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The Florida Bar
Vol. LII, No.1
August 2013

A PUBLICATION OF THE FLORIDA BAR LABOR & EMPLOYMENT LAW SECTION

IN THIS ISSUE:

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See pp. 15-17 for brochure.

High Court Narrowly Defines "Supervisor" for Purposes of Title VII

By Erin Jackson and Elizabeth Stringer, Tampa

In a long-awaited decision issued on June 24, 2013, the United States Supreme Court—by affirmatively defining "supervisor" as an employee who is empowered by the employer to take "tangible employment actions" regarding a subordinate employee—narrowed the circumstances under which an employer can be held liable for harassment under Title VII. *Vance v. Ball State Univ.*[1] Such actions, said the Court, citing its opinion in *Burlington Industries, Inc. v. Ellerth,* are those that involve a "'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'"[2] Because the liability of employers can hinge on the status of the harasser, the determination as to whether the employee was a supervisor or a co-worker impacts the theories and approaches of both

See "High Court Defines 'Supervisor'," page 6

U.S. Supreme Court Reaffirms Class Action Waivers in Arbitration Agreements, Effectively Nullifying the "Effective Vindication" Doctrine

By James A. McKenna, Chicago

Again applying the Federal Arbitration Act ("FAA") to uphold agreements requiring parties to arbitrate their disputes rather than litigate them in court, the United States Supreme Court recently held that the FAA prohibits courts from invalidating a contractual waiver of class arbitration because the cost of arbitrating a federal statutory claim individually exceeds the potential recovery, even if the effect of enforcing the waiver is to prevent the claim from being brought. *American Express Co. v. Italian Colors Restaurant*.[1]

Facts

Retail merchants who accept American Express personal and corporate charge cards alleged that American Express used its market power to impose an "honor all cards" policy, pursuant to which merchants were required to accept the full range of American Express cards, including revolving credit cards and debit cards, as a condition to being able to accept the traditional American Express

See "Class Action Waivers," page 9

Message from the Chair

June 16, 1977 -- Just after my second year of law school and third week into my summer internship, I was sent to an attorney luncheon in Orlando. Everyone in the room was a stranger. I sat down at a table. A stocky man was sitting next to me, nursing a drink. He looked straight ahead and in a gravelly whisper of a voice said, "Think you can take me, kid?" I turned and looked at him and then looked down at his hands. They were big. "What? No sir." I kind of stammered. He leaned in toward me and dared, "Want to try?" I replied, "No sir!" With that, he put his arm around my shoulders, gave me a "welcome to the group" hug and laughed. It was my first meeting of our Labor and Employment Law Section (back then, a Committee), and I was immediately welcomed.

The luncheon speaker was John "Doc" Pennello. He was introduced as a member of the Board (whatever that was). Doc Pennello then talked about his career with the NLRB. He joined as a field agent just after passage of the National Labor Relations Act. He explained that when he started as a Board agent no one really knew what the NLRA was, and neither he nor the NLRB was respected. He gave the example of going to the Eastern Shore of Maryland to conduct his first election for employees to vote on whether they wanted a union. However, before he could do so, the employer "kidnapped" him and held him in a motel room to make sure the election would not be held. He then went on to discuss the "current" issues facing the NLRB. That day changed my life. I was hooked on labor and employment law.

Since then, I have been active in the Section, participating in seminars, committees and the Executive Council. Through my involvement, I learned the law from great presenters, met many interesting people, made friends with folks I otherwise would never have met, had lunches and dinners with government officials and judges, enjoyed great venues, and watched our Section grow dramatically over the years.

So what's in store this year for our Section? Keep an eye out for our upcoming live CLE seminars and audio webcasts. We are now hosting both Facebook and LinkedIn pages that I urge you to check out and join.

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Robert S. Turk, Chair
Stearns Weaver, Miami

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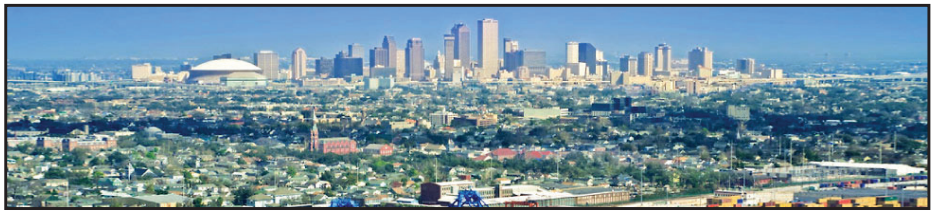

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Eighth Circuit Holds That Plaintiff Seeking Unpaid Overtime Under the FLSA Must Provide Evidence of Actual Damages Even Where Employer Failed to Keep Accurate Time Records

By Laurie M. Weinstein, Ft. Lauderdale

In *Carmody v. Kansas City Board of Police Commissioners*,[1] the Eighth Circuit addressed a plaintiff's burden of proof in a Fair Labor Standards Act ("FLSA") case where an employer failed to keep accurate time records. The court held that, even under a "relaxed" evidentiary standard, a plaintiff must still provide evidence of actual damages.

In *Carmody*, police officers sued the Kansas City Board of Police Commissioners under the FLSA and alleged that they were given flextime rather than overtime pay for overtime hours worked. The FLSA requires overtime be paid at time-and-a-half for any hours worked over forty in a week.[2] Neither the officers nor the city tracked the flextime that accrued.

In their written discovery responses, the officers failed to provide the number of unpaid hours or the amount of money owed. The officers stated that they needed access to department documents, such as daily activity sheets, to prepare more accurate discovery responses. The city produced the majority of the requested documents six weeks before the discovery deadline and finished the document production two weeks before the deadline. The city moved for summary judgment after discovery closed, asserting that the officers could not satisfy their evidentiary burden. In response, the officers provided affidavits that identified what the Eighth Circuit opinion termed "precise" estimates week by week, of hours owed.

The district court struck the officers' affidavits, finding that the officers unjustifiably failed to comply with their discovery obligations under Fed. R. Civ. P. 26(e)(1)(a). In evaluating the admissibility of such evidence, the district court applied a balancing test. Specifically, the district court reasoned that the late production of the affidavits was "extremely prejudicial" to the city because the city's litigation posture may have been different if the information had been provided earlier. The district court noted that admitting the affidavits would likely require reopening discovery and re-deposing every officer, which would be an unnecessary expense. Additionally, the court determined that lesser sanctions would not deter future non-compliance with discovery requests. The district court granted the city's motion for summary judgment, reasoning that the officers could not satisfy their burden of proof without the affidavits.

