

EMPLOYMENT LAWS IN FLORIDA

by

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EMPLOYMENT LAWS IN FLORIDA¹

I. GENERAL EMPLOYMENT LAW

A. Employment At Will and Overview of Workplace Laws:

1. Florida is what is known as an “at will” or “right to work” state.
2. The “at will” rule simply means that absent a prohibited or discriminatory reason, an employer under Florida or any federal law may fire an employee for (a) a good reason, (b) a bad reason, or (c) no reason at all.
3. The most significant exceptions to the doctrine of employment at will are found in the body of federal, state and local statutes and regulations prohibiting specified forms of discrimination in the workplace.

B. Protected Classes Under Federal Law:

1. Gender: Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), the Equal Pay Act of 1963 (“EPA”) and the Pregnancy Discrimination Act of 1978 (“PDA”) collectively protect employees and applicants for employment from gender discrimination, which is typically known as sex discrimination. Gender discrimination includes sexual harassment, pregnancy discrimination, pay discrimination because of gender, as well as discrimination because of gender in any term or condition of employment.
2. Race: Discrimination on the basis of race or color generally refers to discrimination on the basis of characteristics or traits associated with race, such as skin color, facial features or perceptions about certain racial group members.
3. Age: The Age Discrimination in Employment Act (“ADEA”) protects any employee **over the age of 40** from employment discrimination based on age.
4. Religion: Title VII prohibits employment discrimination based on an individual’s religious observances, beliefs or practices.
5. National Origin: Discrimination on the basis of national origin refers to discrimination based on differences in ancestry, heritage or national

¹ The following material is intended to provide information of a general nature concerning the broad topic of employment law issues. The materials included in this paper are distributed by the Law Offices of Cynthia N. Sass, P.A., as a service to interested individuals. The outlines contained herein are provided for informal use only. This material should not be considered legal advice and should not be used as such.

background.

6. Disability: Discrimination based on a disabling condition.

C. The 1991 Amendments to Title VII:

1. Compensatory Damages: Compensatory damages compensate the employee monetarily for emotional distress or any other type of injury that may result from the alleged intentional discriminatory conduct. They are decided by a jury and may include actual out-of-pocket monetary losses, lost future earnings (the judge decides these), emotional pain, suffering, mental anguish, loss of enjoyment of life and other non-monetary losses.
2. Punitive/Liquidated Damages: Damages designed to punish the employer for malicious conduct, and deter other employers from engaging in similar conduct in the future. Punitive damages are decided by a jury.

D. Damage Caps Under Title VII:

15-100 employees	\$50,000
101-200 employees	\$100,000
201-500 employees	\$200,000
500-plus employees	\$300,000

E. Other Remedies Under Title VII:

1. Back Pay: Back pay is the amount of earnings and benefits the employee would have earned had he or she not been discharged, demoted, etc., minus any amount he or she earned from other sources. Please note that back pay is not subject to the caps on Title VII damages.
2. Reinstatement to Former Position.
3. Front Pay: An award that compensates for lost future earnings. It is paid in lieu of reinstatement.
4. Attorneys' Fees and Costs.
5. Reinstatement of Benefits.
6. Injunctive Relief.

F. Additional Liability:

1. Employers may be liable for potentially UNLIMITED damages for torts such as assault & battery, and invasion of privacy.

2. Managers and supervisors can be personally liable.

G. Administrative Procedures Pursuant to Title VII:

1. A charge of discrimination must be filed with the U.S. Equal Employment Opportunity Commission (“EEOC”) within 300 days of the alleged act of discrimination.
2. Once the Right to Sue is received from the EEOC, a complaint must be filed in court within 90 days of the date of receipt of the same.

H. Overview of the Florida Civil Rights Act of 1992 (“FCRA”):

1. Coverage: Florida law covers all employers with 15 or more employees for each working day for 20 or more weeks, and prohibits discrimination on the basis of race, color, religion, gender, national origin, handicap, age and marital status.
2. Damages Under The FCRA:
 - a. Punitive: Plaintiffs can recover punitive damages not to exceed \$100,000.
 - b. Compensatory: No caps on compensatory damages.
 - c. Attorneys’ fees: Prevailing party may recover.
 - d. Injunctive Relief: Court becomes employer.
3. Administrative Procedures Pursuant to the FCRA:
 - a. Plaintiff must exhaust certain administrative remedies. This requires the filing of a charge with the Florida Commission on Human Relations within 365 days from the date of violation.

II. RULES OF THE WORKPLACE

A. Sexual Harassment

1. Sexual Harassment - What Is It? The EEOC defines sexual harassment in employment as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature.
 - a. “Unwelcome” means that the employee did not invite or solicit the alleged behavior and that he or she finds it undesirable or offensive.

