months of work in a bipartisan effort to offer some protection to Florida companies who take certain actions to help "engaged individuals" during exigencies defined in the statute.

In the midst of the pandemic, concerns about misclassification of workers placed many companies between a rock and a veritable hard place as companies sought to assist their independent contractors in returning to work without exposing themselves to liability in providing such assistance. This new law aims to mitigate those risks. The law first presents the notion of an "engaged individual," which is an individual who provides a good or service to a business, or on behalf of a business, and who is renumerated for the good or service regardless of the individual's classification as an employee or independent contractor.[2] The law then outlines actions which, if taken by a business during either a public health emergency, as declared by the state health officer, or during a state of emergency, as declared by the Governor, cannot be brought as evidence in certain civil employment causes of action by such engaged individuals.[3] The enumerated actions include:

1. Providing financial assistance to previously engaged individuals unable to work due to health and safety concerns.
2. Providing health and safety benefits to engaged individuals, including medical supplies and personal protective equipment.
3. Providing training or information related to public health and safety.

4. Taking any action intended to protect public health and safety.[4]

More specifically, a business's actions cannot be used to establish liability as an employer under Florida's workers' compensation laws, Florida's wage and hour laws, Florida's labor pool laws, or in any other civil action to recover lost wages, salary, employment benefits, or other compensation based on misclassification of an employee.[5] This law would allow employers to be more proactive in protecting their independent contractors without running the risk of having the contractors identified as employees. That being said, it is important to note that the evidentiary restrictions of this new law are limited to the actions identified therein, and employers may face liability for misclassification established through other employer actions.

Furthermore, while this law might be helpful for Florida businesses concerned about state causes of action, its protections cannot shield an employer from liability for misclassification under the Fair Labor Standards Act, the provisions of which may be changing soon. Less than a month after Florida passed this law, the Department of Labor announced its efforts to engage in federal rulemaking on employee/independent contractor definitions under the FLSA.[6] This initiative was spurred in part by the Eastern District of Texas's recent ruling affirming the status of the Department of Labor's 2021 "Independent Contractor Status Under the FLSA" rule.[7] The rule, which was set to take effect March 8, 2021, codified economic reality factors previously used to identify independent contractors and placed a greater emphasis on the economic dependence of a potential contractor.[8] More specifically, the rule focused on what it identified as two "core factors" in determining employment status, with one notable factor being whether the potential employer exercised "substantial control" over the employee.[9] This distinction of substantial control versus other framings of control previously cited by federal courts and the Department of Labor was a marked change and represented a more employer-friendly interpretation of independent contractor status.[10]

Upon taking office, the Biden administration initially proposed a sixty-day delay in the implementation of this rule and then withdrew the rule on March 12, 2021.[11] In an opinion dated March 14, 2022, the Eastern District of Texas found that both the delay and withdrawal of the rule by the Department of Labor constituted a violation of the Administrative Procedures Act; therefore, the rule did take effect on March 8, 2021 and remains in effect.[12] Given the Biden administration's prior actions with respect to the Trump-era rule and its announcement of impending proposed rulemaking, employers can expect broader definitions in classifying workers as employees and a removal of the "substantial control" core factor.

C. STEIN

***Carly Stein** is an attorney at Seyfarth Shaw LLP who counsels and represents employers through all stages of employment law cases.*

Endnotes

1 Fla. S.B. 542 (2022).

2 Fla. Stat. § 448.111(1).

3 *Id.*

4 Fla. Stat. § 448.111(2)(a–d).

5 Fla. Stat. § 448.111(2).

6 Jessica Looman, *Misclassification of Employees as Independent Contractors Under the Fair Labor Standards Act*, Dep't of Labor Blog (June 3, 2022), https://blog.dol.gov/2022/06/03/misclassification-of-employees-as-independent-contractors-under-the-fair-labor-standards-act.

7 Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021) (to be codified at 29 CFR pts. 780, 788, 795).

8 *Id.*

9 *Id.* at 1176, 1179–81.

10 *Id.* at 1179–81.

11 Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, 86 Fed Reg. 12535 (March 4, 2021); Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 FR 24303 (May 6, 2021).

12 *Coalition for Workforce Innovation v. Marty Walsh*, No. 1:21-CV-130 (E.D. Tex., filed Mar. 14, 2022).

The 2022 "Stop W.O.K.E." Amendments to the Florida Civil Rights Act: Will They Survive First Amendment Challenge?

By Jay P. Lechner, Tampa

Many employers have adopted diversity, equity, and inclusion (DEI) training as a way to address disparities in workplace culture. The 2022 amendments to the Florida Civil Rights Act of 1992[1] (FCRA), which took effect July 1, 2022, will limit employers' ability to implement certain types of workplace DEI training.

The amendments—part of the so-called Stop W.O.K.E. Act, which stands for "Stop Wrongs to Our Kids and Employees"—expand Section 760.10, Florida Statutes, to provide that subjecting a person as "a condition of employment, membership, certification, licensing, credentialing, or passing an examination" to "training, instruction, or any other required activity" that "espouses, promotes, advances, inculcates, or compels such individual to believe" any certain enumerated concepts "constitutes discrimination based on race, color, sex, or national origin" under the FCRA.[2] Those concepts include:

- Members of one race, color, sex, or national origin are morally superior to members of another race, color, sex, or national origin.
- An individual, by virtue of his or her race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
- An individual's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, sex, or national origin.
- Members of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.
- An individual, by virtue of his or her race, color, sex, or national origin, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, sex, or national origin.
- An individual, by virtue of his or her race, color, sex, or national origin, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.
- An individual, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the individual played no part, committed in the past by other members of the same race, color, sex, or national origin.
- Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, sex, or national origin to oppress members of another race, color, sex, or national origin.[3]

However, the bill specifies that it does not prohibit discussion of these concepts as part of a course of training or instruction given in "an objective manner" without endorsement of such concepts.[4]

Background

The precursor to the 2022 FCRA amendments was Executive Order (EO) No. 13950, issued by President Donald Trump on September 22, 2020. EO 13950 forbade federal contractors from using DEI training that promoted or endorsed "divisive race and gender concepts," including any workplace training that "inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating."[5] "Race or sex stereotyping" was defined as "ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex."[6] "Race or sex scapegoating" was defined as "assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex" and also encompassed "any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others."[7]

According to EO 13950, its purpose was to confront the "destructive ideology"

> grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.[8]

In other words, EO 13950 targeted teaching of so-called "critical race theory" and "gender theory" concepts,

upon which DEI training is often based. According to EO 13950, these "ideologies" "are designed to divide us and to prevent us from uniting as one people in pursuit of one common destiny for our great country."[9] EO 13950 expressed fear that such "ideologies" are

> now migrating from the fringes of American society and threaten[] to infect core institutions of our country. Instructors and materials teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist are appearing in workplace diversity trainings across the country . . . .[10]

When Florida Governor Ron DeSantis signed the "Stop W.O.K.E. Act" into law in 2022, he used similar language: "We believe an important component of freedom in the State of Florida is the freedom from having oppressive ideologies imposed upon you without your consent, whether it be in the classroom, or whether it be in the workplace."[11]

First Amendment Concerns

It remains to be seen if the 2022 amendments to the FCRA will pass muster under the First Amendment. On January 25, 2021, President Biden revoked President Trump's Executive Order,[12] one month after a federal district court found that it likely violated the First Amendment and imposed a nationwide preliminary injunction due to the impermissible reach of EO 13950 on contractors' "freedom to deliver the diversity training and advocacy that they deem necessary to train their own employees . . . ."[13] The court concluded that, under the *Pickering*[14] balancing test, "the at-issue training qualified as speech on a matter of public concern for which the government does not have adequate justification to suppress . . . ."[15] The court also found the Executive Order void for vagueness.