On appeal, the Eighth Circuit affirmed summary judgment in the city's favor. The court acknowledged the "relaxed" evidentiary standard established by *Anderson v. Mt. Clemens Pottery Co.*[3] and stated that an employee is relieved of "proving the precise extent of uncompensated work" when an employer fails to maintain time records.[4] The court, however, noted that the relaxed evidentiary standard under *Anderson* "only applies where the existence of damages is certain."[5] In *Carmody*, the Eighth Circuit found the officers failed to meet this burden because they did not show that they carried flex hours forward into a new workweek or that they went entirely unpaid for those hours. The officers did not provide the specific dates worked, specific hours worked, or money owed. An investigation by the Kansas City Board of Police Commissioners' Internal Affairs Department was insufficient evidence of actual damages because it could not determine whether the officers used flextime or time off for the hours where overtime appeared unpaid.

The Eighth Circuit concluded that "[t]he city's failure to provide accurate time records reduces the officers' burden, but does not eliminate it."[6] Even though *Anderson* relaxed the burden of proof because the city failed to keep accurate time records, the officers still had the burden to "prove the existence of damages."[7] In sum, said the court, "[w]ithout record evidence of a single hour worked over forty hours that did not receive overtime wages or flextime, the officers' unsupported estimations of the unpaid hours due are not enough."[8]

L. WEINSTEIN

***Laurie M. Weinstein** is an associate in the Fort Lauderdale office of Berger Singerman LLP. She splits her time handling employment related litigation and complex commercial litigation. Her litigation experience includes handling matters involving non-compete agreements, trade secrets, and the Fair Labor Standards Act.*

Endnotes:

1 713 F.3d 1 (8th Cir. 2013).
2 *See* 29 U.S.C. §§ 207, 215.
3 328 U.S. 680 (1946).
4 *Carmody*, 713 F.3d at 406.
5 *Id.*
6 *Id.* at 407.
7 *Id.*
8 *Id.*

U.S. Supreme Court to Take up Eleventh Circuit's Decision in "Thing of Value" Case

By Jason C. Taylor, Tallahassee

The Eleventh Circuit, in its January 18, 2012 opinion in *Mulhall v. Unite Here Local 355*,[1] addressed the concept of a "thing of value" in the context of Section 302 of the Labor Management Relations Act ("Section 302"), 29 U.S.C. § 186. The ruling was not a final determination on the merits of the case but was instead a reversal of the district court's decision to dismiss the Complaint of Plaintiff Martin Mulhall. On June 24, 2013, the United States Supreme Court granted the Petition for Certiorari filed by Unite Here Local 355 ("Unite Here") seeking review of the Eleventh Circuit's decision.[2] The possibility exists that on review the Court will establish parameters for the term "thing of value" that could substantially alter the relationship between unions and employers in organization efforts.

Procedural Background

Mulhall is an employee of Hollywood Greyhound Track, d/b/a Mardi Gras Gaming ("Mardi Gras").[3] Mardi Gras entered into a memorandum of agreement with Unite Here, a labor union, on August 23, 2004 ("Agreement"). The terms of the Agreement provided for Mardi Gras to allow Unite Here representatives access to private work space for organization efforts; to give Unite Here a list of employees, including their job classifications, departments and addresses; and to remain neutral during organization efforts. As consideration for the access, information and neutrality, Unite Here agreed to provide financial support (spending in excess of $100,000) for a state ballot initiative favorable to Mardi Gras related to casino gaming. Unite Here also agreed not to picket, boycott, strike or undertake any economic activity against Mardi Gras during the pendency of the Agreement.[4]

Mulhall was less than enthused about the prospect of union representation and initiated the underlying action, asserting that the consideration Mardi Gras provided for the Agreement included "thing[s] of value" in violation of Section 302.[5] After Mulhall withstood a challenge to his standing to bring such an action, the district court dismissed Mulhall's Complaint, ruling that no part of Mardi Gras' consideration for the Agreement could be deemed a "thing of value."[6] On appeal, the Eleventh Circuit reversed.[7] The appellate panel found that Mulhall's allegations could withstand dismissal because it was possible for the consideration Mardi Gras provided to be "thing[s] of value" using a common sense understanding of the term.[8]

Section 302

The title of Section 302 is "Restrictions on Financial Transactions,"[9] and the Section generally prohibits any employer from giving, or a union from receiving, any money or "thing of value," subject to limited exceptions.[10] The exceptions relate to payments to an employee acting for the employer in labor relations or personnel administration; court judgments; trust funds for the benefit of employees; and other matters not related to the Agreement at issue.[11] The statute obviously seeks to prevent corruption in organized labor processes, but it is less clear what "thing of value" might indicate corruption or should be avoided to prevent the appearance of corruption.

In addressing the issue, the Eleventh Circuit essentially found that whether something is of value is in the eye of the beholder and that the meaning can therefore vary.[12] Thus, noted the court, a $5 tie given as a Christmas present would have differing value to different people depending on the spirit in which or purpose for which it was given.[13]

Predictably, the lack of more definite guidance from the legislative drafters produces an "I know it when I see it" analysis.[14] The difference in this instance is whether an agreement, or consideration in agreements similar to the Agreement at issue, has the purpose of improperly influencing the relationship between the employer and the union.