- b. What is the standard? Requires an objectively abusive or hostile environment that a **reasonable** person would find to be abusive or hostile, in addition to the victim's subjective perception of the environment.
- 2. Mere acquiescence by plaintiff does not bar relief.
- 3. The harassment must affect a term, condition or privilege of employment. An isolated incident is not sufficient.
- 4. The employer knew *or should have known* of the harassment and failed to take **prompt remedial action**.
 - a. KEY ELEMENT: Prompt remedial action on the part of employer. A separate sexual harassment policy and procedure for reporting and investigating complaints must be established. The existence of such a policy and procedure is significant in minimizing liability.
- 5. Supreme Court cases instruct employers to take preventative measures:
 - a. Employers can be liable for a supervisor's harassment of an employee unless the employer proves (a) that it had a "proven effective mechanism" and policy for reporting and resolving harassment complaints, **and** (b) that the employee unreasonably failed to use the employer's proven system or otherwise unreasonably failed to avoid harm.
 - b. But also note that even if the employer does have a policy in place and the employee has unreasonably failed to follow the policy, the company may still be liable if the harassment resulted in a "tangible job action," such as firing or demotion.
- 6. Employer's responsibility:
 - a. Employers must acknowledge and PROMPTLY address complaints of harassment when they occur.
 - b. After a complaint is made, a thorough investigation should be conducted.
- 7. Also, employers have the responsibility to prevent future occurrences of sexual harassment:
 - a. Take appropriate corrective action against co-workers and non-employees.

- b. Affirmatively raise the subject of sexual harassment in the workplace.
- c. Express strong disapproval of sexual harassment.
- d. Inform employees of their right to initiate a complaint of sexual harassment and how to initiate it using the employer's grievance/complaint procedure.

8. Addressing Sexual Harassment Complaints:

- a. Employers should have specific, clearly articulated procedures for ***reporting, investigating and resolving*** sexual harassment complaints.
- b. The procedures should encourage harassment victims to come forward, but ***not*** require a victim to complain first to the offending supervisor.
- c. The procedures should ensure as much confidentiality as possible and provide effective remedies, including protection of victims and witnesses against retaliation by the harasser.
- d. When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, he or she should investigate the complaint promptly and thoroughly. Pro-active consultation with employment counsel is advisable.
- e. The employer should take ***immediate and corrective action*** to end the harassment and to prevent it from re-occurring.
- f. Consider removing the alleged harasser from direct supervision of the complaining employee.
- g. Disciplinary action against the offending supervisor or employee, ranging from a reprimand to discharge depending upon the severity of the conduct, may be necessary.
- h. Procedures addressing the investigation of a complaint and the resulting corrective action should be consistently applied.

B. Sex Discrimination: Federal and Florida Law prohibit treating employees differently in the terms and conditions of their employment based on gender.

C. Third-Party Actions: This involves situations where clients or vendors are

harassing a company employee and the employer knew or should have known of the harassment.

D. Same-Sex Harassment.

E. ADEA:

1. Employers are covered by the ADEA if they employ 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year.
2. The ADEA prohibits discrimination in hiring, promotion, assignment, compensation, discharge, and working environment against persons who are at least 40 years old.

F. Race Discrimination under Section 1981: Section 1981 of the Civil Rights Act of 1866 prohibits discrimination based on race in the making and enforcing of contracts. Under Section 1981, employment is a contractual relationship, even if there is no written contract. Section 1981 contains no minimum number of employees. Section 1981 provides unlimited compensatory and punitive damages.

G. Retaliation:

1. If an employee remains on the job after making a complaint of discrimination, an employer may **not** take adverse action against that employee.
2. Retaliation for participation.
3. Retaliation for opposition.

H. EPA: The EPA makes it illegal to pay male and female employees unequally for “equal work.” “Equal work” generally means those jobs which require equal skill, effort and responsibility. The EPA applies to both wages and fringe benefits.

I. “Wage & Hour” Issues under the Fair Labor Standards Act (“FLSA”):

1. What does the FLSA require?
 - a. Payment of at least a **minimum wage** to “non-exempt” employees. Currently, the minimum wage is \$5.15² per hour.
 - b. **Overtime pay** for any time worked **over** 40 hours in a workweek. The FLSA provides that overtime pay shall be calculated at a rate of

² In 2003

at least 1 ½ times an employee's *regular rate of pay*.

c. **Record-keeping** requirements.

2. Enforcement of the FLSA:

- a. The Wage & Hour Division of the U.S. Department of Labor is authorized to conduct extensive investigations into an employer's alleged violation of the FLSA.
- b. Under the FLSA, the Department of Labor may recover back wages on behalf of employees that have been underpaid in violation of the law. In the event that an employer is discovered to have repeatedly and willfully violated the FLSA, fines of up to **\$1,000 per violation** (NOTE: a "violation" occurs any time an employee is not properly compensated in accordance with the FLSA during any given workweek!) may be levied against an employer, and criminal sanctions including imprisonment can also be imposed.
- c. Employees may also bring their own private suits under the FLSA.
- d. It is illegal to retaliate for bringing claims forth.

J. Americans With Disabilities Act ("ADA"):

- 1. The ADA prohibits discrimination in employment on the basis of an actual or perceived disability or a record of having a disability.
- 2. Individuals with a disability:
 - a. Those who have a physical or mental impairment that substantially limits them in one or more major life activities;
 - b. Those who have a record of such an impairment; or
 - c. Those who are regarded as having such an impairment.
- 3. Essential functions of the job: Essential functions include those job duties that are fundamental to the job, and not marginal.
- 4. Reasonable accommodation and undue hardship:
 - a. A reasonable accommodation enables a qualified individual with a disability to achieve the same level of performance as a non-disabled person with similar skills.

