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The Checkoff

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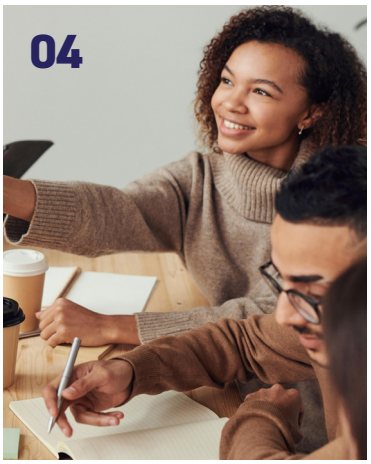

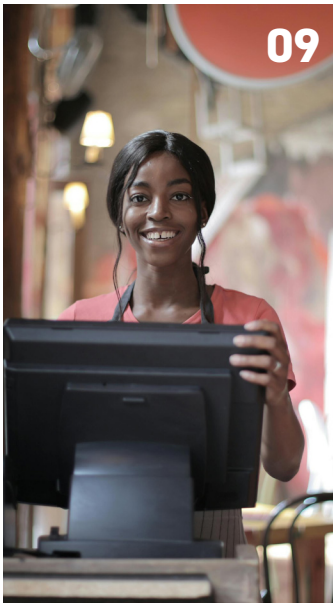

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CHAIR'S MESSAGE

Dear Labor and Employment Section Members,

What a whirlwind year 2024 was! As your section chair, I'm pleased to report that we did not only meet our goals but exceeded them—and managed to have some fun along the way.

Our commitment to providing valuable programming proved successful through three complimentary webinars featuring distinguished speakers on cutting-edge topics. A particular highlight of 2024 was co-sponsoring the 50th Anniversary Public Employee Labor Relations Forum with The Florida Bar City, County, and Local Government Law Section at Disney's Coronado Springs Resort in October. The special magistrate session was particularly enlightening, offering a fascinating retrospective on PERC's evolution over the past five decades. Check out the commemorative issue of *The Checkoff* to learn more about this program.

While Mother Nature had other plans for our intended St. Pete/Clearwater venue (Hurricanes Helene and Milton certainly made their presence known; our thoughts remain with those affected by the historic storm season), we've pivoted to transform our **Litigation Skills and Technology seminar** into a comprehensive full-day webinar on **March 5, 2025.** Registration details and pricing will be announced soon—you won't want to miss this reimagined program!

In addition to keeping an eye out for registration information on the litigation webinar, mark your calendars for these two upcoming free webinars (and more to come):

January 29, 2025: "Changes to the Florida Rules of Civil Procedure: What Labor and Employment Lawyers Need to Know."

February 19, 2025: "Expanding Intercultural Skills to Resolve Today's Increasingly Multi-Cultured Disputes."

And for those wondering about **Advanced Labor Topics**—we are working on securing **Hawks Cay Resort for April 25-26, 2025.** Consider it your excuse to dust off that bathing suit or fishing gear and combine CLE credits with ocean views! There's nothing quite like time together at a vacation destination to build camaraderie!

Finally, this issue contains a nomination form for the Section Hall of Fame, a posthumous honor recognizing those whose professional life was characterized by significant involvement in the section and the active practice of labor and employment law in Florida. The honoree's family receives the award at the Bar's Annual Convention in June, so please submit a nomination if you know someone whose career fits the bill. A list of past honorees is on the section website.

Our section thrives on volunteer participation, and we're always eager to welcome new voices. Whether you're interested in speaking, writing for one of our section's publications, or contributing in other ways, we'll help find the perfect fit for your interests and schedule. Special thanks to our new Florida Bar program administrators Amy Walker and Whitney Bledsoe for ensuring a seamless transition and maintaining our momentum.

The future looks bright for our section, and it's all thanks to members like you who make it possible. Don't hesitate to reach out with your section ideas, article ideas, questions, or just to say hello. After all, the best professional networks are built on personal connections.

As we navigate the challenges and opportunities of 2025, I'm both grateful and excited to serve as your chair. Together, we're not just building a stronger professional community—we're shaping the future of labor and employment law in Florida. Happy New Year!

Warmest regards,
Yvette D. Everhart
Chair, Labor and Employment Law Section

EMPLOYEE OR INDEPENDENT CONTRACTOR? Ensuring Proper Classification of Workers

By Abhishek Ramaswami, Plantation

Introduction

In recent years, the number of independent contractors, including freelance and gig workers, has increased dramatically. Though statistics vary, some estimates indicate that as many as sixty million Americans, or 38% of the workforce, are engaged in some form of independent contractor work.[1] In July 2023, almost twelve million people worked solely or predominately as independent contractors.[2] Independent contractors are attractive to employers because they allow businesses to grow without the many financial obligations—including employment benefits, administrative overhead, and FICA taxes—inherent in a more fixed, full-time W-2 workforce. With the increase of independent contractors, last year the Department of Labor (DOL) issued new guidelines on how to determine whether a worker is an employee or an independent contractor.

The Fair Labor Standards Act

One of the key bodies of law pertaining to employees in the United States is the Fair Labor Standards Act (FLSA), enforced by the DOL. The FLSA requires employers to pay all covered, non-exempt *employees* at least the federal minimum wage for all hours worked, and overtime pay at a rate of one and a half times the regular rate of pay for all hours worked in excess of forty hours in a workweek. The FLSA also requires most employers to maintain certain records regarding employees and prohibits discrimination and retaliatory action against employees. However, the FLSA's protections do not apply to independent contractors: Independent contractors are not covered by wage-and-hour laws; do not have the right to unionize; and are not eligible for workers' compensation, unemployment insurance, or most employer-provided benefits. Consequently, to protect the business and to ensure workers are receiving benefits to which they may be entitled, it is crucial for employers to properly classify their workers.

