

GENERAL PRACTITIONERS BEWARE! EMPLOYMENT CLAIMS YOU SHOULD KNOW ABOUT

by

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GENERAL PRACTITIONERS BEWARE!

EMPLOYMENT CLAIMS YOU SHOULD KNOW ABOUT¹

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e, *et seq.* (“TITLE VII”)

A. Covered Employers:

1. Applies to federal, state and local governments and to private employers, labor organizations and employment agencies.
2. Employers must be engaged in an industry affecting commerce, and have 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding calendar year.

B. Prohibits:

1. Discrimination based on:

- Race;
- National origin;
- Color;
- Gender, including sexual harassment;
- Pregnancy, childbirth, or related medical conditions; and
- Religion.

Three types:

- a) **Disparate treatment:** A person is treated less favorably than someone similarly situated because of their membership in a protected group.
- b) **Disparate impact:** Bars neutral criteria that are fair on their face but have a disproportionate, adverse impact on members of a protected group, and are not justified by business necessity.
- c) **Pattern or Practice:** Where discrimination or harassment is the company’s “standard operating procedure.” The plaintiff must “prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts,” he or she must show that

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 clients and other interested individuals. The outline contained herein is provided for informal use only. This material should not be considered legal advice and should not be used as such. Thank you to Joshua R. Kersey, Esquire, of the Law Offices of Cynthia N. Sass, P.A. for his assistance in preparing these materials.

discrimination is the company's "regular rather than unusual practice."

2. Harassment:

- Sexual harassment; and
- Harassment based on any of the characteristics above.

3. Retaliation:

- An employer may not take adverse action against any employee or former employee who has made a complaint of discrimination.
- Title VII prohibits discrimination against any employee because he has opposed any practice made unlawful by Title VII, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII.

C. **Statute Of Limitations:** An employee is required to file a charge of discrimination before filing a lawsuit in court. In Florida, the statute of limitations for filing a charge with the United States Equal Employment Opportunity Commission ("EEOC") is 300 days from the date the employee knew or should have known of the discriminatory action taken against him.

D. **Remedies** (as appropriate in each particular case):

1. Injunctive relief;
2. Reinstatement or, in the alternative, front pay;
3. Promotion;
4. Lost wages and benefits;
5. Reasonable attorneys' fees and costs;
6. Prejudgment and postjudgment interest; and
7. Damages:
 - a) **Compensatory Damages:** Compensate the employee monetarily for emotional distress or any other type of injury that may result from the alleged intentional discriminatory conduct. This issue is decided by a jury and may include:

- (1) Actual out-of-pocket pecuniary losses;
- (2) Future pecuniary losses (court-decided); and
- (3) Emotional pain, suffering, mental anguish, loss of enjoyment of life, loss of reputation, and other non-monetary losses.

- b) **Punitive Damages:** Designed to punish the employer for malicious conduct, and deter other employers from engaging in similar conduct in the future. Where available, punitive damages are decided by a jury.

NOTE: Punitive damages are NOT available against government employers.

- c) **Damages Caps:** The total of compensatory and punitive damages is capped at:

15-100 Employees	=	\$50,000
101-200 Employees	=	\$100,000
201-500 Employees	=	\$200,000
500+ Employees	=	\$300,000

- E. **Standard of Proof:** A plaintiff must establish that a protected characteristic was a “motivating factor” in the Defendant’s decision to take an adverse employment action against him. The plaintiff generally has the ultimate burden of persuasion in a Title VII action, and the Defendant generally has to meet only a burden of production as to its legitimate, nondiscriminatory or nonretaliatory reason for taking the adverse action against the plaintiff.

II. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, 29 U.S.C. § 621, *et seq.* (“ADEA”)

A. Covered Employers:

1. Applies to federal, state and local governments, and to private employers, labor organizations and employment agencies.
2. Must be engaged in an industry affecting commerce and have 20 or more employees for each working day for 20 or more calendar weeks in the current or preceding calendar year.