Existing Precedent

In a press release, Unite Here asserted the Eleventh Circuit's decision is "out of step with all the other courts which have considered the theory advanced" by *Mulhall*.[15] Given that only two other circuits have considered the issue, that assertion may be a stretch. The Third Circuit Court of Appeals took the position that a neutrality agreement did not violate Section 302 because organizing assistance did not qualify as a payment, loan or delivery, and also because the benefit from a cooperative process could not constitute a "thing of value."[16] Similarly, the Fourth Circuit Court of Appeals determined that organizing assistance consisting of access to private property, neutrality and requirements for some employees to attend union presentations on company time had no ascertainable value and could not give rise to a violation of Section 302.[17]

The Eleventh Circuit considered not only the aforementioned decisions, but also the Sixth Circuit's determination that a "thing of value" was not limited to things of monetary value.[18] Further, the panel weighed the opinion of the Second Circuit that "value is usually set by the desire to have the 'thing' and depends on the individual and circumstances."[19]

The Grant of Certiorari

It may be that the Supreme Court's willingness to hear this matter is an effort to place limits on the interpretation of a "thing of value." Further clarification

could have either the purpose of setting boundaries for the law or avoiding similar actions where an individual can prevent the majority of employees from proceeding with organization. With regard to *Mulhall*, it is interesting that the Eleventh Circuit has not gone so far as to establish specifically what a "thing of value" is, but only to allow Mulhall's Complaint to survive dismissal. Such rulings, of course, are no indication as to future success on the merits, only that a party did not succeed in demonstrating that absolutely no sustainable cause of action exists. Regardless of the reason, it appears the possibility of a broad definition has caught the interest of the Court.

From the strict constructionist view, it would seem that the lack of any ascertainable monetary value is a valid basis to restrict the definition of a "thing of value." The title of the statute ("Restrictions on Financial Transactions") would also support such a conclusion.[20] Further, there is no specific language in the statute addressing the intent of the consideration offered.[21] Such a narrow view, however, could also allow the exchange of items or services that represent significant savings in costs and create the very influence the statute is trying to avoid, particularly if the items or services are of a continuing nature.

Alternatively, as information becomes a more valuable commodity, and where employees are concerned about jobs in an economy that is still recovering, consideration such as employee lists and neutrality take on a higher value than simply negligible documents and bargaining positions. That interpretation would work a substantial change on the current practices between employers and unions.

Finally, in *Mulhall*, if Unite Here's efforts regarding the ballot initiative are any indication, the union placed a value of at least $100,000 on the consideration that Mardi Gras provided. Although no money changed hands between the employer and the union, the benefit to Mardi Gras of at least that amount (not including the income now derived from the successful ballot initiative) should bear, it would seem, some relationship to the analysis of the issue.

J. TAYLOR

***Jason Taylor's** practice includes employment and labor law compliance and litigation, including workers compensation and general commercial matters, insurance coverage and defense issues, transportation and auto liability, premises liability and general civil practice. He has represented clients before Florida and federal trial and appellate courts and administrative bodies. Mr. Taylor also participated in a lobbying effort addressing amendments to the Florida Statutes on the issue of automobile insurance coverage.*

Endnotes:

1 687 F.3d 1211 (11th Cir. 2012).

2 *Unite Here Local 355 v. Mulhall*, 2013 U.S. LEXIS 4907 (June 24, 2013).

3 *Mulhall*, 687 F.3d at 1213.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 1215-16.

8 *Id.*

9 29 U.S.C. § 186.

10 *Id.*

11 *Id.* § 186(c).

12 *Mulhall*, 687 F.3d at 1215.

13 *Mulhall*, 687 F.3d at 1215, *citing United States v. Roth*, 333 F.2d 450, 454 (2d Cir. 1964).

14 *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Justice Stewart concurring).

15 Press Release, Unite Here Local 355 (June 24, 2013) (http://www.unitehere.org/presscenter/release.php?ID=4765).

16 *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res.*, 390 F.3d 206, 219 (3d Cir. 2004).

17 *Adcock v. Freightliner, LLC*, 550 F.3d 369, 374 (4th Cir. 2008).

18 *United States v. Douglas*, 634 F.3d 852, 858 (6th Cir. 2011).

19 *Roth*, 333 F.2d at 453-54 (2d Cir. 1964).

20 29 U.S.C. § 186.

21 *Mulhall*, 687 F.3d at 1216-17.

parties to an employment dispute under Title VII. The Court's holding may reduce the number of cases in which harassment by a supervisor is alleged, making it more difficult to hold the employer liable.

The effect of the employment status of the harasser on an employer's liability stems from two cases decided by the Supreme Court fifteen years ago—*Ellerth* and *Faragher v. Boca Raton.*[3] These cases set the legal standards associated with liability:

- If the harassment is committed by a co-worker, employer liability will result only if the employer was negligent in that it knew or should have known about the conduct but failed to stop it.
- If the harassment is committed by a supervisor and results in a tangible employment action, the employer will be strictly liable.
- If the harassment is committed by a supervisor and no tangible employment action was taken, the employer may avoid liability if it can establish that it exercised "reasonable care to prevent and correct any harassing behavior" and "the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided."[4]

Though the distinction with regard to employer liability based on co-worker versus supervisor harassment was made clear in *Faragher* and *Ellerth*, the definition of which employees actually qualified as "supervisors" was not. Subsequent to these decisions, the EEOC offered its own definition, taking the position that the ability to exercise "significant direction over another's daily work" qualified an employee as a supervisor.[5] The Supreme Court in *Vance* rejected the EEOC's definition, referring to it as "a study in ambiguity."[6]

In *Vance*, the petitioner, Maetta Vance, an African–American woman employed by Ball State University ("BSU") as a catering assistant, brought suit against BSU in the Southern District

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of Indiana, alleging that she had been subjected to a racially hostile workplace by Shauna Davis, a catering specialist. Vance alleged that Davis was her supervisor despite the fact that Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance.

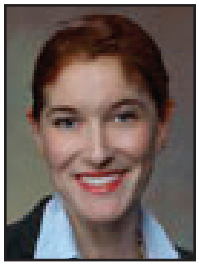
The Southern District of Indiana granted summary judgment in favor of Ball State and that decision was affirmed by the Seventh Circuit, which explained that supervisor status requires the power to hire, fire, demote, promote, transfer, or discipline an employee. Because Davis was not Vance's supervisor and BSU was not negligent regarding Davis' conduct, summary judgment was appropriate.