Court Challenge

On April 22, 2022, a lawsuit styled *Falls v. DeSantis* was filed in the Northern District of Florida challenging—on First Amendment and void-for-vagueness grounds—the constitutionality of the 2022 Stop W.O.K.E. amendments to the FCRA.[16] The suit contends that the amendments "unlawfully restrict [employers' free speech rights] as they are not narrowly tailored to meet a compelling state interest" and "constitute viewpoint discrimination as they are explicitly designed to target and suppress ideas with which GOP lawmakers disagree."[17] In *R.A.V. v. St. Paul*,[18] the United States Supreme Court (SCOTUS) recognized that an ordinance that singled out particular, content-based viewpoints violated the First Amendment where it was not narrowly tailored to achieve a compelling governmental interest.

One could reasonably conclude that the 2022 Stop W.O.K.E. amendments to the FCRA single out particular, content-based viewpoints relating to race and gender because they expressly target certain "oppressive ideologies" while permitting the teaching of other "ideologies" relating to race and gender. On the other hand, courts have tended to be less protective of employers' free speech rights in the workplace. In *Booth v. Pasco County*,[19] the Eleventh Circuit opined that, in the hostile work environment context, restrictions on employers' speech "should be understood as consistent with general First Amendment standards because the speech in such cases is not a matter of public concern, and does more than cause mere emotional distress—it invades a legally cognizable interest of the employee that arises from the employment setting."[20]

In *Avis Rent-a-Car System v. Aguilar*,[21] SCOTUS declined to review a ruling by the California Supreme Court that upheld an injunction prohibiting an employee from uttering derogatory remarks about Latino co-employees.[22] The California Supreme Court held that the injunction did not violate the First Amendment's right to freedom of speech because the use of such epithets would contribute to the continuation of a hostile work environment and, therefore, would constitute employment discrimination.[23] In *Robinson v. Jacksonville Shipyards, Inc.*,[24] the Middle District of Florida likewise held that certain workplace speech and pictures "are not protected speech because they act as discriminatory conduct in the form of a hostile work environment."[25]

The *Robinson* court further ruled that "the regulation of discriminatory speech in the workplace constitutes nothing more than a time, place, and manner regulation of speech";[26] therefore, this type of regulation merely "re-

continued, next page

2022 "STOP W.OK.E." AMENDMENTS, *continued from page 7*

quires a legitimate governmental interest unrelated to the suppression of speech, content neutrality, and a tailoring of the means to accomplish this interest."[27] The court then explained that "[t]he eradication of workplace discrimination is more than simply a legitimate governmental interest, it is a compelling governmental interest."[28] Finally, the *Robinson* court concluded that employees in the workplace are a captive audience, and "[t]he free speech guarantee admits great latitude in protecting captive audiences from offensive speech."[29] One could reasonably conclude that an employee who is required to receive training or instruction as "a condition of employment, membership, certification, licensing, credentialing, or passing an examination," in the language of the 2022 amendments, is a captive audience.

Given the unclear state of the law, it will be interesting to see how the Northern District rules in *Falls v. DeSantis*. Regardless, this is an issue that will likely make its way through the appellate process.

J. LECHNER

Jay P. Lechner *owns Lechner Law in Tampa and is Board Certified by The Florida Bar in Labor and Employment Law.*

Endnotes

1 *See* FLA. STAT. § 760.10(8) (2022).
2 *Id.* at § 760.10(8)(a).
3 *Id.* at § 760.10(8)(a)(1)–(8).
4 *Id.* at § 760.10(8)(b).
5 Exec. Order No. 13950, 85 Fed. Reg. 60,683 (Sept. 22, 2020).
6 *Id.* at 60,685.
7 *Id.*
8 *Id.* at 60,683.
9 *Id.*
10 *Id.*
11 WFSU Public Media, *A Lawsuit Says Florida's New Anti-WOKE Law Violates Free Speech Rights*, WFSU (Apr. 22, 2022, 7:55 PM EST), https://news.wfsu.org/state-news/2022-04-22/a-lawsuit-says-floridas-new-anti-woke-law-violates-free-speech-rights.
12 Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021).
13 *Santa Cruz Lesbian and Gay Cmty. Ctr. v. Trump*, No. 5:2020cv07741 (N.D. Cal. Dec. 22, 2020).
14 *Pickering v. Bd. of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (1968).
15 The parties did not agree that the *Pickering* balancing test was the appropriate standard.
16 No. 4:22-cv-00166-MW-MJF (N.D. Fla.).
17 The hearing on plaintiffs' motion for preliminary injunction occurred on Tuesday, June 21, 2022. As this article was being finalized for publication, the court has not yet ruled on the motion.
18 505 U.S. 377 (1992).
19 757 F. 3d 1198 (11th Cir. 2014).
20 *Id.* at 1216 (internal marks omitted).
21 529 U.S. 1138 (2000).
22 *Id.*
23 *Aguilar v. Avis Rent-A-Car Sys., Inc.*, 980 P.2d 846, 848 (1999).
24 760 F. Supp. 1486 (M.D. Fla. 1991).
25 *Id.* at 1535.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.* at 1536.

AUTHOR SPOTLIGHT

Leslie W. Langbein

Leslie W. Langbein has sat on "all sides of the table" during forty-two years of practicing labor and employment law. Her career as a labor attorney began in 1981 when she joined the City of Hollywood Attorney's Office in the midst of the first ever public employee strike in Florida. Her participation in the PERC proceedings and her handling of innumerable unfair labor practice claims that followed accounted (in part) for her promotion to Deputy City Attorney. She "left a good job in the City" in 1986 in response to a law firm recruitment seeking a public sector attorney to serve as the "outhouse" General Counsel of Florida International University. Leslie had the honor of serving in that capacity for nearly ten years before forming Langbein & Langbein, P.A. in 1996 with her husband. They practiced together for 19 years until he fell ill and retired in 2015. During that time and until recently, Leslie's practice was concentrated on providing advice to and representing companies and individuals in all aspects of employment law before agencies and in state and federal courts. She now focuses her practice on service as a neutral.

Leslie's vast experience as an arbitrator began in 1989 when she was first accepted onto the American Arbitration Association's (AAA) national panel of labor arbitrators and also became a hearing officer for personnel appeals for Broward and Miami-Dade Counties. Soon thereafter she was accepted onto the AAA's national panels of employment and commercial arbitrators. She also was accepted as a permanent panelist on labor arbitration panels for the State of Florida. Leslie has served as a labor arbitrator for state agencies, universities, schools, municipalities, and counties throughout Florida.