2024 Updated Classification Standard

On March 11, 2024, the DOL issued new guidance (the 2024 Rule) on how to distinguish employees from independent contractors under the FLSA. The 2024 Rule revised the guidelines regarding worker classification under the FLSA's January 2021 rule (the 2021 Rule), using instead an analysis that aligns with long-standing judicial precedent for determining employee or independent contractor status.[3]

By way of brief background, the 2021 Rule used the same six factors that are outlined below

for the 2024 Rule. However, the 2021 Rule emphasized the significance of two core factors: (1) the nature and degree of the individual's control over the work, and (2) the individual's opportunity for profit or loss. The 2021 Rule explained that these factors are traditionally the most probative and therefore should be afforded greater weight than other factors.[4] Widely viewed as making it easier for employers to designate workers as independent contractors, the 2021 approach, according to the DOL, "marked a departure from the consistent, longstanding adoption and application of the economic reality test by courts and the Department of how to determine whether a worker is an employee or an independent contractor under the FLSA."[5]

The 2024 Rule restores the multifactor analysis used by courts across the country for decades, ensuring that all relevant factors are analyzed to determine whether a worker is an employee or an independent contractor. The 2024 Rule addresses six factors that should guide the analysis of a worker's relationship with an employer, including: (1) the worker's opportunity for profit or loss; (2) the nature of the investments by the parties; (3) the permanency of the work relationship; (4) the nature and degree of control over the work; (5) the extent to which the work is an integral part of the employer's business; and (6) the worker's skill and initiative.

In accordance with the DOL's longstanding perspective that the "economic reality" of the relationship between the worker and potential employer should be analyzed based on the "totality of the circumstances," the 2024 Rule returns the focus to the six economic reality factors that both the DOL and courts historically have applied. Consistent with the United States Supreme Court's 1947 decision in *U.S. v. Silk*,[6] federal courts of appeals, including the Eleventh Circuit, have taken the approach that no one factor is controlling, nor is the list exhaustive.[7]

The six-factor test is used to assess if the worker is economically dependent on the employer for work or is instead in business individually. According to the DOL, all six factors should be considered equally. Unlike the 2021 Rule, no single factor determines a worker's status, and no one factor, or combination of factors, is more important than the other factors. Instead, the totality of the circumstances of the work relationship should be analyzed. The 2024 Rule clarifies that, in some cases, one or more factors may be more probative than others, and one or more factors may be irrelevant. A brief review of the factors follows:

1. **Opportunities for profit or loss**

This factor assesses whether a worker can earn profits or suffer losses through individual effort and decision-making. Relevant facts can include whether the worker negotiates the pay, decides to accept or decline work, hires his or her own workers, purchases material and equipment, or engages in other efforts to expand a business or secure more work, such as marketing or advertising.

2. Investments by the parties

This factor primarily looks at whether the worker makes investments that are capital or entrepreneurial in nature. Investments by a worker that support the growth of a business, including increasing the number of clients, reducing costs, extending market reach, or increasing sales, weigh in favor of independent contractor status. A lack of such capital or entrepreneurial investments weighs in favor of employee status. The focus should be on whether the worker makes similar types of investments as the employer (even if on a smaller scale) or investments of the type that would allow the worker to operate independently in the worker's industry or field. Such investments by the worker weigh in favor of independent contractor status.

3. Degree of permanence of the work relationship

Under this factor, a worker is more likely to be an employee when the work relationship is indefinite in duration, continuous, or exclusive of work for other employers. By contrast, this factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for himself or herself and marketing the services or labor to multiple entities. However, where a lack of permanence is due to operational characteristics that are unique or intrinsic to a particular business or industry and the workers they employ, this factor does not necessarily indicate independent contractor status unless the worker is exercising independent business initiative.

4. Nature and degree of control

This factor analyzes the level of control the potential employer has over the performance of the work and over the economic aspects of the work relationship. Relevant factors include whether the potential employer controls hiring, firing, scheduling, prices, or pay rates; supervises, including by way of technology, the performance of the work; has the right to supervise or discipline the worker; and takes actions that limit the worker's ability to work for others. The more control a potential employer maintains over these aspects of the work relationship, the more likely a worker has employee status rather than that of an independent contractor.

5. Extent to which the work performed is an integral part of the employer's business

This factor primarily looks at whether the work is critical, necessary, or central to the potential employer's principal business, which, if so, would indicate employee status. This factor does not depend on whether any individual worker in particular is an integral part of the business but, rather, whether the work performed is an integral part of the business.

6. Worker's skill and initiative

This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to a business-like initiative. Under this factor, employee status is indicated where the worker does not use specialized skills in performing the work or where the worker depends on training from the potential employer to perform the work. If the worker brings specialized skills to the work relationship, this fact does not itself indicate independent contractor status because both employees and independent contractors may be skilled workers. It is the worker's use of those specialized skills in connection with business-like initiative that indicates the worker is an independent contractor.

The 2024 Rule also notes that additional factors could possibly be used if they in some way illustrate the economic dependence between a worker and potential employer.

Irrelevant Factors

There are certain factors that are not relevant to whether an employment relationship exists. Importantly, what the worker is called is not relevant. A worker may be an employee under the FLSA regardless of the title the individual is given. A worker who is paid "off the books" or receives a 1099 form is not necessarily an independent contractor, and agreeing verbally or in writing to be classified as an independent contractor, including by signing an independent contractor agreement, does not automatically make a worker an independent contractor under the FLSA. Additionally, such factors as the place where work is performed, licensing by state/local government, and the time or mode of pay do not determine whether a worker is an employee or an independent contractor under the FLSA.

No Preemption

That being said, the DOL also specified that the 2024 Rule revises only the DOL's interpretation under the FLSA. The 2024 Rule has no effect on other laws, federal, state, or local, that use different standards for employee classification, including states such as California, Illinois, Massachusetts, New Hampshire, or New Jersey. The FLSA does not preempt any other laws that protect workers, so businesses must comply with all federal, state, and local laws that apply and must ensure they are meeting whichever standard provides workers with the greatest protection.[8] For example, some states, including those mentioned above, utilize the "ABC test" to determine employee or independent contractor status. Under the ABC test, a worker can be lawfully classified as an independent contractor only if all three of these criteria are satisfied: (a) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) the worker performs work that is outside the usual course of the hiring entity's business; and (c) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Risks of Misclassification

According to a report commissioned by the DOL, as many as 30% of employers, and perhaps more, have misclassified some workers.[9] Misclassification of workers as independent contractors can result in significant liability to the employer under the FLSA and other applicable employment and employee benefit laws. It is important to remember that even if the misclassification of a worker was inadvertent, rather than intentional, liability can still attach to the business.

