

Florida

Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

Topics

I. Discrimination

The Florida Civil Rights Act (FCRA) has been amended to expressly include pregnancy as a protected class. Accordingly, all prohibitions concerning employment discrimination against an individual of a protected class will apply to discrimination based on pregnancy. Note that employers will not be subject to claims of unlawful discrimination in instances where the discriminatory criteria that formed the basis of an adverse employment action constitutes a bona fide occupational qualification (BFOQ) that is “reasonably necessary for the performance of the particular employment” at issue.

Before the amendment, although not expressly included in the fair employment laws, the Florida Supreme Court held pregnancy discrimination was a form of prohibited sex discrimination: “[D]iscrimination based on pregnancy, a natural condition unique to females and a primary characteristic of the female sex, is subsumed within the prohibition in the FCRA against sex discrimination in employment practices.” *Delva v. Continental Group, Inc.*, 137 So. 3d 371 (Fla. 2014).

In addition to amending the FCRA’s employment discrimination provisions, the new law amends the anti-discrimination provisions applicable to public accommodations, public lodging, and public food service establishments.

Fla. Stat. § 760.01, Fla. Stat. § 760.07, Fla. Stat. § 760.10, and Fla. Stat. § 760.11 (Effective Date 07/01/2015).

II. Pre-Employment Inquiry Guidelines

No new laws or regulations enacted in 2015 or 2016.

III. Family and Medical Leave

No new laws or regulations enacted in 2015 or 2016.

IV. Wage and Hour Laws

The Florida Department of Economic Opportunity announced that the minimum wage will increase to \$8.10 per hour for non-exempt employees in 2017. The minimum wage for tipped employees will increase to \$5.08 per hour. The annual calculation is based on the percentage increase in the federal Consumer Price Index for Urban Wage Earners and Clerical Workers in the South Region for the 12-month period prior to September 1, 2016.

Fla. Stat. § 448.110 and Fla. Const. Art. X, § 24 (Effective Date 01/01/2017).

V. Drug Testing

Florida voters approved Amendment 2, a provision permitting qualifying patients to use medical marijuana for treatment of cancer, epilepsy, glaucoma, HIV, AIDS, post-traumatic stress disorder, amyotrophic lateral sclerosis, Crohn’s disease, Parkinson’s disease, multiple sclerosis, and other debilitating medical conditions with a physician’s certification. The law expands Florida’s existing medical marijuana law, passed in 2014, which permits the use of non-smoked, low-THC marijuana for qualified residents. Amendment 2 does not immunize individuals from prosecution for violations of federal law or protect the non-medical use, possession, or production of

marijuana by any person. Of relevance to employers, Amendment 2 does not require workplace accommodation of on-site medical use of marijuana. The measure does not state whether employers can otherwise enforce neutral drug-free workplace policies against medical marijuana users.

Fla. Const. Art. X, § 29 (Effective Date 11/08/2016).

VI. Noncompete and Other Employment Agreements

No new laws or regulations enacted in 2015 or 2016.

VII. Workplace Safety

No new laws or regulations enacted in 2015 or 2016.

VIII. Workers' Compensation

No new laws or regulations enacted in 2015 or 2016.

IX. Miscellaneous

A. Child Labor Recordkeeping Requirements

Florida's Department of Business and Professional Regulations requires that employers provide the Department, immediately upon request, with any and all records and documentation required to be kept by the Child Labor Law, its implementing regulations, or any other federal or state statute regulating minors. The amended regulation extends the definition of "records" and "documentation" to include any records that "may aid in the enforcement" of the Child Labor Law.

These records include:

- the legal name of the business;
- the employer's federal tax identification number (FEIN);
- employment applications of minor employees;
- description of job duties of minor employees;
- records listing the names and dates of birth of every employee;
- timesheets;
- records relating to the times a minor employee clocked in and out at the beginning and end of each shift;
- records relating to any breaks taken by a minor employee off the clock.

The amended regulation extends the number of days from two to ten in which an employer must produce records kept in a location other than the location where the request was made. However, the amended regulation requires records relating to proof of age, partial waiver, or work exemption documents to be produced within two business days.

61L-2.008, F.A.C. (Effective Date 11/16/2015).

B. Service Animals & Public Accommodations

Florida's statute governing the rights of individuals with a disability has been amended. The amendments impact disability-related definitions, the definition of service animal, activities associated with service animals in public accommodations, and penalties for violations.