Leslie was accepted onto the arbitration panel of the American Health Law Association and admitted to the National Academy of Distinguished Neutrals in 2014. She was accepted onto the Federal Mediation and Conciliation Service panel of labor arbitrators in 2018. Leslie also has served as a fact finder for private entities investigating internal employment claims and as a private judge. She is a PERC Special Magistrate and a Florida Qualified Court-Appointed Arbitrator. Indeed, if you have undergone training to become a Florida Qualified Court-Appointed Arbitrator, then you may recognize a much younger Leslie in the role of chair of the arbitration panel depicted in the training video.

Leslie became certified as a Florida circuit/civil mediator in 1996. Initially, she was one of the few mediators who concentrated her mediation practice in the field of labor and employment law. The extent of her employment mediation experience led to her acceptance as an approved mediator for the U.S. District Courts for the Southern and Middle Districts of Florida and to membership on the AAA's national panel of mediators. She is also a member of the employment mediation panels of the AAA and the American Health Law Association.

Leslie's service to the legal community includes membership on the Volunteer Lawyers of the Southern District pro bono panel; membership on the Board of Directors of Legal Services of Greater Miami; past Chair of and membership on the board of the Miami-based fair housing organization, HOPE, Inc.; past Chair of The Florida Bar Labor and Employment Law Section and membership on its Executive Council; and past Chair of and membership on the Board of Directors of the Miami Lakes Bar Association. She has spoken at numerous CLE programs for the Labor and Employment Law Section and is also a member of both the ADR and the City, County and Local Government Sections of The Florida Bar.

In her "other life," Leslie is the proud mother of two adult children, an adoring grandmother of two toddlers, an avid collector of pottery and glass, a frustrated gardener, a fair-to-middling cook, an adopter of rescued pets, a generous supporter of non-profit organizations, and a world traveler.

Enforcing Arbitration Agreements: A Recent Case and a New Law

By Jonathan E. O'Connell, Virginia

Introduction

Many employers choose to incorporate arbitration agreements into their employee onboarding process to avoid formal litigation and address potential future employment disputes in a more streamlined and cost-effective forum. Such agreements are, of course, generally enforceable under the Federal Arbitration Act (FAA). This article will examine a recent Eleventh Circuit decision, *Lambert v. Signature Healthcare, LLC*,[1] that further affirms the enforceability of predispute arbitration agreements in the employment context and will highlight some traps for the unwary when seeking to compel arbitration pursuant to such agreements. Additionally, this article will review a recent amendment to the FAA via the "Ending Forced Arbitration of Sexual Harassment Act of 2021," which limits the scope of claims that may be waived pursuant to arbitration agreements.

Lambert v. Signature Healthcare

By June of 2012, the plaintiff in *Lambert* had been unemployed for roughly six months despite actively searching for new employment. When all efforts to find a job seemed to have failed, the plaintiff, who was 57 years of age, became concerned that without an imminent source of a steady income, she would need to retire early, thereby incurring early distribution tax penalties associated with her retirement accounts.[2] In June 2012, the plaintiff finally found employment with Signature Healthcare, LLC (the Company).[3]

At the time of her hire, the plaintiff signed an agreement consenting to mandatory arbitration in connection with disputes arising from her employment.[4] Additionally, she signed a document acknowledging receipt of the Company's employee handbook.[5] As is commonplace, the handbook contained standard language setting forth the Company's ability, in its discretion, to amend or discontinue policies.[6] The handbook also cross-referenced the Company's arbitration agreement.[7]

The plaintiff's employment was subsequently terminated, and she filed suit in Florida state court against the Company, alleging violations of the Family and Medical Leave Act and the Fair Labor Standards Act, and asserting a number of state law claims.[8] The Company then removed the case to federal court and moved to dismiss and to compel arbitration pursuant to the FAA.[9] In response, the plaintiff asserted that the arbitration agreement was unenforceable because there was no "meeting of the minds" between the parties, and the agreement lacked consideration as a result of the Company's ability to unilaterally change the terms of the arbitration agreement in accordance with the management amendment provision set forth in the handbook.[10] For these reasons, the plaintiff asserted that the arbitration agreement was unconscionable and thus unenforceable under Florida law.[11]

The district court agreed with the plaintiff, concluding that the agreement was unconscionable from both a procedural and substantive standpoint.[12] In finding that the agreement was procedurally unconscionable, the court noted the plaintiff's difficult financial position and concluded that she "did not have a meaningful option" to decline to enter into the arbitration agreement.[13] As to substantive unconscionability, the court concluded that, reading the language of the arbitration agreement in tandem with the language in the handbook allowing the Company to unilaterally modify its terms, there was no mutual obligation between the parties.[14] The Company filed an interlocutory appeal under the FAA.[15]

In reviewing the lower court's decision, the Eleventh Circuit first disposed of the Company's threshold argument that pursuant to the terms of the arbitration agreement, an arbitrator should decide the issue of arbitrability in the first instance.[16] Rejecting this argument, the court explained that the Company did not invoke the agreement's delegation clause before the district court and, therefore, the Company "forfeited the delegation issue."[17]

As to the issue of unconscionability, the Eleventh Circuit set forth the basic framework for determining whether an arbitration agreement is enforceable under the FAA;[18] specifically, that: "(a) the plaintiff entered into a written arbitration agreement that is enforceable under ordinary state-law contract principles and (b) the claims before the court fall within the scope of that agreement."[19] Turning to Florida law, the court explained that to establish unconscionability, a party resisting arbitration must demonstrate that the agreement is both procedurally and substantively unconscionable.[20] In this regard, Florida courts engage in an interdependent analysis of substantive and procedural aspects of an agreement, whereby "one prong [may] outweigh another provided that there is at least a modicum of the weaker prong."[21]

The court noted that the key question in assessing procedural unconscionability is whether the party challenging enforceability had a "meaningful choice" to enter into the agreement.[22] In this regard, Florida courts apply a "totality of the circumstances" analysis in assessing whether a party indeed had a meaningful choice.[23] The court went on to explain:

> That analysis considers such factors as:
>
> (1) the manner in which the contract was entered into; (2) the relative bargaining power of the parties and whether the complaining party had a meaningful choice at the time the contract was entered into; (3) whether the terms were merely presented on a "take-it-or-leave-it" basis; and (4) the complaining party's ability and opportunity to understand the disputed terms of the contract.[24]

The court rejected the lower court's conclusion that because the plaintiff was presented with a "take-it-or-leave it" proposition, the agreement was procedurally unconscionable. "As we have explained," said the Eleventh Circuit, "the fact that a contract is presented on a take-it-or-leave-it basis is insufficient by itself to show procedural unconscionability under Florida law."[25] Correspondingly, the court also determined that the plaintiff's lack of employment and difficult financial position did not alone establish procedural unconscionability.[26]

Next, the court rejected the plaintiff's argument that the agreement was procedurally unconscionable because she had a limited understanding regarding its contents and otherwise felt pressured to sign the document.[27] The Eleventh Circuit opined that the plaintiff had the opportunity to pose questions and speak with an attorney before signing the document and that "pressure that is self-imposed does not weigh in favor of procedural unconscionability."[28] Finally, the court noted that the agreement and the other on-boarding documents were all presented in normal, type-faced font. Finding that the circumstances did not warrant a finding of procedural unconscionability, the court did not need to reach the issue of whether the agreement was substantively unconscionable.[29]

As demonstrated by the Eleventh Circuit's decision in *Lambert*, whether an arbitration agreement is enforceable under Florida law often depends on the factual circumstances under which it was executed by the parties. In drafting, seeking to enforce, or seeking to challenge such agreements, practitioners and employers should place themselves in the shoes of the individual employee. How clear is the agreement given the individual's level of education and experience? Is the agreement well labeled and written in a large font? Was the employee provided a certain number of days in which to consider the agreement and obtain legal counsel, and does the agreement specify this? Such fact-specific inquiries may prove important down the road in the event of an employment dispute.

