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IN THIS ISSUE

SAVE THE DATE!

49th Annual Public Employment Labor Relations Forum (PELRF)

Oct. 19-20, 2023

Rosen Centre Orlando

Senate Bill 256:
Legislature Enacts BIG Changes Affecting Public Sector Unions

By Christopher Shulman, Tampa

The Florida Legislature recently enacted, and the Governor approved, substantial changes to the way most public employee unions—including those representing teachers—will have to do business, at least with regard to public-sector employees (other than firefighters, law enforcement officers, correctional officers, and probation officers).[1] In Senate Bill (SB) 256 (Chapter 2023-35, Laws of Florida), the Legislature modified or did away with several well-established features of Chapter 447, Florida Statutes. These changes include prohibiting dues deduction by public employers; requiring a particular form designating union membership; changing significantly the process of union registration renewal and recertification with the Public Employees Relations Commission (PERC); and requiring greater disclosure of certain financial information by unions to their members.

*See "*Senate Bill 256*," page 7*

The Service Contract Act:
A Refresher and Practical Considerations for Representing Clients Holding Federal Service Contracts

By Jonathan E. O'Connell, Reston, Virginia

The Service Contract Act (SCA or the Act) can be a tricky statute, even for those labor and employment lawyers who regularly represent federal contractors performing under service contracts with the federal government. In this regard, there is frequent overlap between the SCA and its implementing regulations and the Federal Acquisition Regulation (FAR), which governs the federal government's acquisition of supplies and services. The following provides a brief refresher for labor and employment practitioners who may encounter the Act in the course of representing clients who hold or seek to hold federal service contracts.

Historical Background and Application of the Act

In 1931, in response to the economic challenges resulting from the Great Depression, Congress passed the Davis-Bacon Act (the DBA), which created a prevailing wage minimum in connection with federal construction projects on a location-by-location or "locality" basis.[1] The prevailing wage requirements of

*See "*Service Contract Act*," page 10*

CHAIR'S MESSAGE

Gregg Riley Morton

Dear Labor & Employment Law Section Members,

Thank you for the opportunity and privilege of serving as your Chair for the 2022–2023 Bar year. The strength of our Section relies heavily on your continued membership. During the upcoming year, our leadership team plans to focus on providing increased support and benefits to our members. As those who practice labor and employment law are undoubtedly aware, there have been numerous changes in recent years that present added opportunities and challenges. The nature of the relationship between employers and employees has undergone significant changes due to the new normal we encountered after emerging from the pandemic. At the state and federal levels, the law regarding labor organizations and private and public employers has also changed dramatically. Our mission will be to examine this changing landscape and provide the tools and resources to our members to make them better practitioners and advocates.

Over the next year, the Section has a number of live events planned. We will continue to offer remote attendance; however, we would also love to see our members attend in person, and we hope to make events family friendly so that we may connect on a personal level. On October 19–20, 2023, we will have the 49th Annual Public Employment Labor Relations Forum at the Rosen Centre in Orlando. This long-established conference, held jointly with the City, County, and Local Government Law Section, takes on new importance this year given recent legislation involving public sector employment. In January, we will hold our annual update and certification review conference in Orlando as part of The Florida Bar's winter meeting. In March, we will partner with the Administrative Law Section for a seminar on practicing before state labor and employment agencies. Finally, in the Spring, we are hoping to take our Advanced Labor Practices program back on the road and travel to Asheville, North Carolina, for a conference that provides both training and entertainment.

An Executive Council meeting will be held during each of our live events. These meetings are open to Section members, so consider yourself invited to join us. I also invite you to become more involved in Section activities by volunteering to serve on one of our committees. Soon, you will be receiving an email with the names of our committee chairs and instructions on how to participate. I hope you will consider joining your fellow members to make a difference for our Section!

In addition to these live events, the Section will be offering free webinars throughout the year. These webinars, which will be exclusively offered to our members, will allow us to learn from experts about the cutting-edge topics that face our practice. Watch your inbox and our website for more details about this year's calendar of events and webinars.

Further, you can stay updated on Section events and news through our *Checkoff* newsletter and on social media. We currently have a presence on Facebook and LinkedIn and are planning to add additional platforms. If you would like to volunteer to write articles or social media posts, or to speak on a topic, please contact me at the phone number or email address below!

I want to thank our immediate past chair, Sacha Dyson, for everything she did to make last year a great success. She led us through challenging times, and I look forward to her continued work with the Section. I also want to recognize and thank my fellow officers for their help and dedication to the Section: Yvette Everhart (Chair-Elect), Robert Eschenfelder (Secretary/Treasurer), and Chelsie Flynn (Legal Education Director).

I look forward to an exciting and productive year!

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Federal Accommodation Protections Broadened for Pregnant Workers

By Suhaill Morales, Miami Lakes

On December 29, 2022, President Biden signed the Pregnant Workers Fairness Act (PWFA) into law, with an effective date of June 27, 2023.[1] The PWFA expands existing federal law relating to the accommodation of pregnant employees and applicants, and it applies to all employers with fifteen or more employees.[2]

Prior to the passage of the PWFA, federal law required an employer to accommodate a pregnant employee's medical restrictions only if those restrictions rendered the employee "disabled" within the meaning of the Americans with Disabilities Act of 1990, as amended (ADA). The PWFA requires employers to make reasonable accommodations for pregnancy-related medical conditions as long as the accommodations do not impose an undue hardship on the employer.[3] The definitions of "reasonable accommodation" and "undue hardship" are the same in the PWFA and the ADA.[4]

Additionally, the PWFA specifically prohibits employers from requiring pregnant employees "to take paid or unpaid leave if another reasonable accommodation can be provided."[5] Thus, an employer may use leave only as a last resort unless the employee prefers leave as an accommodation. The PWFA also prohibits employers from denying employment opportunities to qualified applicants because of their need for an accommodation and prohibits adverse employment actions against employees based on their request for (or use of) accommodations.[6]

Moreover, the PWFA expands the basis on which an employer is required to provide an accommodation. For example, under the ADA, an employer is only required to provide an accommodation if it would allow the individual to "perform the essential functions of the employment position that such individual holds or desires."[7] However, under the PWFA, qualified employees include: (a) those who can perform the essential functions of the role with or without reasonable accommodation, and (b) those whose inability to perform an essential function of the role is temporary and can be reasonably accommodated.[8] Therefore, covered employers under the PWFA—unlike under the ADA—will need to accommodate pregnant employees even if they *cannot* perform the essential functions of their positions, so long as their inability to do so is for a "temporary period" and the essential job func-

continued, next page

tions can be performed in "the near future."[9]

Similarly, under the Pregnancy Discrimination Act (PDA), employers are required to give the same treatment to a pregnant employee dealing with a medical condition as to employees who have similar abilities or inabilities to work.[10] However, under the PWFA, an employer's duty to accommodate a pregnant employee is not dependent on a comparison to other employees' accommodations.

On the state level, while Florida prohibits discrimination on the basis of pregnancy and "handicap," there are no statutes that specifically require accommodations for pregnancy-related medical conditions.[11]

As with the ADA and other discrimination statutes, the PWFA provides a private right of action for employees once they have exhausted their administrative remedies through the Equal Employment Opportunity Commission (EEOC).[12] The EEOC and the Attorney General have the same investigatory and enforcement powers under the PWFA as they do under Title VII. Under the PWFA, an employer can avoid the imposition of damages on a failure-to-accommodate claim if it demonstrates that it engaged in "good faith efforts" to identify and make a reasonable accommodation that would provide "an equally effective opportunity" to that employee and not cause an undue hardship for the employer.[13]

Recently, the EEOC published an article titled "What You Should Know About the Pregnant Workers Fairness Act," where it noted that employees may file charges of discrimination beginning on June 27, 2023, for incidents that occur from that date forward.[14] In the article, the EEOC provides examples of possible "reasonable accommodations": providing breaks (or additional breaks) for sitting, resting, or drinking water; offering flexible hours; providing closer parking; providing appropriately sized uniforms; offering leave to recover after birth; and excusing employees from strenuous activities or exposure to compounds not safe for pregnancy.[15] While the EEOC has not issued its proposed regulations, the PWFA states that the EEOC will issue regulations, including "examples of reasonable accommodations," by December 23, 2023.[16]

In light of the above changes, employers should immediately review and update their policies to ensure compliance with the PWFA and coordinate training for employees who receive and process requests for accommodation.

