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I. AT-WILL EMPLOYMENT

A. Statute

There is no statutory provision concerning at-will employment.

B. Case Law

Florida does not recognize a common law cause of action for wrongful discharge. *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994). In Florida, if the term of employment is for an indefinite period of time, either party may terminate the employment at any time and no action may be maintained for breach of an employment contract. *Kelly v. Gill*, 544 So. 2d 1162, 1164 (Fla. 5th Dist. Ct. App. 1989); *DeMarco v. Publix Super Mkts, Inc.*, 360 So. 2d 134, 136 (Fla. 3d Dist. Ct. App. 1978), *aff'd*, 384 So. 2d 1253 (Fla. 1980).

Generally speaking, an employer has the right to discharge an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. *Toussaint v. Pub. Health Trust*, 277 F. Supp. 2d 1290, 1296-97 (S.D. Fla. 2003), *aff'd*, 116 Fed. Appx. 250 (11th Cir. 2004).

However, even an at-will employee can sue her employer for the recovery of compensation or other benefits. E.g., *Patwary v. Evana Petroleum Corp.,* 18 So. 3d 1237, 1238-1239 (Fla. 2d Dist. Ct. App. 2009).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

The general rule is that personnel manuals do not give rise to enforceable contract rights in the absence of language expressly providing that the manual constitutes a separate employment agreement, or the parties explicitly agree to that effect. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1273 (11th Cir. 2009) (applying Florida law) (compensation plan not a contract); *Sleit v. Ricoh Corp.*, 2007 U.S. Dist. LEXIS 64581, at *1-2 (M.D. Fla. Aug. 30, 2007); *Freese v. Wuesthoff Health Sys.*, 2006 U.S. Dist. LEXIS 31784 (M.D. Fla. May 19, 2006), *citing Quaker Oats Co. v. Jewell*, 818 So. 2d 574, 576-77 (Fla. 5th Dist. Ct. App. 2002). *See also Caravello v. Am. Airlines, Inc.,* 315 F. Supp. 2d 1346 (S.D. Fla. 2004) (applying Florida law, the court held that policy statements contained in an employment manual, including workplace rules of conduct, do not give rise to enforceable contract rights); *Rumbel v. Suggs*, 908 F. Supp. 901, 904 (M.D. Fla. 1995) (personnel manual containing six-step procedure for termination not a contract where manual stated employment was at-will and manual not a contract); *Lozano v. Marriott Corp.,* 844 F. Supp. 740

(M.D. Fla. 1994) (no employment contract despite handbook's provision for progressive discipline). *Accord Walton v. Health Care Dist.*, 862 So. 2d 852 (Fla. 4th Dist. Ct. App. 2003); *Muller v. Stromberg Carlson Corp.,* 427 So. 2d 266, 270 (Fla. 2d Dist. Ct. App. 1983).

2. Provisions Regarding Fair Treatment

There are no cases on this topic other than those cited elsewhere in the outline.

3. Disclaimers

There are no cases on this topic other than those cited elsewhere in the outline.

4. Implied Covenants of Good Faith and Fair Dealing

Florida law is clear that "the implied obligation of good faith cannot be used to vary the express terms of a contract." *City of Riviera Beach v. John's Towing*, 691 So. 2d 519, 521 (Fla. 4th Dist. Ct. App. 1997). Thus, the implied covenant of good faith could not be used to vary the terms of a listing agreement that provided that either party could terminate the agreement for good cause, bad cause, or no cause. *Terranova Corp. v. 1550 Biscayne Associates*, 847 So. 2d 529, 532-33 (Fla. 3d Dist. Ct. App. 2003).