"Ending Forced Arbitration of Sexual Harassment Act of 2021"

Having examined the general enforceability of predispute arbitration agreements in the employment context, and the seemingly difficult burden associated with challenging enforceability, it is worth noting a recent amendment to the FAA impacting certain employment claims.

On March 3, 2022, President Biden signed into law the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" (the Act), which amended the FAA.[30] The Act states, in relevant part, that "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law" and "relates to" such dispute.[31] The Act also makes clear that issues as to its applicability to a particular dispute must be determined by a court applying federal law, regardless of any provision in the agreement that purports to delegate the issues of arbitrability to an arbitrator.[32] In terms of applicability, the Act states that it "shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment," which was March 3, 2022.[33]

Given the Act's recent enactment, case law interpreting its provisions is sparse. However, interesting issues will arise as courts grapple with the language of the statute. In this regard, the statute's language limiting enforceability "with respect to a case filed under Federal, Tribal, or state law, and

continued, next page

relates to . . . [a] sexual harassment dispute," will undoubtedly result in judicial clarification in scenarios in which sexual harassment claims are packaged with other causes of action.

J. O'CONNELL

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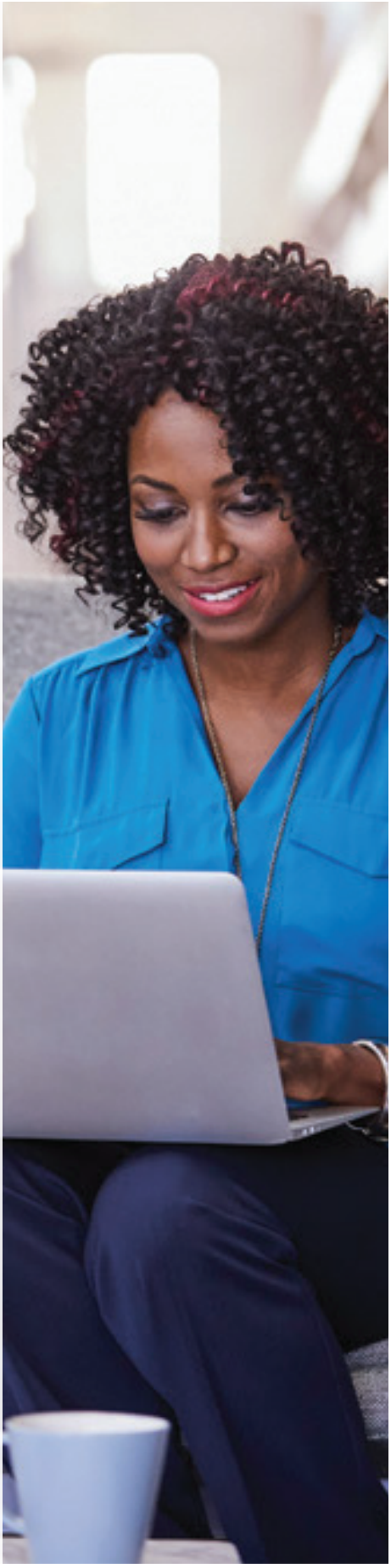
Endnotes

1 No. 19-11900, 2022 WL 2571959 (11th Cir. July 8, 2022).
2 *Id.*
3 *Id.*
4 *Id.* at *1–2.
5 *Id.*
6 *Id.* at *2.
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.* at *3.
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.* *3 & n.5.
18 *Id.* at *4.
19 *Id.* (internal quotation marks omitted).
20 *Id.*
21 *Id.* (internal quotation marks omitted).
22 *Id.* at *5.
23 *Id.*
24 *Id.* (quoting *Hobby Lobby Stores, Inc. v. Cole*, 287 So. 3d 1272, 1275 (Fla. 5th Dist. Ct. App. 2020).
25 *Id.* at *5–6.
26 *Id.*
27 *Id.* at *7.
28 *Id.* (internal quotation marks omitted).
29 *Id.*
30 Pub. L. No. 117-90 (2022) (codified at 9 U.S.C. §§ 401–402).
31 *Id.*
32 *Id.*
33 *Id.*



Advanced Labor Topics 2022

Washington, D.C.

Scott Atwood, 2021–22 Section Chair, with Jessica Looman, Acting Administrator of the Wage and Hour Division, U.S. Department of Labor.

Advanced Labor Topics Co-Chair Don Slesnick with Mark Gaston Pearce, Visiting Professor of Law and Executive Director, Workers'Rights Institute at Georgetown University Law Center.

Advanced Labor Topics Co-Chair Greg Hearing with EEOC Commissioner Keith Sonderling.

The Honorable Gwynne A. Wilcox of the National Labor Relations Board.

PERC General Counsel Gregg Morton with Javier Ramirez, Executive Manager, Division of Agency Initiatives, Federal Mediation and Conciliation Service (nominated for FMCS Director).

Edmund C. Baird, Associate Solicitor for Occupational Safety and Health, U.S. Department of Labor.

Don Slesnick, Scott Atwood and Greg Hearing with Carolyn Wheeler, a former appellate lawyer with the EEOC and now a partner at Katz, Marshall & Banks, LLP.

Craig E. Leen, a partner at K&L Gates LLP, Washington, D.C., who provided an affirmative action and DEIA update.

majeure or contagion that inhibits the ability to make sales calls in the field. Given the high compensation earned by many outside salespeople and the equally high cost of litigating FLSA lawsuits, mistaken beliefs about the elements of proof under the OSE can prove costly. That is why it is important for practitioners to understand all the criteria that must be met at all times to successfully assert this defense to an overtime claim.

But before delving into the elements of the OSE, a bit of history affords the practitioner a better understanding of why it was included in the FLSA upon its enactment in 1938. As the Tenth Circuit Court of Appeals noted in *Jewel Tea Co. v. Williams*, Congress recognized that:

> [An outside] salesm[a]n, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of this employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.[1]

Seventy-one years later, the United States Supreme Court expounded on the rationale by observing:

> The exemption is premised on the belief that exempt employees typically earned salaries well above the minimum wage and enjoyed other benefits that set them apart from the nonexempt workers entitled to overtime pay. It was also thought that exempt employees performed a kind of work that was difficult to standardize to any time frame and could not be easily spread to other workers . . . .[2]

Thus, it is precisely the benefit to be gained from the exemption (no overtime pay for hours over forty in a workweek) that also creates the legal maelstrom that follows when an employer fails to heed (or attempts to evade) U.S. Department of Labor (DOL) regulations: liability for large dollar damages (due to a three-year statute of limitations and liquidated damages) to a high-earning employee who worked long hours on a self-created schedule with little supervision.

