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EMPLOYMENT LAW NEWSLETTER

SAME-SEX MARRIED COUPLES AND THE IMPACT ON FLORIDA EMPLOYERS©

BY: CHRISTINA HARRIS SCHWINN, ESQ.

Many counties and municipalities now have ordinances In a landmark decision last year, the United States Supreme Court ruled that the provision contained in the Defense of Marriage Act ("DOMA") that limited lawful marriages to one between a man and a woman was unconstitutional on June 26, 2013. The decision is limited in the sense that it only gives recognition to legally married same-sex couples under federal law if they were married in a state that recognizes such marriages on par with a marriage between a heterosexual couple.

The State of Florida currently does not recognize same-sex marriages. However, same-sex couples who legally marry in a state that recognizes same-sex marriages on par with that of a heterosexual couple are entitled to the same federal tax treatment as a heterosexual married couple would be. Therefore, Florida employers need to be mindful that even though an employee who is married to a same-sex spouse does not enjoy the privileges of marriage under Florida law, the employee does enjoy such privileges under federal law.

Is your business prepared to accommodate requests from an employee who is married to a same-sex partner for equal treatment under federal law for tax purposes as a heterosexual couple? What about a request for leave under the Family and Medical Leave Act ("FMLA") to care for the employee's same-sex sick spouse? The answers to these questions depend on whether the employee was married in a state that allows same-sex couples to marry and whether the employer is covered under the FMLA and whether the employee is an eligible employee.

In addition to the IRS providing guidance on its interpretation of the Windsor decision, the United States Department of Labor ("DOL") released guidance on September 18, 2013 regarding how it intends to interpret the word "spouse" under those federal laws it is charged with enforcing. The DOL intends to interpret the term "spouse" to apply equally to a same-sex spouse provided that the individual was legally married in a state that affords a same-sex married couple the same privileges of a legally married heterosexual couple. Both the IRS and the DOL were mindful to distinguish marriage from civil unions and domestic partnerships. Employers will likewise need to do the same.

Among other areas of laws enforced by the DOL, the *Windsor* decision will affect employer sponsored group health plans under ERISA.

To avoid liability for wrongful denial of requests for FMLA leave from an employee whose marriage to a same-sex individual is lawfully recognized elsewhere or for a request for spousal coverage under a group health plan, employers should consult with competent employment law counsel before saying no.

There is no doubt about the fact that the *Windsor* decision will affect future policy making at all levels of government and undoubtedly will lead to greater protection for same-sex married couples as time goes on. The *Windsor* decision affects Florida employers even though the State of Florida does not currently recognize same-sex marriage. The full effect is not yet known. Stay tuned. A lawsuit has already been filed in federal court in Florida challenging Florida's ban on same-sex marriage. As an employer, the issue is not whether same-sex marriages are right or wrong. Rather, the focus should be on what obligations are imposed upon employers under federal law to afford

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certain benefits and privileges available under federal law to its employees who have married a same-sex individual.

Employers are well advised to consult with competent employment counsel when confronted with these types of issues. Making the wrong decision can lead to financial liability, agency action, or litigation.

A note to the reader: *This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.*

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United States v. Windsor, et al., 133 S.Ct. 2675 (2013). Technical Release No. 2013-04, U.S. DOL, Employee Benefits Security Administration (September 18, 2013). Employee Retirement Income Security Act of 1974 (ERISA).

MEMORANDUM

HRMA PRESENTATION

The purpose of this memorandum is to provide general information about the matters commented on herein. This memorandum is not intended to be an exhaustive review, but rather only to highlight significant matters that HR professionals should know.

FLORIDA STATE LEGISLATIVE UPDATE

Minimum Wage

Florida's minimum wage increased to $7.93 per hour effective January 1, 2014 and the tipped minimum wage increased to $4.98.

Unemployment Claims - Don't Ignore Them

Florida's Unemployment Compensation Act has been amended to comply with the Federal Unemployment Insurance Integrity Act. As a result, employers are required to respond to all unemployment claims that an employer receives and to provide complete information. Gone are the days when employers could ignore unemployment claims without penalty. Employers who fail to respond to unemployment claims face not only potential penalties, but also lose the right to challenge benefits wrongfully charged to the employer's account for unemployment compensation paid to a former employee if the employer failed to respond to the initial unemployment claim notice.