S. MORALES

Suhaill Machado Morales *is a managing partner of SSM Law P.A. in Miami Lakes. Before starting SSM Law P.A., she worked at one of the largest labor and employment law firms in the U.S. and then served as a partner for a number of years at a regional labor and employment law practice.*

Endnotes

1 Pregnant Workers Fairness Act, H.R. 2617-1626, 117th Cong. § 103(1) (signed into law Dec. 29, 2022).

2 H.R. 2617-1626, 117th Cong. § 102(2)(B), 102(3).

3 *Id.* § 103(1).

4 *Id.* § 102(7).

5 *Id.* § 103(4).

6 *Id.* § 103(3), (5).

7 42 U.S.C. § 12111(8).

8 *Id.* § 102(6).

9 H.R. 2617-1626, 117th Cong. § 102(6).

10 42 U.S.C. § 2000e(k).

11 Fla. Stat. § 760.10(1)(a) (unlawful to "discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of . . . pregnancy . . . .").

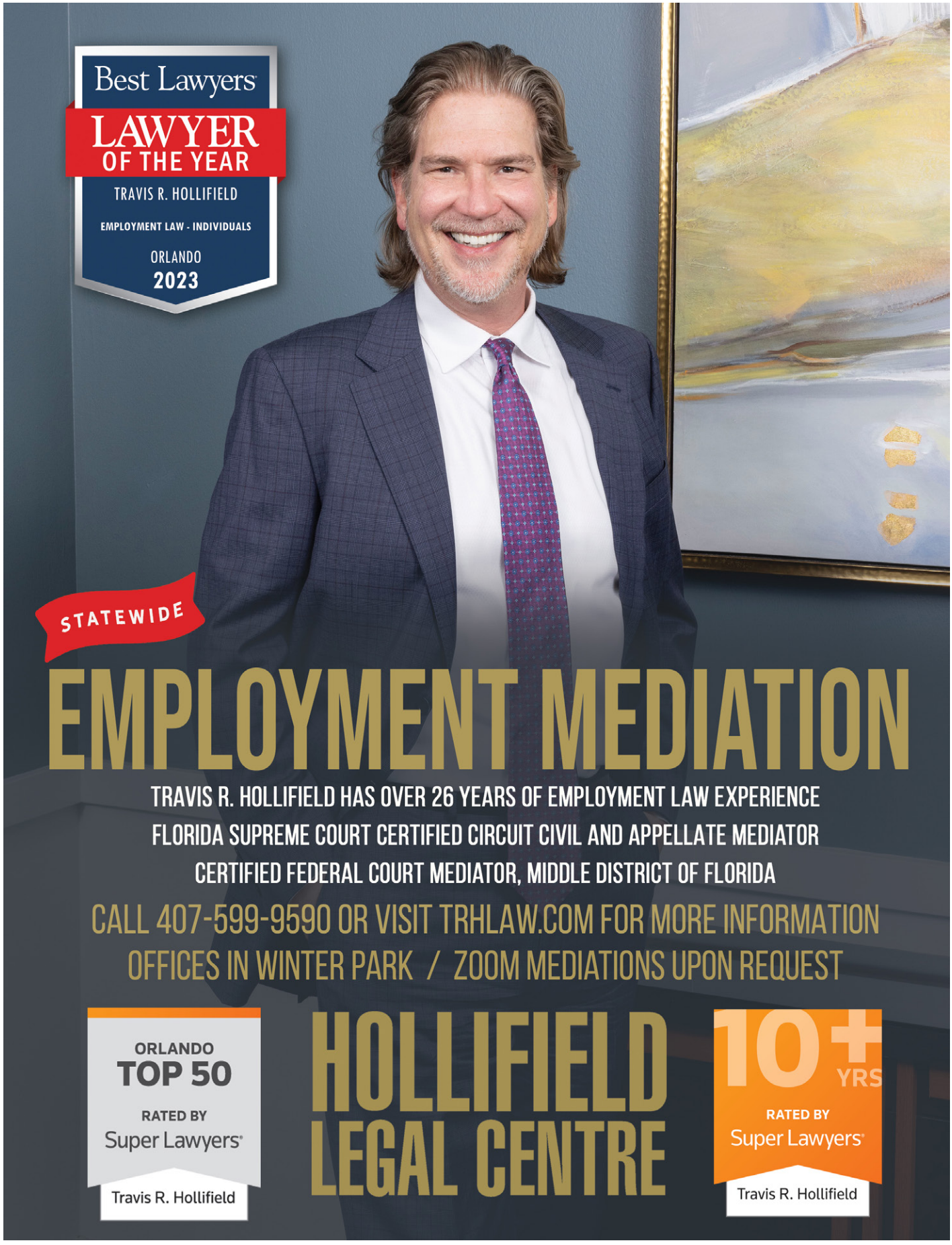
12 H.R. 2617-1626, 117th Cong. § 104(a)(1).

13 *Id.* § 104(g).

14 *What You Should Know About the Pregnant Workers Fairness Act*, EEOC, https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act (last visited June 25, 2023).

15 *Id.*

16 H.R. 2617-1626, 117th Cong. § 105(a).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Author Spotlight

A frequent contributor to *The Checkoff*, **Suhaill Morales** was born and raised in Miami-Dade. She received her Bachelor's Degree from the University of Miami (Go Canes!) and her Juris Doctor from Fordham University School of Law in New York City. After graduating from law school, Suhaill returned home and has practiced labor and employment law since 2010.

Suhaill currently manages her firm, SMM Law P.A., which she opened in August 2022. Located in Miami Lakes, SMM Law handles labor and employment cases and represents both employers and employees. She is also a circuit civil mediator for labor and employment cases, business disputes, and other similar cases. Prior to opening her firm, Suhaill worked at two large labor and employment firms, and was a partner at a regional firm.

Suhaill has been featured on NBC-6 and Telemundo, among other media outlets, regarding labor and employment topics, and she frequently provides training to management and employees in English and Spanish.

Additionally, Suhaill is an active member of the Miami Lakes Bar Association, the Miami Lakes Chamber of Commerce, the Fordham Law Miami Chapter, and other local networking groups such as Miami Moms in Business and Ms. Esquire. She is on the Board of Directors of HR Miami.

Suhaill has been married to a fellow–attorney for nine years, and they have three beautiful children together, including a set of twins. In her downtime, she enjoys spending time with her family and friends, visiting new restaurants, traveling, and cycling.

Dues Checkoffs[2] Prohibited

As of July 1, 2023, public employers of bargaining units that are not otherwise exempt may no longer collect union dues and uniform assessments from their employees' pay. Instead, unions must collect such monies directly from public employees who choose to pay dues. There is speculation, but no express legislative history,[3] that this change was intended to bring about, or at least will have the effect of, a diminishment in regular dues collections by public sector unions.[4]

Implementation may raise some thorny issues where collective bargaining agreements are in place, since, at least as argued by certain instructional personnel unions and others, the revision to Section 447.303, Florida Statutes, constitutes an unconstitutional impairment of contract. Moreover, public employers' discontinuation of checkoff dues deduction may trigger bargaining obligations, over either the substance of the change or its impact.

