www.laboremploymentlaw.org

# the Checkoff

The Florida Bar
Vol. LIV No. 2
March 2015

A PUBLICATION OF THE FLORIDA BAR LABOR & EMPLOYMENT LAW SECTION

## IN THIS ISSUE

*Message from the Chair..... 2*

*The Public Employees Relations Commission After 40 Years ..... 3*

*Same-Sex Marriage Decision by Northern District of Florida Could Mark Sea-Change in Employee Benefits in Florida ..... 7*

*Evans v. Books-A-Million: The Eleventh Circuit's Interpretation of "Prejudice" Under the FMLA and Taxable Costs Under ERISA .. 9*

*Case Notes..... 13*

*Section Bulletin Board..... 18*

*CLE Section..... 19*



# Enhanced Enforceability: Florida Arbitration Agreements Under the Revised Florida Arbitration Code

**By Christopher M. Shulman, Tampa**

Most new arbitration agreements between Florida parties[1] are (or will be[2]) subject to the Revised Florida Arbitration Code ("RFAC"), Chap. 682, Fla. Stat. (2013). While employment arbitration clauses are already usually enforceable, RFAC increases that likelihood, even without the clause containing specific discovery or remedies provisions. In light of the ubiquity of employer-promulgated employment arbitration clauses that may be subject to RFAC, this article highlights some provisions of the new act.

## Arbitration Agreement

RFAC provides that parties may waive or vary many of its provisions but also states that some provisions may not be altered.[3] The act also specifies that the court decides whether a valid agreement to arbitrate exists and whether it applies to a specific controversy, but the arbitrator decides whether the arbitration clause is enforceable (for a reason not within the court's review of the validity of the agreement) and whether conditions precedent to arbitrability have been fulfilled.[4] This apportionment follows that which the U.S. Supreme Court reaffirmed under the Federal Arbitration Act in *Buckeye Check Cashing, Inc. v. Cardegna*,[5] reversing *Cardegna v. Buckeye Check Cashing, Inc.*[6] Stated the Court:

> *Prima Paint* and *Southland* answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.[7]

Under RFAC, the parties may, of course, incorporate the rules of specific fora in their arbitration clause, such as those of the American Arbitration Association's Employment Arbitration Rules & Mediation Procedures. This provides the procedural protections required to make an individual employment arbitration clause enforceable, such as affording the parties some discovery[8] and allowing the arbitrator the ability to award the same relief as an employee might be able to obtain in court.[9] While an arbitration clause that is silent as to which party will bear the arbitrator and forum expenses will usually be enforceable (absent evidence that the fees would actually be cost prohibitive for an employee bringing a claim),[10] the better practice—required by most arbitration fora—is to have the employer either bear the cost or allow the employee the option of (a) splitting the cost or (b) having the employer pay the entire cost.

## Initiation of Arbitration

Parties commence arbitration using the method provided for in their agreement; if

*See "Florida Arbitration Agreements," page 6*

# Message from the Chair

On behalf of the entire Section, thanks to everyone who has volunteered their time for the great year we've had so far. Looking forward, I hope many of you will join us for the Advanced Labor Topics seminar, May 29-30 at the Sarasota Ritz-Carlton, and that you will log in for one or both of our next two webinars: Statistical Evidence in Employment Law Cases (Sherril Colombo, March 24); and What Every Lawyer Should Know About Litigating Benefit Claims (John Murray, April 22). Also, our Section has been selected once again to present at the Presidential Showcase, during the Bar's Annual Convention, Thursday, June 25, 2015, from 1:40 p.m. to 5:00 p.m. at the Boca Raton Resort & Club.

**Shane T. Muñoz, Chair**
FordHarrison, LLP



## Join Us For A Reception

**Honoring the Chief Judges (2013-15) of Florida's District Courts of Appeals**

**Sponsored by the Labor and Employment Law Section and the Florida Lawyers' Chapters of the Federalist Society**

**Thursday, June 25, 2015**
**6:30 p.m. - 8:30 p.m.**

**The Florida Bar Annual Convention**
**Boca Raton Resort & Club, Boca Raton, FL**


the CHECKOFF

*The Checkoff* is prepared and published by The Florida Bar Labor and Employment Law Section.

Shane T. Muñoz, Tampa
Chair

Hon. Frank E. Brown, Tallahassee
Chair-Elect

Leslie W. Langbein, Miami Lakes
Secretary/Treasurer

Zascha Blanco Abbott, Miami
Legal Education Director

Robert S. Turk, Miami
Immediate Past Chair

Jay P. Lechner, Tampa
Zascha Blanco Abbott, Miami
Co-Editors

Angie Froelich, Tallahassee
Program Administrator

Donna Richardson, Tallahassee
Design/Layout

# The Public Employees Relations Commission After 40 Years

## The Genesis

During Florida's constitutional revision process in 1968, the following provision was added to Article 1, Section 6, of the state constitution: "Public employees shall not have the right to strike." *In Dade County CTA v. Ryan*,[1] the Florida Supreme Court held that this provision—read in pari materia with the rest of Article 1, Section 6—meant that, with the exception of the right to strike, public employees have the same right of collective bargaining as private employees and that this right shall not be denied or abridged. In the landmark opinion, the court further opined that the Florida legislature must enact appropriate legislation setting standards for public sector collective bargaining, something that did immediately occur.

In 1972, the same union involved in *Ryan* filed a petition for mandamus requesting the Florida Supreme Court to compel the legislature to enact public sector collective bargaining guidelines. Citing separation of powers concerns, the court declined to do so but warned the legislature that if it did not act within a reasonable period of time, the court itself would fashion guidelines to enforce the constitutional requirements.[2] Judicial enforcement, however, raised major issues regarding statewide uniformity in applying these rights.

Facing significant political pressure, in 1974 the legislature created the Public Employees Relations Act, Chapter 447, Part II, Florida Statutes ("the Act"). The Act—which became effective January 1, 1975—also established the Public Employees Relations Commission ("PERC") to administer and enforce the Act. In conjunction with the creation of the Act and PERC, the first Public Employee Labor Relations Forum was held 40 years ago.

## Chapter 447, Part II, as Originally Enacted

PERC was originally organized along the lines of the National Labor Relations Board. It had just nine employees, including the chairman who was the administrator. There were four part-time commissioners, who were highly regarded and nationally recognized labor experts.

The legal staff investigated and brought unfair labor practice charges. These suits, and representation cases, were litigated before hearing officers at the newly created Division of Administrative Hearings ("DOAH"). Predictably, this process was cumbersome for a number of reasons. The law was broad in application, and major policies that are now well established were heavily litigated by very divisive litigants. Many issues were appealed to the District Courts of Appeal and the Florida Supreme Court, creating years of litigation. There was a huge rush for new public sector unions to become certified so that they could obtain dues-paying members. The unions were understandably frustrated with delays. There was also a perception that PERC's role in investigating, prosecuting and deciding unfair labor practice cases showed a pro-union bias.

During this era, PERC had a staff of highly motivated and dedicated personnel who subsequently became successful labor and employment practitioners. These included Thomas W. Brooks, William E. Powers, Gene "Hal" Johnson, Patricia A. Renovitch, Rodney W. Smith, Curtis L. Mack, Jack L. McLean Jr., Richard T. Donelan Jr., Bruce A. Leinback, Anthony C. Cleveland, Jane Rigler, Errol H. Powell, and I. Jeffrey Pheterson. However, they were understandably overwhelmed by the huge influx of representation cases; by compliance with the public meetings ("Sunshine") law; by sporadic meetings of the part-time commissioners; and by compliance with the Administrative Procedures Act ("APA") requirement for hearings at DOAH. The commission was deciding cases, but written orders were not being issued. When finally drafted, the orders sometimes did not correctly state what the commission had decided. In short, the operation was not efficient.

Despite these initial challenges, the Act was notable from the beginning: it contained an automatic dues deduction provision for employees who are members of employee organizations certified as bargaining agents of a unit of public employees;[3] it required collective bargaining agreements to contain grievance procedures culminating in binding arbitration;[4] and it contained an election of remedies provision that required employees to select between a civil service appeal procedure and a contractual grievance procedure.[5]

## 1977 and 1979 Changes to the Act

In 1976, Leonard A. Carson, who was Chairman of the Industrial Relations Commission ("IRC"), was appointed as PERC Chairman by then-Governor Reubin Askew. Chairman Carson was charged with fixing what was perceived to be a broken operation that had an important constitutionally-based function. His immediate goal was to get PERC out of the role of investigating and prosecuting cases and to organize it as a purely quasi-judicial entity like the IRC. After lengthy and studious examinations of public sector labor relations laws in other states, including New York, New Jersey, Michigan and Wisconsin, Carson instituted a number of structural changes that redefined PERC.