Under the FLSA, an employer can be liable to the misclassified

worker for back overtime pay for a two-year period (or for three years, if the misclassification is considered "willful") and for liquidated damages. Even workers who, had they been hired as employees, might have qualified as exempt from overtime requirements under the FLSA, may be eligible for back overtime wages if, as putative independent contractors, they were not paid a guaranteed weekly salary.[10]

Incorrect independent contractor classifications often exclude these workers from participation in employee benefit plans for which they would have been eligible if classified as employees. Misclassified workers can seek to recover the value of benefits that they were wrongfully denied. Improper classifications can also jeopardize a plan's tax-qualified status under ERISA.[11] As it relates to health insurance, employers can incur penalties under the Patient Protection and Affordable Care Act for failure to properly calculate the number of employees for determining large employer status, as well as for failure to offer any health coverage or to offer adequate coverage to workers (and their dependents) who should have been classified as full-time employees.[12] Similarly, an individual who applies for workers' compensation or unemployment benefits may be entitled to benefits if the state agency determines the worker was misclassified as an independent contractor. The DOL and other state agencies have been increasingly likely to audit companies and conduct investigations into a company's classification practices, which can result in significant financial and legal liability if the classifications are found to be improper. Additionally, the FLSA, and some state wage-and-hour laws, allow for individual liability for managers or executives who make compensation or classification decisions.

Further, the worker's status as an employee also carries federal tax deduction obligations for income tax withholding and Social Security and Medicare taxes. Employers who fail to withhold these amounts from workers misclassified as independent contractors can be liable for up to the full amount of income tax that should have been withheld, for both the employer and employee shares for FICA, and for interest and penalties.[13] Finally, the FLSA also allows for attorneys' fees awards to successful plaintiffs.

Employee vs. Independent Contractor Classifications by Other Agencies

Internal Revenue Service

According to the Internal Revenue Service (IRS), the following factors are analyzed in determining whether a worker is an employee or independent contractor for tax purposes: (1) Behavioral control: Does the company control or have the right to control what the worker does and how the worker does the job? (2) Financial control: Does the business direct or control the financial and business aspects (things like how the worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.) of the worker's job? (3) Relationship of the parties: Are there written contracts or employee-type benefits such as a pension plan, insurance, or vacation pay? Will the relationship continue, and is the work performed a key aspect of the business?

If a business has misclassified an employee as an independent contractor, the business can be held liable for employment taxes for that worker. As referenced above, if a worker is an employee, an employer must withhold and pay income taxes, Social Security and Medicare taxes, and unemployment taxes.

National Labor Relations Board

In the June 13, 2023, decision in *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union*, Local 798, IATSE. Case 10–RC–276292, the National Labor Relations Board (NLRB) returned to the 2014 *FedEx Home Delivery* standard for determining independent contractor status under the National Labor Relations Act (NLRA), overruling *SuperShuttle* (2019). The NLRB reinstated the common-law agency test for determining worker status found in the Restatement (Second) of Agency § 220. Under that test, the NLRB looks at the following factors, assessing and weighing them, with no one factor being decisive: (1) the extent of control, which by agreement, the employer may exercise over the details of the work; (2) whether the worker is engaged in a distinct occupation or business; (3) whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the worker supplies the instrumentalities, tools, and the place of work; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating the relation of master and servant; and (10) whether the principal is or is not in business.

Under the NLRA, employees have the right to form or join unions; engage in protected, concerted

activities to address or improve working conditions; or refrain from engaging in these activities. Independent contractors are exempt from coverage under the NLRA, which means they generally have no right to form or join a union in the private sector.

Conclusion

Employers must be careful to review the pertinent requirements under federal and state laws to ensure they are properly classifying workers. An employer who realizes that its workers might be misclassified should take prompt steps to correct the misclassification. Based on the fact that numerous federal and state agencies monitor and audit employee and independent contractor classifications under a myriad of laws, employers who run afoul of the law are likely to be audited eventually. A business's failure to properly classify workers can result in substantial damages and penalties, including back pay (with overtime compensation); employee benefits (with stock options, retirement benefits, and health plan coverage); disability payments and workers' compensation; tax and insurance obligations; liquidated damages; and civil monetary penalties.[14] As such, employers should be very careful before classifying a worker as an independent contractor, as it may end up costing a business far more in the long run than any short-term cost savings such classification might yield.

Abhishek ("Ab") Ramaswami *is an associate at Cadogan Law in Plantation, Florida, practicing in the areas of labor and employment law and business litigation. He is a member of the State Bars of Florida, New York, and New Jersey.*

Endnotes

[1] *Freelance Forward 2023*, Upwork, https://www.upwork.com/research/freelance-forward-2023-research-report (Dec. 12, 2023).

[2] *Contingent and Alternative Employment Arrangements Summary*, U.S. Bureau of Labor Statistics, https://www.bls.gov/news.release/conemp.nr0.htm (Nov. 8, 2024).

[3] U.S. Dep't of Labor, Final Rule: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking.

[4] *See* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (2024), https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act [hereinafter Employee or Independent Contractor Classification].

[5] Employee or Independent Contractor Classification.

[6] 331 U.S. 704 (1947).

[7] Employee or Independent Contractor Classification.

[8] 29 U.S.C. § 218.

[9] Lynn Rhinehart et al., *Misclassification, the ABC Test, and Employee Status*, Econ. Policy Inst. (June 16, 2021), https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/.

[10] Kenneth W. Taber et al., *Employers Face Greater Misclassification Risk Under Resurrected Federal Independent Contractor Rule, Opening Door to Substantial Liability*, Pillsbury Winthrop Shaw Pittman LLP (Jan. 17, 2024), https://www.pillsburylaw.com/en/news-and-insights/dol-fair-labor-standards-act-contractors.html.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

CHILD LABOR IN FLORIDA:

A Weakening of State Protections

By Carly Stein, Tampa

Over the years, Florida has provided employment protections to children far beyond those outlined in the Fair Labor Standards Act (FLSA); but, as of July 1, 2024, those restrictions have been rolled back, allowing for greater use of child labor in the workforce. These changes were supported by certain special interest groups, including the Florida Restaurant and Lodging Association, which reported a need for additional labor in the state's tourism industries.[1] Currently, according to the National Restaurant Association, 9.2% of all restaurant and foodservice employees are under the age of eighteen.[2]