> "To allege a breach of the implied covenant, the party must demonstrate a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence; but, rather by a conscious and deliberate act, which unfairly frustrates the agreed common purpose and disappoints the reasonable expectations of the other party. . . "

Shibata v. Lim, 133 F. Supp. 2d 1311, 1319 (M.D. Fla. 2000). Therefore, to state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must identify the specific contract term(s) giving rise to the implied duty of good faith, and allege how a defendant breached the implied duty, alleging facts different from those giving rise to the breach of contract claim. *See Stallworth v. Hartford Ins. Co*., 2006 U.S. Dist. LEXIS 70389, *17 (N.D. Fla. Aug. 8, 2006).

B. Public Policy Exceptions

1. General

Florida courts have declined to recognize public policy exceptions to the at-will doctrine, absent legislative action. *See Bell v. Novartis Pharms. Corp.,* 2008 U.S. Dist. LEXIS 107195, *7 (M.D. Fla. July 3, 2008)(refusing to recognize a "negligent investigation" exception to the at will rules); *Weld v. Southeastern Co. Inc*., 10 F. Supp. 2d 1318 (M.D. Fla. 1998) (declining to recognize wrongful discharge claim based upon national origin discrimination); *Smith v. Piezo Tech. Prof'l Administrators*, 427 So. 2d 182, 184 (Fla. 1983) (noting that claims for common law wrongful discharge are not cognizable in Florida). However, a terminated at-will employee may be able to sue his former employer under various tort theories, such as fraudulent or negligent misrepresentation or intentional infliction of emotional harm. *Golden v. Complete Holdings, Inc.*, 818 F. Supp. 1495, 1497 (M.D. Fla. 1993); *Hamlen v. Fairchild Indus., Inc.*, 413 So. 2d 800, 802 (Fla. 1st App. 1982).

2. Exercising a Legal Right

See "Exposing Illegal Activity," below.

3. Refusing to Violate the Law

See "Exposing Illegal Activity," below.

4. Exposing Illegal Activity (Whistleblowers)

a. Public Employers

Under the Public Employee Whistleblower's Act of 1986, state and local government employees may not be retaliated against for reporting suspected violations that endanger public health, safety, and welfare. *See* FLA. STAT. §§ 112.3187, *et seq*.

b. Private Employers

Under the Private Employee Whistleblower's Act an employer may not take any retaliatory personnel action against an employee because the employee has disclosed employer violations of a law, rule, or regulation to an appropriate government agency, or because an employee objected to or refused to participate in a practice of the employer that is in violation of a law, rule, or regulation. *See* FLA. STAT. §§ 448.101-105. The Act applies to employers who employ ten or more persons. FLA. STAT. § 448.101(3). The Act provides that an individual may be liable for actions taken in his or her capacity as an employer, although there is no liability for actions taken by an individual in his or her capacity as an officer, director, or shareholder of a corporation. *See Tracey-Aledcloff v. J. Altman Hair & Beauty Cm, Inc*., 899 So. 2d 1167, 1168-69 (Fla. 4th DCA 2005); *see also Diaz v. Kaplan Univ*., 567 F. Supp. 2d 1394, 1397-99 (S.D. Fla. 2008); *Greif v. Jupiter Med. Ctr., Inc*., No. 08-80070-CIV, 2008 WL 2705436, at *5 (S.D. Fla. July 9, 2008).

There are three distinct causes of action under the Act:

Section 448.102(1) provides a cause of action for an employee who is retaliated against by the employer for disclosing, or threatening to disclose, to a government agency, under oath and in writing, "an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation."

Section 448.102(2) provides a cause of action for an employee that is retaliated against by the employer for providing information to, or testifying before, a "governmental agency, person, or entity that is conducting an investigation, hearing, or inquiry into an alleged violation of law, rule, or regulation by the employer."

Section 448.102(3) provides a cause of action for an employee that is retaliated against by the employer for objecting to, or refusing "to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." *See Golf Channel v. Jenkins*, 752 So. 2d 561, 564 (Fla. 2000).