New Membership Authorization Forms Required

Also effective July 1, 2023, any member of a non-excluded bargaining unit[5] who wishes to be a member of a union (including, presumably, the union that is the certified bargaining agent of the bargaining unit), is required to complete and sign a new membership card, which must be in a PERC-authorized format.[6] The new card must contain "the name of the bargaining agent, the name of the employee, the class code and class title of the employee, the name of the public employer and employing agency, if applicable, the amount of the initiation fee and of the monthly dues which the member must pay, and the name and total amount of salary, allowances, and other direct or indirect disbursements, including reimbursements, paid to each of the five highest compensated officers and employees of the employee organization . . . ." Further, the new card must also contain the following "in 14-point type":

> The State of Florida is a right-to-work state. Membership or nonmembership in a labor union is not required as a condition of employment, and union membership and payment of union dues and assessments are voluntary. Each person has the right to join and pay dues to a labor union or to refrain from joining and paying dues to a labor union. No employee may be discriminated against in any manner for joining and financially supporting a labor union or for refusing to join or financially support a labor union.[7]

This part of the new law also makes clear a member's right to revoke union membership, placing limitations and

continued, next page

requirements on the unions regarding such revocation. For example, unions must revoke membership effective immediately upon receipt of a member's written revocation and may not limit revocation to any specific time period (e.g., a particular month or amount of time after initially joining). If a union requires a specific written revocation form, the form may not require the member to identify the reason for the revocation.[8] Finally, the union is required to retain membership revocation forms for PERC inspection; the law does not specify the period of time the union must keep these documents.[9]

PERC has issued a Notice of Proposed Rule 60CC-1.101, "Employee Organization Membership Authorization Form" (the text of which is available on PERC's website),[10] which was subject to technical revisions following hearings and a workshop on June 7, 2023. Unless changed significantly prior to final promulgation, proposed Rule 60CC-1.101 adopts a specific form for use under Section 447.301(1)(b), Florida Statutes; defines several of the terms related to the form; specifies that dues listed on the form may be listed either in monthly amounts or—if the period for collection thereof is different—then in those amounts with the frequency indicated (i.e., a certain amount each week); and indicates that the employee organization, registration number, date of latest registration renewal, and employee organization compensation information data to be listed on the form should be whatever was listed on the union's "most recent registration or renewal application. If that application does not list the compensation information for five or more officers and employees, only those listed, if any, should be included."[11]

Changes to Union Registration Renewal Process

Changes regarding what information unions must submit with initial or annual renewal registration take effect on October 1, 2023.[12] Such registrations already required submission of the union's current financial statement, but the new law requires a financial statement audited by a certified public accountant (CPA).[13] Moreover, as to registration renewals after that effective date, unions must also provide certain information and supporting documentation—verified by a CPA—regarding the number of employees in the bargaining unit eligible for representation; the number who have submitted membership authorizations but have not revoked same; and the number of bargaining unit members who have and have not paid dues to the union. Unions must submit this information and documentation both to PERC and, simultaneously, to the bargaining unit's public employer.[14]

After submission, either the public employer or any bargaining unit employee may challenge the accuracy of the information and documentation submitted with the renewal application, and PERC shall then investigate the accuracy thereof. PERC is *required* to revoke the registration and certification if it "finds that the application is inaccurate or does not comply with [Florida Statute Section 447.305 (2023)]." Indeed, PERC has the authority to investigate the accuracy of the information and documentation *sua sponte* and *may* revoke or deny registration or certification if it finds the union has failed to cooperate with PERC's investigation or has "[i]ntentionally misrepresented the information it submitted . . . ."[15]

Automatic Revocation if Fewer Than 60% of Bargaining Unit Are Members

Another significant provision of SB 256 is that if the newly required renewal application documents show that fewer than sixty percent of the bargaining unit are dues-paying members of the union at the time of renewal (i.e., each year), the union "must petition . . . for recertification as the exclusive representative of all employees in the bargaining unit within 1 month after the date [of application]." Thereafter, an election will take place (in which, as usual, the union must merely show at least fifty percent support for certification). Failure to petition for recertification will automatically lead to revocation of such certification.[16] This provision does not apply to firefighters and law enforcement officers, correctional officers, and probation officers.[17] In an action challenging the new law,

continued, next page

several plaintiffs' unions argue that these exempted unions are "favored unions"—excluded from the new requirements because of their political support for the Governor, which the plaintiffs assert violates Equal Protection principles and the like.[18]

New Requirements for Reporting to Members

The new law also requires increased reporting of information to members. Not only must unions keep accurate books and make them reasonably available for inspection by members or PERC, but also, effective October 1, 2023, unions must provide their members with "an annual audited financial report that includes a detailed breakdown of revenues and expenditures, and an accounting of membership dues and assessments." Further, unions are also required to notify members "annually of all costs of membership."[19] As noted by legislative staff analysis of the bill, compliance with these requirements, especially for CPA-audited financials and CPA-audited documentation that unions will have to submit with renewal registration applications, will impose substantial additional costs on unions, but the changes will impose essentially no expense on public employers.[20]

Conclusion

It is clear, regardless of political affiliation or pro- or anti-union bent, that the changes embodied in SB 256 will have a significant effect on many public-sector unions and that some of the changes may also require additional, unplanned, and out-of-cycle bargaining, placing additional burdens on public sector employers and unions. Thus, it behooves all labor practitioners to follow closely the lawsuits challenging SB 256. Indeed, even PERC, in remarks delivered at the commencement of the June 7, 2023, public meeting regarding Proposed Rule 60CC-1.101, noted the law likely would be subject to judicial scrutiny and that PERC was therefore limiting its rulemaking solely to the area on which the Legislature required it take action: the member authorization form.[21]


C. SHULMAN

***Chris Shulman** is an attorney, mediator, arbitrator, and PERC Special Magistrate based out of Tampa. A member of the National Academy of Arbitrators, he has conducted more than 3900 mediations and more than 1900 arbitrations (or similar decision-making processes)—a majority of which involved labor or employment issues. He also trains mediators and arbitrators.*

Endnotes

1 Most of the changes do not apply to these select groups or their unions. *See* Ch. 2023-35, §§ 1, 3, 4, Laws of Fla., to be codified at FLA. STAT. §§ 447.301(1)(b)(6), 447.303(2)(a), and 447.305(9) (2023). Additionally, public employers may petition PERC for waiver of the dues deduction and registration renewal aspects of the new law, if the public employer "has been notified by the Department of Labor that the public employer's protective arrangement covering mass transit employees does not meet the requirements of 49 U.S.C. § 5333(b) and would jeopardize the employer's continued eligibility to receive Federal Transit Administration funding . . . ." *Id.* at § 2, to be codified at FLA. STAT. §§ 447.207(12) (2023).

2 Reporting this change here is ironic, given this publication's title.

3 However, in a federal court filing, several unions state, "[I]n promoting SB 256, Governor DeSantis made clear that the purpose of the ban on disfavored unions' collection of voluntary membership dues via employee-authorized payroll deductions was 'to make sure the school unions are not getting any of that money.'" First Amended Complaint, at 5–6, *Alachua Cnty. Educ. Ass'n. v. Rubottom,* No. 1:23-cv-00111-MW-HTC (N.D. Fla. May 11, 2023), ECF No. 13.

4 At least one of the affected unions has implemented a new online bill-pay feature to allow members to have payments automatically withdrawn from members' bank accounts. *See* https://feaweb.org/member-center/edues (last visited June 25, 2023).