The first changes were legislatively initiated in 1977. PERC became a full-time commission with two important members, Michael M. Parrish and Jean K. Parker. Carson knew these commissioners to be scholars in Florida law, who, with their intellect and work habits, would make up for any lack of labor experience. Chairman Carson also obtained an exemption from DOAH for hearings in representation cases. With PERC legal staff conducting these hearings, the operation became much more efficient. PERC commissioners

*continued, next page*

began to conduct hearings in unfair labor practice cases. The changes led to exponential growth in policies in significant areas not directly addressed in the statute, such as development of the status quo period after expiration of a contract, the concept of the insulated period and quasi-judicial impasse resolutions before legislative bodies, and the requirement that contractual waivers be clear and unmistakable.[6] The integrity of PERC's decisions attained significant judicial acknowledgement during this time period as well.[7] PERC was also the first agency in the state to have its decisions published and indexed in compliance with the APA. The predictability this offered resulted in greatly reduced litigation.

Significantly, PERC's deliberations are held outside of the public view, draft orders are not subject to public disclosure, and PERC's decisions are not rules under the APA.

Chairman Carson continued his modifications to PERC in 1979 when he proposed—and the legislature enacted—legislation that allowed PERC to operate as a truly quasi-judicial body. The parties are the advocates, and all hearings are held by PERC. PERC's hearing officers are required to be attorneys. This again bolstered efficiency, soundness and professionalism in the handling of cases.

## PERC's Additional Jurisdictions

Based upon PERC's case handling performance in the labor arena, which featured no discovery absent exceptional circumstances, between 1986 and 1992 it obtained jurisdiction over employment cases, including state Career Service appeals,[8] Veterans' Preference appeals,[9] Drug-Free Workplace Act appeals,[10] Forced Retirement appeals,[11] certain Age Discrimination appeals,[12] and Whistle-Blower Act appeals.[13] This was done with no increase in hearing officer staff. Michael Mattimore was first a Commissioner and later the Chairman during this era.

Career Service appeals resulted in a huge increase in hearings. There were then approximately 600 case filings a year with a case backlog of 230. There was a statutory requirement that the cases be set for hearing within 30 days of filing. PERC was able to eliminate the backlog and bring all cases current within one year.

Attaining this goal attested to PERC's success, but it had the unfortunate consequence of distracting from its significant labor legacy. Based on the evaluation of its organization, its significant participation in state and national labor and legal organizations, and its proven performance, PERC is recognized as a model for public labor relations on a national level. However, it is not an uncommon public perception that PERC is largely focused on employment cases.

## PERC's Performance

As previously noted, PERC had its hearing functions removed from DOAH and now conducts its own hearings. PERC currently has eight hearing officers with an average experience of well over 20 years. It has an internal appeal feature with each case being resolved with a final order by the two Commissioners and Chair that is appealable to a district court of appeal. This results in uniformity of decision making throughout the state, consistent with established precedent.

The Commission's unfair labor practice cases are streamlined by the sufficiency review process performed by the General Counsel pursuant to Section 447.503, Florida Statutes. This results in the early dismissal of numerous cases with insufficient factual details to cogently describe the complained of conduct and those unsupported by existing case law.

All labor cases are scheduled for hearings within 30 to 45 days of sufficiency. Career Service cases are statutorily required to be set for hearings within 60 days of filing.

Since the mid-1990s, the Commission has been legislatively required to issue final orders in labor cases within 180 days of filing. Employment cases are required to be completed within 105 days of filing. These deadlines include all aspects of case processing, such as motion practice, preliminary hearing officer orders, hearings, hearing officer recommended orders, exceptions, oral argument before the Commission when necessary, and the Commission's final order.

Each year the Commission's performance is legislatively evaluated on three criteria: meeting the time limit in labor cases; meeting the time limit in employment cases; and the number of cases affirmed on appeal, dismissed, or

# WANTED: ARTICLES

The Section needs articles for *the Checkoff* and *The Florida Bar Journal*. If you are interested in submitting an article for *the Checkoff,* contact Jay P. Lechner (*jay.lechner@jacksonlewis.com*) or Zascha Blanco Abbott (*zabbott@siolilaw.com*). If you are interested in submitting an article for *The Florida Bar Journal,* contact Robert Eschenfelder (*robert.eschenfelder@mymanatee.org*) to confirm that your topic is available.

## REWARD: $150*

(*For each published article, a $150 scholarship to any section CLE will be awarded.)

**Article deadline for the next *Checkoff* is May 15.**

withdrawn. Historically the Commission has met these standards in over 90% of its cases.

PERC has recently had significant challenges. Due to a major reduction in state revenue over the past decade, PERC has been forced repeatedly to reduce staffing from a high of 42 full-time employees to the current staff of 26. Also, the Commissioners have again been made part-time employees. Notwithstanding these changes, PERC's operations have remained efficient. With its incomparable statistics, which are largely attributable to an experienced staff, efficient process, and technological advancements, PERC looks forward to the next 40 years of serving the state.

*This article was presented on October 23, 2014, at the 40th Annual Public Employment Labor Relations Forum in Orlando, Florida. It was principally written by* ***PERC General Counsel Stephen A. Meck****, with significant input by the three panel members,* ***Thomas W. Brooks, Leonard A. Carson, and Michael Mattimore****.*

**Endnotes**

1 *Dade County CTA v. Ryan*, 225 So. 2d 903 (Fla. 1969).

2 *Dade County CTA v. Legislature*, 269 So. 2d 684 (Fla. 1972).

3 Fla. Stat. § 447.303.

4 *City of Casselberry v. Orange County Police Benevolent Ass'n*, 482 So. 2d 336 (Fla. 1986).

5 Fla. Stat. § 447.401. The initial election of remedies required employees to choose between filing a grievance or a Career Service appeal. Later, following the Commission's decision in *Williard v. HRS*, 14 FPER ¶ 19154 (1988), the legislature amended Section 447.401, Florida Statutes, to include unfair labor practice charges in the choice of remedies provision.

6 *Florida Sch. for the Deaf and the Blind Teachers United v. Florida Sch. for the Deaf and the Blind*, 11 FPER ¶ 16080 (1985), *aff'd*, 483 So. 2d 58 (Fla. 1st DCA 1986); *Boca Raton Fire Fighters, Local 1560, Inc. v. City of Boca Raton*, 4 FPER ¶ 4040 (1978); *Palowitch v. Orange County Sch. Bd.*, 3 FPER 280 (1977), *aff 'd*, 367 So. 2d 730 (Fla. 4th DCA 1979).

7 *Pasco County Sch. Bd. v. Publ. Employees Relations Comm'n*, 353 So. 2d 108 (Fla. 1st DCA 1978).

8 *See* Fla. Const. art. III, § 14, as implemented in Fla. Stat. §110.227.

9 *See* Fla. Stat. ch. 295.

10 Fla. Stat. § 112.0455.

11 Fla. Stat. § 110.124.

12 Fla. Stat. § 112.044.

13 Fla. Stat. § 112.31895.

none, then by certified mail or service of process. Separate arbitrations may be consolidated by the court unless prohibited by the arbitration agreement(s), and waivers of class arbitration retain their validity.[11] The arbitrator appointment process has been streamlined and prevents appointment of a non-party arbitrator with a clear conflict of interest.[12] Arbitrators must disclose potential conflicts of interest and may serve only if all parties consent after such disclosure.[13]

## Provisional Remedies and Prehearing Procedures

RFAC allows the arbitrator (or the court, before an arbitrator has been appointed) to order interim relief. Parties may challenge/enforce such interim orders of provisional relief, in much the same manner as an arbitration award.[14] Arbitrators may permit discovery as they deem appropriate, considering "the needs of the parties . . . and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective." They may issue subpoenas for appearance or duces tecum at hearing or "at a discovery proceeding" and may issue protective orders.[15]

## Arbitration Hearings

Scheduling and conduct of the hearings has been streamlined. Arbitrators may rule on motions for summary disposition, with due notice; final evidentiary hearings are no longer required. A hearing—summary or final—may move forward in the absence of a party if that party has received due notice. Parties still have the right to be heard, present evidence and cross-examine witnesses appearing at a final hearing.

## Awards

Arbitrators may award punitive damages or attorneys' fees and costs, if such would be available in a civil action involving the same claim(s). Awards may be modified or corrected by the arbitrator on motion submitted within 20 days after receipt of the award; the opposing party has 10 days to object. Alternatively, on motion to confirm, vacate, or modify the award, the court may rule, after taking what evidence it deems necessary, or may submit some types of modifications or corrections to the arbitrator for resolution.

In all, the RFAC has made for a more comprehensive arbitration process—if more akin to litigation. As such, employment arbitration agreements subject to the new act are more likely to be enforced since RFAC provides greater procedural protections to both parties, while still allowing the parties access to a quick, efficient, confidential and (perhaps) less costly alternative to litigation.

C. SHULMAN

***Christopher M. Shulman** has limited his practice to service as a neutral dispute resolution professional since 2002. Between service as a mediator, arbitrator, hearing officer, and federal-sector EEO complaint adjudicator, he has resolved—or, in the case of mediation, helped the parties resolve—more than 4000 matters.*

### Endnotes

1 The Federal Arbitration Act still preempts arbitration clauses for disputes involving "maritime transactions" or "interstate commerce" as defined in 9 U.S.C. §1. An exception to the preemption exists where the parties have specifically stated that the law of Florida would govern the agreement. *Volt Info. Sci., Inc. v. Bd. of Trustees*, 489 U.S. 468 (1989).