The Supreme Court agreed with the Seventh Circuit's decision, holding that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim. The Court reasoned that there was "no hint in either *Ellerth* or *Faragher* that the Court contemplated anything other than a unitary category of supervisors, namely, those possessing the authority to effect a tangible change in a victim's terms or conditions of employment. The *Ellerth/Faragher* framework draws a sharp line between co-workers and supervisors."[7] While, according to *Ellerth,* co-workers "can inflict psychological injuries" by creating a hostile work environment, they "cannot dock another's pay, nor can one co-worker demote another."[8] Along with *Ellerth*, the *Vance* Court concluded, "Only a supervisor has the power to cause 'direct economic harm' by taking a tangible employment action."[9]

The Court highlighted the fact that the definition of supervisor adopted in *Vance* is one that can be easily applied:

> In a great many cases, it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser's status will become clear to both sides after discovery. And once this is known, the parties will be in a position to assess the strength of a case and to explore the possibility of resolving the dispute. Where this does not occur, supervisor status will generally be capable of resolution at summary judgment.[10]

E. JACKSON



E. STRINGER

Erin G. Jackson *is a shareholder with Thompson, Sizemore, Gonzalez & Hearing P.A. in Tampa. She is Board Certified in Labor and Employment Law by The Florida Bar and has achieved an "AV" rating in the Martindale-Hubbell legal directory.*

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Endnotes:

1 2013 U.S. LEXIS 4703 (June 24, 2013).
2 *Id.* at *18 (quoting *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 761 (1998)).
3 524 U.S. 775 (1998).
4 *Vance*, 2013 U.S. LEXIS 4703 at *5-6.
5 *Id.* at *17.
6 *Id.* at *37.
7 *Id.* at *33.
8 *Id.* (quoting *Ellerth*, 524 U.S. at 762).
9 *Id.*
10 *Id.* at *36.

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charge cards. Plaintiffs alleged that this requirement constituted an illegal tying agreement under Section 1 of the Sherman Antitrust Act. The merchants said this injured them as a result of the higher fees they incurred on sales paid for with American Express credit and debit cards as compared to lower fees charged by "mass-market" credit cards, such as Visa and MasterCard.

A mandatory arbitration clause in the American Express Card Acceptance Agreement contained a class arbitration waiver requiring all disputes to be arbitrated on an individual basis. The merchants nevertheless brought a class action in federal district court, and American Express moved to compel arbitration. Opposing this move, the plaintiffs argued that the class action waiver was unenforceable because the cost of prosecuting an individual antitrust action would be prohibitively expensive in light of the relatively small potential recovery to any individual merchant and, therefore, they could not "effectively vindicate" their statutory rights. The district court granted the motion to compel arbitration and dismissed the lawsuit, ruling the antitrust laws' provision for treble damages and the recovery of attorneys' fees provided sufficient incentive to pursue arbitration on an individual basis.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed and, in three separate opinions issued over a four-year period, held the class action waiver was unenforceable. In its first opinion, the Second Circuit held that despite the strong federal policy in favor of arbitration, agreements to arbitrate federal statutory claims are enforceable only if the litigant may vindicate the statutory claim effectively in the arbitral forum.[2] The Second Circuit ruled that plaintiffs had met their burden of showing that proceeding in individual arbitration would be cost prohibitive. The court's decision was based on the undisputed declaration of plaintiffs' economic expert witness that the cost of preparing an expert report and testimony necessary to prove plaintiffs' antitrust claims would be at least several hundred thousand dollars and could exceed $1 million, while the maximum damages any individual plaintiff could expect was less than $40,000 after trebling damages. Applying the effective-vindication rule, the Second Circuit held the class action waiver was unenforceable.

Subsequent to the Second Circuit's decision, the U.S. Supreme Court handed down decisions in two class arbitration cases, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*[3] and *AT&T Mobility LLC v. Concepcion*.[4] After each of those rulings, the Second Circuit ordered additional briefing from the parties on whether those decisions required a different outcome in the case before it. In each instance, the Second Circuit reaffirmed its initial decision that the class action waiver was unenforceable by reason of the effective-vindication rule, which the court held was unaffected by and consistent with *Stolt-Nielsen* and *Concepcion*.

Supreme Court's Decision

In a 5-3 opinion written by Justice Antonin Scalia, the Supreme Court reversed. (Justice Sonya Sotomayor did not participate.) The Court reiterated that arbitration is a matter of contract and that the FAA requires arbitration agreements be "rigorously enforced" according to their terms, even for claims alleging a violation of a federal statute, unless Congress has provided otherwise.[5] Applying this precept, the Court analyzed two grounds that the Second Circuit had relied on to invalidate the class action waiver.

First, the Court rejected the argument that enforcing the class action waiver would contravene the policies of the antitrust laws. The antitrust laws, it said, contain certain provisions to encourage plaintiffs to bring such claims (primarily the provision for the recovery of treble damages), but they do not evince any intention to preclude class action waivers. Indeed, the Court noted, the Sherman and Clayton Acts were enacted decades before the adoption of Rule 23 of the Federal Rules of Civil Procedure, which made the class action procedure generally available. In short, the Court stated, "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[6]

Second, the Court rejected the effective-vindication rule as a basis to invalidate class action waivers, characterizing the rule as a "judge-made

continued, next page

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exception to the FAA" crafted to prevent a "'prospective waiver of a party's *right to pursue* statutory remedies.'"[7] In the Court's view, a class action waiver did not eliminate the right to pursue statutory remedies, even if the cost of *proving* entitlement to such remedies was prohibitive. The Court stated:

> The class action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938 . . . . Or, to put it differently, the individual suit that was considered adequate to assure the "effective vindication" of a federal right before adoption of class-action procedures did not suddenly become "ineffective vindication" upon their adoption. [8]

Citing *Concepcion,* the Court rejected the proposition that class proceedings were necessary to prosecute claims "that might otherwise slip through the legal system."[9]

The Court recognized that an arbitration agreement expressly waiving federal statutory remedies would constitute a prospective waiver of "the right to pursue" such remedies (and therefore, presumably, would be invalid), as "perhaps" would be prohibitively expensive arbitration fees.

In concluding, the Court noted that adopting the effective-vindication rule would require courts to analyze the enforceability of class action waivers on a case-by-case basis. The parties would have to litigate what evidence was necessary to meet the legal requirements of each claim and the cost of developing that evidence, and then compare those costs to the damages that could be recovered if the plaintiffs were to prevail on the issue of liability. The FAA foreclosed the imposition of such a "hurdle" to the enforcement of class action waivers, the Court said.[10]

Justice Elena Kagan, joined by two other Justices, dissented. The dissent argued that enforcing the arbitration agreement would effectively immunize American Express from antitrust liability, because no individual merchant could afford to challenge the complained-of practice. The dissent argued Supreme Court precedent had established that "[a]n arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result."[11] A majority of the Court disagreed with this position, at least as it applied to class action waivers.