The FLSA imposes restrictions on fourteen- and fifteen-year-old employees as to the number of hours they can work daily and weekly, and the times of day they are permitted to work, both of which vary based on whether school is in session. The federal government places no restrictions on the number of hours a child age sixteen or seventeen may work, and Florida now is allowing children to work longer than it has in decades. Minors still cannot work before 6:30 a.m., but, as of July of 2024, they are now permitted to work after 11:00 p.m., provided school is not scheduled for the following day, thereby allowing later working hours most Fridays and Saturdays during the school year.[3] Minors cannot work over eight hours in a day when school is scheduled the following day, unless the work day in question is a Sunday or a holiday.[4]

Previously, no minors could work six consecutive days in a week, but that prohibition now applies only to minors age fifteen or under.[5] Additionally, under the new law, minors age sixteen or seventeen are not required to receive half-hour breaks unless they work at least eight consecutive hours, but fifteen-year-olds must still receive breaks of at least thirty minutes if they work four or more consecutive hours.[6]

The final major change in the law pertains to removing restrictions on hours per week that can be worked by minors. Previously, sixteen- and seventeen-year-olds could not work more than thirty hours in any given week, but that restriction now only applies while school is in session.[7] Furthermore, this restriction can be waived by either the minor's parent or guardian or—in the case of minors enrolled in an educational institution who qualify on a hardship basis, such as economic necessity or family emergency—by the school's superintendent or his or her designee.[8] The new law does not provide any guidance as to what the superintendent should consider in determining whether to waive the requirement and does not require consideration of the minor's school performance or disciplinary record.

The Florida legislature also exempted certain students from the aforementioned employment requirements. More specifically, students enrolled solely in Florida's Virtual School program or who are homeschooled do not have any restrictions on working, beyond those imposed by the federal government.[9]

These changes to the law come as employers in Florida have been the subject of numerous investigations by the United States Department of Labor (DOL) for violations of federal child labor laws, especially with regard to fourteen- and fifteen-year-old employees. In October 2024, the DOL obtained a consent order involving Adventure Landing, a Jacksonville Beach water park, for child labor violations related to minors ages fourteen to seventeen.[10] In 2022 and 2023, numerous Florida employers were subject to fines for violations involving minors age fifteen or under.[11]

Violation of the new, more

lenient provisions still carry the prior punishments of no more than $2,500 per offense for individuals or organizations that employ minors outside of the allotted times.[12] In addition, individuals who allow children to violate these provisions may be subject to misdemeanor criminal charges.[13]

Carly Stein *is an attorney and an assistant professor of instruction in the Muma College of Business at the University of South Florida, focused on teaching business law and ethics to students in the graduate and MBA programs.*

Endnotes

[1] Mitch Perry, *"Additional labor is desperately needed in Florida's tourism industry," New Bill Would Rollback State's Child Labor Laws*, Islander News (Jan. 11, 2024), https://www.islandernews.com/local/business/additional-labor-is-desperately-needed-in-florida-s-tourism-industry-new-bill-would-rollback-state/article_c55b7378-b089-11ee-80e3-87368fa99cd7.html.

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[3] Fla. Stat. § 450.081(2) (2024).

[4] *Id.*

[5] *Id.* at § 450.081(3).

[6] *Id.* at § 450.081(4).

[7] *Id.* at § 450.081(2).

[8] *Id.*

[9] *Id.* at § 450.081(5).

[10] News Release, Federal Judge Orders Florida Water Park to Pay $151K in Penalties After Department of Labor Again Finds Child Labor Violations (Oct. 21, 2024), https://www.dol.gov/newsroom/releases/whd/whd20241021.

[11] *See* Robert Yaniz, Jr., *DOL Fines Florida Skating Rinks for Illegal Employment of Minors*, OH&S, https://ohsonline.com/articles/2023/08/23/dol-fines-florida-skating-rinks-for-illegal-employment-of-minors.aspx?oly_enc_id=6600A2423378I1K (Aug, 23, 2023); News Release, South Florida Frozen Custard Franchisee Pays More Than $15K Penalty After Allowing 14- and 15-Year-Olds to Work Outside Legally Permitted Hours (Dec. 19, 2022), https://www.dol.gov/newsroom/releases/whd/whd20221219-1.

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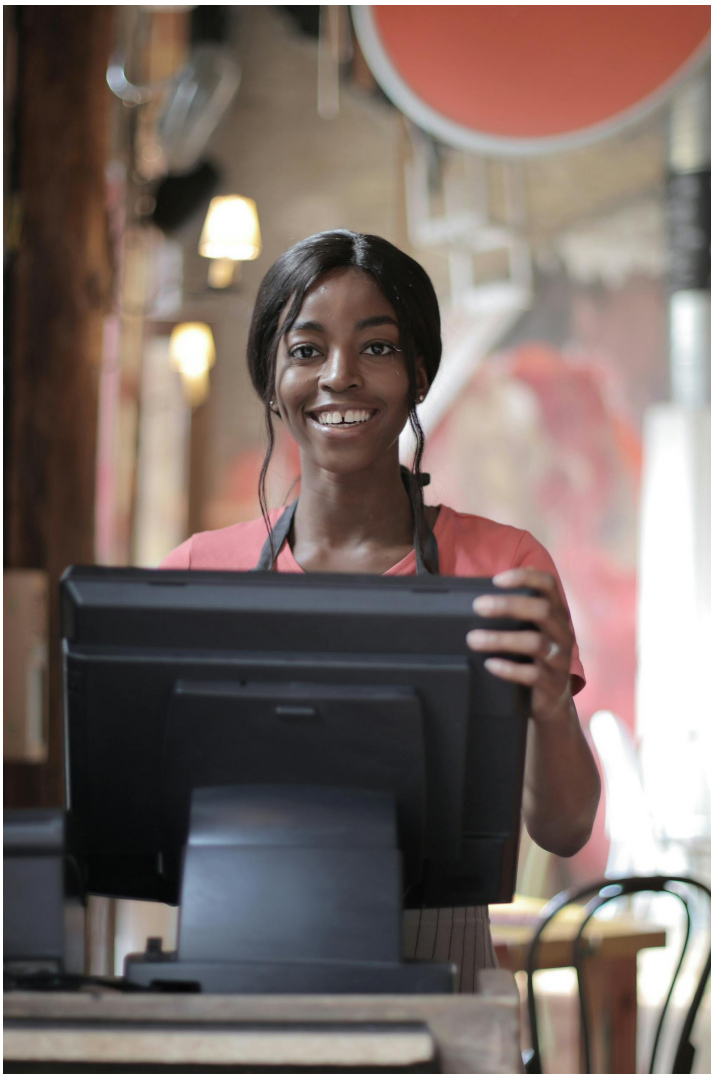
[13] *Id.* at § 450.141(1).