2 The Revised Code will apply to ALL non-preempted arbitration agreements as of July 1, 2016, and applies to any pre-existing agreement where the parties agree it will apply. Fla. Stat. § 682.013 (2013).

3 For example, the following may not be waived: the applicability of RFAC; the availability of judicial proceedings pre- and post-hearing; the standards for judicial vacation or modification of an arbitration award; arbitrator immunity; the arbitrator's authority to change an award; provisional remedies; arbitrator authority to issue subpoenas and to permit depositions; the enforceability of a judgment or decree based on an award or the bases for appeal. Fla. Stat. § 682.014 (2013).

4 Fla. Stat. § 682.02(2)–(4) (2013).

5 546 U.S. 440 (2006).

6 894 So.2d 860 (2005).

7 546 U.S. 440, 445-46 (2006).

8 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991).

9 https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362.

10 *See*, *e.g.*, *Musnick v. King Motor Co.*, 325 F.3d 1255, 1259-60 (2003).

11 Fla. Stat. §§ 682.032, 682.033 (2013). Waivers of class arbitration are enforceable under the Federal Arbitration Act, whether the substance of the claim being arbitrated is a creature of state or federal law. *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748–1752 (2011). The Florida Supreme Court has followed *Concepcion*, acknowledging that the Federal Arbitration Act preempts state law. *McKenzie Check Advance v. Betts*, 112 So.3d 1176, 1183–1188 (Fla. 2013).

12 A conflict exists where an arbitrator "has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party." Fla. Stat. § 682.04 (2013).

13 Fla. Stat. § 682.041 (2013).

14 Fla. Stat. §§ 682.031, 682.081 (2013).

15 Fla. Stat. § 682.08 (2013).

16 Fla. Stat. § 682.06 (2013).

17 Fla. Stat. §§ 682.05, 682.06 (2013).

18 Fla. Stat. §§ 682.09 – 682.10, 682.12–682.14 (2013).

# Same-Sex Marriage Decision by Northern District of Florida Could Mark Sea-Change in Employee Benefits in Florida

**By Jeffrey D. Slanker, Tallahassee**

The U.S. District Court for the Northern District of Florida recently held in *Brenner v. Scott*[1] that Florida's constitutional amendment banning same-sex marriage is unconstitutional under the Fourteenth Amendment of the U.S. Constitution.[2] The decision comes on the heels of several state court decisions throughout Florida that similarly struck down the ban on same-sex marriage. If ultimately upheld, the *Brenner* decision will lead to change in how employers handle benefits to employees and the employees' same-sex partners.

Florida voters approved the constitutional amendment banning same-sex marriage in 2008.[3] The amendment defines marriage as a union solely between a man and a woman, to the exclusion of marriages or civil unions between members of the same sex. The provision reads: "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."[4]

The *Brenner* case arose from a suit brought by a number of plaintiffs, all denied a right or benefit because they could not enter into a legally valid marriage in Florida or because Florida did not recognize their marriage entered into in another state.[5] The Northern District held that Florida's constitutional amendment banning same-sex marriage itself violates the equal protection and due process clauses of the Fourteenth Amendment to the U.S. Constitution. Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The court noted that marriage is a fundamental right guaranteed under the Constitution and likened Florida's ban on same-sex marriage to bans on interracial marriage held to be unconstitutional several decades ago by the Supreme Court in *Loving v. Virginia*.[6] Because marriage is a fundamental right, the district court found that the state's ban would have to withstand strict scrutiny.[7] To survive strict scrutiny, the ban must further a compelling governmental interest and be narrowly tailored to achieve that interest.[8] The district court held that the ban on same-sex marriage did not pass strict scrutiny because the justifications offered in support of the ban were insufficient as a matter of law to demonstrate that the government has a compelling interest that would justify the abridgement of a fundamental right under the U.S. Constitution.[9]

The decision is not wholly in effect at this time, however. The district court stayed implementation of the majority of the decision pending appeals.[10] Indeed, Florida Attorney General Pam Bondi has filed an appeal with the Eleventh Circuit Court of Appeals, which is pending.[11] The American Civil Liberties Union, which opposed the state's ban on same-sex marriage, asked the court to lift the stay but that request was denied.[12]

In fact, the issue might eventually reach the United States Supreme Court. The Court has previously declined to hear same-sex marriage cases from several circuits, but those denials occurred at a time when all circuit courts of appeals that had addressed such bans found them unconstitutional.[13] However, a conflict among circuits has recently developed, which may mean that the Supreme Court will have to weigh in on whether such bans, like the ban in Florida, are constitutional.

The conflict stems from the recent opinion issued in *DeBoer v. Snyder*, where the Sixth Circuit Court of Appeals held that bans on same-sex marriage in the states comprising the Sixth Circuit did not violate the U.S. Constitution.[14] The opinion found that fundamental decisions regarding same-sex marriage are properly left to the states and not the courts.[15]

If the rulings striking down bans on same-sex marriage, including the Northern District's decision in *Brenner*, are ultimately upheld, the provision of employment benefits in Florida will necessarily change. Same-sex marriage partners will be entitled to the benefits that stem from marriage, which is a qualification for many employment benefits.

U.S. Department of Labor ("DOL") guidance regarding the provision of employment benefits to same-sex couples is instructive.[16] The guidance was issued in 2013, in the wake of the United States Supreme Court's decision in *United States v. Windsor*.[17] In *Windsor*, the Court struck down Section Three of the federal Defense of Marriage Act ("DOMA").[18] That section provided that when the term "marriage" is referred to in any federal statute, that term means only a marriage between a man and a woman.[19]

The DOL guidance provides assistance on compliance with the Employee Retirement and Income Security Act ("ERISA"), a federal law governing the

*continued, next page*

administration of workplace benefits plans—including pension plans, 401(k) retirement plans, and health and welfare plans—when the beneficiary is in a recognized same-sex marriage. The guidance provides that the term "spouse" refers to individuals lawfully married under any state law and that the term "marriage"—when referred to in ERISA or related regulations—can refer to a same-sex marriage legally recognized under any state law.[20] Thus, the DOL guidance requires employers to extend benefits offerings for married couples to same-sex married couples, where those couples were married in a state that recognizes the marriage as valid.[21]

Should the decisions striking down Florida's constitutional amendment banning same-sex marriage be upheld, same-sex partners in a Florida-recognized marriage will be entitled to a host of benefits based on marital status, as well as protection from discrimination based on marital status under the Florida Civil Rights Act of 1992. Only time will tell whether the Northern District of Florida's decision in *Brenner* is ultimately upheld by the Eleventh Circuit and whether the U.S. Supreme Court will decide to weigh in on whether same-sex marriage bans violate the U.S. Constitution.

**Editor's Note:** On January 16, 2015, the United States Supreme Court granted the Petition for Writ of Certiorari in *DeBoer v. Snyder*.

J. SLANKER

***Jeffrey D. Slanker*** *is an associate at Sniffen and Spellman, P.A., in Tallahassee. He practices labor and employment law, civil rights defense, local government law, and administrative law. His litigation experience includes handling matters involving Title VII of the Civil Rights Act, the Fair Labor Standards Act, the Americans with Disabilities Act and other federal and state employment statutes.*

### Endnotes

1 999 F. Supp. 2d 1278 (N.D. Fla. 2014).

2 *Id.* at 1281-82.

3 Lindsay Peterson, *Florida Voters Pass Same-Sex Marriage Amendment*, TAMPA TRIBUNE, Nov. 5, 2008.

4 FLA. CONST. art. I, § 27 (amended 2008).

5 *Brenner*, 999 F. Supp. 2d at 1281-82.

6 *Id.* at 1287 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

7 *Id.* at 1288-89.

8 *Id.* at 1281-82.

9 *Id.* at 1289.

10 *Id.* at 1291-92.

11 *Brenner v. Sec'y, Fla. Dep't of Health, appeal docketed*, No. 14-14061(11th Cir. Sept. 9, 2014).

12 *See Brenner*, Case Nos. 4:14cv107-RH/CAS, 4:14cv138-RH/CAS, Docket No. 95.

13 Nina Totenberg, *Supreme Court Declines To Hear Gay-Marriage Case . . . For Now* (N.P.R. radio broadcast Oct. 2, 2014).

14 *DeBoer v. Snyder*, No. 14-1341, 2014 WL 5748990, at *26-27 (6th Cir. Nov. 6, 2014).

15 *Id.*

16 *Guidance to Employee Benefit Plans on the Definition of "Spouse" and "Marriage" under ERISA and the Supreme Court's Decision in United States v. Windsor, United States Department of Labor*, Employee Benefits Security Administration, Technical Release No. 2013-04.

17 *Id.* (providing guidance on *United States v. Windsor*, 133 S.Ct. 2675 (2013)).