Implications

Despite the Supreme Court's previous strong pronouncements in favor of enforcing arbitration agreements according to their terms, a significant limitation on the enforcement of class action waivers remained: the effective-vindication rule. With *American Express,* that limitation largely has been eliminated. Challenges to the enforceability of arbitration agreements will continue, but most likely on narrower grounds, such as those mentioned by the Court: lack of contract formation, excessive arbitration fees and other unfair or overreaching provisions, as well as improper limitations on the right to pursue statutory rights or remedies otherwise available in litigation.

J. MCKENNA

James A. McKenna *is a partner in the Chicago office of Jackson Lewis LLP, where he specializes in employment law and class action litigation. He has frequently written and lectured on arbitration and class actions, and is co-chair of the firm's Fair Credit Reporting Act litigation practice. Mr. McKenna can be reached at McKennaJ@jacksonlewis.com.*

Endnotes:

1 2013 U.S. LEXIS 4700 (June 20, 2013).
2 554 F.3d 300 (2d Cir. 2009).
3 559 U.S. 662 (2010).
4 131 S. Ct. 1740 (2011).
5 2013 U.S. LEXIS 4700, at *8.
6 *Id. at* *8-9.
7 *Id.* at *11(emphasis supplied) (quoting *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).
8 *Id.* at *13.
9 *Id.* at *17.
10 *Id.* at *18.
11 *Id.* at *24.

Seventh Circuit Clarifies Meaning of "Inquiries" Under ADA Medical Confidentiality Requirement

By Carlo D. Marichal, Fort Lauderdale

The Americans with Disabilities Act ("ADA") requires that employers treat as a "confidential medical record" information obtained from "medical examinations and inquiries."[1] In *EEOC v. Thrivent Financial for Lutherans*,[22] the Seventh Circuit held that information obtained in response to a general question is not required to be kept confidential pursuant to the ADA.

In *Thrivent*, a technology consulting agency hired the plaintiff as a "temporary" programmer for a financial services company. For the first four months of employment, the employee/plaintiff was "very good about notifying" both his worksite employer and agency employer when he planned to be absent from work.[3] When the employee missed work one day without giving prior notice, his worksite supervisor contacted the employee's supervisor at the consulting agency.[4] Since neither party knew the whereabouts of the employee, the worksite employer sent the employee an email asking that he contact him to let him know "what was going on."[5] The employee sent a response to both employers, explaining he suffers from severe migraines that render him bedridden and for which he takes prescription medication.[6] One month later, the employee quit and had difficulty finding new employment.[7] Suspecting that his former employer was providing negative references, the plaintiff hired a reference-checking agency to ascertain what type of reference was being given by his former employer.[8] In response to a reference check, the worksite employer stated that the plaintiff suffered from migraines and had failed to notify his supervisor that he could not report to work.[9]

The employee timely filed a charge of discrimination with the EEOC and, upon receipt of the Right to Sue letter, instituted an action alleging violations of the ADA.[10]

The threshold issue before the court was "whether [the employer] received [the plaintiff's] medical information through a medical inquiry."[11] The Seventh Circuit found that the email sent to the employee by the worksite employer was not a "medical inquiry" because the latter did not know that there was "already . . . something wrong with the employee before initiating the interaction."[12] The court's rationale in concluding there was no inquiry as defined by the ADA hinged on the fact that the record was devoid of any evidence suggesting that the worksite employer should have inferred that the employee's failure to report to work was due to a medical condition or that the employee was ill during his first four months of employment.[13]

In coming to this conclusion, the *Thrivent* court relied on the Eleventh Circuit's opinion in *Harrison v. Benchmark Electronics Hunstville, Inc.*, 593 F.3d 1206 (11th Cir. 2010).[14] The plaintiff/employee in *Harrison* failed a drug test and advised his employer that his epilepsy medication was the reason he failed the drug test. The employer's human resources representative required the employee to provide his prescription and discuss his medication with the drug testing agency's medical review officer. The Eleventh Circuit ruled that the employer made an inquiry as defined by the ADA after learning that something could "be wrong" with the employee.[15]

The Seventh Circuit's holding regarding information obtained from general inquiries relaxes an employer's burden to maintain the confidentiality of its employees' medical information. The ruling further confirms that "inquiries" under the ADA refers to "medical inquiries." Notwithstanding this recent ruling, employers should be careful to maintain the confidentiality of its employees' medical information because knowledge of an employee's medical condition may be imputed to the employer in some circumstances. For example, the employer may have obtained information from a medical certification under the Family Medical Leave Act.[16] Moreover, an employer may be charged with constructive knowledge through claims submitted under the employer's self-insured group health plan.[17] Thus, employers should be wary of divulging medical information—whether or not received in response to a general inquiry—because such disclosure may violate other laws (e.g., HIPAA).

C. MARICHAL

Carlo D. Marichal *graduated magna cum laude from Florida Coastal School of Law, where he was a Law Review editor. He is an associate with Banker Lopez Gassler, P.A. in Fort Lauderdale.*

Endnotes:

1 42 U.S.C. § 12112(d).
2 700 F.3d 1044 (7th Cir. 2012).
3 *Id.* at 1046.
4 *Id.*
5 *Id.*
6 *Id.* at 1046-47.
7 *Id.* at 1047.
8 *EEOC v. Thrivent,* 700 F.3d 1044, 1047 (7th Cir. 2012).
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.* at 1052.
13 *Id.*
14 *EEOC v. Thrivent,* 700 F.3d 1044, 1051 (7th Cir. 2012).
15 *Id.*
16 *See Only "Medical Inquiry" Results Are Subject to ADA Confidentiality, Appeals Court Rules*, Employer's Guide to HIPAA Privacy Requirements Newsl. (Thompson Pub. Group, Wash. D.C.), Jan. 2013 at 2.
17 *Id.*

CASE NOTES

Eleventh Circuit

By Jay P. Lechner

In ***Turner v. Fla. Prepaid College Bd.,*** 2013 U.S. App. LEXIS 13502, 6-9 (11th Cir. July 2, 2013), the Eleventh Circuit, affirming summary judgment for the employer on a Title VII race discrimination claim, explained that, to establish a prima facie case, a plaintiff has to show, inter alia, that she was treated less favorably than a similarly situated employee outside of her protected class or, alternatively, present a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decision maker." The court found that the plaintiff failed to establish a prima facie case because the identified comparator was not similarly situated since the "quantity and quality" of that person's misconduct was not "nearly identical" and the plaintiff's own statement in an affidavit that white employees were not treated as harshly was not sufficient to create a "convincing mosaic of circumstantial evidence."