5 At least those employees who are not otherwise excluded. *See supra*, note 1.

6 The law does not make clear whether bargaining unit members who have, prior to July 1, 2023, already submitted union membership authorizations will have to do so again, using the new form. However, in "FAQs" regarding the law, PERC has stated:

> Beginning July 1, 2023, PERC Form 2023-1.101 is mandatory for all public employees who desire to be a member of a registered employee organization that is the certified bargaining agent for the employee's bargaining unit or seeking certification as the bargaining agent. The control over the filings is the retention of the forms by the organizations, which must account for those in its custody each year in its application for renewal of registration. Thus, for practical purposes, the initial date of accountability for forms signed by current organization members is the date at which the organization must apply for registration renewal. For prospective members, the practical deadline is prior to or contemporaneous with joining the organization.

https://perc.myflorida.com/FAQs%20-%20Ch%202023-35%20LOF%206-6-23.docx.pdf.

7 Ch. 2023-35, § 1, Laws of Fla., to be codified at FLA. STAT. § 447.301(1)(b)1–3 (2023). The prescribed inclusion of the right-to-work language has been specifically challenged in the *Alachua Cty. Educ. Ass'n* action, *supra* note 3, as an infringement on freedom of speech, among other bases.

8 Ch. 2023-35, § 1, Laws of Fla., to be codified at FLA. STAT. § 447.301(1)(b)(4) (2023).

9 *Id.* at FLA. STAT. § 447.301(1)(b)(5) (2023).

10 See https://perc.myflorida.com/Proposed%20Rule%2060CC-1.101%20Employee%20Organization%20Membership%20Authorization%20Form.pdf. As of this writing, it is not known when PERC will issue the final version of its Proposed Rule and Form.

11 *Id.*

12 At least those employees who are not otherwise excluded. *See supra*, note 1.

13 Ch. 2023-35, § 4, Laws of Fla., to be codified at FLA. STAT. §§ 447.305(1)(d), (2) (2023).

14 *Id.*, to be codified at FLA. STAT §§ 447.305(3)–(4) (2023).

15 *Id.*, to be codified at FLA. STAT. §§ 447.305(7)–(8) (2023).

16 *Id.*, to be codified at FLA. STAT. § 447.305(6) (2023).

17 *Id.*, to be codified at FLA. STAT. § 447.305(9) (2023).

18 *Alachua Cty. Educ. Ass'n*, *supra*, note 3.

19 Ch. 2023-35, § 4, Laws of Fla., to be codified at FLA. STAT. § 447.305(11) (2023).

20 Staff analyses are available on the Florida Senate's webpage for SB 256; links to the two post-committee meeting analyses are: https://www.flsenate.gov/Session/Bill/2023/256/Analyses/2023s00256.go.PDF and https://www.flsenate.gov/Session/Bill/2023/256/Analyses/2023s00256.fp.PDF.

21 Video of the meeting is available on PERC's website, https://perc.myflorida.com/PERCRulemaking.mp4.

the DBA aimed to prevent federal contractors from further depressing wages in the construction industry by transporting and utilizing labor from localities outside of the situs of actual construction.[2] The federal government also sought to prevent its complicity in contributing to the country's difficult economic situation through its payment of federal taxpayer dollars to construction contractors paying suboptimal wages for the location of the work.[3]

Not long after the passage of the DBA, in 1936, Congress passed the Walsh-Healey Public Contracts Act (Walsh-Healey Act).[4] The Walsh-Healey Act created a wage minimum and safety standards for contractors engaged in manufacturing or the furnishing of materials, supplies, articles, and equipment on behalf of the federal government.[5]

In 1965, seeking to fill the prevailing wage gap as to service contracts, Congress passed the McNamara-O'Hara Service Contract Act, establishing prevailing wage and fringe benefit minimums on a locality basis for employees performing work pursuant to covered service contracts.[6] Subject to certain exemptions, the SCA applies to:

> any contract or bid specification for a contract, whether negotiated or advertised, that—
>
> (1) is made by the Federal Government or the District of Columbia;
>
> (2) involves an amount exceeding $2,500; and
>
> (3) has as its principal purpose the furnishing of services in the United States through the use of service employees.[7]

While broad in its coverage, it is important to note that the SCA does not apply to all instances in which federal funds are at issue. As evident from the text of the statute itself, the SCA's requirements apply to "any *contract* . . . that is *made by* the Federal Government."[8] Thus, the SCA's implementing regulations make a distinction between contracts made or entered into by the United States, and those contracts that are merely federally financed but entered into between a private contractor and a state or local entity.[9] With that said, it is also worth highlighting that the SCA does not contain an exclusion for service contracts entered into directly between federal agencies and state or local entities, and the law expressly applies to service contracts entered into by federal agencies "with States or their political subdivisions, as well as such contracts entered into with private employers."[10]

Over the years, the federal government's reliance on service-related contracts has increased significantly. In 2019, the United States Department of Defense (DOD) alone obligated $190 billion on service-related procurements—amounting to nearly half of DOD's obligations.[11] While such increased reliance provides new and lucrative opportunities for existing and potential service contractors, performing such work also requires compliance with the Act and its complex set of regulations.

Basic Requirements

Under the Act, agencies entering into covered contracts must include language "specifying the minimum wage to be paid" and "the fringe benefits to be provided to each class of service employee engaged in the performance of the contract or any subcontract."[12] In enacting the SCA, Congress delegated significant discretion and authority to the Department of Labor (DOL) to implement and enforce its terms, resulting in DOL's regulations found at 29 C.F.R. Part 4.[13] Among DOL's responsibilities under the Act and implementing regulations is the development of wage determinations setting forth the relevant prevailing wage minimum and fringe benefit requirements associated with various non-exempt[14] positions on a locality-by-locality basis throughout the United States,[15] which are publicly available via the internet.[16]

The majority of DOL wage determinations set forth contractor obligations on a fixed-cost "per employee" basis. Such determinations contain a list of positions according to locality, along with the corresponding prevailing wage and health and welfare requirement, stated in dollar terms for all hours paid up to 2,080 per year and, finally, vacation and holiday requirements.

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Thus, for instance, a contractor employing an Aircraft Mechanic I in Brevard County, Florida, would have the following obligations under a covered service contract with respect to such employee:

- Prevailing Wage: $29.07 per hour.
- Health & Welfare: $4.80 per hour, up to 40 hours per week, or $192.00 per week or $832 per month.[17]
- Paid vacation beginning after 1 year of service with the contractor.
- A minimum of 11 paid holidays as set forth in the wage determination.[18]

In addition to the Act's implementing regulations, DOL periodically issues publicly available interpretive guidance, including, for example, a Field Operations Handbook addressing various compliance issues.[19] Despite such guidance, contractors regularly struggle with complying with various technical components of the law, particularly those relating to satisfying the health and welfare, vacation, and record-keeping requirements.

By way of example, among the quirks associated with the SCA is that a contractor must pay out vested but unused vacation required pursuant to the relevant wage determination upon an employee's anniversary date.[20] Another challenge is ensuring that employees *actually receive* the applicable health and welfare benefit dollar amount, even in instances in which they choose to decline a particular employer-sponsored benefit. This latter issue is most frequently addressed via the contractor paying an employee "cash in lieu" of the health and welfare benefit amount, which is permitted under the regulations.[21]

Interaction Between the SCA and the FAR

In connection with the issuance of a solicitation or award to which the Act applies, it is the contracting agency's obligation to include relevant SCA language. Unfortunately, it is not uncommon for agencies to fail to include the relevant FAR provision (FAR 22.1006), clause (FAR 52.222-41), and/or wage determinations within solicitations and awards. While in most cases of such an omission, the agency makes an appropriate price adjustment to the contract in order to account for the higher prevailing wage and fringe benefits by virtue of application of the SCA, such adjustments can frequently involve a contractor's expenditure of considerable time, legal fees, and resources in achieving the proper result.