B. Prohibits:

1. Discrimination against persons who are at least 40 years old in:
 - Hiring;
 - Promotion;

- Assignment;
- Compensation;
- Discharge; and
- Working environment.

2. Retaliation:

- An employer may not take adverse action against any employee or former employee who has made a complaint of discrimination.
- The ADEA prohibits discrimination against any employee because he has opposed any practice made unlawful by the ADEA, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the ADEA.

C. Statute of Limitations: An employee is required to file a charge of discrimination before filing a lawsuit in court. In Florida, the statute of limitations for filing a charge with the Equal Employment Opportunity Commission is 300 days from the date the employee knew or should have known of the discriminatory action taken against him.

D. Remedies (as appropriate in each particular case):

1. Injunctive relief;
2. Reinstatement or, in the alternative, front pay;
3. Promotion;
4. Lost wages and benefits;
5. Liquidated damages (if violation was willful) in an additional equal amount to the lost wages and benefits; and
6. Reasonable attorneys' fees and costs.

E. Standard of Proof: To establish a disparate-treatment claim under the ADEA, a plaintiff must prove by a "preponderance of the evidence" that age was the "but-for" cause of the employer's adverse decision.²

F. Release and Waiver of Claims:

1. Older Workers Benefit Protection Act amended the ADEA in 1990 (29 U.S.C. § 626(f)).

² *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2350 (2009).

2. Generally the individual has 21 days to consider the agreement and general release of all claims (may be waived).
3. Individual has seven days to revoke the agreement (cannot be waived).

III. AMERICANS WITH DISABILITIES ACT OF 1990, AS AMENDED (“ADA”)

A. Covered Employers:

1. Applies to federal, state and local governments and to private employers, labor organizations and employment agencies.
2. Employers must be engaged in an industry affecting commerce, and have 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding calendar year.

B. Prohibits:

1. Discrimination based on an individual’s:
 - Actual disability;
 - Record of disability; or
 - Perceived disability, which is also known as “regarded as disabled.”
2. Harassment
3. Retaliation:
 - An employer may not take adverse action against any employee or former employee who has made a complaint of discrimination.
 - The ADA prohibits discrimination against any employee because he has opposed any practice made unlawful by the ADEA, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the ADEA.

C. Reasonable Accommodation:

1. The ADA requires employers to provide reasonable accommodations to employees with disabilities.
2. An individual with a disability is considered “qualified” if the individual can perform the essential functions of the position held or desired with or without reasonable accommodation.

3. A covered entity is required, absent undue hardship, to provide reasonable accommodation to an otherwise qualified individual with a substantially limiting impairment or a “record of” such an impairment.
4. However, a covered entity is not required to provide an accommodation to an individual who meets the definition of disability solely under the “regarded as” prong.
5. If an employer fails to provide an employee with a reasonable accommodation required under the law, the employee may bring a discrimination claim against the employer on this basis as well.

D. Statute Of Limitations: An employee is required to file a charge of discrimination before filing a lawsuit in court. In Florida, the statute of limitations for filing a charge with the Equal Employment Opportunity Commission is 300 days from the date the employee knew or should have known of the discriminatory action taken against him.

E. Remedies (as appropriate in each particular case):

1. Injunctive relief;
2. Reinstatement or, in the alternative, front pay;
3. Promotion;
4. Lost wages and benefits;
5. Reasonable attorneys’ fees and costs;
6. Prejudgment and postjudgment interest; and
7. Damages:
 - a) **Compensatory Damages:** Compensate the employee monetarily for emotional distress or any other type of injury that may result from the alleged intentional discriminatory conduct. This issue is decided by a jury and may include:
 - Actual out-of-pocket pecuniary losses;
 - Future pecuniary losses (court-decided); and
 - Emotional pain, suffering, mental anguish, loss of enjoyment of life, loss of reputation, and other non-monetary losses.
 - b) **Punitive Damages:** Designed to punish the employer for malicious conduct, and deter other employers from engaging in similar conduct in the future. Where available, punitive damages

are decided by a jury.