In ***Dent v. Ga. Power Co.***, 2013 U.S. App. LEXIS 12382, 7-8 (11th Cir. June 17, 2013), the Eleventh Circuit affirmed summary judgment for the employer on a Title VII retaliation claim. The court found that the plaintiff could not establish a prima facie case because, although he had filed an EEOC charge, there was no evidence that either of the decision makers had knowledge of it prior to terminating him. The court also rejected the plaintiff's "cat's paw" theory of causation because the manager who did know about his EEOC charge "did not speak to either of the decision makers prior to their decision, and [the plaintiff] did not show that the manager who knew of the charge took any action motivated by a discriminatory or retaliatory animus that was intended to create an adverse employment action."

In ***Shultz v. Sec'y of the United States Air Force***, 2013 U.S. App. LEXIS 12110 (11th Cir. June 13, 2013), the Eleventh Circuit affirmed summary judgment for the Air Force on an employee's Title VII retaliation claim. The evidence showed that the employer fired the plaintiff soon after she initiated an EEO complaint process and, in the termination letter, explained that she was being terminated for three separate reasons. The court concluded that, "[t]o meet her burden on pretext, [the plaintiff] was required to rebut each of the Air Force's proffered reasons for her termination," which she did not do.

In ***Davila v. Menendez***, 2013 U.S. App. LEXIS 11616 (11th Cir. June 10, 2013), a nanny alleged FLSA minimum wage violations by the couple who had employed her. A jury found in favor of the plaintiff and awarded her $33,025, but the trial court granted judgment as a matter of law to the defendants on the issue of willfulness. The Eleventh Circuit determined that the court's refusal to submit the willfulness issue to the jury was error. The plaintiff introduced evidence from which a reasonable jury could have found that the couple willfully violated the minimum wage laws. Although the couple asserted that they were ignorant of their obligations under the minimum wage laws, the plaintiff elicited from them that they knew of the hourly wage laws but failed to investigate whether they had complied with those laws. Other evidence from which willfulness could be inferred included plaintiff's testimony that the couple did not sign a contract with her, did not record her working hours, paid her in cash and made threatening comments about her alien status. The Eleventh Circuit concluded that because the jury was not provided the opportunity to rule on willfulness, the district court erred in denying liquidated damages.

In ***Hubbard v. Meritage Homes of Fla., Inc.***, 2013 U.S. App. LEXIS 10906 (11th Cir. May 30, 2013), the Eleventh Circuit affirmed summary judgment for the employer, a builder of planned residential communities, on the plaintiff's Title VII pregnancy discrimination claim.

The evidence showed that after the plaintiff, a sales associate, became pregnant, her supervisor transferred her to a slower selling community and subsequently terminated her for insubordination. However, the court concluded that the plaintiff could not establish a prima facie case because she did not show that she was treated differently than other non-pregnant employees since, inter alia, the other sales associates did not engage in the same or similar misconduct for which she was terminated. The evidence also showed that the company consistently transferred all of its employees into and out of different offices.

In ***AFSCME Council 79 v. Scott***, 2013 U.S. App. LEXIS 10786 (11th Cir. May 29, 2013), the Eleventh Circuit addressed the constitutionality of the Florida Governor's 2011 Executive Order requiring state employees to submit to suspicionless drug testing. Finding that the Executive Order violated the Fourth Amendment, the Southern District invalidated the Order and enjoined the Governor from conducting suspicionless drug testing of all 85,000 covered employees. On appeal, the Eleventh Circuit agreed that the Executive Order violated the Fourth Amendment to the extent that the State could not show that it had a special need to conduct drug testing without an individualized suspicion of wrongdoing. However, the Executive Order was not unconstitutional as to all current state employees because the Fourth Amendment permits suspicionless drug testing of certain safety-sensitive categories of employees, such as employees who operate large vehicles and law enforcement officers who carry firearms in the course of duty. The court vacated the district court's declaratory judgment and injunction and remanded the case for the district court to tailor its relief more precisely.

In ***Owusu-Ansah v. Coca-Cola Co.***, 2013 U.S. App. LEXIS 9340 (11th Cir.

May 8, 2013), the Eleventh Circuit, affirming summary judgment for the employer, held that the employer did not violate the ADA by requiring the plaintiff employee to undergo a fitness-for-duty evaluation. While complaining during a meeting about harassment and mistreatment, the employee allegedly became agitated, banged his hand on the table, and said that someone was "going to pay for this." The employer placed him on paid leave and, as a condition for continued employment, required him to undergo a psychiatric/psychological fitness-for-duty evaluation. The court concluded that the evaluation was both job related and consistent with business necessity because the employer had a reasonable, objective concern about the employee's mental state affecting job performance and potentially threatening the safety of its other employees.

In ***Underwood v. Dep't of Fin. Servs. Fla.***, 2013 U.S. App. LEXIS 8360 (11th Cir. Apr. 25, 2013), the Eleventh Circuit affirmed summary judgment to the employer on plaintiff's Title VII retaliation claim. The employee, who did not engage in protected activity, claimed he was fired because his wife had filed a discrimination charge against a different employer. The court refused to extend *Thompson v. North American Stainless LP*, 131 S. Ct. 863 (2011), in which the Supreme Court held that an employee could seek protection for retaliation where he was fired because his fiancée had filed an EEOC charge against the same employer. The court reasoned that the spouse, the individual who engaged in protected conduct, was not an employee of the defendant.

In ***Bayou Lawn & Landscape Servs. v. Oates***, 713 F.3d 1080 (11th Cir. 2013), the Eleventh Circuit affirmed an injunction preventing the U.S. Department of Labor ("DOL") from enforcing its 2012 H-2B regulations governing the employment of temporary, non-agricultural foreign workers. The court concluded that the DOL had no statutory authority to issue the regulations, as the Department of Homeland Security was given overall responsibility, including rulemaking authority, for the H-2B program. The DOL's designation as a consultant for the program did not authorize it to engage in such rulemaking.