WHAT TO EXPECT FROM TRUMP'S SECOND TERM:

Key Areas to Watch in Employment Law and Labor Policy

By Suhaill Morales, Miami Lakes

With Donald J. Trump returning to the White House for a second term as president, employers and employees alike are anticipating potential shifts in employment law and labor policy. Drawing from his previous administration's priorities, these changes are likely to focus on reducing federal oversight, promoting business flexibility, and revisiting labor policies enacted in recent years. Below are key areas to watch.

Leadership at the Department of Labor: A Surprising Choice

On November 22, 2024, President-elect Trump surprised the business community by announcing Lori Chavez-DeRemer as his nominee to lead the Department of Labor (DOL). The selection of Chavez-DeRemer raised eyebrows among some in the employer community because she was one of only three Republicans to co-sponsor the controversial PRO Act this past July, a bill containing a proverbial wish list of pro-union initiatives. Perhaps complicating her nomination is the fact that the Teamsters president has publicly supported her selection, further casting her as an unconventional choice. Despite this, Chavez-DeRemer is expected to pursue many employer-friendly initiatives if confirmed by the Senate.

Federal Overtime Rules: Reversal or Delay

The Biden administration's updated overtime threshold rule, which was recently blocked by a Texas federal court, could face further challenges or delays under a Trump-led DOL. In April 2024, the Biden administration issued a final rule[1] raising the salary threshold for the "white-collar" exemptions and extending overtime coverage to approximately four million additional workers. The rule's two phases included an increase to approximately $44,000 on July 1, 2024, and a further increase to nearly $59,000 scheduled for January 1, 2025. Many had predicted the Trump DOL would roll back these requirements, and the Texas ruling[2] now provides an opportunity to scrap or significantly scale back the changes and time to implement a more employer-friendly approach. Employers should prepare for the possibility of fluctuating wage and hour enforcement, and attorneys should advise clients on adapting payroll practices amid this uncertainty.

Worker Classification: A Return to Business-Friendly Standards

Worker classification is another area where significant changes are anticipated. Under Trump's prior administration, the DOL adopted a more lenient interpretation of independent contractor status, benefiting gig

economy businesses and other industries reliant on flexible labor arrangements. Shortly before President Biden took office, the Trump DOL finalized a rule easing the requirements to classify workers as independent contractors. Although this rule was never implemented, it is highly likely that a second Trump administration will reinstate it. This change would have a profound impact on industries such as ridesharing and delivery services, making it easier for businesses to reclassify workers as independent contractors.

Similarly, the National Labor Relations Board (NLRB) under Trump is expected to reinforce employer-friendly interpretations of independent contractor status. By emphasizing entrepreneurial opportunity as a key factor in the common-law test for determining independent contractor classification, the NLRB would further align its standards with business interests. This approach would likely limit certain protections for workers classified as independent contractors, reinforcing distinctions between employees and independent contractors in labor relations contexts.[3]

Labor Law Reform: A Pro-Employer Shift

Labor unions will also face heightened scrutiny under a second Trump administration. During the first Trump term, the NLRB issued rulings that curtailed union organizing efforts and limited the power of labor unions. In contrast, the Biden administration ushered in an era of labor-friendly policies, including changes that made it more difficult to decertify unions, that created a framework for union bargaining without a vote by employees, and that allowed third-party union representatives to accompany safety inspectors during workplace visits. In addition to the likelihood of undoing these initiatives, President-elect Trump is expected to replace Jennifer Abruzzo, the current NLRB general counsel, with a conservative appointee tasked with reversing Abruzzo's pro-labor agenda.

The Trump administration is also likely to reintroduce a more restrictive joint employer standard. This change would provide greater protection for franchisors and staffing companies, limiting their liability for labor violations involving another employer's workforce. Under this tightened framework, direct and substantial control over essential employment terms—such as hiring, firing, wages, and scheduling—would remain the cornerstone for determining joint employer status.

OSHA and Workplace Safety: Relaxed Standards

Workplace safety standards enforced by the Occupational Safety and Health Administration (OSHA) are expected to become less stringent under Trump's leadership. During his first term, the administration reduced the number of OSHA inspectors, rescinded parts of electronic recordkeeping requirements, and relied heavily on the OSH Act's General Duty Clause to address workplace hazards rather than implementing specific standards. The proposed heat safety rule, slated for implementation in 2025, is likely to be scaled back or abandoned altogether. This reflects a broader strategy of prioritizing voluntary compliance programs over strict enforcement measures.

Discrimination Laws and DEI Initiatives: Scaled-Back Protections for Workers

In the realm of anti-discrimination laws and diversity, equity, and inclusion (DEI) initiatives, the Trump administration is poised to take a more conservative approach. The EEOC, under Republican leadership, is expected to revise or reverse Biden-era policies that strengthened protections for LGBTQ+ workers and expanded interpretations of the Pregnant Workers Fairness Act (PWFA). Andrea Lucas, widely expected to be Trump's nominee to chair the EEOC, has previously expressed skepticism regarding broad interpretations of the PWFA, particularly its inclusion of accommodations related to abortion, menopause, and infertility. With respect to LGBTQ+ protections, the Trump administration may seek to challenge workplace harassment guidelines that broadened the definition of sex-based discrimination, particularly where such protections intersect with religious freedoms.

Immigration and Employment Visas: Significant Impacts on the Labor Market

Finally, immigration reform is expected to remain a centerpiece of Trump's second term, with policies that could significantly impact the labor market. Employers reliant on H-1B visas or other employment-based immigration programs may face stricter requirements and increased application scrutiny. The administration has signaled its intent to curtail the reliance on highly skilled foreign workers and impose additional penalties on employers who employ undocumented workers. Worksite enforcement measures, including raids and heightened verification requirements, are also expected to increase. Programs such as Deferred Action for Childhood Arrivals (DACA) and Temporary Protected Status (TPS) are likely to face termination, which could result in a significant reduction in the available workforce.