NOTE: Punitive damages are NOT available against government employers.

- c) **Damages Caps:** The total of compensatory and punitive damages is capped at:

15-100 Employees	=	\$50,000
101-200 Employees	=	\$100,000
201-500 Employees	=	\$200,000
500+ Employees	=	\$300,000

- F. **Standard of Proof:** A plaintiff must establish that a protected characteristic was a “motivating factor” in the Defendant’s decision to take an adverse employment action against him. The plaintiff generally has the ultimate burden of persuasion in an ADA action, and the Defendant generally has to meet only a burden of production as to its legitimate, nondiscriminatory or nonretaliatory reason for taking the adverse action against the plaintiff.

IV. **FLORIDA CIVIL RIGHTS ACT OF 1992, FLORIDA STATUTE § 760.01, *et seq.* (“FCRA”), IS THE STATE EQUIVALENT OF FEDERAL ANTI-DISCRIMINATION, HARASSMENT AND RETALIATION LAWS**

A. **Covered Employers**

1. Applies to federal, state and local governments and to private employers, labor organizations and employment agencies.
2. Employers must be engaged in an industry affecting commerce, and have 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding calendar year.

B. **Prohibits:**

1. Discrimination based on:
 - Race;
 - Color;
 - Religion;
 - Sex;
 - National origin;
 - Age;
 - Handicap;
 - Marital status (the state of being married, single, divorced, widowed or separated, but does not include the specific identity of an individual’s

- spouse);³ and
- Pregnancy, childbirth, or related medical conditions.

2. Harassment based on a protected characteristic

3. Retaliation

C. Statute Of Limitations: An employee is required to file a charge of discrimination before filing a lawsuit in court. The statute of limitations for filing a charge with the Florida Commission on Human Relations is 365 days from the date the employee knew or should have known of the discriminatory action taken against him. (See below for more information regarding dual-filing of charges between agencies.)

D. Remedies (as appropriate in each particular case):

1. Injunctive relief;
 2. Reinstatement or, in the alternative, front pay;
 3. Promotion;
 4. Lost wages and benefits;
 5. Reasonable attorneys' fees and costs;
 6. Prejudgment and postjudgment interest;
 7. Damages:
 - a) **Compensatory:** No cap on compensatory damages.
 - b) **Punitive:** Punitive damages capped at \$100,000.
 8. Liability of the state or its agencies is limited to \$200,000 per person or \$300,000 per incident. Section 760.11 (5), Fla. Stat. and Section 768.28, Fla. Stat.
- E. Standard of Proof:** A plaintiff must establish that a protected characteristic was a "motivating factor" in the Defendant's decision to take an adverse employment action against him. The plaintiff generally has the ultimate burden of persuasion in an FCRA action, and the Defendant generally has to meet only a burden of production as to its legitimate, nondiscriminatory or nonretaliatory reason for taking the adverse action against the plaintiff.

³ *Donato v. American Telegraph & Telephone Co.*, 767 So.2d 1146 (Fla. 2000)

V. SEXUAL HARASSMENT UNDER TITLE VII AND/OR FCRA

A. Definition: Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature.

B. Standard:

1. When submission is an explicit or implicit term or condition of employment;
2. When it is used as the basis for an employment decision; or
3. When it unreasonably interferes with an employee's work or creates an intimidating, hostile or offensive working environment.