Disability-Related Definitions

Under the amendments, an individual with a disability is a person who has a physical or mental impairment that substantially limits one or more major activities. Moreover, a major life activity is defined as a function such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Additionally, a physical or mental impairment is either: 1) a physiological disorder or condition, disfigurement, or anatomical loss that affects one or more bodily functions; or 2) a mental or psychological disorder that meets one of the diagnostic categories specified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association, such as an intellectual or developmental disability, organic brain syndrome, traumatic brain injury, post-traumatic stress disorder, or an emotional or mental illness.

Definition of Service Animal

The definition of service animal has been amended to mean an animal that is trained to do work or perform tasks for an individual with a disability. Moreover, under the amendments, disability includes a physical, sensory, psychiatric, intellectual, or other mental disability.

The amendments provide that the work done or tasks performed must be directly related to the individual's disability. This category has been expanded to cover alerting an individual to the presence of allergens, providing physical support and assistance with balance and stability to an individual with a mobility disability, helping an individual with a psychiatric or neurological disability by preventing or interrupting impulsive or destructive behaviors, reminding an individual with mental illness to take prescribed medications, calming an individual with posttraumatic stress disorder during an anxiety attack, or doing other specific work.

The amendments limit a service animal to a dog or miniature horse. Additionally, the amendments specify that the crime deterrent effect of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks.

Full & Equal Accommodations, Advantages, Facilities, and Privileges

The amendments require that a public accommodation modify its policies, practices, and procedures to permit use of a service animal by an individual with a disability. However, the law still states that a public accommodation is not required to modify or provide any vehicle, premises, facility, or service to a higher degree of accommodation than is required for a person that is not so disabled.

A new provision provides that a service animal must be under the control of its handler and must have a harness, leash, or other tether, unless either the handler is unable because of a disability to use these items or their use would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control by means of voice control, signals, or other effective means.

The amendments provide that the place of public accommodation cannot ask about the nature or extent of an individual's disability.

The law allows the place of public accommodation to exclude or remove a service animal from its premises if the animal's behavior poses a direct threat to the health and safety of others. The amendments allow removal or exclusion if the service animal is out of control and

the animal's handler does not take effective action to control it, or if the animal is not housebroken.

Violations

In addition to a violation being a misdemeanor of the second degree, the amendments require violators to also perform 30 hours of community service for an organization that serves individuals with disabilities, or for an entity or organization at the discretion of the court, to be completed within 6 months. A new provision also makes it a violation to knowingly and willfully misrepresent oneself, through conduct or verbal or written notice, as using a service animal and being qualified to use a service animal, or being a trainer of a service animal. A violation is a misdemeanor of the second degree and violators must also perform the aforementioned community service.

Fla. Stat. § 413.08 (Effective Date 07/01/2015).

C. The Computer Abuse and Data Recovery Act

The Florida Computer Abuse and Data Recovery Act (CADRA) provides remedies to employers who have been harmed or experienced loss due to unauthorized access to information stored on their computers. An employer that prevails in a CADRA claim may be entitled to monetary remedies, injunctive relief, and attorney's fees.

Actions that constitute unauthorized access include obtaining information from a protected computer; causing the transmission of a program, code, or command to a protected computer; and trafficking in a technological access barrier through which access to a protected computer may be obtained. The unauthorized access must have been made knowingly and with intent to cause harm or loss.

In order for an employer to maintain a cause of action under CADRA, the employer must have taken reasonable measures to protect the data, in other words, the business's computer(s) must have been protected. A computer is protected if the business uses it to store information, programs, or code that can only be accessed using a technological access barrier. Additionally, the access must have been carried out by someone who was not an authorized user. Authorized users include directors, officers, employees, third-party agents, contractors, consultants of the owner, operator, or lessee of the protected computer or the owners of the stored information. Authorized users must be given express permission to access the protected computer through a technological access barrier. Only the owner, operator, or lessee of the protected computer or the owner of information stored in the protected computer may give permission.

It is unclear whether an employee who exceeds their authority violates CADRA; however, the owner of the information or computer may revoke the user's access. A terminated employee who may have had the authority to access the information when authorized is no longer authorized upon employment termination from the company. CADRA provides that an employer may maintain a counterclaim against a terminated employee who takes and fails to return employer data.

Fla. Stat. § 668.801 and Fla. Stat. § 668.805 (Effective Date 10/01/2015).