- b. Accommodations that are unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the position create an undue hardship.

K. Family and Medical Leave Act of 1993 (“FMLA”):

1. The FMLA requires employers to grant employees unpaid leaves of absence with job protection and no loss of service, for family-related issues such as childbirth or a serious health condition.
2. A person seeking FMLA leave must:
 - a. Have been employed for a total of at least 12 months;
 - b. Have worked at least 1,250 hours during the 12 months before commencement of the leave;
 - c. Be employed at a location where the employer employs at least 50 employees within a 75 mile radius.
3. Leave is limited to 12 weeks during a 12-month period for any of the following reasons:
 - a. The birth and care of a child of the employee;
 - b. The adoption of a child by the employee or acceptance of a child for foster care;
 - c. The care of a spouse, child, or parent with a serious health condition; or
 - d. The employee’s own serious health condition.
4. Definition of serious health conditions:

The term “serious health condition” means an illness, injury, impairment, or physical or mental condition that involves:

 - a. inpatient care in a hospital, hospice, or residential medical care facility; or
 - b. continuing treatment by a health care provider.

- L. Pregnancy Discrimination:** The PDA prohibits an employer from refusing to hire, terminating or otherwise discriminating against an employee because of her pregnancy, childbirth, or pregnancy-related medical condition.

III. CASE MANAGEMENT: HOW TO PRO-ACTIVELY ADDRESS COMPLAINTS OF DISCRIMINATION/HARASSMENT

A. Internal Complaints:

1. Anti-discrimination/anti-harassment policy and complaint procedure.
 - a. Complain to supervisor or H.R.
 - b. No retaliation.
2. Open door policy.
3. Educate employees on the alternatives available for initiating a complaint under the established policy.
4. Discuss concerns privately.
5. If the complainant is reluctant:
 - a. Protect. Tell the complainant that he/she is protected from being retaliated against for making a legitimate complaint.
 - b. Explain. The company is obligated to address and take action against any unlawful behavior or action occurring in the workplace.
 - c. Do not promise confidentiality.
6. Ask questions. Find out as much as you can about the situation. Be a good listener.
7. Find out what the employee wants.
8. Pro-actively involve legal counsel in the investigative process.
9. Respond in a timely fashion.
10. Correct and remedy the problem.
11. Review the facts and make a decision.
12. Explain the investigation procedure and the process for arriving at a particular response.
13. Ask the employee/complainant for his or her response in writing to the

action taken.

14. Advise the employee that he/she may appeal the decision.
15. **DO NOT RETALIATE!!!**
16. **DOCUMENT ALL ACTIONS TAKEN THROUGHOUT THE PROCESS!!!**

B. External Complaints/Lawsuits:

1. Retain employment counsel to defend your company.
2. Fully disclose all that you remember when discussing the situation with legal representatives.
3. Keep information confidential.
4. **DO NOT RETALIATE!!!**

C. Prompt Remedial Action:

1. Investigate and address complaints immediately.
2. Deal with problems as they arise on a daily basis.
3. Treat employees fairly and even-handedly.

D. General Considerations:

1. Understand your policies and apply them consistently and fairly.
2. **DOCUMENT, DOCUMENT, DOCUMENT!!!**

VI. AVOIDING LIABILITY

A. Termination Guidelines:

1. Handle termination in a professional manner.
2. Have legitimate documentation to support reason for termination.

B. Exceptions to the At-Will Rule:

1. Refusal to commit an unlawful act or crime.

2. Workers' compensation laws: It is unlawful to take retaliatory action (including intimidation, coercion or discharge) against an employee for filing a worker's compensation claim.
3. "Whistleblower" protection: Florida law prohibits an employer from taking retaliatory action, including discharge, against an employee who, in good faith, reports or complains about possible violations of federal, state or local laws.

C. Employer's Defenses to Lawsuits:

1. The employer has a legitimate, nondiscriminatory reason for the discharge.
2. The employer has implemented a mechanism to address and investigate complaints and the employee has unreasonably failed to use it.

D. Preventative Measures Employers Can Take to Avoid Employment-Related Litigation:

1. Understand company policies and apply them consistently.
2. Place disclaimers in company documents asserting the "at will" nature of the employment.
3. Instruct supervisors, recruiters and other persons making job offers about making employment "promises" that should not be made to applicants or employees.
4. Communicate work rules to employees.
5. Evaluate employee performance regularly and fairly.
6. Document problems in writing.
7. Give advance warning to an employee of unsatisfactory behavior or performance to encourage improvement.
8. Consider implementing and adhering to a progressive discipline policy.
9. Administer terminations fairly and consistently. Have more than one person involved in the termination process.
10. Request that employee execute termination form and general release.
11. Consider using severance packages.

12. Do not allow unemployment claims, grievances and discrimination charges to go unanswered.
13. Involve legal counsel to assist in the termination.