In ***Rakip v. Paradise Awnings Corp.***, 2013 U.S. App. LEXIS 6112, 5-6 (11th Cir. Mar. 27, 2013), the Eleventh Circuit affirmed a district court judgment that an FLSA settlement agreement was valid, holding that the district court did not err by concluding after an evidentiary hearing that the agreement was a fair and reasonable settlement of the employee's FLSA claims. The plaintiff received $10,000 to cover his workers' compensation and FLSA claims and to pay his attorney's fees. The plaintiff argued that the district court erred because it did not explain how it decided that the amount he would receive under the settlement agreement was fair. The Eleventh Circuit rejected this argument and explained that "*Lynn's Food* does not stand for the proposition that any valid settlement of a FLSA claim must take a particular form. It only means that the district court must take an active role in approving the settlement agreement to ensure that it is not the result of the employer using its superior bargaining position to take advantage of the employee."

In ***Koch Foods, Inc. v. Secretary, United States DOL***, 712 F.3d 476 (11th Cir. 2013), the Eleventh Circuit addressed the issue of whether protection under the whistleblower provision of the Surface Transportation Assistance Act is triggered only when operation of a motor vehicle would result in an "actual" violation of a regulation, standard, or order related to commercial motor vehicle safety, health or security or, as the DOL argued, when a driver could "reasonably but incorrectly believe" that operation would result in such a violation. After reviewing the statutory language and context, the court concluded that a plain reading of the text suggested that an actual violation had to occur as a result of the operation of the vehicle.

In ***Lamonica v. Safe Hurricane Shutters, Inc.***, 711 F.3d 1299 (11th Cir. 2013), the Eleventh Circuit held that undocumented aliens are "employees" entitled to relief under the FLSA. The court distinguished *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), in which the Supreme Court held that the NLRB cannot award back pay to undocumented workers who are terminated for union activity in violation of the NLRA. The court pointed to differences between the NLRA and FLSA with respect to statutory text, remedies, administrative agency involvement and statutory purpose. The court also held that a supervisor's title does not in itself establish or preclude his or her individual liability under the FLSA, but rather the court must look to the "circumstances of the whole activity." Thus, supervisors other than officers may be individually liable if they have substantial supervisory powers in relation to the employees.

In ***Moore v. Appliance Direct, Inc.***, 708 F.3d 1233 (11th Cir. 2013), the Eleventh Circuit held that the FLSA does not require the imposition of liquidated damages after a finding of liability for retaliation, unless excused by proof of reasonable good faith of the employer; rather, an award of liquidated damages in FLSA retaliation cases is discretionary with the trial court. The court reasoned that the second sentence in § 216(b), which allows such damages as might be appropriate to effectuate the purposes of the retaliation provision, creates a discretionary standard of damages for retaliation claims separate from the standard for overtime or minimum wage violations.

In ***Kaplan v. Code Blue Billing & Coding, Inc.***, 504 Fed. Appx. 831 (11th Cir. 2013), the Eleventh Circuit,

affirming summary judgment for the employer, held that plaintiff student externs were not "employees" entitled to minimum wage for their externship work under the FLSA. Applying the DOL six-factor "economic realities" test, the court reasoned that the training benefitted the plaintiffs, who received academic credit for their work and who satisfied a precondition of graduation; the training was similar to that which would be given in school and was related to the plaintiffs' course of study; plaintiffs were supervised closely and did not displace regular employees; and the company received no immediate advantage from their work and, at times, were impeded by their efforts to help train and supervise them.

In ***Sims v. MVM, Inc.***, 704 F.3d 1327 (11th Cir. 2013), the Eleventh Circuit addressed the causation standard to be applied in "cat's paw" cases under the ADEA. The court, affirming summary judgment for the employer, held that because the ADEA requires a "but for" causal link between the discriminatory animus and an adverse employment action, the proximate causation standard announced by the Supreme Court in *Staub v. Proctor Hosp.,* 131 S. Ct. 1186 (2011), does not apply to age discrimination claims. Under the "but for" standard, the discriminatory animus must have a "determinative influence" on the employer's adverse decision, rather than be merely a "motivating factor," as under the USERRA proximate causation standard.

Can *Noel Canning* Can the Quorum?

By J. Evan Gibbs, Jacksonville

On January 25, 2013, in *Noel Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013), the U.S. Court of Appeals for the District of Columbia Circuit struck down three "recess appointments" by President Obama to the National Labor Relations Board. The ruling came in a case where employer Canning, a bottling company, argued that a quorum did not exist when the Board issued a decision adverse to the company. If ultimately binding on the Board, the appellate court's ruling will leave the Board with only one "valid" member and will mean that all Board decisions dating back to January 4, 2012, when the appointments were made, may be void for lack of a quorum as in the instant case.

At the time of the appointments, the Senate was holding short "pro forma" sessions at least once every three days between December 20, 2011, and January 23, 2012, during which time it took some substantive actions, including votes approving a temporary extension of a payroll tax provision on December 23, 2011, and commencing a second session of the 112th Congress on January 3, 2012. The Obama Administration contended that: (1) the Senate was effectively in recess beginning December 20, 2011; (2) the pro forma sessions meant nothing; and (3) it had the power to make recess appointments during this period. The D.C. Circuit disagreed, finding first that the President has power to make appointments only during an intersession recess, which the Board conceded at oral argument was not the case here. The court also found that recess appointments are authorized only for vacancies arising during such an intersession recess and ruled that none of the relevant vacancies met that requirement.

On June 24, 2013, the United States Supreme Court granted review on the issues decided by the D.C. Circuit and also requested briefing from the parties on a third issue: whether the recess appointment power may be exercised when the Senate is convening in pro forma sessions, with adjournments of less than three days, as it was in January of 2012. Prior to the D.C. Circuit's decision, many observers believed that this was the central issue in the case, with the Board and the Obama Administration contending that the pro forma sessions did not prevent a recess from occurring and others—including Noel Canning and the U.S. Chamber of Commerce—asserting that they did.