C. Employer's Strict Liability:

1. Employers are strictly liable for the sexually harassing actions of their supervisors when the harassment results in a "tangible employment action."⁴
2. If the harassment results in a tangible employment action, the employer is strictly liable even if:
 - a) The employer has a policy against harassment.
 - b) The employer has no notice of the harassment.
3. A "tangible employment action":
 - a) Typically has a financial impact;
 - b) Is usually approved by higher levels of management; and
 - c) Is generally memorialized in company records

Examples include:

- Failure to hire
 - Firing
 - Failure to promote
 - Reassignment with significantly different responsibilities
 - A decision causing a significant change in benefits
- d) A tangible employment action may also take the form of a

⁴ *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998)

constructive discharge, but only if it is precipitated by a supervisor's "official act," that is, where the plaintiff quit her employment in reasonable response to an adverse action officially changing her employment status or situation, e.g., a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.⁵

D. Hostile Work Environment:

1. When an individual, based on his or her gender, is subjected to a hostile, intimidating or offensive work environment which is so "severe or pervasive" that it alters the conditions of the victim's employment.
 - a) The work environment must be perceived as "hostile" or "abusive;"
 - b) Objectively by a reasonable person; and
 - c) Subjectively by the victim.⁶

Examples include:

- Kissing
- Repeated, unwelcome love letters
- Pervasive sexual comments, jokes or innuendo
- Posters or cartoons
- Unwelcome comments on physical appearance
- Touching (assault & battery)

2. Factors:

- a) Frequency of the discriminatory conduct;
- b) Severity of the conduct complained of;
- c) Physically threatening or humiliating conduct vs. "mere offensive utterances";
- d) Whether it unreasonably interferes with an employee's work performance; and
- e) Whether it is unwelcome.

⁵ *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004).

⁶ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

3. Employer's Affirmative Defense:⁷

- a) The employer took reasonable steps to prevent and promptly correct any harassment that occurred; and
- b) The employee unreasonably failed to take advantage of any preventative or corrective opportunities or to otherwise avoid harm.

4. Employer's Reasonable Steps:

- a) Policy prohibiting sexual harassment in the employee handbook should:⁸
 - (1) Be separate from general EEO policy;
 - (2) Include grievance and complaint-reporting procedures that provide alternative avenues for employees to complain;
 - (3) Be distributed to all employees;
 - (4) Define harassment (consult EEOC regulations, case law and periodically update with employment counsel);
 - (5) Include specific and clear reporting, complaint and investigation procedures;
 - (6) Clearly articulate that the company PROHIBITS any form of illegal harassment or discrimination; and
 - (7) Notify employees that violation of the policy may result in discipline, up to and including termination.
- b) The complaint procedure should not require an employee to first complain to the alleged harasser.⁹ Employer should:
 - (1) Consider use of a "1-800" hotline;
 - (2) Stress good-faith efforts at confidentiality and "need-to-know";
 - (3) Provide protection against retaliation; and

⁷ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

⁸ See generally *Walton v. Johnson & Johnson Services*, 347 F.3d 1272 (11th Cir. 2003).

⁹ *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 1999), cert denied, 121 S.Ct. 303 (2000).

- (4) Provide mandatory periodic training to all employees and supervisors, obtain written acknowledgment of attendance, and retain training materials and acknowledgments.
- c) Process for handling complaints:
- (1) Take immediate action;
 - (2) Identify an investigator;
 - (3) Interview complainant, alleged harasser and third-party witnesses;
 - (4) Be professional and courteous to all interviewed;
 - (5) Keep information as confidential as possible;
 - (6) Document the investigation; and
 - (7) Ensure no retaliation!!!

Examples of effective measures to stop harassment:

- Oral/written warning or reprimand
- Transfer or reassignment
- Demotion
- Reduction of wages
- Suspension
- Discharge
- Training

5. Employee Unreasonably Failed to Take Advantage: An employee unreasonably fails to avoid the actionable harassment where he or she fails to report the supervisor's behavior to the employer at the time of the incidents.¹⁰
6. Same-Sex Harassment.¹¹
 - a) The harassment must be based on gender in order to be actionable.
 - b) A supervisor who is abusive to employees of both genders may not be guilty of violating anti-harassment laws unless the comments toward employees of one gender are more derogatory or different

¹⁰ *Walton*, 347 F.3d 1272.

¹¹ *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998)

in tone or intensity than those directed at employees of the other gender.