Turning now to the law, the OSE has only titular recognition in 29 U.S.C. § 213(a)(1). That is because Congress delegated to DOL the responsibility to define and delimit the exemption. DOL's regulations and guidance for the OSE are found at 29 C.F.R. § 541.500-504(a).

29 C.F.R. § 541.500(a) sets forth the elements of the OSE and defines the phrase "employee employed in the capacity of outside salesman" to mean any employee whose primary duty is making sales within the meaning of section 3(k) of the FLSA or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer and who is customarily and regularly engaged[3] *away from the employer's place or places of business* in performing such primary duty. The italicized phrase is the "meat and potatoes" of the OSE, and DOL emphasized its importance by promulgating 29 C.F.R. § 541.502, which provides (with emphasis added):

> An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." The outside sales employee is an employee who makes sales **at the customer's place of business or, if selling door-to-door, at the customer's home**.[4] Outside sales does not include sales made by mail, telephone or the Internet[5] unless such contact is used merely as an adjunct to personal calls. Thus, **any fixed site**, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, **even though the employer is not in any formal sense the owner or tenant of the property**. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (i.e., one or two weeks) should not be considered as the employer's place of business.

A sub-issue that often complicates an analysis of the OSE is what constitutes a "fixed site" of an "employer's place or places of business." Another type of fixed site might be an employer-owned condominium regularly used by a traveling salesperson as a business base in another state. But does the calculus change if it is only a hotel room in a resort where the salesperson is vacationing for two weeks but still monitoring work?

Fortunately, DOL has issued numerous opinion letters over the course of time that offer insight into the agency's deliberations on this topic. In WHD Opinion Letter 1964-0143, DOL's Administrator was asked to opine if real estate salespersons working from an office set up by their employer in a model home located within the boundaries of a newly constructed residential development were properly classified as outside salespersons. The Administrator noted that where a model home on a real estate development is maintained on a "relatively permanent basis" as an office of the employer, staffed with necessary personnel for making sales, it constituted a fixed site of the employer's place of business. Thus, when the salespersons left the office to show a lot to, or tour the planned development with, potential buyers, they were engaged in making sales "away from the employer's place of business" and

covered by the OSE. DOL's position remained unchallenged until the very same scenario was presented in *Billingslea v. Brayson Homes*.[6]

In *Billingslea*, the employer contended that the district court was bound to defer to WHD Opinion Letter 1964-0143 and conclude that the plaintiff salespersons were subject to the OSE. The district court rejected this argument, finding instead that DOL's opinion was "illogical." After all, how could the mere fact that a salesperson stepped off the front porch of a model home to show a lot change the essential character of the sales work to exempt status? The *Billingslea* court substituted its judgment for that of the agency and determined the employer's "place of business" was the entire subdivision because the employer controlled its construction. The district court thus concluded the plaintiff salespersons never left "the employer's place of business" and were entitled to overtime compensation as inside salespersons.

It is not clear what action DOL took or did not take as a result of this decision, but months later, the agency issued three opinion letters (all on the same day) that discussed factors it deemed determinative of an "employer's place of business" in the context of sales in the real estate industry.[7] In WHD Opinion 2007-1, DOL explicitly rejected the *Billingslea* test of employer control over a "community" on the remarkably similar facts before it. DOL explained: "While the sales office is the employer's place of business, because it is a fixed site used as a 'headquarters' for making sales, [citation omitted], the lots for sale are not part of the employer's place of business but rather are the products to be sold by the sales associates." The agency reiterated this opinion in WHD Opinion Letter 2007-2, which presented comparable facts. Importantly, WHD Opinion Letter 2007-2 opined that collateral duties performed by outside salespersons, including meeting with prospects, real estate sales employees, or others involved in the home buying process; showing properties and communities to prospects; touring and demonstrating model homes and home sites; engaging in a wide variety of marketing efforts; and meeting with customers, real estate sales employees, construction personnel, and others to ensure customer satisfaction throughout the sale and construction of the new home were "indispensable" and "critical" parts of the sales process, and therefore the time spent by salespersons on these tasks also was exempt.[8]

WHD Opinion Letter 2007-4 presented a slightly different factual scenario. There, real estate sales associates met with prospects for the purchase of time-share interests in a fixed, off-site sales office. After a film presentation, a sales associate ferried prospects to the actual time-share resort property a short distance away. A second sales associate then provided a tour of the resort and pointed out its amenities. If any prospects decided to purchase a unit at the end of the tour, they returned to the sales office with the first sales associate, who then completed all paperwork related to the purchase/sale. On these facts, DOL found that the real estate sales associates did not meet the OSE because a "resort such as the one you describe is generally maintained on a permanent basis as a location of the employer and is staffed with the necessary personnel for maintaining the resort facilities and in such circumstances, the employer maintains a continuing interest in the resort facilities and the unsold units."[9]

The "fixed site" language of 29 C.F.R. § 541.502 was reconsidered by DOL in WHD Opinion Letter 2008-6NA. There, the employer maintained a permanent place of business where it manufactured novelty products for sale. Its salesforce reported to the business each morning to pick up inventory, sales brochures, receipt books, and folding tables. From there the salespersons traveled to predetermined locations where they set up a sales display of the wares either outside or inside an existing retail store. The salespersons returned to the employer's place of business at the end of each day and turned in their unsold merchandise and sale proceeds. The salespersons earned commissions for each sale they made. A sales campaign at a given site could last anywhere from one day to three days.

On these facts, DOL opined that the salespersons were covered by the OSE because most of their time was spent at locations away from their employer's business premises. "The locations where the salesperson sells novelty items are fixed sites, but would not be considered the employer's place of business because the salesperson remains there for only a short time period . . . and the sites are retail stores."[10]

The temporary nature of a sales site also was a deciding factor in WHD Opinion letter 2020-6. In the situation presented, a salesforce—in a specially equipped and decorated employer-owned truck stocked with goods for sale—drove from location to location to attend street fairs and other events. Once the truck arrived at a location, the salesforce exited and mingled with the event crowd and made sales of the goods and of services. They were paid commissions on the sales.

The employer sought an opinion holding that its salesforce was subject to the OSE. DOL's concurrence was dual-based. First, it opined that the employer's truck was not a fixed site because it was driven to a different location each day (i.e., each site was temporary). Second, even if it was a fixed site, the employer's salesforce exited the truck at each location to interact with the crowd and make sales, thereby mirroring the rationale applied in WHD Opinion Letters 2007-1 and 2007-2 to find that real estate salespeople were "away from their employer's place of business" when they left the office in a model home to show prospective buyers lots for sale. Indeed, DOL described the truck-based salesforce as the modern-day equivalent of the "paradigmatic traveling salesmen" for whom Congress had modeled the OSE.