In situations in which a particular contract contains relevant SCA language, but the contractor (or its subcontractor(s)) fails to pay workers accordingly, funds ordinarily due to the contractor are subject to withholding by the agency.[22] As set forth in the FAR, violation of the SCA "renders the responsible contractor liable for the amounts of any deductions, rebates, refunds, or underpayments (which includes nonpayment) of compensation due employees performing the contract[]" and "[t]he contracting officer may withhold—or, upon written request of the Department of Labor . . . , shall withhold—the amount needed to pay such underpaid employees from accrued payments due the contractor on the contract, or *on any other prime contract* (*whether subject to the Service Contract Labor Standards statute or not*) with the contractor."[23]

Enforcement

The SCA does not confer a private right of action upon private litigants; instead, Congress delegated to DOL the authority to enforce the requirements of the SCA through its investigative and enforcement tools.[24] DOL undertakes such efforts via audits of federal contractors, which audits are most frequently initiated as a result of employee complaints. In addition to the payment withholding mechanism described above, the SCA contemplates mandatory debarment upon contractors that fail to comply with the law's prevailing wage and fringe benefit requirements absent "unusual circumstances."[25]

The vast majority of DOL audits finding violations of the Act are resolved via a contractor's payment of back pay and settlement. However, in cases in which a contractor contests DOL's findings or the application of the Act, judicial review of DOL determinations surrounding SCA implementation and enforcement is subject to the administrative exhaustion requirements of the Administrative Procedures Act.[26]

Practice Pointers

The overlap between the SCA as a prevailing wage statute and the area of government contracts can be difficult to navigate. Here are some practice pointers to help protect service contractor clients:

- Carefully scrutinize contract solicitations for the presence of the SCA provision and clause.
- Ensure that subcontracts contain relevant "flow down" language with respect to SCA obligations.
- Where SCA language is not present and the solicitation appears to be one involving the provision of services, contractors should inquire with the agency at any Q&A opportunity during the solicitation process as to the potential application of the SCA. Doing so will ensure compliance, as well as a level playing field during the bid submission process.
- Where a wage determination is absent from a solicitation or contract that contains relevant SCA language, contractors should similarly make the agency aware of such omission or otherwise obtain a copy of the wage determination via DOL's website.
- Where a wage determination and/or FAR 52.222.41 was not present in the relevant award documents, examine the possibility of obtaining an equitable adjustment to the contract price for the associated increased costs of performance.
- In cases in which a contractor is considering changing the place of performance of an SCA-covered contract, the contractor should take affirmative steps via interaction with the Contracting Officer in order to request a modification to the contract

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to account for such change in place of performance, as well as incorporation of an appropriate wage determination for the new locality.

- Counsel should assist contractor clients in carefully "mapping" positions to SCA-covered contracts and gain fluency with the fringe benefit, holiday, and vacation requirements associated with applicable wage determinations.


J. O'CONNELL

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Endnotes

1 40 U.S.C. §§ 3141–3148.

2 Glenn Sweatt & Brian Cruz, *Rights and Remedies Under The Davis-Bacon Act: An Analysis of Recent Proposals for Reforms*, 44-Fall Procurement Law 3 (2008).

3 *Id.*

4 41 U.S.C. §§ 6501–6511.

5 *Id.*

6 41 U.S.C. §§ 6701–6707.

7 41 U.S.C. § 6702(a). The exemptions set forth in 41 U.S.C. § 6702(b) are:

> (1) a contract of the Federal Government or the District of Columbia for the construction, alteration, or repair, including painting and decorating, of public buildings or public works; (2) any work required to be done in accordance with chapter 65 of this title; (3) a contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect; (4) a contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934 (47 U.S.C. 151 et seq.); (5) a contract for public utility services, including electric light and power, water, steam, and gas; (6) an employment contract providing for direct services to a Federal agency by an individual; and (7) a contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations.

8 41 U.S.C. § 6702(a)(1) (emphasis added).

9 29 C.F.R. § 4.107, "Federal Contracts."

10 29 C.F.R. § 4.110, "What contracts are covered."

11 U.S. Gov't Accountability Off., Gao-21-267r, Service Acquisitions: Dod's Report To Congress Identifies Steps Take To Improve Management, But Does Not Address Some Key Planning Issues 1 (2021).

12 41 U.S.C. § 6703(1)–(2).

13 *See* 41 U.S.C. § 6707.

14 Importantly, the prevailing wage requirements of the Act do not apply to employees who are exempt under the Fair Labor Standards Act. *See* 29 C.F.R. 4.6(k) ("As used in these clauses, the term *service employee* means any person engaged in the performance of this contract other than any person employed in a bona fide executive,

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administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations . . . .").

15 The SCA does not apply to service work performed overseas. *See* 29 C.F.R. 4.112(b), "Contracts to furnish services 'in the United States.'"

16 *See* SAM.GOV, https://sam.gov/content/wage-determinations (last accessed July 11, 2023) (allowing access to both Service Contract Act and Davis-Bacon Act Wage Determinations).

17 As set forth in the relevant wage determination, such Health & Welfare amount is lower for contracts covered by Executive Order 13706, "Establishing Paid Sick Leave for Federal Contractors."

18 *See* Wage Determinations, Service Contract Act WD # 2015-4555, SAM.GOV (Dec. 27, 2022), https://sam.gov/wage-determination/2015-4555/19.

19 U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK, Ch. 14, The Mcnamara-O'Hara Service Contract, http://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch14.pdf (last accessed July 11, 2023).

20 29 C.F.R. 4.173, "Meeting Requirements for Vacation Fringe Benefits."

21 29 C.F.R. § 4.177, "Discharging fringe benefit obligations by equivalent means."

22 41 U.S.C. § 6705(a)–(b) (discussing violations under the SCA and noting that "[t]he total amount determined . . . to be due any employee engaged in the performance of a contract may be withheld from accrued payments due on the contract or on any other contract between the same contractor and the Federal Government.").

23 FAR 22.1022, "Withholding of contract payments" (emphasis added).

24 41 U.S.C. § 6705(d) ("In accordance with regulations prescribed pursuant to . . . this title, the Secretary [of Labor] or the head of a Federal agency may carry out this section."); *see also* 41 U.S.C. § 6707.

25 41 U.S.C. § 6706. In practice, however, such debarments are rare.

26 *See*, *e.g.*, *Aune v. Adm'r, Wage & Hour Div., U.S. Dep't of Labor*, No. 09-5009, 2010 WL 6336645, at *19 (D.S.D. June 28, 2010), *report and recommendation adopted*, No. 09-5009-JLV, 2011 WL 1135917 (D.S.D. Mar. 29, 2011) ("Because the SCA itself does not provide for federal judicial review of final agency decisions in cases arising under the SCA, the Administrative Procedure Act . . . provides the sole basis for a district court's review of final agency decisions.").

Context Matters:
Does a Return to Setting-Specific Considerations for Disciplining Union Employee Misconduct Represent a Larger Concern for Labor Attorneys in the Future?

By Carly Stein, Washington D.C.

In May of this year, the National Labor Relations Board (the Board) issued its opinion in *Lion Elastomers II*,[1] overturning its three-year-old decision in *General Motors LLC*[2] and returning to its prior precedent of considering setting-specific standards in cases where employees are disciplined for misconduct that occurs during activity traditionally protected by the National Labor Relations Act (NLRA). While the return to the prior standards is important for labor lawyers to note, equally important is the underlying message regarding the longevity of Board precedents. This decision serves as a reminder that parties in labor disputes may fall victim to a decision from a fickle and ever-changing Board.