- c) There are three ways a same-sex harassment plaintiff can prevail:
 - (1) Present evidence that the alleged harasser was homosexual and therefore motivated by sexual desire;
 - (2) Present evidence that the harasser was motivated by a “general hostility” to men (or women if the plaintiff is a woman) in the workplace; or
 - (3) Present evidence of differential treatment of the sexes in the workplaces in which both sexes were present.

E. Remedies for Harassment: See Title VII and/or FCRA sections, above.

F. Methods of Proof:

1. Direct Evidence: Direct evidence of discrimination is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. Once a plaintiff provides direct evidence of discrimination, the employer has the burden of showing that it would have taken the adverse action against the plaintiff had it not been motivated by discrimination.
2. Circumstantial Evidence:
 - a) The plaintiff establishes a prima facie case of discrimination. In a termination case, the prima facie case includes that the plaintiff was a member of a protected class, the plaintiff was qualified to do the job, the plaintiff was terminated from his job, and he was replaced by someone outside the protected class;
 - b) The defendant then articulates a legitimate, nondiscriminatory reason for terminating the plaintiff's employment; and
 - c) The plaintiff establishes that the defendant's legitimate, nondiscriminatory reason for terminating the plaintiff's employment is pretextual, and that discrimination is the real reason the defendant terminated the plaintiff's employment.
3. Statistical Evidence

G. Selected Employer Defenses:

1. Same Actor Defense:

- a) The inference of bias is lessened when the same supervisor hired and fired the plaintiff.
- b) Lessened further if hiring and firing occurred within a short period of time.
- c) Age bias inference is also lessened if the plaintiff was hired when he or she was well within the protected category.

2. Stray Remarks Defense: Stray remarks generally will not be probative of discrimination. These include remarks that are:

- a) Not made by the decision-maker;
- b) Not close in time to the challenged decision; and
- c) Do not relate to the personnel actions that are at issue in the lawsuit.

VI. EXHAUSTION OF ADMINISTRATIVE REMEDIES:

Under Title VII, the ADA, ADEA and FCRA, a plaintiff must exhaust his administrative remedies before proceeding to the appropriate federal or state court. Administrative exhaustion involves filing a charge of discrimination or retaliation with the United States Equal Employment Opportunity Commission ("EEOC") and/or the Florida Commission on Human Relations ("FCHR").

A. EEOC:

1. Date Calculations:

- a) The statute of limitations for filing a charge with the EEOC is 300 days¹² from the date the plaintiff knew or should have known of the discriminatory action taken against him. A charge filed with the EEOC is considered dual-filed with the FCHR and vice versa.¹³
- b) Before proceeding to court, the plaintiff who files with the EEOC must receive a "Notice of Right to Sue." There are two ways this

¹² Normally 180 days but extended to 300 days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. Florida has the FCRA/FCHR and, therefore, a 300-day time limit to file EEOC charges.

¹³ Typically, when one agency begins an investigation into the charge, the other will cease its investigation.

notice will be issued:

- (1) The EEOC will issue a Notice of Right to Sue upon the completion of its investigation; or
 - (2) An employee can request that the EEOC cease its investigation and issue a Notice of Right to Sue. However, the employee must not request the notice until 180 days have passed from the date on which the charge was filed, pursuant to the FCRA.
- c) The plaintiff has 90 days from the date he receives a Notice of Right to Sue from the EEOC to file his claims in court. If he misses this deadline, he will be forever barred from pursuing his federal discrimination claims in court.