18 *Windsor*, 133 S. Ct. at 2683, 2696.

19 *Id.* at 2683.

20 *Id.*

21 *Id.*

## *Evans v. Books-A-Million:*

# The Eleventh Circuit's Interpretation of "Prejudice" Under the FMLA and Taxable Costs Under ERISA

**By Carlo D. Marichal, Ft. Lauderdale**

## I. Introduction

The Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601, et seq. ("FMLA") provides that eligible employees may take up to 12 workweeks of leave during any 12-month period for certain enumerated occurrences.[1] The FMLA also makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" a right prescribed under the FMLA.[2] To bring a claim of FMLA interference, the employee must be able to show that (1) the employer interfered with, restrained, or denied the employee's exercising of rights under the FMLA, and (2) the employee was prejudiced.[3] A plaintiff who prevails in an action pursuant to the FMLA, COBRA, or both, is entitled to, among other things, costs.[4] 28 U.S.C. § 1920 enumerates items that are considered "taxable" costs.[5] Mediation, legal research, postage, and travel, however, are not enumerated under section 1920. Whether such costs are recoverable and what actions constitute "prejudice" under the FMLA were two of the issues in *Evans v. Books-A-Million*.[6]

Evans, a former Books-A-Million employee, appealed the district court's summary judgment dismissal of her claims under the FMLA, Title VII, and the Equal Pay Act. In addition, Evans appealed the district court's denial of recovery of the litigation expenses of mediation, legal research, postage, and travel when she prevailed on her claim that the employer-defendant violated COBRA for failing to send her a notice relating to the continuation of her dental insurance. Books-A-Million cross-appealed the trial court's finding of an intentional COBRA violation.

## II. Factual and Procedural Background

In January 2006, Evans advised her employer that she was pregnant. At that time, Evans was part of a team tasked with implementing a new payroll system, which was set to "go live" in August 2006. Five months after notifying the company of her pregnancy, Evans approached her supervisor to discuss what documents were required for her FMLA maternity leave. Evans was told that she could not take FMLA leave and could instead work from home while on maternity leave. Evans voiced her objections about working while on maternity leave but was told that she "really needed" to work on the payroll system due to the impending "go live" date. Evans was advised that successful implementation of the payroll system would account for 50% of her annual bonus.

Evans gave birth on August 30, 2006—one day after her last day at the office. Two days later, Evans began answering work-related calls, and soon thereafter she began working full-time again. During this time, Evans was paid her full salary.

Despite no prior performance problems, upon her return from leave Evans began receiving criticism of her work implementing the payroll system. The month after Evans returned to work, she was reassigned to a newly created risk manager position, which had neither clearly defined responsibilities nor payroll duties.

On March 13, 2007, Evans learned that the company had placed an advertisement for her previous position, and she asked her supervisor about it. Her supervisor told her the company was not pleased with the payroll implementation process. Evans expressed her opposition to the risk manager position because she wanted to advance her career in payroll management and because the risk manager position required travel, which would be difficult with a newborn child. Evans was told she could either accept the new position or resign. Evans did not accept the position, and her employment was terminated on March 27, 2007.

To be eligible for the annual bonus, an employee must have been employed on the date that the company's audit committee voted to approve the annual financial statements. Evans was advised that she would not be eligible for the 2006 annual bonus because the committee had not met when she was terminated; it met two days after her termination. Additionally, Evans did not receive a COBRA notice relating to her dental insurance.

## III. Evans' FMLA Interference Claims

Books-A-Million filed a motion for summary judgment.[7] The district court granted the motion, dismissing all claims except the claim for the COBRA violation (which was not addressed in the summary judgment motion). With respect to Evans' FMLA claim, the court found that she was paid her full salary and, therefore, did not suffer any legal damages.

On appeal, the Eleventh Circuit vacated the district court's award of summary judgment with respect to Evans' FMLA claim. The crux of Evans' argument on appeal was that her FMLA interference claim should not

*continued, next page*

have been dismissed solely because she suffered no legal damages. The Eleventh Circuit agreed, reasoning that the district court did not consider all the "damages" available under the FMLA, which includes not only compensation and benefits but also equitable relief, such as reinstatement, employment, and promotion.[8] The Eleventh Circuit reiterated that although granting equitable relief is discretionary, a court must consider on a case-by-case basis whether to grant equitable relief; it cannot simply refuse to consider such relief.[9] The appellate court further opined that a court must articulate a reason for refusing to grant equitable relief when such relief is sought in a complaint.[10] The court pointed out that the district court's order did not make any reference to the equitable relief sought by Evans.[11] The Eleventh Circuit presumed that the court, relying on *Demers v. Adams Homes of Northwest Florida, Inc.*,[12] concluded that because Evans was paid her salary, she suffered no legal damages.[13]

The Eleventh Circuit concluded that *Demers* held only that the employee failed "to articulate any harm suffered" that resulted from the FMLA violation.[14] The appellate court relied on the Supreme Court's holding in *Ragsdale* that an employee must show she has been prejudiced in some way by the FMLA violation. Neither the *Ragsdale* court nor the *Demers* court defined "prejudice." The Eleventh Circuit noted that "prejudice" does not mean "legal damages"; instead, it defined "prejudice" as "some harm remediable by either 'damages' or 'equitable relief.'"[16] Applying this definition, the Eleventh Circuit reversed summary judgment, holding that there were issues of fact regarding whether Evans was prejudiced, in that the supervisor focused on Evans' job performance while on leave when deciding to reassign her.[17] The court elaborated: "It seems plain to us that if an employer coerces an employee to work during her intended FMLA leave period and, subsequently, reassigns her based upon her allegedly poor performance during that period, the employee may well have been harmed by the employer's FMLA violation."[18] The Eleventh Circuit further noted that Evans may have sought reinstatement as an equitable relief or sought front pay if reinstatement was not viable.[19]

The *Evans* holding places district courts on notice that "prejudice" may be articulated much more easily than expected. In footnote 3, the court noted that 29 C.F.R. § 825.220(b) prohibits an employer from discouraging an employee from taking leave.[20] Going forward, the *Evans* opinion also places employers on notice that criticizing work of an employee who requests FMLA leave may amount to "prejudice." Indeed, if the trial court finds that there are no legal damages, the plaintiff no longer has a right to a trial by jury because equitable claims are not proper for juries.[21] Consequently, it would be wise in summary judgment to request that the trial court deny a request for equitable relief and remind the court that it must articulate a reason for the denial.

## IV. Evans' COBRA Claim and Recovery of Costs

The issue of whether Books-A-Million intentionally violated COBRA for failing to send dental insurance information proceeded to a bench trial.[22] The Eleventh Circuit affirmed the district court's credibility assessment in finding the intentional violation.[23] The district court granted fees and costs to Evans pursuant to ERISA's fee-shifting provision.[24] 28 U.S.C. § 1920 lists the following as taxable costs:

> (1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) Docket fees under section 1923 of [Title 28]; and (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of

special interpretation services under section 1828 of [Title 28].

The district court refused to award costs associated with mediation, legal research, postage, and travel because § 1920 does not include them as recoverable costs.[25] The Eleventh Circuit was faced with a matter of first impression: whether expenses, which the parties agree are not enumerated in § 1920, are still taxable under § 1132(g)(1).[26] In resolving this issue, the Eleventh Circuit noted that § 1132(g)'s fee-shifting provision should be analyzed in accordance with other fee-shifting statutes. Applying this rule, the court quoted another Eleventh Circuit case that held that a litigant may recover "all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case."[28] The appellate court rejected the notion that § 1920 was controlling and instead held that "reasonable litigation expenses such as mediation, legal research, postage, and travel may be recovered under § 1132(g)(1) if it is the prevailing practice in the legal community to bill fee-paying clients separately for those expenses."[29]

Depending on the result you seek, it may be prudent to offer expert testimony from a legal practitioner—or more than one, if allowed—"in the relevant legal community who [is] familiar with the type of legal service provided and the prevailing market rate for such work."[30] However, courts are also considered experts on the reasonableness of fees and, accordingly, may prohibit other testimony.[31] As such, it would be wise to conduct research regarding the court's past orders when faced with a motion for attorneys' fees and costs.

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 *See* 29 U.S.C. § 2612 (2009).

2 *See* 29 § 2615(a)(1) (2008).

3 *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 88 (2002).

4 § 2617(a)(3); 29 U.S.C. § 1132(g)(1).

5 *Id.*

6 2014 WL 3882506 (11th Cir. 2014).

7 *Id.*

8 *Id.* (citing 29 U.S.C. § 2617(a)(1)(B)).

9 *Id.* (citing *Demers v. Adams Homes of Northwest Fla., Inc.*, 321 Fed. App'x 847, 849 (11th Cir. 2009) and *Ragsdale*, 535 U.S. at 89).

10 *Id.* (citing *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1052 (11th Cir. 1989)).

11 *Id.*

12 321 Fed. App'x 847 (11th Cir. 2009).