Pending Florida Bills

What follows is a brief description of certain pending Senate bills. Readers are encouraged to read the entire text of the bills. Please note that during the legislative session it is not uncommon for committees to substitute bills, to amend, for new bills to be drafted, deferred, or for related bills to be filed. Note that the only task the legislature is required to complete is approval of a balanced budget.

Senate Bill 26 - Fair Pay Act

If SB 26 passes, Florida's Department of Economic Opportunity and the Florida Commission on Human Relations would be required to study the difference between pay to men and women for the purpose of identifying any discrepancies between wage rates men receive versus women in the same or similar positions. Further, it would require that the Department of Economic Opportunity and the Florida Commission

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on Human Relations to proactively investigate and prosecute violations of laws requiring equal pay, to publish their studies and findings to employers, labor organizations, professional associations, educational institutions and media outlets. If passed, the legislation would take effect on July 1, 2014.

Senate Bill 220 - FCRA - Add pregnancy

SB 220 would amend Florida's Civil Rights Act to provide that pregnancy discrimination is expressly unlawful under Section 760.01(2). The term "pregnancy" would include women who are affected by pregnancy, childbirth or any medical condition relating to pregnancy or childbirth. If passed, the legislation would take effect on July 1, 2014.

Senate Bill 234 - Discrimination based on criminal record

SB 234 addresses employer practices of asking questions on employment applications relating to a prospective application's criminal history. The legislation seeks to prohibit employers from asking questions on their applications about criminal history. Note that it would not prohibit an employer from taking into account criminal history if the employer intended on making an offer of employment to the prospective job applicant. If passed, the bill would take effect on July 1, 2014.

Senate Bill 324 - Prohibiting use of credit history in hiring

SB 324 is intended to limit an employer's use of credit checks in the applicant screening process when hiring new employees. Note that none of the restrictions contained in the proposed bill bar complete use of credit checks. Rather, the bill seeks to prohibit an employer from requiring that an applicant submit to a credit background check unless the employer has a bona fide purpose or if the employee is going to be in certain positions where a credit check may be indicative of a prospective applicant's financial discipline. If passed, this bill would take effect on July 1, 2014.

Senate Bill 348 - Sexual Orientation

SB 348, if passed, would be known as the Florida Competitive Workforce Act and it would amend various chapters of the Florida Statutes including Chapter 509 regarding public lodging establishments and Florida Civil Rights Act (Chapter 760) to make it an unlawful employment practice to discriminate against someone based upon an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity. If passed, this bill would take effect on July 1, 2014.

Senate Bill 456 - State minimum wage - removing federal exemptions

SB 456 is a bill that would increase Florida's minimum wage to $10.10 an hour if passed and it would further provide that an employer may not pay any employee at a rate less than the state minimum wage, i.e., meaning that the condition precedent of coverage under the FLSA would be eliminated. If passed, this bill would take effect January 1, 2015.

Senate Bill 548 - Bullying (would be a crime)

SB 548 is an amendment to Chapter 784 of the Florida Statutes making bullying or aggravated bullying a misdemeanor in the first degree for willful or malicious or repeated harassment or cyber bullying of another person. Additionally, it would make such offense a third degree felony if the person was convicted of aggravated bullying. The bill defines course of conduct, credible threats, cyberbullied and harassment. If passed, this bill would take effect on October 1, 2014.

Senate Bill 309 - Abusive Workplace Act

Introduced in 2013, SB 309, the Abusive Workplace Act would prevent a public sector employer from allowing bullying in its workplace and it would impose an obligation on public sector employers to implement antibullying policies. The Act would impose individual liability on offenders. Further, the bill provides for a private cause of action that may be initiated in court subject to a one year statute of limitations. There has been some discussion that the bill or versions thereof may be reintroduced.

House Bill 149 - Safe Work Environment Act

Introduced in 2013, the Safe Work Environment Act would apply to all employers and it seeks to provide the same protections as SB 309 and to impose obligations on employers to eliminate bullying in the workplace. There has been discussion that the bill or versions thereof may be reintroduced.

For more information about the Healthy Workplace Initiative, visit www.healthyworkplacebill.org.

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Senate Bill 198 - Social Media Privacy Bill

SB 198, the Social Media Privacy Bill, if passed would prohibit employers from asking employees or prospective applicants to provide them with passwords so the employer could access the private pages of the employee or job applicant social media page. Further, it would prohibit retaliation against an employee who refused to provide such information or an employer's refusal to hire a job applicant who refused. If passed, this bill would take effect on October 1, 2014.