B. FCHR:

1. Date Calculations:

- a) For the FCHR, the statute of limitations for filing a charge is 365 days.
- b) If the FCHR has not issued a determination of either “cause” or “no cause” to believe that the employer has engaged in unlawful discrimination or retaliation within 180 days of the plaintiff’s filing the charge with the FCHR, the plaintiff may proceed with filing a complaint in the appropriate court.
- c) If the FCHR issues a finding of “cause” within the 180-day time period, the plaintiff has the option of filing a civil action within one year of the determination or requesting an administrative hearing within 35 days of the determination.
- d) If the FCHR issues a finding of “no cause” within the 180-day time period, the plaintiff is prohibited by statute from filing a complaint in court, but may request an administrative hearing challenging the FCHR’s “no cause” finding within 35 days of the determination.
- e) If the FCHR makes a reasonable cause determination after 180 days but before an individual files suit, the individual still has the benefit of the four year statute of limitations. *Joshua v. City of Gainesville*, 768 So.2d 432 (Fla. 2000). The same is true if the FCHR makes a finding of no reasonable cause after expiration of 180 days, but before the individual has filed a civil action. See *Woodham v. Blue Cross & Blue Shield*, 829 So.2d 891 (Fla. 2002).

Unfortunately, the statutes and the case law do not specify from when the four years runs, so be careful if you are faced with this particular question.

C. Hillsborough County, Florida Ordinances Ch. 16 ¾, § 4 (2000)

1. Covered Employers:

- a) “Employer” includes any person employing five or more full-time employees working 30 or more hours per week, or who has more than 15 or more employees irrespective of the number of hours worked per week in each of 13 or more calendar weeks in the current or preceding calendar years and any agent of such person.

“Employer” does not include the United States or a corporation wholly owned by the government of the United States; an Indian Tribe; a bona fide private membership club; or the State of Florida.

- b) “Employment Agency” is any person, or his or her agent, regularly undertaking, with or without compensation, to procure employees for an employer or to procure for employees opportunities to work for an employer.

- c) “Labor Organization” is

- (1) Any organization of any kind which exists, in whole or in part, for the purpose of collective bargaining or to deal with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment; or
- (2) Any conference, general committee, joint or system board, or joint council which is subordinate to a national or international labor organization; or
- (3) Any agent of a labor organization.

2. Prohibits discrimination based on:

- Race;
- Color;
- Religion;
- National origin;
- Sex;
- Age;
- Marital status;

- Disability;
- Sexual harassment; and
- Retaliation (Ch. 16 ¾, § 11).

3. Administrative Exhaustion:

- a) The employee must file a complaint with the County Administrator within 180 days of the alleged discriminatory practice.
- b) The County Administrator will conduct an investigation, and if he determines that there is no reasonable cause to believe a violation of the ordinance exists, the complaint shall be dismissed.
- c) If the County Administrator finds that reasonable cause does exist, a hearing will be held in front of the Division of Administrative Hearings.

4. Remedies: If the hearing officer finds that a violation of the section has occurred, the hearing officer shall issue an appropriate recommended order prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay, and may further allow the prevailing party a reasonable attorney's fee as part of the costs.

VII. THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201, *et seq.* (“FLSA”)

A. Enterprise Coverage:

1. Companies with gross annual dollar volume of business of \$500,000 or more who are engaged in business affecting interstate commerce.
2. Hospitals or institutions primarily engaged in the care of the sick, the aged, the mentally ill or the mentally handicapped who live on the premises.
3. Pre-schools, elementary or secondary schools or institutions of higher learning, or schools for the mentally or physically handicapped or gifted children.
4. Federal and local government agencies.

B. Integrated Enterprise: If all of the following factors are present, two or more companies may be an integrated enterprise:

1. Common ownership;
2. Common management;
3. Centralized control of labor relations; and

4. Common offices and interrelated operations.

C. Individual Coverage: The FLSA applies to many employees on an individual basis even if they do not work for a covered enterprise. Employees are subject to individual coverage if they are individually engaged in handling or producing goods for interstate commerce. This term is applied broadly and has been extended to employees who utilize the instrumentalities of interstate commerce, including such minor interstate activities as processing payments via credit cards.