In its July 21, 2020, decision in *General Motors*, the Board, composed of only three Republican members, bucked nearly four decades of precedent to allow employers to more easily discipline employees engaged in protected conduct.[3] In so doing, the Board rejected three prior setting-specific standards that had been used in determining whether an employer acted unlawfully in disciplining or discharging an employee engaged in "abusive conduct" in connection with protected activity under Section 7 of the NLRA. These standards included the *Atlantic Steel*[4] test, which governed employee conduct towards management in the workplace; the *Desert Springs Hospital*[5] "totality-of-the-circumstances" test, which governed social media posts and employee conversations in the workplace; and the *Clear Pine Mouldings*[6] test, which addressed picket-line conduct. The 2020 Board rejected any consideration of the setting in which the conduct occurred and instead addressed only the motive of the employer in taking the adverse action. Notably, the Board in *General Motors* chose to apply the standard retroactively to all cases involving "abusive

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conduct" that were pending before the Board.

This year's *Lion Elastomers II* decision was issued by a significantly different Board, composed of three new Democrat appointees and one remaining Republican member from *General Motors*, and returns the Board to the setting-specific standard it had previously utilized. Under this standard, conduct by employees engaged in activity protected under Section 7 of the NLRA is considered in the context of the protected activity, thereby giving employees more leeway in their actions before employers can discipline or discharge them. This decision is far from a bright-line rule for employers to follow, but there is significant Board precedent for all parties to consider.

In deciding *Lion Elastomers II*, the Board looked at the history of the employee discipline/protected conduct issue, which has come before it many times in the past seven decades. Indeed, the setting-specific standards have been accepted not only by the Board but cited with approval by the United States Supreme Court.[7] This wealth of precedent both administratively and judicially made the Board's decision in *General Motors* even more confusing for labor attorneys trying to navigate employee discipline during protected activity. And while the Board is no stranger to changing standards (independent contractor status anyone?), these two decisions in tandem appear to be an even starker contrast in such a short period of time—explained, one can reasonably speculate, by the differing political persuasions of the decision makers. Unfortunately, as political polarization in the country continues, we can expect many other long-held understandings of the NLRA to be subject to vastly different interpretations in the coming years, making it more difficult for attorneys to successfully counsel their clients.

C. STEIN

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Endnotes

1 *Lion Elastomers LLC II*, 372 N.L.R.B. No. 83 (2023).

2 *General Motors LLC*, 369 N.L.R.B. No. 127 (2020).

3 *Id.*

4 *Atlantic Steel*, 245 N.L.R.B. 814 (1979).

5 *Desert Springs Hosp. Med. Ctr.*, 363 N.L.R.B. 1824 (2016).

6 *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984).

7 *See Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966).

Recent Trends in Child Employment Laws

By William D. Slicker, St. Petersburg

It has been estimated that over 250,000 migrant children came into the United States unaccompanied during 2021 and 2022.[1] United States Customs and Border Protection apprehended over 150,000 unaccompanied children at the U.S.–Mexico border in 2022 alone.[2]

Under federal law, the Department of Health and Human Services (HHS) is tasked with checking the background of U.S. sponsors of these children to ensure the children are protected from exploitation or trafficking.[3] However, the flood of children overwhelmed HHS, and there were complaints that children were being released to people who planned to exploit them.[4] Additionally, between 2018 and 2023, the Department of Labor documented a sixty-nine percent increase in the number of children employed in violation of child labor laws.[5]

Almost half of the unaccompanied children released to sponsors in the U.S. during the past two years have come from Guatemala.[6] These children often end up working dangerous jobs in factories, meat plants, and construction sites that violate federal child labor laws.[7]

This surge in unaccompanied children has occurred at a time when employers in the U.S. have had trouble filling jobs. Not coincidentally, perhaps, twenty states have eased or attempted to ease their state child labor protection laws. Typically, these new laws or bills extend work hours for minors, lift restrictions on hazardous work, or introduce a lower legal wage.[8]

One example is Iowa. In May of 2023, Iowa enacted a law that allows fourteen- and fifteen-year-olds to work an additional two hours on a school day and allows children as young as fourteen to work construction.[9] And Arkansas recently ended a requirement that fourteen- and fifteen-year-olds obtain a parent's consent and a state permit before starting work.[10]

While some states are lowering the child labor restrictions, bills have been introduced in Congress that would strengthen some child labor laws. The Children's Act for Responsible Employment and Farm Safety (CARE Act) would set the minimum age for

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farmworkers at fourteen and the minimum age for hazardous farm work at eighteen. Similarly, the Children Don't Belong on Tobacco Farms Act would ban children under eighteen from working on tobacco farms.[11]

No one can predict how these trends will play out in Florida, but it certainly is an area of employment law to keep an eye on.


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Endnotes

1 Hanna Dreier, *As Migrant Children Were Put to Work, U.S. Ignored Warnings*, N.Y. Times (Apr. 17, 2023), https://www.nytimes.com/2023/04/17/us/politics/migrant-child-labor-biden.html.

2 *Keeping Kids Safe: A Seamless Safety Net for Children on the Move*, Kind (June 2023), https://supportkind.org/wp-content/uploads/2023/06/23_Keeping-Kids-Safe-A-Seamless-Safety-Net-for-Children-on-the-Move-v3-DEV.pdf#:~:text=The%20campaign%2C%20Keeping%20Kids%20Safe%3A%20A%20Seamless%20Safety,system%E2%80%94and%20subsequently%20protection%20systems%20across%20the%20globe%E2%80%94treats%20children.

3 Dreier, *supra* note 1.

4 *Id.*

5 Julia Ainley and Laura Strickler, *Child Labor Investigation Spreads to Meatpacking, Produce Companies in 11 States*, NBC News (June 7, 2023), https://www.nbcnews.com/politics/immigration/migrant-child-labor-investigation-11-states-meatpacing-produce-rcna88156.

6 *Id.*

7 Camilo Montoya-Galvez, *U.S. Takes Action to Prevent Migrant Child Labor Amid Rise in Violations*, CBS News (Feb. 27, 2023), https://www.cbsnews.com/news/immigration-migrant-child-labor-biden-administration.

8 William Finnegan, Comment, *Child Labor Is on the Rise*, The New Yorker (June 12, 2023), https://www.newyorker.com/magazine/2023/06/12/child-labor-is-on-the-rise; Melissa Angell, *States are Loosening Child Labor Laws. Should They?*, Inc. (June 6, 2023), https://www.inc.com/melissa-angell/states-are-loosening-child-labor-laws-should-they.html.

9 Angell, *supra* note 8; Kaanita Iyer, *Iowa Governor Signs Bill to Loosen Child Labor Laws*, CNN (May 27, 2023), https://www.cnn.com/2023/05/26/politics/iowa-child-labor-laws-kim-reynolds/index.html.

10 Finnegan, *supra* note 8.

11 Margaret Wurth, *U.S. Lawmakers Move to Protect Child Farmworkers*, Human Rights Watch (June 12, 2023), https://www.hrw.org/news/2023/06/12/us-lawmakers-move-protect-child-farmworkers.

CASE NOTES

Eleventh Circuit Case Notes

By Viktoryia Johnson, Tampa

Eleventh Circuit clarifies the types of communications sufficient and insufficient to trigger an employer's obligation to give eligibility and rights-and-responsibilities notice under the FMLA.

Graves v. Brandstar, Inc., 67 F.4th 1117, 1123 (11th Cir. 2023).