Senate Bill 926 - Local Regulation of Wage Theft Ordinances enacted on or before January 1, 2014

If passed, the bill would impose requirements on counties with ordinances to partner with local legal services organizations.

FEDERAL LEGISLATIVE UPDATE

Legislation was introduced in 2013 to increase the minimum wage from $7.25 an hour to $10.10 an hour under the Fair Labor Standards Act ("FLSA). Whether the House and the Senate will pass the minimum wage bill increasing the minimum wage is uncertain. However, a number of states have taken matters into their own hands and have approved minimum wage increases. Additionally, the voters in Sea-Tac, Washington (a town located between Seattle and Tacoma) recently voted to increase the minimum wage for employees working in Sea-Tac to $15.00 an hour. The following states have increased their minimum wage:

State	Minimum Wage	Tipped Wage	Effective Date
California	$9.00		July 1, 2014
California (part 2)	$10.00		January 1, 2016
Colorado	$8.00	$4.98	January 1, 2014
Connecticut	$8.70		January 1, 2014
Connecticut (part 2)	$9.00		January 1, 2015
Missouri	$7.50		January 1, 2014
Montana	$7.90		January 1, 2014
New Jersey	$8.25		January 1, 2014
New York	$8.00		December 31, 2013
New York (part 2)	$8.75		December 31, 2014
New York (part 3)	$9.00		December 31, 2015
Ohio	$7.95	$3.98	January 1, 2014
Oregon	$9.10		January 1, 2014
Rhode Island	$8.00		January 1, 2014
Washington	$9.32		January 1, 2014
Washington DC	$13.40		January 1, 2014
Vermont	$8.73	$4.23	January 1, 2014

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Because so many states are taking the lead to increase their state's minimum wage, the proposed federal law could become irrelevant. If your company has operations outside of the state of Florida, be sure to check the state's minimum wage law to ensure compliance.

Credit Checks

On December 17, 2013, Senator Elizabeth Warren, a Democrat from Massachusetts, introduced the Equal Employment for All Act of 2013 with six other senators cosponsoring. The legislation would, if passed, essentially prohibit employers from requiring prospective employees to submit to a background credit check.

CASE LAW UPDATE - CASES OF SIGNIFICANCE

Hernandez vs. Colonial Grocers, Inc. (Arbitration)

While arbitration agreements are generally enforceable, it is important to remember that the arbitration agreement cannot attempt to do something that is not permissible under applicable laws. For example, the FLSA requires that an employer pay an employee's attorneys fees if the employee is successful in recovering any overtime that the employer failed to pay. In *Hernandez v. Colonial Grocers, Inc.*, 2013 WL 5762986 (Fla. 2nd DCA Oct. 25, 2013), the arbitration provision was contained in the employee handbook and provided that the parties would split the cost of arbitration. This provision constituted an unlawful fee shifting provision. Under the FLSA an employee who is successful on an overtime claim is entitled to recover her attorney fees whereas an employer is not entitled to recover attorneys' fees from the employee if the employer prevails. While arbitration agreements in employee handbooks may be enforceable, the better approach is to have the employee sign a separate arbitration agreement that does not run afoul of the law.

Vance vs. Ball State University (Supervisors) (June 24, 2013)

In *Vance v. Ball State University* (citation omitted), a race discrimination case, the Supreme Court determined that in order for a person to qualify as a supervisor the person had to have the authority to take a tangible employment action against an employee. Tangible employment actions include the ability to hire, fire, reassign and discipline an employee. In so ruling, the Supreme Court rejected the Equal Employment Opportunity Commission's ("EEOC") longstanding guidance which provides that a person can be a supervisor even though the person does not have the ultimate authority to take a tangible employment action against an employee. For example, under the EEOC's guidance a coworker who directed an employee's work could be a supervisor.

Why is the decision in *Vance* significant? Because an employer is generally not vicariously liable for the unlawful discrimination committed by a nonsupervisor, but an employer can be vicariously liable for unlawful discrimination against an employee committed by a supervisor. In *Vance*, the person who was accused of discriminating against Vance was not a supervisor based upon the Supreme Court's ruling. Therefore, Vance's employer could not be held vicariously liable for the actions of Vance's coworker based upon the theory that an employer is liable for the acts of its supervisors.