A second Trump administration promises to bring sweeping changes to the employment law landscape, favoring business interests and rolling back labor-friendly policies of the Biden era. Attorneys should proactively guide clients through these transitions, ensuring compliance while helping them navigate opportunities and challenges presented by this evolving regulatory framework.

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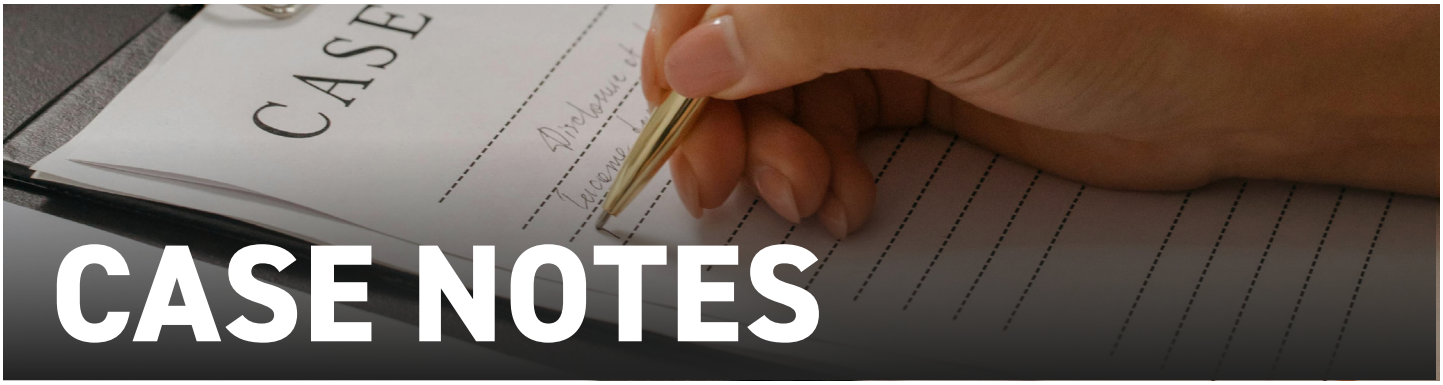
Endnotes

1 U.S. Dep't of Labor, Final Rule: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, https://www.dol.gov/sites/dolgov/files/WHD/flsa/ot-541-final-rule.pdf?mkt_tok=ODIzLVRXUy05OD-QAAAGSq7tizR_9uVHsxwaC5FsO6zhxkgz-JPbvhJxY5rACFWwc4sMfELJ46_Ho0kfH-qn7CO4cLDHTvh-euc4-SDCemUoCcCrVsz-6RtM4NHp6s4Kfmh3v0-8RQ.

2 *Texas v. Dep't of Labor*, Case No. 4:24-cv-00499-SDJ (E.D. Tex. Nov. 15, 2024).

3 For a full discussion of these distinctions, see Abhishek Ramaswami, *Employee or Independent Contractor? Ensuring Proper Classification of Workers*, *supra*.



CASE NOTES

by Viktoryia Johnson, Tampa

Title IX of the Education Amendments of 1972 does not create implied right of action for sex discrimination in employment.

Joseph v. Bd. of Regents of the Univ. Sys. of Georgia, 121 F.4th 855 (11th Cir. 2024).

Thomas Crowther, a former art professor at Augusta University, and MaChelle Joseph, a former head women's basketball coach at Georgia Tech, filed separate complaints of discrimination and retaliation against the University System of Georgia. The common question between the two consolidated appeals was whether Title IX of the Education Amendments of 1972 (Title IX) provides an implied right of action for sex discrimination in employment.

Crowther worked as an art professor at Augusta University for many years. During the Spring 2020 semester, several students complained that Crowther had sexually harassed them. After an investigation found that Crowther had violated the sexual harassment policy, Crowther was suspended for a semester; eventually, the University declined to renew his contract for the next academic year. Crowther sued the Board of Regents (the Board) of the University System of Georgia and several officials for discrimination and retaliation under Title IX and other statutes. The district court denied the Board's motion to dismiss Crowther's claims against it under Title IX.

Joseph was the head women's basketball coach at Georgia Tech for many years. Although Joseph and her male counterpart—the head men's basketball coach—performed the same kinds of duties, the men's basketball program consistently received more money and resources from Georgia Tech than the women's program. The women's locker room and the coaches' office space were outdated, smaller, and inferior in comparison to the men's; the men's team had more funds and a dedicated full-time marketing professional; the men's head coach was paid for television and radio sets during the season whereas Joseph was not; assistant coach and staff salaries for the men's team were larger; and the men's team received more travel funds than the women's team. Over time, Joseph complained to athletic department leadership about these and other disparities, to the point that the athletic director reportedly became "worn down" by her complaints.

At the same time that Joseph was complaining, Georgia Tech was also receiving various complaints about Joseph. For example, Joseph reportedly was intoxicated at a home football game; was suspected of paying recruits impermissible benefits; and was accused of mistreating players on the women's team and causing "genuine terror" among them, leading several players' parents to write grievance letters to the athletic department leadership. While Georgia Tech was deciding how to navigate the parents' complaints, Joseph again filed a complaint of discrimination, disparate resources, and retaliation. Georgia Tech ultimately hired an attorney to investigate the parents' complaints. At the end of the investigation, Joseph was terminated. Joseph sued, alleging, in part, claims against the Board and the athletic association for sex discrimination and retaliation under Title IX. The district court dismissed Joseph's claims of employment discrimination under Title IX as precluded by Title VII.

On appeal, Crowther and Joseph asked the Eleventh Circuit to decide whether the rights and remedies under Title VII precluded claims for employment discrimination under Title IX. The Eleventh Circuit posed for itself a broader question: whether Title IX provides an implied right of action for sex discrimination in employment.