13 *Books-A-Million*, 2014 WL 3882506 at *5. The Eleventh Circuit also made a point to note that *Demers* was an unpublished decision. Unpublished decisions are not binding, but they are persuasive. *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007). The Eleventh Circuit in *Demers* affirmed the entry of summary judgment in favor of the employer where the employer denied leave because the employee could not articulate any harm that resulted from the denial. However, in its unpublished opinion, the appellate court did not recite any facts or offer any allegations advanced by the parties.

14 *Id.*

15 *Id.* (citing *Ragsdale*, 535 U.S. at 89).

16 *Id.* at *6.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at *5 n. 3.

21 *Sullivan v. School Bd. of Pinellas County*, 773 F.3d 1182, 1187 (11th Cir. 1985).

22 *Books-A-Million*, 2014 WL 3882506 at *1.

23 *Id.* at *7.

24 *Id.* (citing 29 U.S.C. § 1132(g)(1)).

25 *Id.*

26 *Id.*

27 *Id.* (citing *Murphy v. Reliance Standard Life Ins. Co.*, 247 F.3d 1313, 1315 (11th Cir. 2001)).

28 *Id.* (quoting *ACLU of Ga. v. Barnes*, 168 F.3d 423, 438 (11th Cir. 1999)).

29 *Id.* at *8.

30 *Schafler v. Fairway Park Condo. Ass'n*, 324 F. Supp. 2d 1302, 1313 (S.D. Fla. 2004).

31 *Bedoya v. Aventura Limousine & Transp. Service, Inc.*, No. 11-24432-CIV, 2013 WL 539259, at *2 (S.D. Fla. Feb. 13, 2013).

# Mark Your Calendar

## ADVANCED LABOR TOPICS 2015

### Ritz Carlton Sarasota
### 1111 Ritz Carlton Drive
### Sarasota FL 34236
### (941) 309-2000
### www.ritzcarlton.com / sarasota

### May 29-30, 2015

**Hotel Reservations:** A block of rooms has been reserved at The Ritz Carlton Sarasota, at the rate of $199 single/double occupancy. There is an optional $28 resort fee per day. To make reservations, please contact The Ritz Carlton Sarasota at (800) 241-3333. Reservations must be made by Thursday, April 20, 2015, to ensure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

**Guests at The Ritz-Carlton, Sarasota, located in downtown Sarasota, will enjoy the rich, artistic uniqueness that surrounds this Florida Gulf Coast retreat and the sandy, white beaches that indulge the desire to relax. Take time to explore the city's fine dining, museums, art galleries and performance venues. Spend moments, too, savoring the tranquil coastal lifestyle.**

# FEDERAL COURTS

## Eleventh Circuit

### By Allison M. Gluvna

**Statute of limitations for ERISA claim began to run when employee had reason to know administrator repudiated his disability benefits claim by failing to pay benefits, regardless of whether employee received a formal denial letter terminating the benefits.**

*Witt v. Metropolitan Life Ins. Co.*, 2014 U.S. App. LEXIS 22321 (11th Cir. Nov. 25, 2014).

An employee filed a claim for disability benefits in 1997, which was initially approved but terminated several months later by MetLife for failure to provide adequate supporting medical records. MetLife's records indicated that it sent the employee a denial letter upon the termination of benefits, which letter the employee denied receiving. The employee took no action for 12 years. Subsequently, he contacted MetLife regarding the status of his claim and was informed that the claim had been terminated in 1997 and would remain terminated. Following an internal review, MetLife maintained this position, and the employee filed a lawsuit in 2012 for reinstatement of the benefits. He argued that the statute of limitations on his ERISA claim did not begin to run until 2012, when MetLife completed its internal review and issued a written decision. The district court rejected this argument, and the Eleventh Circuit affirmed on appeal, holding that regardless of whether the employee received a denial letter in 1997, the ERISA cause of action accrued (and the limitations period began to run) at or around that time, when the employee had reason to know the administrator repudiated the claim by failing to pay him benefits.

**Failure to reference FLSA unpaid overtime claim in statement of claim did not bar plaintiffs from proceeding with FLSA claims.**

*Calderon v. Baker Concrete Constr., Inc.*, 2014 U.S. App. LEXIS 21559 (11th Cir. Nov. 14, 2014).

Construction workers sued contractor alleging, among other things, failure to pay overtime wages under the FLSA. As required in the Southern District of Florida, the plaintiffs submitted a statement of claim (which is not required by the Federal Rules of Civil Procedure). Because the plaintiffs failed to mention unpaid overtime hours in their statement of claim, the district court dismissed the lawsuit for lack of subject matter jurisdiction. The Eleventh Circuit reversed, holding that the statement of claim was not controlling and did not have the status of a pleading. Rather, the court emphasized that federal jurisdiction at the pleading stage should be based on the contents of the complaint, not a statement of claim required by a district court.

**In connection with ADA claim, EEOC's subpoena seeking cruise ship company's data on all workers discharged since 2009 due to medical conditions denied as unduly burdensome.**

*EEOC v. Royal Caribbean Cruises, Ltd.*, 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014).

The EEOC issued an administrative subpoena requesting a list of all Royal Caribbean employees who had been discharged, or whose contracts were not renewed, since August 2009, in connection with an ADA charge of discrimination filed by a former employee. The Eleventh Circuit agreed with the federal district court that the subpoena should be denied because it was "at best tangentially relevant" to the employee's charge of discrimination and because compliance with the subpoena would be unduly burdensome in light of Royal Caribbean's estimate that it would take five to seven employees two months to comply with the subpoena.

**A foreign accent or difficulty with spoken English can be legitimate basis for adverse employment action when effective communication skills are reasonably related to job performance.**

*Fong v. Sch. Bd. of Palm Beach County, Fla.*, 2014 U.S. App. LEXIS 21224 (11th Cir. Nov. 4, 2014).

A teacher sued the school board after her teaching contract was not renewed, alleging disparate treatment on the basis of her national origin (Chinese). She attempted to rely on statements made by the school principal that she had a "very strong accent" and her students "don't understand" her as direct evidence of discrimination. The Eleventh Circuit rejected this argument, finding that the statements were not "blatant" remarks "whose intent could mean nothing other than to discriminate on the basis of" her national origin. The court noted that it could be reasonably inferred that the statements were an observation of a fact regarding her ability to communicate effectively with her students. The court went on to state that assuming the teacher established a prima facie case, the articulated reasons for not renewing her contract—her work performance and teaching style—were legitimate and non-discriminatory.

**FLSA's burden-shifting analysis not triggered when employees failed to introduce more than a "mere scintilla of evidence" suggesting that wage and time records were inaccurate.**

*Gilson v. Indaglo, Inc.*, 581 Fed. App'x 832 (11th Cir. Oct. 31, 2014).

Sales employees filed FLSA lawsuit against employer seeking to recover unpaid wages. In an attempt to trigger the FLSA's burden-shifting analysis on the grounds that the employer's records were "inaccurate and inadequate," the employees alleged that there were inconsistencies between the sales commissions sheets and the employee time calendar and that the employees

worked through automatically deducted meal breaks without compensation. The Eleventh Circuit rejected their argument and affirmed the district court's granting of summary judgment in the employer's favor because the employees failed to introduce more than a "mere scintilla of evidence" suggesting that the employment records were inaccurate. Among other things, they failed to produce any documentary evidence, state specific dates when their work hours were not reflected in their employer's records, or estimate the number of days when they worked through lunch.

**Court revives former employee's retaliation claim alleging she was rejected for rehire after former employer learned of her prior FMLA leave.**

*Coleman v. Redmond Park Hosp. Servs., LLC*, 2014 U.S. App. LEXIS 20756 (11th Cir. Oct. 23, 2014).

A nurse filed suit against her former employer, alleging that it retaliated against her by refusing to rehire her when it learned she previously used FMLA leave during her employment at a related hospital. The employer argued that it did not hire the nurse because she had left a profanity-laden voicemail for its recruiter (which the nurse denied doing). The district court granted summary judgment in the employer's favor. The Eleventh Circuit reversed, finding that there was a factual dispute regarding the content of the voicemail at issue and recognizing that a former employee has a cause of action under the FMLA if her past use of FMLA leave was a motivating factor in the employer's refusal to rehire her.

**Requiring employer to create part-time position that does not exist is not a reasonable accommodation under the ADA.**

*Rabb v. Sch. Bd. of Orange County, Fla.*, 2014 U.S. App. LEXIS 20757 (11th Cir. Oct. 23, 2014).

A teacher, who suffered a stroke preventing her from performing the functions of a full-time teacher without accommodation, sued the school board, claiming that it failed to reasonably accommodate her disability. She contended that allowing her to work part-time was a reasonable accommodation. The Eleventh Circuit disagreed, holding that the ADA does not require employers to create a part-time position to accommodate a disability, and the fact that the employer previously accommodated the teacher's disability by allowing her to work part-time temporarily did not make the accommodation reasonable.