Finally, WHD Opinion Letter 2020-8 considered whether salespersons who set up and man booths or displays at home-and-garden shows, trade

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shows, state and county fairs, and so-called big-box stores from which they make sales, are subject to the OSE.[11] The facts established that the sales shows could be as short as one day or as long as twenty-one days, but they typically last ten days. Based on the temporary nature of the sales site, DOL found that the employees qualified for the outside sales exemption, echoing the grounds for its ruling in WHD Opinion Letter 2008-6NA.

The takeaway from this survey of DOL opinion letters is that the agency treats a location as a fixed site of an employer's business when it takes on the characteristic of permanency due to being furnished, used, or maintained by the employer as a headquarters or base of operations for a sales employee over an extended period of time, and it is not a public place. These same factors have been applied by courts.[12]

As with most claimed exemptions under the FLSA, practitioners may confront close questions of fact when determining if the OSE applies, but these DOL and court opinions should provide much-needed guidance.

L. LANGBEIN

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Endnotes

1 118 F.2d 202, 207–08 (10th Cir. 1941).

2 *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 166 (2012) (internal quotation marks, brackets, and citations omitted).

3 The phrase "customarily and regularly" is defined in 29 C.F.R. § 541.701 as a frequency "greater than occasional but . . . less than constant." It is not a "majority of time" test, but rather it looks to whether the employee performs tasks critical to the sales process away from the office on a greater than occasional basis. *See Devivo v. Adams Homes of Northwest Fla.*, 2021 U.S. Dist. LEXIS 231015 (M.D. Fla. 2021).

4 Notably, this sentence does not include the word "only." Presumably this was due to DOL's observation that sales contacts also take place in face-to-face meetings in coffee shops and restaurants, at chamber of commerce events, in business development groups, at trade shows, on golf courses, or at an array of other locations where business deals are negotiated and completed.

5 During DOL's 2004 rule revision process, the agency staunchly rejected a proposal to expand the OSE to inside sales personnel. The commenter noted that the use of "fax machines, voice-mail, teleconferencing, cellular phones, computers, and video-conferencing" had enabled such employees "to emulate the customer contact formerly within the exclusive province of outside salesperson." DOL's response in the Federal Register and its specific exclusion of Internet-based sales in 29 C.F.R. § 541.502 placed employers panic stricken by COVID-19 on notice that Zoom and other web-based platforms do not suffice as off-premises sales calls.

6 2006 U.S. Dist. LEXIS 11707 (N.D. Ga. 2006).

7 While the opinions are industry specific, they can be read broadly to apply to any other category of business.

8 *See also*, WHD Opinion Letter 2020-6, discussed *infra*.

9 These factors were not evident in the record in *Billingslea v. Brayson Homes, supra*.

10 Although the stores were privately owned by others, and 29 C.F.R. § 541.502 does not consider whether an employer is the owner or tenant of a "fixed site," it appears DOL also considered the fact that the stores and areas in front of them were open to the public, and the employer had no real, ongoing connection to them.

11 DOL did not question the status of the employees as salespersons versus mere promoters because the salespersons' primary duty at the sales shows was sales work directed toward the consummation of their own sales; they had quotas to meet and they earned commission on their sales. This is an important distinction because employees who are engaged solely to perform promotional work and do not make sales are not exempt under the OSE. See 29 C.F.R. § 541.503(b) and (c). However, promotional work that is incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. See 29 C.F.R. § 541.503(a).

12 *See Urso v. Wells Fargo Bank, N.A.*, 2011 U.S. Dist. LEXIS 167160 (N.D. Ill 2015) (bank branch was a fixed site of the employer's mortgage business; although not owned or leased by her employer, plaintiff was assigned there to generate new business and routinely spent at least two full days and sometimes a third day each week there throughout the four-month period she worked for the employer) and *Freeman v. Kaplan, Inc.*, 132 F. Supp. 1002 (N.D. Ill 2015) (salesperson employed to work exclusively at a law school campus over a course of months was not an outside salesperson because employer used campus as a "base of operations" to sell bar exam prep courses to students). *But see, Lane v. Humana Marketpoint, Inc.*, 2011 U.S. Dist. LEXIS 59608 (D. Idaho 2011) (salespersons assigned to a Walmart location to set up a kiosk and sell insurance to shoppers were not working from their "employer's place of business," even though their employer had an agreement with Walmart, because the location was public and was not used as a "headquarters"); *Modeski v. Summit Retail Solutions, Inc.*, 470 F. Supp. 3d 93 (D. Mass. 2020) (makeup salespersons stationed at a drugstore to sell products were outside salespersons because the drugstore was not a headquarters) and *Butt v. HF Mgmt. Servs., LLC*, 2020 U.S. Dist. LEXIS 6309 (E.D. N.Y. 2020) (hospitals, pharmacies, and doctors' offices visited by salesperson to take reorders of goods were not fixed sites because they were not furnished, maintained, or used as headquarters).

Since opening its doors in 2017, the restaurant has maintained a practice of adding a mandatory 18% service charge to customers' bills.[4] After collecting these payments, Nusret redistributes the fees to certain employees on a pro rata basis to cover the restaurant's minimum and overtime wage obligations.[5] Operating in this manner, Nusret uses a provision in the FLSA exempting certain retail and service establishments from paying overtime wages if "'the regular rate of pay' of employees exceeds one and one-half times the applicable minimum hourly rate."[6]

A group of tipped employees at Nusret challenged the restaurant's compensation scheme in a collective action before the United States District Court for the Southern District of Florida.[7] The employees alleged that they were paid less than the required federal minimum and overtime wages and were forced to participate in an illegal tip pool with non-tipped employees.[8] The employees' argument was premised upon the belief that, "although their portion of the service charges exceeded the statutory wage requirements (e.g., some employees made over $100,000 per year), Nusret still violated the FLSA because the 18% 'service charge' was not a service charge, but, in fact, a tip."[9] The employees reasoned that because tips were not part of their regular rate of pay, Nusret was unable to use the "tips" at issue to offset its wage obligations under the FLSA.[10] Nusret's argument on summary judgment was that the 18% fee was a "bona fide service charge"; that the evidence showed the employees were compensated above the statutorily required wage rate; that the decision to add a tip and determine the amount of the tip is entirely within the customer's discretion; and "[b]ecause Nusret did not allow customers to refuse to pay the service charge, it was not a tip."[11] In response, the employees argued that Nusret was required to report the income from the mandatory service charges in gross receipts on the restaurant's tax returns, if the 18% mandatory fee was in fact a bona fide service charge.[12]

The district court rejected the employees' argument and concluded that Nusret "satisfied the 29 U.S.C. § 207(i) exemption because: (1) it was a retail or service establishment; (2) it was undisputed that at all relevant times [Employees'] 'regular rate of pay' was more than one and one-half times the minimum wage; and (3) more than half of the Employees' compensation for the relevant time consisted of commissions on goods or services."[13] The district court considered the definition of a tip as set forth in 29 C.F.R. § 531.52 and highlighted the fact that Nusret's service charge was not paid directly to its employees; nor did customers have the option to direct receipt of the service charge to an individual employee.[14] Relying on Ninth Circuit precedent, the district court observed that "the essential element of a tip is its voluntary nature" and noted that Nusret's customers had no choice but to pay the service charge.[15]