The court began its analysis by recalling that private rights of action to enforce federal law must be created by Congress. The court noted that, where implied rights of action exist, the court "must honor them, but . . . cannot expand their scope without

assuring [itself] that Congress unambiguously intended a right of action to cover more people or more situations than courts have yet recognized." The court recounted that Congress enacted Title IX under the Spending Clause and provided an express remedial scheme for withdrawing federal funding. Indeed, the typical remedy for noncompliance with federally imposed conditions under the Spending Clause is not a private cause of action, but federal government action to terminate funds. The court further noted that the Supreme Court has held that Title IX provides an implied right of action for students who complain of sex discrimination by schools that receive federal funds. The prospective students, thus, are clearly members of an intended beneficiary class, and Congress intended Title IX not only to ferret out discriminatory uses of federal funding but also to protect individual students from discrimination. The Supreme Court has also held that Title IX provides a private right of action for retaliation for an employee's complaint about discrimination against students. However, the Supreme Court has never extended to employees of educational institutions an implied private right of action for claims of sex discrimination under Title IX. So, to determine the appropriate scope of the implied right of action—and whether that scope includes employment discrimination—the Eleventh Circuit looked to the text of Title IX and its statutory context. The court found that "nothing about that language indicates congressional intent to provide a private right of action to employees of educational institutions. In other words, although there can be little doubt that Title IX's focus on educational institutions and programs represents an intent to provide students new protections from sex discrimination, that connection is less obvious for employees." In light of Title VII's express remedial scheme, the court said that it "would be anomalous to conclude that the implied right of action under Title IX would allow employees of educational institutions immediate access to judicial remedies unburdened by any administrative procedures," whereas Title VII requires an exhaustion of administrative remedies before suing for employment discrimination. In the end, the Eleventh Circuit held that "Title IX does not create an implied right of action for sex discrimination in employment."

The Eleventh Circuit holds that (1) a Florida breach of contract claim for back pay does not import the prevailing wage under the Service Contract Act, and (2) the "regular rate" under the FLSA may include the prevailing wage required by the Service Contract Act.

Perez v. Owl, Inc., 110 F.4th 1296 (11th Cir. 2024).

Owl, Inc., a contractor with the Department of Veterans Affairs (VA), transports veterans to and from medical appointments. Owl's contract with the federal government is subject to the Service Contract Act (SCA), 41 U.S.C. § 6701, *et seq.*, which requires Owl to pay its drivers a prevailing wage based on the drivers' job classification issued by the U.S. Department of Labor (DOL). Owl and its drivers disagreed about the proper classification for the drivers but agreed that they were either taxi drivers, shuttle bus drivers, or ambulance drivers. The DOL mandates that taxi drivers be paid around $11 per hour, shuttle bus drivers around $15 per hour, and ambulance drivers around $18 per hour.

When Owl was initially awarded its contract with the VA, it classified its drivers as taxi drivers and entered oral, at-will employment contracts with the drivers to pay them around $11 per hour. Several years later, the DOL investigated Owl's classification and determined that Owl drivers should be classified as shuttle bus drivers and paid accordingly.

A class of Owl drivers sued Owl in 2017, seeking back pay and overtime payments based on Owl's misclassification of the drivers. The drivers argued that Owl (1) breached its employment contracts with the drivers under Florida law by failing to pay its drivers the correct wage under the SCA, and (2) violated the Fair Labor Standards Act (FLSA) when it failed to pay the drivers overtime because the FLSA overtime wages should have been based on a higher rate than the taxi driver rate that Owl paid. Owl moved for summary judgment on the breach of contract claim and moved to prohibit the drivers from presenting evidence of the higher shuttle bus driver rate. The district court granted Owl's motion for summary judgment, reasoning that, although the SCA might incorporate the mandated wage into employment contracts that are silent on the matter, the Owl drivers contracted for "an explicit rate of pay"—the taxi driver rate—and that enforcing the higher SCA wage through a state breach of contract claim "would create a private right of action under the SCA" even though none existed. The district court also granted Owl's motion in limine because, in light of its rejection of the drivers' breach of contract claim, damages for the FLSA overtime claim were limited to one-and-a-half times the rate the drivers received, even if they were due a higher hourly rate under the SCA. The parties later reached a settlement agreement.

On appeal, the drivers argued that the district court (1) should not have granted summary judgment on their state law breach of contract claim because the SCA minimum wage was incorporated into their employment contracts, and (2) erred when it limited their damages under their FLSA overtime claim. The Eleventh Circuit began its analysis by reminding that the SCA applies to certain contracts made by the federal government and must "contain a provision specifying the minimum wage to be paid to each class of service employee engaged in the performance of the contract." There is "no private right of action under the SCA," and the Secretary of Labor may enforce the SCA through the DOL administrative review board. To that end, the DOL determined that Owl's drivers should be classified as shuttle bus drivers and that Owl paid its drivers about $4 less an hour than required by Owl's contract with the VA. By bringing a claim under Florida contract law, the drivers sought to recoup the difference between what Owl paid them and what they say the SCA required.

Owl argued on appeal that, even if it breached a clause in its contract with the government, it did not breach any obligation under its employment contract with the drivers. Instead, Owl argued, it paid the drivers exactly what they agreed to be paid—an $11 hourly rate. The Eleventh Circuit agreed with Owl and held that the drivers could not enforce the SCA prevailing rate through a Florida breach of contract claim: "For one, the SCA applies to contracts 'made by the Federal Government,' so the only contract the SCA would apply to is the contract between

Owl and the VA, not the contracts between Owl and its drivers." More importantly, the court said, the contracts between Owl and its drivers disclosed an intention to contract for something other than the SCA rate: "Although there was no written contract, the drivers agreed to accept the taxi driver rate, not a rate to be determined by the DOL under the SCA." The court clarified that the parties usually *could* incorporate federal statutes without private rights of action into their employment contracts, but the problem with the case at hand was not that it was impossible to incorporate a federal minimum wage law into an employment contract, but that there was no reason to think that the drivers and Owl actually did so. In this case, the parties agreed to the taxi driver rate, and it was nearly five years later that the DOL brought an enforcement action and told Owl that it should have paid its drivers the shuttle bus driver rate instead.

The court next considered whether the district court erred when it granted Owl's motion in limine to cap the drivers' FLSA overtime damages at one-and-one-half times the hourly rate that Owl paid them, notwithstanding the DOL's determination that they should have been paid a higher hourly wage under the SCA. The court agreed with the drivers that an employer cannot cap overtime pay by paying an unlawfully low hourly rate and that damages for their FLSA overtime claim should have been based on the higher SCA prevailing rate to the extent that rate was what the law required.

The plaintiff plausibly alleged that the city commission discriminated against him because he is white; federal law is no more tolerant of discrimination against whites than it is of discrimination against members of any other race.