Notably, the decision in *Noel Canning* may affect other "recess" appointments—including President Obama's appointment of Richard Cordray to the Consumer Financial Protection Board—and the outcome of similar cases, such as the decision of the U.S. Court of Appeals for the Third Circuit in *N.L.R.B. v. New Vista Nursing and Rehab.*, 2013 WL 2099742 (3d Cir. 2013), in which the court held that the appointment of Craig Becker to the Board in March of 2010 was an invalid intrasession recess appointment.

E. GIBBS

Evan Gibbs *is an associate in the Jacksonville office of Constangy, Brooks & Smith, LLP. He represents and advises both private and public sector entities in employment and labor matters. He is a graduate of the Florida State University College of Law, where he was an editorial board member of Law Review.*

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Schedule of Events

Thursday, October 24, 2013

12:45 p.m. – 1:00 p.m. **Late Registration**

1:00 p.m. – 1:10 p.m.
Welcome/Opening Remarks
Gregg Morton, Hearing Officer, PERC, Tallahassee

1:10 p.m. – 2:05 p.m.
Public Employees Relations Commission Update
Mike Hogan, Chair, PERC, Tallahassee
Stephen A. Meck, General Counsel, PERC, Tallahassee
Gregg Morton, Hearing Officer, PERC, Tallahassee

2:05 p.m. – 3:00 p.m.
To Tweet or Not To Tweet: What Public Employees (and Employers) Should Know About Social Media
Debbie C. Brown, Thompson, Sizemore, Gonzalez & Hearing, P.A., Tampa

3:00 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 4:05 p.m.
Issues and Trends in Title IV and the FCRA
Robert J. Sniffen, Sniffen and Spellman, P.A., Tallahassee
Heather Tyndall-Best, Sniffen and Spellman, P.A., Tallahassee

4:05 p.m. – 4:55 p.m.
Litigating Attorney's Fees Awards in Labor Cases
David Young, Fisher & Phillips, LLP, Orlando

5:00 p.m. – 5:10 p.m.
Joint City, County & Local Government and Labor and Employment Section Meeting (all invited)

5:10 p.m. – 6:30 p.m.
Section Meetings (all invited)

6:30 p.m. – 7:30 p.m.
All Members' Reception (Included in Registration Fee)

Friday, October 25, 2013

8:35 a.m. – 8:45 a.m. **Opening Remarks**

8:45 a.m. – 10:00 a.m.
Litigating Veterans' Employment and Reemployment Rights Cases
Kathryn S. Piscitelli, Orlando

10:00 a.m. – 10:15 a.m. **Break**

10:15 a.m. – 11:10 a.m.
Special Magistrates – Panel Discussion
Robert Kilbride, Fox Wackeen Dungey et al, LLP, Stuart
Thomas W. Young, III, Port Charlotte

11:10 a.m. – 12:00 p.m.
FRS & Pension Developments
James Linn, Lewis, Longman & Walker, P.A., Tallahassee

12:00 p.m. – 1:00 p.m.
Luncheon (Included in Registration Fee)

1:00 p.m. – 2:15 p.m.
Ethics / Professionalism
Paul A. Remillard, Remillard Law Firm, Tallahassee

2:15 p.m. – 3:05 p.m.
Financial Urgency Update
Michael Mattimore, Allen, Norton & Blue, P.A., Tallahassee
Noah Scott Warman, Sugarman & Susskind, P.A., Coral Gables

3:05 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 4:05 p.m.
Federal 11th Circuit and Florida Public Sector Update
F. Damon Kitchen, Constangy, Brooks & Smith, LLP, Jacksonville
J. Evan Gibbs, Constangy, Brooks & Smith, LLP, Jacksonville

4:05 p.m. – 4:15 p.m.
Questions, Answers and Closing Remarks

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

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

Name: _____ Phone: _____

Institution/Affiliation: _____

Address: _____

City/State/Zip: _____

Your Relationship to Nominee: _____

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Standard	$ 150.00
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Issue	Ad Deadline
February	January 25th

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

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_____ _____

Contact Signature Date

Send form to: *Cathleen Scott*
Cathleen Scott, P.A.
250 S. Central Boulevard, Suite 104
Jupiter, FL 33458-8812
E-mail: cscott@floridalaborlawyer.com
Fax: 561-653-0020

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

- Print optimized PDF (preferred) (MAC or PC)
- JPEG, EPS or TIF, 300 dpi (MAC or PC)
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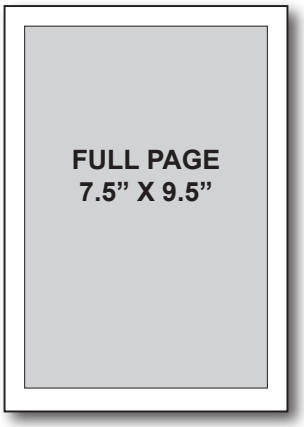
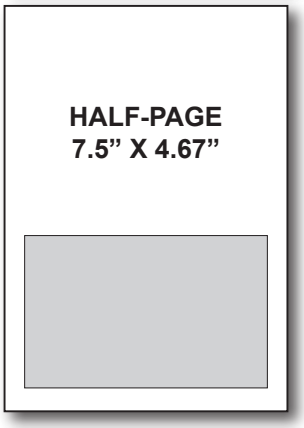
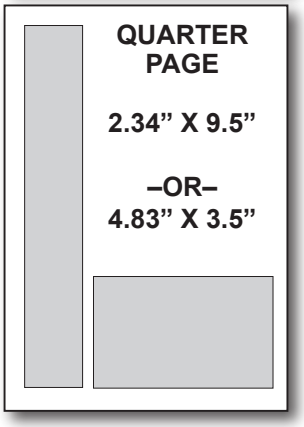
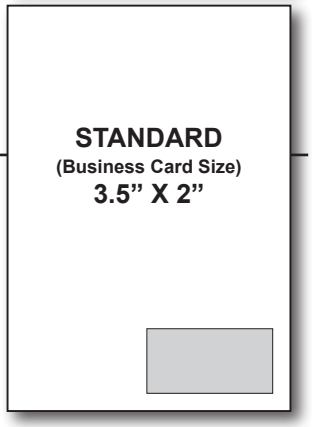
All fonts must be imbedded. Please *do not use an image from the web* (typically 72 dpi and not acceptable for print media). We reserve the right to refuse low resolution or poor quality images. Every effort will be made to utilize files sent to us, but ads that have to be resized or reformatted (this 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**









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