On appeal, the parties did not dispute "that if the service charge [was] properly considered part of the Employees' 'regular rate of pay,' Nusret satisfied its overtime and minimum wage obligations under the FLSA because the Employees were paid well above 1.5 times Florida's minimum wage per hour."[16] Instead, the primary issue before the Eleventh Circuit was whether the service charge was in fact a tip and therefore not eligible to be used to satisfy the restaurant's wage obligations under the overtime exemption in 29 U.S.C. § 207(i) "because tips cannot count toward the hourly 'regular rate of pay.'"[17] The Eleventh Circuit affirmed the lower court's findings and held that "Nusret's service charge was not a tip under the FLSA or other [Department of Labor (DOL)] regulations and was therefore part of the Employees' 'regular rate of pay.'"[18]

The Eleventh Circuit noted that the FLSA does not define "tip" nor "service charge"; however, DOL regulations explain that "the critical feature of a 'tip' is that '[w]hether a tip is to be given, and its amount, are matters determined solely by the customer.'"[19] The court emphasized the distinction between "a payment of a charge, if any made for the service," and a "tip," which is presented by a customer "as a gift or gratuity in recognition of some service performed for the customer."[20] Accordingly, the Eleventh Circuit concluded that Nusret's service charge is not a tip because the amount of the service charge and the decision to pay it are determined by the restaurant, rather than the customer.[21] In that regard, the court noted the lead plaintiff conceded in deposition testimony that employees "were told that the service charge was supposed to be mandatory as if it was an item that a person ordered . . . [;] it had to be on the check."[22] Additionally, DOL regulations mention "examples of amounts not received as tips" and speak directly to the type of charge at issue, explaining that "[a] compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip . . . ."[23]

The employees maintained that a service charge is a tip unless an employer includes the charge in its gross receipts for tax purposes.[24] According to the employees, "Nusret failed to show that it included the service charges in its federal tax returns," and, therefore, a genuine issue of material fact existed as to whether the service charge was a tip.[25] The Eleventh Circuit dismissed this contention, directly stating that "Nusret's tax forms are irrelevant"[26] and holding, "as a matter of law, Nusret's mandatory 18% service charge was not a 'tip' no matter how it was treated on Nusret's tax returns."[27] Further, the Eleventh Circuit found that a DOL regulation explaining that "service charges and *other similar sums which become part of the employer's gross receipts* are not tips"[28] merely provides

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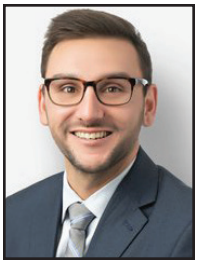
examples of non-tips and does not purport to define "tips" under the FLSA.[29] Finally, the employees argued that Nusret's service charge was not mandatory because "managers had the discretion to remove the charges on the bills of dissatisfied customers (much like a manager might 'comp' an entrée)."[30] The Eleventh Circuit again emphasized that because the customers had no ability on their own to determine whether they would pay the service charge, it was "irrelevant that *managers* would sometimes remove the service charge for dissatisfied customers."[31]

In summary, the Eleventh Circuit concluded that the determination of whether a "mandatory service charge" is in fact a service charge, rather than a tip, is impacted by whether the decision to pay the charge—and the amount to pay—are determined by the customer or by the establishment.[32]



B. LAGOS

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Endnotes

1 *Compere v. Nusret Miami, LLC.*, 28 F.4th 1180 (11th Cir. 2022).
2 *Id.* at 1181.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.* (quoting 29 U.S.C. § 207(i)).
7 *Id.* at 1181.
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.* at 1184.
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.* at 1184–85 (quoting *Compere v. Nusret Miami LLC*, 2020 U.S. Dist. LEXIS 97637, *8 (S.D. Fla. May 31, 2020)).
16 *Id.* at 1185.
17 *Id.* at 1185–86 (citing *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) ("[T]he regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed.")); 29 U.S.C. § 207(e) (defining "regular rate" in part, as including "all *remuneration for employment* paid to, or on behalf of, the employee" (emphasis added)).
18 *Compere*, 28 F.4th at 1186.
19 *Id.* (citing 29 C.F.R. § 531.52(a)).
20 *Id.*
21 *Id.*
22 *Id.* at 1186–87.
23 *Id.* at 1187 (quoting 29 C.F.R. § 531.55(a)).
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.* at 1188.
28 *Id.* at 1187 (quoting 29 C.F.R. § 531.55(b)).
29 *Id.*
30 *Id.* at 1188.
31 *Id.*
32 *Id.* at 1189.

CASE NOTES

UNITED STATES SUPREME COURT

By Jesica P. Fico

High school football coach's "brief, quiet, personal" prayer at midfield after football games is protected by the Free Exercise and Free Speech Clauses of the First Amendment.
Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

In this First Amendment free speech and free exercise of religion case, the United States Supreme Court (SCOTUS) held that a school district infringed on a high school football coach's rights under the First Amendment when it disciplined him for praying after football games. Throughout his career, the football coach would pray after games or offer religiously inspired motivational speeches to his players. After this conduct was brought to the principal's attention, the school district forbade the coach from engaging in actions that could be viewed as an endorsement of religion by the school district. When the football coach continued his lone, silent prayers at midfield after games, the school district placed the football coach on paid administrative leave, and his contract was not renewed. The coach sued in federal court, alleging that the district's actions violated the First Amendment's Free Speech and Free Exercise Clauses, and seeking reinstatement to his job. The district court denied the request for reinstatement and ultimately granted summary judgment to the school district. On appeal, the Ninth Circuit affirmed, finding that the district had a compelling state interest in avoiding an Establishment Clause violation, which justified the district's regulation of the coach's speech. The Ninth Circuit and the SCOTUS dissent noted that the football coach had not accepted any accommodations offered by the school district, such as praying once the stadium was empty.

SCOTUS reversed the Ninth Circuit's decision, ruling that the football coach's prayers were protected by both the Free Exercise Clause and Free Speech Clause of the First Amendment. In so doing, SCOTUS found that the prayers were not conducted within the scope of the coach's duties as a public employee, given that the prayers occurred post-game when coaches are "free to engage in all manner of private speech." Further, SCOTUS determined that the school district tried to punish the coach for engaging in a personal religious observance and that the Constitution did not mandate nor tolerate the school district's suppression of this observance.

ELEVENTH CIRCUIT

Where a motion for summary judgment relies on a plaintiff's deposition transcript, the parties must seek to reach agreement on the transcript's accuracy before the motion can be decided. In the absence of such agreement, the court itself must make a determination on the transcript's accuracy.
Reed v. Pediatric Servs. of Am. Inc., 2022 WL 1136968 (11th Cir. Apr. 18, 2022).