McCarthy v. City of Cordele, Georgia, 111 F.4th 1141 (11th Cir. 2024)

The city commission of Cordele, Georgia, hired Roland McCarthy, a white man, as its finance director in 2017; in January 2021, he was unanimously promoted to city manager. Later in 2021, Joshua Deriso announced his campaign for chair of the city commission. During that campaign, he frequently expressed his goal to see "an entirely African American Commission" and to replace Caucasian employees with African Americans. He stated on social media that, if elected chair, he would replace McCarthy with a city manager "of color; ideally a woman," within ninety days of taking office; that the "new City Manager should be Black"; and that "Cordele's heads of Departments are not diverse at all! Structure needs to change . . . More Blacks!!!" During two "Facebook Live" video streams, Deriso likewise promised "to replace Caucasian department heads with African Americans"; said that it was "time for us [African Americans] to run our city"; and promised to "take actions" to secure an "all black" city commission within four years. Deriso was elected commission chair in November 2021. The following month, the outgoing commissioners voted to renew McCarthy's employment as city manager for another year. The newly elected commissioners—four black and one white—however, voted to terminate McCarthy's employment and to hire a black woman to replace him. The new commissioners voted along racial lines; Deriso did not participate in the vote. McCarthy

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The Checkoff

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was fired and not allowed to return to his former position as finance director.

McCarthy sued the city of Cordele and Deriso for intentional race discrimination under 42 U.S.C. §§ 1981, 1983, and Title VII, and for breach of contract. In part, McCarthy alleged that Deriso "orchestrated the decision to terminate [him] due to his race" and "led, directed, and encouraged" the other commissioners to replace McCarthy "with an African American candidate." The city and Deriso moved to dismiss McCarthy's complaint for failure to state a claim because it did not plausibly allege that a "majority" of the five-member commission harbored racial animus against McCarthy when it voted to fire him as city manager; that McCarthy's claims against Deriso in his official capacity were "impermissibly duplicative" of his claims against the city; and that qualified immunity barred McCarthy's claims against Deriso individually. The district court dismissed McCarthy's complaint, and McCarthy appealed.

The Eleventh Circuit began its analysis by noting that Title VII, § 1981, and § 1983 prohibit a public employer from firing any employee because of his race and that the statutes are not limited to discrimination against members of any particular race. The court found that the allegations in McCarthy's complaint—that Deriso "led, directed, and encouraged" his fellow commissioners to fire McCarthy and replace him "with an African American candidate"; that, even before the new commissioners took office, Deriso had garnered enough support for his discriminatory plan to tell McCarthy that he was being replaced with a black woman; that, immediately upon entering office, a majority of the commissioners voted to fire McCarthy, even though he was an exemplary employee and the former commission had renewed his contract one month earlier; that the commission hired a black woman to replace McCarthy; and that all the commissioners who voted to fire McCarthy were black—permitted the reasonable inference that the commissioners who voted to fire him did so because of his race. Thus, the district court erred by dismissing his claims of racial discrimination against the city. "Federal law is no more tolerant of discrimination against whites than it is discrimination against members of any other race. 'Eliminating racial discrimination means eliminating all of it.'"

At the same time, the Eleventh Circuit found that the district court did not err by dismissing McCarthy's claims of discrimination against Deriso individually. "Only a person who has 'the power to make official decisions' can be individually liable for racial discrimination under section 1983." In this case, the commission, not Deriso individually, fired McCarthy. Deriso could not be held individually liable for that decision under § 1983, and, because a § 1981 claim merged into a § 1983 claim for racial discrimination, the court held, McCarthy's § 1981 claim against Deriso individually also failed.

The First District Court of Appeal joins the Second District in holding that a litigant must prove an actual violation of a law, rule, or regulation in order to receive protections from employment retaliation under Florida's Whistle-blower's Act but certifies conflict with the Fourth District.

Gessner v. S. Co., No. 1D2023-2297, 2024 WL 4830575 (Fla. 1st DCA 2024).

Clint Shannon Gessner worked for Gulf Power Company for nearly a decade; struggled with issues relating to performance, skills progression, and competencies as a welder mechanic; and was disciplined multiple times. He also raised a number of safety-related concerns throughout his time with the company. Gessner's employment was ultimately terminated after he used disparaging language towards a coworker and acting team leader. Gessner sued, alleging that, instead, he was terminated for objecting to certain practices "that were in violation of state and/or federal laws or that he reasonably and objectively believed were in said violation." On summary judgment, Gessner argued that, to establish a violation of the Florida Whistle-blower's Act (FWA), he only needed to present evidence of a good-faith, objectively reasonable belief that his employer's actions were illegal—not proof of an actual violation. The trial court disagreed, finding that an "actual" violation was required, following the Second District's opinion in *Kearns v. Farmer Acquisition Co.*, 157 So. 3d 458 (Fla. 2d DCA 2015).

On appeal, the First District began its analysis by noting the years' long disagreement between Florida's Second and Fourth District Courts of Appeal as to which standard applies under the FWA, and discussing the different court opinions that followed, which came down on both sides of the issue. Based on a plain reading of the FWA and the reasoning in *White v. Purdue Pharma, Inc.*, 369 F. Supp. 2d 1335 (M.D. Fla. 2005), however, the First District ultimately "agree[d] with the Second District's reasoning in *Kearns* and h[e]ld that a plaintiff in a private sector FWA action brought pursuant to section 448.102(3) must establish that he or she objected to, or refused to participate in, an activity, policy, or practice of the employer that is an actual violation of a law, rule, or regulation. In so holding, [the court was] guided first and foremost by the plain language of section 448.102(3) . . . . Courts are not at liberty to extend, modify, or limit a statute's express terms." The court continued: "Interpreting section 448.102(3) to include a good-faith standard, as *Aery* [*v. Wallace Lincoln-Mercury, LLC*, 118 So. 3d 904 (Fla. 4th DCA 2013)] did and as [Gessner] asks us to do, would require us to extend or add words to the statute that were not placed there by the Legislature." While acknowledging Gessner's argument that the court's interpretation of the FWA would "frustrate the purpose behind the FWA of encouraging employees to raise potential safety issues without fear of reprisal from their employers," the court concluded that it was "constrained by the plain language of the statute." The First District therefore affirmed summary judgment in favor of the employer and certified the conflict with the Fourth District's decision in *Aery* to the Florida Supreme Court.

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Labor and Employment Law Section Hall of Fame

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