When Jessica Graves worked for Brandstar Studios in Florida, her supervisors knew Graves' father was terminally ill in Pennsylvania and that Graves was his primary caregiver who coordinated his medical services and visited him frequently. After Graves' father was rushed to the hospital one day, Graves emailed her supervisors, stating she planned to fly to Pennsylvania the next day because her father was in ICU and that she would be unavailable for "calls/edits." Upon her return to Florida, Graves emailed Brandstar's CEO that her father had had brain surgery, his throat cancer had metastasized and formed two tumors in his brain, and more radiation and chemotherapy would be needed. She also advised she planned to bring her father to Florida for treatment and requested the use of company employees to help convert her studio apartment to accommodate her father's stay. Graves also verbally asked to be excused from work-related travel and to be staffed only to local projects as she prepared for her father's move. It is undisputed that no one at Brandstar told Graves that her father's condition and her role as his caretaker might entitle her to FMLA benefits. Graves was terminated for performance soon after her return to Florida.

Graves sued Brandstar alleging, in part, that Brandstar interfered with her rights under the FMLA. The district court granted the employer summary judgment on Graves' FMLA interference claim. On appeal, Graves contended Brandstar failed to provide her notice of FMLA rights. The Eleventh Circuit discussed that under the FMLA, an employer must provide several obligatory notices—eligibility notice and rights-and-responsibilities notice—and that "it doesn't take much" to trigger this obligation. If the employer learns from any source that the employee's leave might be for family or medical reasons, the court continued, it is obligated to provide both types of notice. The court found that Graves' first email, in which she told her supervisors that she intended to fly to Pennsylvania and would not be available for calls/edits, triggered Brandstar's obligation to provide the FMLA notices, which it did not do. The court, however, went on to find that Brandstar's technical failure did not cause Graves any harm because Graves received the leave she requested and full pay for those days. On the other hand, Graves' subsequent email, in which she asked for ongoing flexibility to prepare her home for her father's move to Florida, did not trigger Brandstar's obligation "for a fundamental reason"—Graves "didn't request leave." Noted the court: "The Family and Medical *Leave* Act requires, at the very least, that an employee actually seek leave—of some sort—to trigger an employer's obligation to give eligibility and rights-and-responsibilities notice." Because in her second email Graves did not ask for leave of any sort to care for her ailing father, and because Brandstar did not otherwise acquire knowledge on its own that she wanted leave, Brandstar's FMLA notice obligations were not triggered.

Eleventh Circuit holds employee cannot establish failure to accommodate disability without a showing of adverse employment action.

Beasley v. O'Reilly Auto Parts, 69 F.4th 744 (11th Cir. 2023).

Teddy Beasley, a deaf man communicating through American Sign Language (ASL), worked for O'Reilly Auto Parts as an inbound materials handler. Beasley asked O'Reilly for an accommodation of text messages summarizing mandatory nightly pre-shift meetings that covered daily tasks and contained safety information, but did not receive them regularly, and the ones he did receive were incomplete. He also requested, but did not receive, an accommodation of an ASL interpreter (1) during training; (2) during a company picnic (although his wife was able to accompany him and interpret for him); and (3) to enable Beasley to discuss with management his exclusion from pre-shift meetings and, separately, a potentially wrongful disciplinary matter that affected his pay. After Beasley's failure to receive a preferred daytime shift and after another disciplinary action, Beasley resigned.

Beasley sued O'Reilly under the ADA, and the district court granted summary judgment to O'Reilly, finding, in part, that Beasley could not show an adverse employment action because of O'Reilly's failures to accommodate. The court rejected Beasley's argument that O'Reilly's failure to provide an interpreter or summaries of meetings exposed him to an unsafe work environment because he could not understand or discuss the safety information presented at those meetings. It also rejected Beasley's argument that if he had received a better accommodation for those meetings, he would have received better performance evaluations, which in turn would

have resulted in higher pay. The district court held Beasley failed to point to a "specific safety, training, or other job-related issue" that negatively affected his job performance.

The Eleventh Circuit reversed, finding that genuine issues existed, in part, as to whether O'Reilly's failures to provide two of Beasley's requested accommodations led to an adverse employment action. For a failure to reasonably accommodate to be actionable, the court noted that the failure must negatively impact the employee's hiring, advancement, discharge, compensation, training, and other terms, conditions, and privileges of employment. Because Beasley's disability is his deafness, he had to show that any failure of O'Reilly to accommodate his deafness negatively impacted one of the above. "No failure to accommodate could have negatively impacted Beasley's hiring because he was hired, nor could any have negatively impacted him by contributing to his firing because he was not fired." That left for further consideration the promotion, compensation, training, or other terms, conditions, or privileges of employment. The court concluded O'Reilly's failure to provide an interpreter and written summaries of nightly pre-shift meetings, and Beasley's resultant inability to understand or participate, "did adversely affect the terms, conditions, and privileges of his employment," and a jury could reasonably find that, if Beasley had been provided with more complete summaries of, or an interpreter for, these meetings, he would have received higher performance evaluations and higher pay. Likewise, O'Reilly's failure to provide an interpreter for Beasley to dispute a disciplinary matter caused Beasley to earn lower performance scores and deprived him of ability to earn higher pay. However, the court disagreed with Beasley's argument that O'Reilly violated the ADA also by failing to provide Beasley with an interpreter during his forklift training and a company picnic since neither of those failures prevented him from performing an essential job function: Beasley successfully completed the training and didn't operate the forklift in his job anyway, and his wife accompanied him and interpreted for him at the picnic. Beasley had no evidence that any of his terms, conditions, or privileges of employment were adversely affected as a result of O'Reilly's not providing an interpreter during forklift training or the picnic.

Where the EEOC was investigating potentially unlawful employment practices only at one facility named in the charge, the respondent's nationwide data was irrelevant to the investigation.

Equal Emp. Opportunity Comm'n v. Eberspaecher N. Am. Inc., 67 F.4th 1124 (11th Cir. 2023).

Eberspaecher North America (ENA) is a company that manufactures car components at its headquarters in Novi, Michigan, and six other locations across the country. An employee at ENA's Northport, Alabama, plant complained to the Equal Employment Opportunity Commission (EEOC) that he was fired for taking protected absences under the Family and Medical Leave Act (FMLA). An EEOC Commissioner charged ENA with discrimination under the ADA, listing only the Northport facility in the written charge. The EEOC then issued requests for information on every employee terminated for attendance-related infractions at each of ENA's seven domestic facilities around the nation. When ENA objected to the scope of those requests, the EEOC issued a subpoena and eventually sought judicial enforcement in court. The district court enforced only a part of the EEOC's subpoena, ordering ENA to turn over information related only to the Northport, Alabama, facility, but refused to enforce the subpoena as to information from other facilities, holding that nationwide information was not relevant to the EEOC's charge to the Northport facility. The EEOC appealed.

The Eleventh Circuit discussed that the EEOC's investigatory process is a multistep process designed to notify employers of investigations into potentially unlawful employment practices. An EEOC charge serves as notice to the employer that the EEOC is investigating the potentially unlawful employment practices specified in the charge, and it provides the employer the opportunity to comply with the investigation and rectify the targeted practices. However, if the employer does not voluntarily comply with the investigation, the EEOC can then subpoena the charged employer for information. After careful review, the Eleventh Circuit held that the EEOC charged only ENA's Northport facility—which provided notice to ENA that the EEOC was investigating potentially unlawful employment practices only at that specific facility—and thus ETA's nationwide data sought by the EEOC was irrelevant to that charge.

CASE NOTES

State Courts Case Notes

A former university employee's due process rights were violated where the FHCR did not inform her that, because it failed to make its determination within 180 days, she was permitted to proceed as if the FCHR determined there was reasonable cause.

Reddick, v. Univ. of S. Fla. Bd. of Trustees, No. 2D21-3991, 2023 WL 3903799 (Fla. 2d DCA June 9, 2023).