D. Exemptions:

1. Executive: An employee who directs the work of at least two other employees and is paid a salary of at least \$455 per week. This employee is exempt from payment of minimum wage and overtime compensation.
2. Administrative: An employee with a salary of at least \$455 per week that performs non-manual work and uses independent judgment with respect to matters of significance. This employee is exempt from payment of minimum wage and overtime compensation.
3. Professional: Lawyers, doctors, registered nurses, accountants, engineers, architects, etc. This employee is exempt from payment of minimum wage and overtime compensation.
4. Highly-compensated Worker: Salary of at least \$100,000 per year and performs at least one of duties of an executive, administrative or professional employee. This employee is exempt from payment of minimum wage and overtime compensation.
5. Outside Sales: Customarily performs his duties away from the employer's primary place of business. This employee is exempt from payment of minimum wage and overtime compensation.
6. Computer Employees: A computer systems analyst, computer programmer, software engineer, or other similarly skilled worker who earns at least \$455 per week or \$27.63 per hour. This employee is exempt from payment of minimum wage and overtime compensation.
7. Commissioned Sales:
 - a) Retail or service employees who receive more than half of their compensation in a sample period of no less than a month from commissions.

- b) In a workweek in which overtime hours are worked, must receive as pay rate at least one and one-half times the minimum wage for all hours worked.
- c) This employee is exempt from payment of overtime compensation.

E. Excluded:

- 1. Independent contractors;
- 2. Trainees; and
- 3. Volunteers.

F. Pay Rate: The minimum wage rate for an employee in Florida is currently \$7.31 per hour. (The federal minimum wage is currently \$7.25 per hour.) Moreover, non-exempt employees must receive at least one and one-half times their regular rate of pay for all hours worked over 40 hours during one workweek.

G. Prohibits: Prohibits employers from failing to properly compensate employees with respect to the federal minimum wage and overtime, and retaliation for exercising any right under the act.

H. Hours Worked:

Covered employees must be paid for all hours worked in a workweek. In general, compensable hours worked include all time an employee is on duty or at a prescribed place of work and any time that an employee is suffered or permitted to work. This would generally include work performed at home, travel time, waiting time, training, and probationary periods.

I. Statute of Limitations:

- 1. The statute of limitations under the FLSA is two years, or three years if the court determines that there is a willful violation of the law. It is best to file the claim within the two-year time period since there is no guarantee that the court would determine a willful violation of the law occurred.
- 2. The other important issue to be aware of regarding filing an FLSA claim is that an employee is allowed to recover up to two or three years of unpaid minimum wage or overtime compensation from the date he filed the lawsuit in court. For example, if an employee were to file a complaint in court under the FLSA on November 10, 2011, he would be able to recover compensation due back to November 10, 2009, or November 10, 2008, again depending on whether the court determined there was a willful

violation of the law (eligible to recover three years of lost compensation) or not (eligible to recover two years of lost compensation).

J. Administrative Exhaustion:

1. Claimants MAY file a complaint with the United States Department of Labor's Wage and Hour Division ("DOL"), however this does not stop the statute of limitations from running.
2. There are no administrative prerequisites which must be fulfilled before filing a FLSA complaint in court.

K. Remedies:

1. Injunctive;
2. Reinstatement or, in the alternative, front pay;
3. Back pay and benefits;
4. Liquidated damages, or in the alternative prejudgment interest;
5. Attorney's fees and costs;¹⁴ and
6. The employer may be fined by the DOL up to \$1,100 per violation.

VIII. CIVIL RIGHTS ACT OF 1866, 42 U.S.C. § 1981

A. Covered Employers: Generally, §1981 applies to private employers, and public employers via 42 U.S.C. §1983. Section 1981 does not apply to the federal government or federal agencies.

B. Prohibits:

1. Discrimination based on:
 - Race;
 - Color; and

¹⁴ But see *Dionne v. Floormasters Enterprises, Inc.*, 647 F.3d 1109 (11th Cir. 2011) (holding that in order to be a "prevailing party" entitled to the award of attorney's fees under the FLSA, there must be an actual judgment rendered by the court in the party's favor.) However, thus far, the Middle District of Florida has failed to apply *Dionne* to the approval of settlement agreements which contain agreements to pay attorney's fees, often stating "[a]s the impact of *Dionne* has yet to be determined, and as the instant motion presents the fee as part of a stipulated settlement with both sides urging approval, the Court reviews the fee under the traditional FLSA analysis." *Rotger v. Hot Dog Heaven of Orlando, Inc.*, 2011 WL 4946636 (M.D. Fla. Sept 23, 2011).