In this Title VII case, the employee appealed the grant of summary judgment in favor of her former employer. The employee, a pro se litigant, argued that the district court erroneously relied on her deposition transcript in granting summary judgment. The employee was a nurse for a comprehensive pediatric home healthcare company. The employee sued her former employer alleging race and gender discrimination, and retaliation. During discovery, the employee sat for a deposition and later obtained a copy of her deposition transcript. After reviewing the transcript, the employee challenged its accuracy and claimed that it contained errors, omissions, and misquotations. In response, the employer filed an unsworn statement by an employee of the court reporting service asserting the accuracy of the deposition transcript. The magistrate judge denied the employee's motion challenging the accuracy of the transcript. The employer then filed for summary judgment, relying on the employee's transcript. The employee again raised her concerns with the district court over the transcript's accuracy. The district court ruled in favor of the employer, finding the magistrate judge "correctly rejected" the employee's argument. Neither the magistrate nor the district court requested a copy, or reviewed the audio, of the deposition. On appeal, the employee reiterated her claims regarding the transcript's accuracy. Noting that the transcript was a critical part of the record in the case, the Eleventh Circuit vacated the district court's decision and remanded the case so that both parties could review the audio recording of the employee's deposition and seek to come to an agreement about the accuracy of the disputed portions of the transcript. In the absence of such agreement,

the district court was ordered to make a determination regarding accuracy by listening to the audio and comparing it to the parts of the transcript where the parties failed to reach agreement. The Eleventh Circuit concluded by saying, "After the district court conducts the proceedings we have directed, we leave to its determination whether to sanction any party, and whether to refer anyone involved in this case—party or otherwise—to the U.S. Attorney's Office for an investigation into whether any crime, including perjury, has been committed."

The argument that back pay should be limited to the amount accrued from the date of discriminatory non-promotion to the date of nondiscriminatory termination is waived if not raised at trial. *Collins v. Koch Foods, Inc.*, 2022 WL 1741775 (11th Cir. May 31, 2022).

A former employee alleged gender discrimination and failure to promote. The employee was a human resources (HR) manager for a chicken processing plant. She and another employee started cohabitating in—what the employer claimed was a—violation of a company anti-fraternization policy. The plaintiff then applied for a vacancy but was not considered for the promotion due to her relationship with the other employee. Around the same time, the employee's partner was granted a promotion. About a month later, the plaintiff was terminated for violating the anti-fraternization policy. At trial on her Title VII claims, the former employee asked the jury to award as back pay the difference in salary and benefits between her HR manager job and the promotion for which she had applied but was not awarded. The employer never argued that if the plaintiff had been promoted, it would still have terminated her from that new position. Without objection, the jury was instructed that any award of back pay should be calculated from the date of the denial of the promotion to the date of the jury's verdict. After deliberation, the jury found that gender was not a motivating factor in the employer's decision to terminate the employee, but that it was a motivating factor in the decision not to promote her. The jury awarded the employee $262,000 in compensatory damages calculated from the date of her termination to the date of judgment. Subsequently, the employer filed a remittitur, claiming that the back pay award was excessive and should be reduced to $6000 as calculated from the date of the non-promotion to the date of termination, which the jury found was not motivated by gender. The district court granted the motion in part, stating that the "nondiscriminatory termination of [plaintiff] cut off the accumulation of back pay." The district court reduced the award to $10,853.84, the amount the employee would have earned, had she been promoted, up to the date of termination.

On appeal, the Eleventh Circuit reinstated the jury's award, finding that the employee's "economic loss was presumed to continue up to the date of the judgment, and the burden shifted to [the employer] to prove by a preponderance of the evidence that the loss was cut off because it would not have continued to employ" her once the company learned of her marriage to another employee. The court found that the employer's failure to argue at trial that, even if it had promoted the plaintiff, it nonetheless would have terminated her when it learned she had married her partner and thus any accrual of back pay should end on that date, thereby waived the issue of whether back pay for its discriminatory denial of promotion should be cut off when it learned of the marriage.

DISTRICT COURTS OF APPEAL

A not-for-profit hospital staffing company established by a special taxing district that was created by act of the legislature is not a "private corporation" under the Florida Private Whistle-Blower Act. *Dennison v. Halifax Staffing, Inc.*, 336 So. 3d 345 (Fla. 5th Dist. Ct. App. 2022).

In this Florida Private-Sector Whistleblower's Act (FWA) claim, a former employee of a not-for-profit hospital staffing company established by the Halifax Hospital Medical Center—a special taxing district that was created by act of the legislature—alleged that he was terminated in retaliation for reporting billing discrepancies to his superiors. The employer argued that it was not an "employer" as defined by the FWA and, therefore, could not be sued under the statute. The trial court agreed and granted summary judgment in favor of the employer. On de novo review, the Fifth DCA affirmed, finding that the employer did not fall within the meaning of "private corporation" under the FWA because: 1) it was created by a public entity and 2) for a public purpose; 3) it is controlled and fully funded by its public entity creator; 4) its board is composed of public members; and 5) none of its net earnings inure to the benefit of any private person, including a director or officer of the employer.

Communications between a corporation's in-house counsel and certain employees during preparation of a position statement on a charge of discrimination are attorney-client privileged, and the in-house counsel may not be examined about them.

Herrera v. Jarden Corp., 334 So. 3d 637 (Fla. 4th Dist. Ct. App. 2022).

In this Florida Civil Rights Act (FCRA) suit, the plaintiff claimed her employer wrongfully terminated her based on her disability. After the plaintiff filed a charge of discrimination with the Florida Commission on Human Relations (FCHR), the employer's in-house litigation counsel responded with the company's position statement. During discovery in the FCRA suit, the plaintiff attempted to depose employer's in-house counsel, which attempt was opposed. The parties agreed that the position statement could be admitted at trial but that the counsel would not be deposed. At trial, plaintiff, nonetheless, attempted to call the in-house counsel as a witness to question her on how she obtained the information in the position statement. The employer objected, based on the privilege. The trial court agreed and entered an order precluding the counsel's trial testimony.

On appeal of the jury verdict in favor of the employer, the plaintiff contended that the trial court erred in prohibiting the in-house counsel's trial testimony. The Fourth DCA affirmed based on attorney-client privilege. The court noted that when determining that a corporation's internal communications are protected by the attorney-client privilege, a court must find that: 1) the communication would not have occurred but for the contemplation of legal services; 2) the employee making the communication did so at the direction of his or her superior; 3) the superior made the request as part of the corporation's effort to secure legal advice; 4) the content of the communication relates to the legal services being rendered, and the subject matter is within the scope of the employee's duties; and 5) the communication is not disseminated outside of persons who need to know its contents. The court found that the in-house counsel lacked first-hand personal knowledge regarding the facts surrounding plaintiff's termination and thus received information about the case from other employees. The court also noted that there is a distinction between the communications between employees and corporate counsel, and statements made in position statements, and that the former are privileged communications. Since plaintiff attempted to question the in-house counsel about her communications with other employees in preparing a position statement, her testimony contained privileged communications. The court rejected plaintiff's argument that attorneys who draft position statements are subject to being called as witnesses at trial and cross-examined.

J. FICO

Jesica P. Fico *is a summer associate in the Tampa office of FordHarrison and in her final year at Stetson University College of Law.*

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