Trena Reddick worked for the University of South Florida's (USF) police department. USF provided Reddick with notice that she would not be reappointed to her position. In May 2018, Reddick filed a charge of discrimination pursuant to Chapter 760, Florida Statutes, with the Florida Commission on Human Relations (FCHR). In March 2019, the FCHR sent a letter to Reddick informing her that because more than 180 days had passed from the time she filed her charge and the FCHR had not yet made its determination, Reddick had four options: (1) to permit the FCHR to continue its investigation and render a determination; (2) to file suit; (3) to file a petition for relief and proceed with an administrative hearing with the Division of Administrative Hearings (DOAH); or (4) to withdraw her charge. The letter did not indicate that if Reddick elected one option, she was later foreclosed from electing another. Reddick did not respond, and the FCHR continued its investigation.

Subsequently, the FCHR sent Reddick a no-cause determination letter, giving Reddick only one option—to request a hearing with DOAH—and stating that the determination of no cause would become final if she did not file her petition. Reddick initially proceeded pro se with an administrative hearing with DOAH, but later filed a motion to withdraw her petition to pursue a civil action; the administrative law judge (ALJ) informed Reddick that, if she did not withdraw her motion, it would be treated as a voluntary dismissal. Reddick proceeded with the DOAH petition. Reddick subsequently retained counsel who withdrew Reddick's petition, and DOAH closed its file.

In April 2020, Reddick filed her complaint against USF, and after motion practice, the court granted USF's motion for summary judgment, holding it lacked subject matter jurisdiction based on Reddick's initial election to file a petition for relief with DOAH. The court explained that the FCHR's letter satisfied the notice requirements in Fla. Stat. § 760.11(4), (8) because it informed Reddick that the FCHR had not made a reasonable cause determination within 180 days and that she was entitled to proceed under Fla. Stat. § 760.11(4). The court also noted the FCHR gave Reddick four options, with options two and three informing Reddick she could either file a civil action or request a hearing with DOAH. The court further explained that, once Reddick elected to proceed with an administrative hearing, it became her exclusive remedy. Reddick appealed.

The Second DCA found that, because the FCHR failed to render a determination within 180 days, pursuant to Fla. Stat. § 760.11(8), Reddick had a vested right to pursue a civil action or seek an administrative hearing: "This right has been deemed a protected property interest." While this case did not involve a complete prohibition on Reddick's constitutionally protected right to seek relief for a violation of the Florida Civil Rights Act (FCRA), it did involve prohibiting Reddick from utilizing the procedure of her choice to address her claim. For that reason, the Second DCA found, she was entitled to adequate notice of her options before such a restriction was imposed. The problem in this case was that the FCHR's letter failed to clearly inform Reddick of her options and did not contain the exclusivity language of Fla. Stat. § 760.11(4). The court held:

> Contrary to the trial court's finding, Reddick was not informed—pursuant to section 760.11(8)—that because the FCHR failed to make its reasonable or no reasonable cause determination within 180 days, she was permitted to proceed under section 760.11(4) as if the FCHR determined there was reasonable cause to believe that a violation of the Florida Civil Rights Act had occurred. Nor was she informed that section 760.11(4) contained exclusivity language. And while the trial court found that options one (permitting the FCHR to continue its investigation) and four (withdrawing her complaint) were consistent with Reddick's options under section 760.11, . . . the inclusion of option one was confusing at best . . . . [The FCHR] letter did not constitute adequate notice of Reddick's rights.


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Ad size: _____

Phone

Accounting
850-561-5832

Login to:

The Checkoff Advertising 2023-2024

Mail with check made payable to

The Florida Bar
Labor and Employment
Law Section
651 E. Jefferson St.
Tallahassee, FL 32399

Send form to:

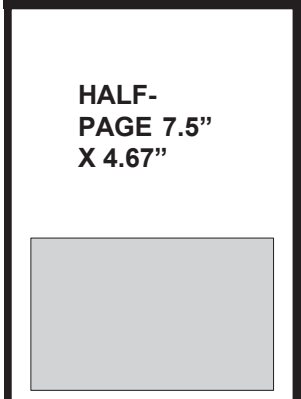
Britt Baxter
651 East Jefferson Street
Tallahassee, FL 32399
850-561-5630 or Fax: 850-561-9427
E-mail: bbaxter@floridabar.org

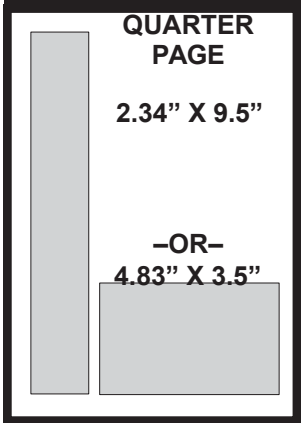
All ads must be camera-ready, in high resolution—at least 300 dpi—and in one of the following formats:

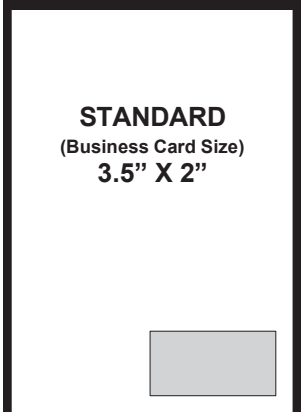
- Print optimized PDF (preferred) (PC or MAC)
- JPEG, EPS or TIF, 300 dpi (PC or MAC)
- Adobe Photoshop 6.0 - CC (PC or MAC)
- Adobe Illustrator CS6 - CC (PC or MAC)

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

*** Position requests are not guaranteed**







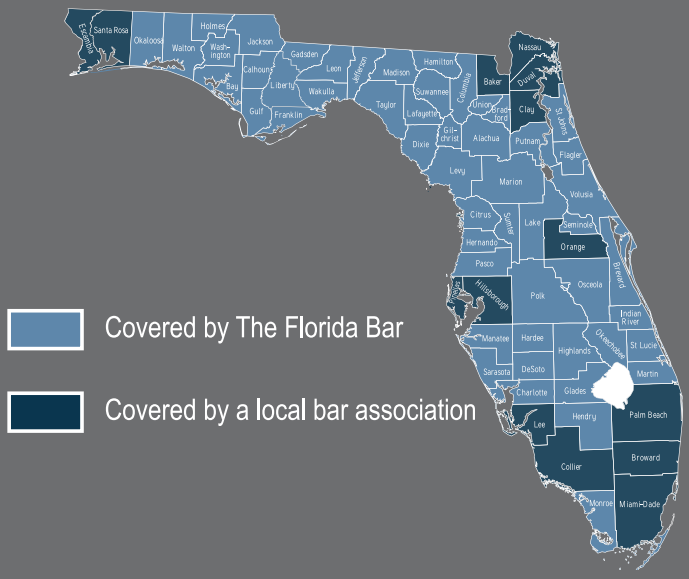
THE FLORIDA BAR
LRS
LAWYER REFERRAL SERVICE

Join the Lawyer Referral Service!

The Lawyer Referral Service is a program of The Florida Bar that is designed to assist members of the public who can afford to pay a lawyer, but do not know how to find one. All panel members of the Lawyer Referral Service must be licensed in Florida, must be members in good standing of The Florida Bar, and must maintain professional liability insurance coverage of not less than $100,000 in order to participate.

MEMBERSHIPCRITERIA

Any Florida Bar member in good standing with no pending findings of probable cause by a Florida Bar grievance committee, who maintains a practice in a county not served by any referral service sponsored by or affiliated with any local bar association, may qualify as a panel member.



LAWYER REFERRAL SERVICE FEATURES

- Toll-free line (800-342-8011)
- Operating hours from 8:00 a.m. to 5:30 p.m., Monday through Friday
- Full-time employees devoted to the efficient operation of the LRS
- Statewide marketing efforts
- Allows attorneys to negotiate fees
- Provides a source for new clients
- Includes an online Lawyer Referral Service. *lrs.floridabar.org*

Sign up today at: **lrs.floridabar.org**