A. GLUVNA

***Allison Gluvna** is an associate in Jackson Lewis' Miami office. She represents management clients in all types of employment litigation, including claims of discrimination, harassment, retaliation, and wage and hour disputes.*

## District Courts

### Northern District of Florida

**By Macon Jones**

**Protected expression under the Florida Whistle-Blower Act requires only an objectively reasonable belief that an employer is conducting illegal activity rather than a showing of an actual violation of the law.**

*Odom v. Citigroup Global Mkts. Inc.*, 2014 U.S. Dist. LEXIS 162805 (N.D. Fla. Nov. 20, 2014).

A former employee sued under the Florida Whistle-Blower Act ("FWA") stating he was terminated because he objected to questionable activity by his employer. The defendant filed a motion for summary judgment arguing that it was not engaged in any illegal activity and thus plaintiff's expression is not protected under the FWA. To state a claim under the FWA, one must show he or she engaged in protected expression, which is objection to or refusal to participate in illegal employer activity. The Northern District addressed whether the FWA requires a showing of an actual violation of the law or just a reasonable belief of a violation. Despite the fact that federal courts have held to the "actual violation" standard, there was no Florida case law on the issue until *Aery v. Wallace Lincoln-Mercury, LLC*, 118 So.3d 904 (Fla. 4th DCA 2013). In *Aery*, the court held that one need show only that he or she was retaliated against for expression related to a good faith, objectively reasonable belief of illegal activity. The Northern District found that although the reasoning in *Aery* was incomplete and questionable, it serves as binding precedent for federal courts applying Florida law. Under the "reasonable belief" standard, the plaintiff's claim provided sufficient material facts to survive summary judgment.

### Middle District of Florida

**Race and color-based discrimination are not synonymous, and a plaintiff must specifically plead color-based discrimination to survive motion to dismiss.**

*Napier v. AFGE*, 2014 U.S. Dist. LEXIS 126647 (M.D. Fla. Sept. 10, 2014).

The plaintiff, a white male and former president of the American Federation of Government Employees ("AFGE") Local 547 chapter, brought suit against both the AFGE and Local 547 for hostile work environment based on race or color; retaliation; retaliation based on race or color; and injunctive relief. The plaintiff alleged that his removal as president from Local 547 and accusations that he received improper benefits while serving as president occurred

because he is "white" and in retaliation for filing an EEOC complaint. Local 547 filed a motion to dismiss for various reasons, all of which were denied, save one: failure to exhaust administrative remedies for color-based discrimination. Local 547 contended that in the plaintiff's original EEOC complaint, he failed to specifically "check the box" for color-based discrimination. Plaintiff argued that race and color overlap and that his prior claims for race-based discrimination are synonymous with his current claims for race and color discrimination. The Middle District disagreed and held that color and race-based claims, while similar, are not synonymous. Color-based claims are rooted in instances where a particular hue of a person's skin is the basis for the discrimination "such as in the case where a dark-color African-American individual is discriminated against in favor of a light-color African-American individual." As a result, Local 547's motion to dismiss was granted on all counts related to color-based discrimination.

**Default judgment cannot differ from relief sought in the original complaint regardless of whether facts contained in the original complaint support a finding of additional relief.**

*White v. OSP, Inc.*, 2014 U.S. Dist. LEXIS 152233 (M.D. Fla. Oct. 27, 2014).

The plaintiff, a former employee at Papa John's who delivered pizza and worked inside the restaurant, filed a complaint against his former employer for failure to pay overtime wages under the Fair Labor Standards Act. The plaintiff contends that he was paid below minimum wage while performing work inside the restaurant and was not provided overtime compensation when he worked in excess of 40 hours per week. After a Clerk's Entry of Default, the plaintiff filed a motion for final judgment with the Middle District, and the employer did not respond. In the motion, the plaintiff sought unpaid minimum wages, plus associated liquidated damages, attorneys' fees and costs. The court denied the motion because the plaintiff did not seek unpaid minimum wages in the original complaint even though the alleged facts supported both unpaid overtime and unpaid minimum wages. The court held that a default judgment cannot differ or exceed what is demanded in the pleadings.

**Motion for summary judgment denied where exemptions under the Fair Labor Standards Act are an affirmative defense and are construed narrowly against the employer, and a genuine issue of material fact exists as to whether the plaintiff's work duties directly related to the management or general business operations of the defendant.**

*Wagner v. Lee County, Fla.*, 2014 U.S. Dist. LEXIS 147824 (M.D. Fla. Oct. 16, 2014).

The plaintiff is a former county employee whose job title was "administrative specialist." One of her duties was management of the county's real estate database which, according to the defendant, played an integral part in encouraging new development in the county. The board of county commissioners ("Defendant") filed a motion for summary judgment arguing that the plaintiff meets the requirements for an administrative exemption under the Fair Labor Standards Act ("FLSA") and is not entitled to overtime compensation. The court found that there was a genuine issue of material fact as to whether the plaintiff's work duties directly related to the management or general business operations of the defendant. The defendant claimed that as part of the plaintiff's database management, plaintiff exercised discretion and independent judgment because her tasks required a high level of privacy and confidentiality. However, the plaintiff asserted she exercised limited or no discretion on matters of significance. Rather, her position was merely secretarial and should not be exempted from overtime compensation under the FLSA. The court stated that the defendant shoulders the burden for the administrative exemption affirmative defense and that any exemption should be interpreted narrowly against the employer. Because the plaintiff has a drastically different account of her role and duties while employed by the defendant, the defendant's motion for summary judgment was denied.

**Motion to dismiss is granted where plaintiffs failed to exhaust administrative remedies concerning employer's unilateral change to plaintiffs' ERISA benefit plan.**

*Comer v. Gerdau Ameristeel US, Inc.*, 2014 U.S. Dist. LEXIS 161766 (M.D. Fla. Nov. 18, 2014).

The plaintiffs filed suit under the Labor Management Relations Act and the Employee Retirement Income Security Act ("ERISA") challenging the employer's unilateral change to a plan established under ERISA. The employer filed a motion to dismiss the ERISA count for failure to exhaust administrative remedies. The plaintiffs claimed administrative remedies would be futile because they are challenging the legality of the plan's change rather than the plan's interpretation. The employer argued that the collective bargaining agreement ("CBA") outlining how and when a plan can be changed is itself a plan document and thus falls under the purview of the plan administrator. The court, granting the employer's motion to dismiss, found that broad authority is granted to the plan administrator under the CBA, and the plaintiffs' assertion that the employer had violated the plan implies the plan administrator's ability to correct the change.

## Southern District of Florida

**Difference in burden of proof permits different outcomes between jury's**

**determination of lack of willfulness and a district court's determination of lack of good faith.**

*Flores v. Wheels Am. Miami, Inc.*, 2014 U.S. Dist. LEXIS 117863 (S.D. Fla. Aug. 25, 2014).

A jury determined that the plaintiff employee was owed approximately $15,000 in overtime wages but found that the defendant employer did not act willfully. The plaintiff moved for a final judgment against the defendant for the actual damages awarded by the jury and for liquidated damages provided by the Fair Labor Standards Act ("FLSA"). The Southern District explained that a jury finding on willfulness did not prevent the court from making its own finding regarding lack of good faith because the employer has the burden with respect to liquidated damages, while the plaintiff has the burden regarding willfulness. The court found the defendant acted in objective and subjective good faith where the defendant had: (1) legal counsel in employment affairs; (2) posted FLSA posters; (3) an employee-controlled time entry program; (4) contracted time-keeping administration to a reputable third-party provider; (5) corrected any employee time problems; and (6) kept employee time and payment records.

M. JONES

***Macon Jones** is an assistant state attorney in the 8th Judicial Circuit. While he currently practices criminal law, he enjoys labor and employment law and keeping a close eye on recent developments.*

## STATE COURTS

### By Brian Calciano

**Private mediation discussions in a federal case regarding public-employee pensions violated Florida's Sunshine Law and voided the resulting settlement agreement where the discussions amounted to closed-door collective bargaining of pension benefits.**

*Brown v. Denton*, 39 Fla. L. Weekly D2203, 2014 WL5333480 (Fla. 1st DCA Oct. 21, 2014).

In February 2013, a fire district chief and three other municipal employees filed suit against the City of Jacksonville and the Police and Fire Pension Board of Trustees alleging that the city used a legislative impasse process to violate the plaintiffs' statutory and contractual rights to certain pension benefits.

Within a month of filing, the parties engaged in a series of voluntary mediation sessions over several months. Although not parties to the litigation, the firefighters union and the police union also attended the mediation sessions. None of the parties placed the federal court on notice that mediation would entail collective bargaining, nor was any public notice given or transcript of the proceedings made pursuant to Florida's Sunshine Law. The mediation sessions resulted in a Mediation Settlement Agreement ("MSA") that changed pension benefits of city employees.

In August 2013, a newspaper editor filed a complaint in state circuit court against the mayor, the city, and the pension board alleging that the MSA negotiations constituted closed-door collective bargaining conducted in violation of Florida's Sunshine Law, Fla. Stat. § 286.011. The complaint sought a declaration that the MSA was void ab initio and an injunction prohibiting the defendants from conducting future mediations regarding the MSA and the pension fund dispute.