University of Texas Southern Medical Center vs. Nassar (Retaliation) (June 24, 2013)

Next up, the Supreme Court ruled in *University of Texas Southern Medical Center v. Nassar* (citation omitted) that in order for an employee to succeed on a claim for unlawful retaliation under Title VII of the Civil Rights Act of 1964, as amended in 1991 ("Title VII"), an employee must show that the retaliation occurred because the employee exercised a protected right under Title VII instead of the retaliatory act being a "motivating factor." Protected activities include: 1) making a claim of harassment, 2) participating in a workplace harassment investigation as a witness, or

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3) objecting to an employer's practice the employee believes to be unlawful under Title VII. The "because of" test is also referred to as the "but for causation" test, i.e. the retaliation would not have occurred but for the employee asserting a protected right under Title VII.

Why is the decision in *Nassar* significant? Because the "because of" standard is a much higher burden of proof than having to prove that the employee's complaint of harassment was a "motivating factor" that culminated in the employee's employer taking a tangible adverse action against the employee. The "motivating factor" concept was codified in the Civil Rights Act of 1991 making it clear that an employee could succeed on the merits in a status-based discrimination claim if the employee could show that the unlawful discrimination was a "motivating factor" that caused the employer to take the tangible adverse employment action against an employee. Until the Supreme Court's decision in *Nassar,* the EEOC applied the "motivating factor" standard to retaliation claims as well as status-based discrimination claims. Status-based discrimination is discrimination based on one's race, color, religion, sex and national origin under Title VII. While the "motivating factor" test is viable in status-based discrimination cases, it is no longer viable in a retaliation case.

Comtran Group, Inc. v. U.S. Department of Labor (Supervisor Misconduct - OSHA)

On July 24, 2013, the Eleventh Circuit Court of Appeals overturned a district court and issued an important decision affecting employer liability under the Occupational Safety and Health Act of 1970 ("OSH Act") in a case involving supervisor misconduct, *Comtran Group, Inc. v. U.S. Department of Labor,* 24 Fla. L. Weekly Fed. C468a. The case on appeal before the Eleventh Circuit involved a case in which the Department of Labor ("DOL") contended that Comtran should be liable for its supervisor's misconduct because an employer is liable for the acts of its supervisors. Therefore, knowledge of the violation should have been imputed to Comtran. The Eleventh Circuit disagreed with the district court and found that the DOL failed to show that the employer knew or should have known that the OSH Act was being violated.

To establish employer liability for OSH Act violations, the DOL must show all of the following:

- That the OSH Act applied to the employer's business;
- That the OSH Act was violated;
- That an employee was exposed to the hazard that was created by the violation of the OSH Act; and
- The employer knowingly disregarded the requirements under OSH Act or an OSH regulation or standard.

In *Comtran*, the DOL established that prongs one through three of the four-prong test had been met, but the Eleventh Circuit found that the DOL failed to prove the fourth prong.

While the DOL can meet its burden under the fourth prong by demonstrating that an employer's safety program is woefully deficient and does not comply with the OSH Act, supervisory misconduct alone is insufficient. If the DOL meets its burden under the fourth prong, a court generally will impute knowledge of the violation to the employer and determine that the fourth prong has been satisfied.

EEOC v. Mach Mining, LLC

The United States Court of Appeals for the Seventh Circuit ruled recently in *EEOC v. Mach Mining, LLC*, No. 13-2456 (7th Cir. Dec. 20, 2013), that the EEOC's failure to conciliate in good faith prior to filing suit against an employer does not provide the employer with an affirmative defense to the litigation brought by the EEOC. In brief, the EEOC took the position that the courts were not vested with jurisdiction to review the conciliation process. While a Seventh Circuit decision is not binding on Florida, decisions from other federal circuits can and do influence other circuits. Florida is part of the Eleventh Circuit.

Windsor

On June 26, 2013, the United States Supreme Court ruled that the Defense of Marriage Act's definition defining marriage as being limited to a marriage between a man and a woman is unconstitutional. As a result, same-sex couples who are married in states that allow same-sex couples to marry will enjoy the same benefits as heterosexual couples under federal law. Even though Florida does not permit same-sex marriages, note that a same-sex couple married in a state that permits such marriages are considered married for federal law purposes even if they reside in Florida after they married.

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EMERGING TRENDS

Workplace Loans

On December 23, 2013, Inc. magazine reporter Will Yakowicz published a brief article that highlighted what could become an employee benefit trend relating to workplace loans. His article highlighted the San Francisco based peer-to-peer lending marketplace Lending Club and discussed its current negotiations with Google and other companies regarding offering low interest rate loans to employees. The article reports that Lending Club expected $100 million in revenue in 2013 and that employees use the low interest rate loans to pay off high rate interest credit cards, student loans or to consolidate multiple high interest rate debts with a low rate interest workplace loan offered through Lending Club and the employee's employer.