- Alienage.
- 2. Making and enforcing contracts, which includes the terms and conditions of employment.
- C. Statute Of Limitations:** Four years.
- D. Remedies** (as appropriate in each particular case):
 - 1. Injunctive relief;
 - 2. Reinstatement or, in the alternative, front pay;
 - 3. Promotion;
 - 4. Back pay and benefits;
 - 5. Compensatory and punitive damages (there is no damages cap under § 1981); and
 - 6. Attorneys' fees and costs.

IX. EQUAL PAY ACT OF 1963, 29 U.S.C. § 206(d) ("EPA")

- A. Coverage:** Same as FLSA.
- B. Prohibits:**
 - 1. The EPA makes it illegal to pay male and female employees unequally for "equal work."
 - 2. "Equal work" generally means those jobs which require equal skill, effort and responsibility; that are "substantially similar."
- C. Statute of Limitations:** Two years, or three years if the court determines that there is a willful violation of the law. It is best to file the claim within the two-year time period since there is no guarantee that the court would determine a willful violation of the law occurred.
- D. Establishing "Substantial Similarity" Under the EPA:**
 - 1. Jobs need not be identical;
 - 2. Occasional "extra tasks" are not enough to defeat an EPA claim;
 - 3. An overall comparison of the work; and

4. Examine the salaries of predecessors and successors.

E. Establishing A *Prima Facie* Case For a EPA Violation:

1. One comparator is sufficient.¹⁵
2. Even small differences in wages can result in liability under the EPA.¹⁶

F. Affirmative Defenses to EPA Claims:

1. Pay based on a seniority system.
2. Pay based on a merit system.
3. Earnings measured by quantity or quality of production.
4. Wage differential is based on any factor “other than sex.”

G. Administrative Exhaustion:

1. Unlike Title VII, an employee does not need to file a claim with the EEOC or any other administrative agency before filing a complaint in federal court.
2. However, because EPA claims generally raise Title VII claims as well, it is best to file a claim with the EEOC under both laws within the 300-day deadline required for Title VII claims in order to preserve plaintiff’s rights to the fullest extent.

H. Remedies:

1. Injunctive relief;
2. Lost pay and benefits;
3. Liquidated damages, or in the alternative prejudgment interest; and
4. Attorneys’ fees and costs.

¹⁵ *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985) (overruled on other grounds).

¹⁶ *Hodgson v. American Bank of Commerce*, 447 F.2d 416 (5th Cir. 1971).

**X. FLORIDA PRIVATE WHISTLEBLOWER'S ACT, FLORIDA STATUTE
§ 448.101, *et seq.***

A. Covered Persons:

1. "Employer" means any private individual, firm, partnership, institution, corporation, or association that employs 10 or more persons.
2. "Employee" means a person who performs services for an employer for wages or other remuneration but does not include an independent contractor.

B. Protects: An employee who objected to or refused to participate in any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.

C. Statute of Limitations:

1. Two years after discovering that the alleged retaliatory personnel action was taken; or
2. Within four years after the personnel action was taken, whichever is earlier.

D. Administrative Exhaustion:

1. None.
2. Employee may file a complaint in state court.

E. Remedies: The court MAY order:

1. An injunction restraining continued violation of the act.
2. Reinstatement of the employee to the same position held before the retaliatory personnel action, or to an equivalent position.
3. Reinstatement of full fringe benefits and seniority rights.
4. Compensation for lost wages, benefits, and other remuneration.
5. Any other compensatory damages allowable at law.
6. A court may award reasonable attorneys' fees, court costs, and expenses to the prevailing party (which means the plaintiff could have to pay the defendant's attorneys' fees if he does not prevail).