In deciding motions for summary judgment on December 31, 2013, the state circuit court held in the plaintiff's favor, voiding the MSA and enjoining the parties from conducting further mediation sessions in private. The court found that changes to terms of employee pension benefits were a mandatory subject of collective bargaining and, thus, such bargaining was required to be conducted "in the sunshine."

On appeal, the First DCA resolutely upheld the lower court's order, emphasizing the importance of liberally construing the Sunshine Law to further the public interest of "protect[ing] the public from 'closed door' politics." In so holding, the appellate court affirmed key findings of the lower court: 1) the board functioned as a representative of the unions during mediation so as to constitute a "bargaining agent" under the Sunshine Law, regardless of the fact that the unions did not formally designate the board as a representative; and 2) the negotiation of pension benefits is a mandatory subject of collective bargaining.

The appellate opinion provided guidance regarding the interplay between Florida's Sunshine Law and federal court confidentiality rules by quoting the lower court's order as follows:

> [I]t is appropriate that the parties be ordered to inform a federal court that they are obligated to comply with Florida's Sunshine Law requirements and further ordered to take all reasonable steps to seek a waiver of the local federal rules in order to comply with this Court's judgment, the Constitution of the State of Florida, and applicable Florida laws mandating Government in the Sunshine. If, after fully complying with the Court's judgment, the parties nevertheless are ordered by the federal court to conduct mediations in private, the Supremacy Clause of the United States Constitution requires that the parties comply with the federal court's order.

**Complaint for breach of severance agreement was not subject to dismissal on the basis that the allegations directly conflicted with the terms of the severance agreement attached to the complaint where the complaint allegations plausibly interpreted the terms of the agreement.**

*Thomas v. Hickory Foods, Inc.*, 145 So.3d 203 (Fla. 1st DCA Aug. 18, 2014).

An employee sued his former employer for failure to pay the salary amount set forth in the parties' separation agreement. The dispute hinged on the meaning of the following provision: "[T]he Company will pay [the employee] an annual salary in the amount of $56,398.68 . . . from the Termination Date through May 24, 2013 (the "Post Termination Period"). Specifically, the parties disagreed as to whether the employee was entitled to his entire annual salary or merely the pro rata value of the eight-week Post Termination Period. The trial court granted the employer's motion to dismiss on the basis that the allegations in the employee's complaint regarding the amount of salary owed directly conflicted with the provision of the severance agreement, which had been attached as an exhibit to the complaint.

On appeal, the First DCA reversed and remanded for further proceedings. The court distinguished the instant case from *Appel v. Lexington Ins. Co*. In *Appel*, the Fifth DCA affirmed dismissal of a complaint containing allegations that certain acts and omissions constituted "professional services" under an agreement on the basis that those allegations directly conflicted with the definition of "professional services" in a policy statement attached as an exhibit to the complaint. The *Thomas* court distinguished *Appel* on the basis that the salary provision of the severance agreement in *Thomas* was more ambiguous than the "professional services" definition in *Appel*. The court concluded that the employee's complaint "state[d] a plausible interpretation of the agreement's less than crystalline terms" and underscored the importance of clarity in drafting severance agreements.

**Employer immune from negligence action by employee under "help supply service company" exception where that employee was leased from a third-party employment agency for a fee.**

*Baker v. Airguide Mfg., LLC*, 39 Fla. L. Weekly D2272, 2014 WL 5462528 (Fla. 3rd DCA Oct. 29, 2014).

An employee worked for Pacesetter, an employment agency that provides employees to shorthanded companies. In July 2008, Pacesetter placed the employee with Airguide, a manufacturing company. Two years later, the employee was injured by machinery in the course of employment at Airguide. Although the employee successfully filed a workers' compensation claim with Pacesetter, she subsequently filed a negligence suit against Airguide for the same injury. The trial court granted Airguide's motion for summary judgment on the basis that Airguide was immune to suit under the common law "borrowed servant" doctrine. The employee appealed on two separate grounds: 1) that the trial court failed to consider her affidavit and errata sheet filed four months after her deposition and two days before hearing on the motion; and 2) that Airguide did not establish its entitlement to workers' compensation immunity under the borrowed servant doctrine.

With regard to the first ground, the Third DCA found that the trial court permissibly rejected the employee's eleventh-hour affidavit and errata sheet when ruling on the motion for summary judgment. In so holding, the court viewed the conspicuous timing of the affidavit—combined with the conflict between with employee's affidavit and her deposition transcript—as "evidenc[ing] an attempt . . . to contravene her prior testimony and create a factual dispute regarding Airguide's ability to control her workplace conduct, which is one of the main factors considered under the 'borrowed servant' doctrine."

In addressing the second ground for appeal, the court made clear that Airguide could establish workers' compensation immunity through one of two means: the common law "borrowed servant" doctrine, which consists of a three-part test, or the statutory "help supply services company" exception, which requires only that the employee's services were acquired from a help supply services company. The court held that Airguide's employment agency was "clearly" a help supply services company, thus entitling Airguide to workers' compensation immunity.


B. CALCIANO

***Brian Calciano** is a St. Petersburg attorney who handles a wide array of employment matters on behalf of employees, contractors, and small to mid-sized businesses.*

**Find CLE COURSE BROCHURES at**

***www.laboremploymentlaw.org.***

# Section Bulletin Board

**To register for CLEs, visit www.FloridaBar.org/cle**

**For more information, contact Angie Froelich:**
**850-561-5633 / *afroelic@flabar.org***

## 2015

**MARCH 24, 2015**

12:00 noon – 12:50 p.m.
Audio Webcast: ***Statistical Evidence in Employment Law Cases (1809R)***
*Sherril M. Colombo, Littler Mendelson, P.C., Miami*

**APRIL 22, 2015**

12:00 noon – 12:50 p.m.
Audio Webcast: ***What Every Lawyer Should Know About Litigating Benefit Claims (1916R)***
*John P. Murray, The Murray Law Firm, P.A., Coral Gables*

**MAY 29-30, 2015**

***Advanced Labor Topics 2015 (1859R)***
Sarasota Ritz
Hotel Reservations: $199 / (800) 241-3333
Group Rate Expires 4/30/15

**JUNE 25, 2015**

***Presidential Showcase @ Annual Convention, 1:40 p.m. - 5:00 p.m.***
Boca Raton Resort & Club / Hotel Reservations: starting @ $149 / (888) 543-1277
Group Rate Expires: 6/3/15 or until sold out

**JUNE 25, 2015**

***Labor Executive Council Meeting @ Annual Convention, 5:15 p.m.***
Boca Raton Resort & Club / Hotel Reservations: starting @ $149 / (888) 543-1277
Group Rate Expires: 6/3/15 or until sold out

The Florida Bar Continuing Legal Education Committee and the Labor and Employment Law Section present

# Labor and Employment Law Section Audio Webcast Series 2014-2015

**COURSE CLASSIFICATION: INTERMEDIATE LEVEL**

**AUDIO WEBCAST PRESENTATION DATES:**

**November 18, 2014; December 16, 2014; February 3, 2015; February 24, 2015; March 24, 2015; April 22, 2015**

**12:00 noon - 12:50 p.m.**

Entire Series Available on CD

**Course No. 1804R**

***Earn CLE credit while sitting at your desk during your lunch hour.***

You may register for individual audio webcasts or pay a reduced price for the entire series live or on audio CD.

## November 18, 2014

12:00 noon – 12:50 p.m.
**Effective and Ethical Use of Social Media in Employment Litigation (1805R)**
*Ethan J. Wall, Social Media Law and Order, LLC, Miami*

## December 16, 2014

12:00 noon – 12:50 p.m.
**The Ins and Outs of Employee Leave and Accommodation Under the FMLA, Title VII, and the ADA (1806R)**
*Scott E. Atwood, Atwood Law Firm, P.A., Fort Myers*

## February 3, 2015

12:00 noon – 12:50 p.m.
**What Every Employment Lawyer Should Know About Intellectual Property Law (1807R)**
*Leslie J. Lott, Lott & Fischer, P.L., Coral Gables*

## February 24, 2015

12:00 noon – 12:50 p.m.
**Working With Expert Witnesses Throughout Your Employment Law Case (1808R)**
*Kerry Notestine, Littler Mendelson PC, Houston, TX*

## March 24, 2015

12:00 noon – 12:50 p.m.
**Statistical Evidence in Employment Law Cases (1809R)**
*Sherril M. Colombo, Littler Mendelson, P.C., Miami*

## April 22, 2015

12:00 noon – 12:50 p.m.
**What Every Lawyer Should Know About Litigating Benefit Claims (1916R)**
*John P. Murray, The Murray Law Firm, P.A., Coral Gables*

### AUDIO WEBCAST

As an audio webcast attendee, you will listen to the program over the Internet. Registrants will receive audio webcast connection instructions prior to the scheduled course date via email. If you do not receive the email 2 days prior to the event, contact InReach Customer Service at 877-880-1335.