Worker Centers

While Worker Centers are not entirely new to the world of labor negotiations, Worker Centers seem to be gaining more ground and notoriety. SHRM's December 2013 issue of the HR magazine contains a very good article called "Leading from Behind." If you have not read the article "Leading from Behind," I recommend that you read it as it is worth it and provides valuable information. Worker Centers are not covered by the National Labor Relations Act and therefore do not have the power to represent employees who desire to be covered by a collective bargaining agreement. However, Worker Centers provide an avenue for union organizers to access workers without having to be concerned about all of the compliance obligations imposed under the National Labor Relations Act and the Labor Management Relations Act. One of the best examples of a local Worker Center is the Coalition of Immokalee Workers. In fact, it is actually on a watch list for the Worker Center Watch. The Coalition of Immokalee Workers, while it is not a union, has managed to gain prominence throughout the United States. Worker Centers can be a powerful tool for union organizers when used wisely. Even though the Worker Centers have been around since the early 1990s, it is important to note that the influence and power of the Worker Centers are gaining ground. These Worker Centers are becoming very influential and even though they may not be focusing entirely on union organization, they are having a tremendous influence on public policies at the local, state and national levels. Many of these Worker Centers focus on improving labor conditions generally across the board. For example, minimum wage initiatives. As stated previously in this report, a number of states increased their minimum wage effective January 1, 2014. One of the initiatives that will be pushed heavily by the Democrats in 2014 is the federal minimum wage proposal pending in Congress to raise the minimum wage to $10.10 an hour. It is likely that we will see more and more of these Worker Centers focused on lobbying their representatives to approve employee-friendly legislation and see union organizations providing funding to them.

AGENCY UPDATE

EEOC

Discrimination Charge Filings

During Fiscal Year 2013, employees and former employees filed 93,727 charges of discrimination against employers. The EEOC recovered $372.1 million during its Fiscal Year 2013 in damages. Of note, the amount recovered in its Fiscal Year 2013 was $6.7 million more than it recovered in its Fiscal Year 2012.

NLRB

Tracking concerted activity. The NLRB has established a website to track concerted activity across the nation.

Amazon Union Election. A Union Election held at an Amazon facility on January 15, 2014 failed to garner majority support.

Employee Policies and ULPs. The NLRB continues to focus on employers' policies relating to use of social

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media by employees. Be mindful that any covered employee can file an unlawful labor practice against the employee's employer or former employer. The NLRB is particularly interested in going after employers that have overly broad confidentiality policies that attempt to prohibit employees from discussing compensation with fellow coworkers.

Right to Know Poster. For now, it appears that the NLRB has abandoned its efforts to require employers to post a Poster and communicate information electronically to employees regarding their rights under the NLRA as the NLRB allowed the deadline for the filing of its brief to pass in the pending Supreme Court case.

Social Media. The NLRB continues to pursue employers with unfair labor practice charges when employers fire covered employees for making derogatory or disparaging statements about the company on the employee's Facebook or other social media page or if the employer's employee handbook restricts such activity. Before making a decision to fire an employee because an employee has said something that is derogatory or negative about the company, contact employment counsel to ensure that the employer is not violating the employee's right to participate in concerted activity under the National Labor Relations Act. Keep in mind that if two or more employees use their Facebook pages to complain about working conditions or a decision that was made by management to, for example, cut salaries, constitutes protected concerted activity under the NLRA and firing the employees is a per se violation of the NLRA. If the employer were to fire the employee, the employee could file an unfair labor practice against the employer. However, there is a distinction between an employee who uses his or her Facebook page just to rant. If he or she used it to defame a company, he would not be protected. There is a fine line between what constitutes slander under the NLRA and what constitutes an expression of dissent regarding an employer policy. The other important thing is to remember that concerted activity requires more than one employee so it takes at least two employees to participate in protected concerted activity under the National Labor Relations Act.

OSHA

Whistleblowers may now file their complaints on line at www.osha.gov/whistleblowers/wbcomplaint.html.

DOL

Effective January 1, 2015, most home health direct care workers will be covered under the Fair Labor Standards Act minimum wage and overtime provisions. (DOL Release #: 13-922-NAT).

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The EEOC is the federal agency responsible for the enforcement of employee rights under Title VII.
United States v. Windsor, et al., 133 S.Ct. 2675 (2013).