### CLE CREDITS

**CLER PROGRAM**

(Max. Credit: 6.0 hours)

General: 6.0 hours for series; 1.0 hour per program
Ethics: 1.0 hour (1804 and 1805 only)

**CERTIFICATION PROGRAM**

(Max. Credit: 0.0 hours)

Labor & Employment Law:
4.5 hours for series; 1.0 hour per program

Intellectural Property Law:
1.0 hour for series; 1.0 hour for 1807R

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your *Florida Bar News* or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

**REFUND POLICY:** A $25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid.

## Register me for the Labor & Employment Law Section Audio Webcast Series 2014-2015.

TO REGISTER, FOLLOW THE LINK BELOW OR TO ORDER AUDIO CD BY MAIL, SEND THIS FORM TO: The Florida Bar, Order Entry Department, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name _____ Florida Bar # _____

Address _____ Phone: ( ) _____

City/State/Zip _____ E-mail* _____

***E-mail address required to transmit electronic course materials and is only used for this order.** **ABF: Course No. 1804R**

**ELECTRONIC COURSE MATERIAL NOTICE:** Florida Bar CLE Courses feature electronic course materials for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable electronic material can be downloaded and printed and is available via e-mail several days in advance of the live presentation or thereafter for purchased products. Effective July 1, 2010.

## AUDIO WEBCAST REGISTRATION FEE

***Effective and Ethical Use of Social Media in Employment Litigation – November 18, 2014 (1805R)***

- Registration Fee: $50

**TO REGISTER ON-LINE:**

**http://tinyurl.com/FloridaBarCLE1805R**

***The Ins and Outs of Employee Leave and Accommodation Under the FMLA, Title VII, and the ADA – December 16, 2014 (1806R)***

- Registration Fee: $50

**TO REGISTER ON-LINE:**

**http://tinyurl.com/FloridaBarCLE1806R**

***What Every Employment Lawyer Should Know About Intellectual Property Law – February 3, 2015 (1807R)***

- Registration Fee: $50

**TO REGISTER ON-LINE:**

**http://tinyurl.com/FloridaBarCLE1807R**

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

***Working With Expert Witnesses Throughout Your Employment Law Case – February 24, 2015 (1808R)***

- Registration Fee: $50

**TO REGISTER ON-LINE:**

**http://tinyurl.com/FloridaBarCLE1808R**

***Statistical Evidence in Employment Law Cases – March 24, 2015 (1809R)***

- Registration Fee: $50

**TO REGISTER ON-LINE:**

**http://tinyurl.com/FloridaBarCLE1809R**

***What Every Lawyer Should Know About Litigating Benefit Claims – April 22, 2015 (1916R)***

- Registration Fee: $50

**TO REGISTER ON-LINE:**

**http://tinyurl.com/FloridaBarCLE1916R**

***Reduced Rate: Entire Audio Webcast Series (1804R)***

- Registration Fee: $199

**TO REGISTER ON-LINE:**

**http://tinyurl.com/FloridaBarCLE1804R**

## METHOD OF PAYMENT FOR AUDIO CD (CHECK ONE):

❑ Check enclosed made payable to The Florida Bar

❑ Credit Card (Fax to 850/561-9413.)

☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX

Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____

Billing Zip Code: _____

Card No. _____

## AUDIO CD

Private recording of this program is not permitted. **Delivery time is 4 to 6 weeks after 04/22/15. TO ORDER AUDIO CD,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price.**

*Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida.* If tax exempt, include documentation with the order form.

❑ **AUDIO CD** **(1804C)**
(includes Electronic Course Material)
$199 plus tax (section member)
$239 plus tax (non-section member)

**+ TAX $_____ = TOTAL $ _____**

**Related Florida Bar Publications can be found at http://www.lexisnexis.com/flabar/**

2015 Annual Florida Bar Convention

BOCA RATON RESORT & CLUB

501 EAST CAMINO REAL
BOCA RATON, FL 33432
(561) 447-3000

CHARTING A COURSE FOR THE FUTURE

*** PRESIDENT'S SHOWCASE ***

**The Florida Bar Continuing Legal Education Committee and the Labor and Employment Law Section present**

# Don't Crash on the Information Highway: What Every Law Firm Needs to Know about the Impact of Technology on Employment Law Issues

**COURSE CLASSIFICATION: INTERMEDIATE**

**Thursday, June 25, 2015, 1:40 p.m.- 5:00 p.m.**
**Course 1960R** Staff Contact: Angie Froelich (afroelich@flabar.org)

**Moderators**:

*Judge Alan Forst of the Fourth District Court of Appeal, former Chair of the Labor and Employment Law Section*

*Sacha Dyson, Esq., of Thompson, Sizemore, Gonzalez, & Hearing, P.A., member of the Executive Council of the Labor and Employment Law Section*

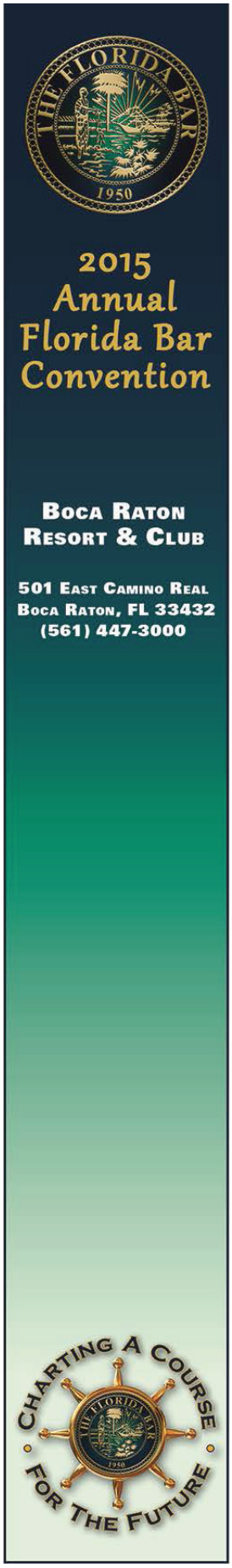
**Schedule**:

1:40 p.m.-2:30 p.m.

**Don't Stall Out: Ethical and Professional Issues in Electronic Communications**
Attendees will learn about the recent Florida Bar Ethics Opinion concluding it is not unethical to advise clients to clean up their social media posts in advance of litigation, and whether that Opinion creates tension with spoliation issues as well as ESI issues. The presenter will also address the ethical issues involved in an attorney purposely spoofing on social media and/or hiding the true identity of the attorney to communicate with litigants and/or jurors during litigation/trials. Additionally, the discussion will include advertising legal services on social media and/or touting results on professional social media sites such as LinkedIn.
*Robyn S. Hankins, Esq., Law Offices of Robyn S. Hankins, P.A., member of the Executive Council of the Labor and Employment Law Section.*

2:30 p.m. - 3:00 p.m.

**Texting While Driving: The FLSA and the Electronic Age**
Attendees will learn about the impact of technology on wage and hour off-the-clock issues. There will be thorough discussions of compensable time issues, including remote work performed on smart phones and other personal devices, and defenses to such claims, including examination of which employees are exempt from wage and hour laws.
*Shane Munoz, Esq., Chair of the Labor and Employment Law Section.*




3:00 p.m.-3:40 p.m. **Speed Bump Ahead: The NLRA and Electronic Communications**

Attendees will learn about the applicability of the National Labor Relations Act to both union and non-union workplaces, including recent developments before the National Labor Relations Board regarding non-disparagement, non-harassment, employee duty of loyalty and other employee handbook policies.

*Gregory A. Hearing, Esq., Thompson, Sizemore, Gonzalez & Hearing, P.A., former Chair of the Labor and Employment Law Section.*

3:40 p.m.-3:50 p.m. **Break**

3:50 p.m.-4:20 p.m. **Merge with Caution: Using Social Media in Workplace Investigations**

Attendees will learn whether Facebook and other social media postings by employees can be used during workplace investigations into allegations of employee misconduct. This session will discuss balancing an employee's expectation of privacy in social media postings with an employer's right to discipline its employees, including an emphasis on whether off-duty conduct posted on social media can be the basis for disciplinary action.

*Cathleen Scott, Esq., The Law Office of Cathleen Scott & Associates, P.A., member of the Executive Council of the Labor and Employment Law Section.*

4:20 p.m.-4:50 p.m. **Maintain the Right of Way: Safeguarding Electronic Information in the Workplace**

Attendees will learn the significance of safeguarding employee information under common law and statutory/regulatory privacy requirements; the importance of maintaining electronic security in the ongoing protection of confidential, proprietary and trade secrets information; the implications of a data breach; and practical steps to take to safeguard such information.

*Frank Brown, Esq., Chairman of the Reemployment Assistance Appeals Commission and Chair-Elect of the Labor and Employment Law Section.*

4:50 p.m.-5:00 p.m. **Questions**

**The Florida Bar**
**651 E. Jefferson Street**
**Tallahassee, FL 32399-2300**

PRESORTED
FIRST CLASS
U.S. POSTAGE
PAID
**TALLAHASSEE, FL**
**Permit No. 43**