Under Florida's private sector statute, a written complaint is required but only for employees who have disclosed or threatened to disclose a policy or practice that is in violation of a law, rule, or regulation to any appropriate governmental agency. Written notice is not required when the employee's complaint is based on assistance or objection whistleblowing under §§ 448.102(2) and (3). *See Golf Channel v. Jenkins*, 752 So. 2d 561, 564 (Fla. 2000).

The Act is construed liberally. *Tibbs v. Power Only, LLC*, 2016 U.S. Dist. LEXIS 4247, *6 (M.D. Fla. Jan. 13, 2016), citing *Golf Channel v. Jenkins*, 752 So. 2d 561, 565-66 (Fla. 2000). As such, the Act even provides for a civil cause of action against an employer who discharges an employee for having filed a workers' compensation claim against a previous employer. Id. at 1251 (emphasis added). *But cf. Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.,* 896 So. 2d 787, 791 (Fla. 2d Dist. Ct. App. 2005) (holding that whistleblower protection is not afforded to an attorney who reports a potential ethical violation under the rules regulating the Florida Bar).

Courts have come to different conclusions as to whether a plaintiff must prove an actual violation of a law, rule, or regulation for violations of FLA. STAT. §§ 448.101(1) and (3). *See Aery v. Wallace Lincoln-Mercury, LLC.*, 118 So. 3d 904, 916 (Fla. 4th DCA 2013) (holding that a plaintiff is not required to show an actual violation and need only demonstrate that he or she had a reasonable, good faith belief that the employer violated the law). *But see Kearns v. Farmer Acquisition Co.*, 157 So. 3d 458, 465 (Fla. 2d DCA 2015) (holding that an employee must demonstrate an actual violation of the law to establish a claim under the Act). All three federal courts sitting in Florida have held that the plaintiff must prove an actual violation. *In re Std. Jury Instructions in Civil Cases*, 95 So. 3d 106, 107-14 (Fla. 2012).

The court has discretion to award attorneys' fees to the prevailing party. *See DeSocio v. Sonic Auto*, 894 So. 2d 1064, 1066 (Fla. 2d Dist. Ct. App. 2005). Some courts have held that the standard articulated in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), does not apply when determining whether a prevailing defendant employer is entitled to fees. *E.g., Hernandez v. Mohawk Industries, Inc.,* 2010 U.S. Dist. LEXIS 36959 (M.D. Fla. April 14, 2010); *Stone v. GEICO Gen. Ins. Co.,* 2006 U.S. Dist. LEXIS 83662, at *4 (M.D. Fla. Nov. 16, 2006) (citations omitted); *New World Communications of Tampa, Inc. v. Akre*, 866 So. 2d 1231, 1235 (Fla. 2d Dist. Ct. App. 2004).

Punitive damages are not recoverable. *Wells v. Xpedx*, 2007 U.S. Dist. LEXIS 33288, at *5 (M.D. Fla. May 7, 2007); *Parker v. Peavy & Son, Inc.*, 2006 U.S. Dist. LEXIS 30327, at *3 (N.D. Fla. May 17, 2006); *Branche v. AirTran Airways, Inc.*, 314 F. Supp. 2d 1194 (M.D. Fla. 2004).

There is a right to a jury trial. *See O'Neal v. Fla. A & M Univ.,* 989 So. 2d 6, 13-14 (Fla. 1st Dist. Ct. App. 2008). An agreement to arbitrate claims under the Act is enforceable. *Hospicecare of Se. Fla., Inc. v. Major*, 968 So. 2d 117, 118-19 (Fla. 4th DCA 2007) (finding the plaintiff's claims arbitrable when the plain language of the employment agreement requires arbitration).

The Florida Civil Rights Act and the private sector Whistleblower's Act were intended to provide dual remedies in "overlap" cases seeking protection from retaliation. *Yarcheski v.*

Keiser Sch., Inc., 508 Fed. App'x 916, 918 (11th Cir. 2013) (noting that the Florida Civil Rights Act's anti-retaliation provision overlaps with the protections offered by the Florida Whistleblowers Act); *Clifford v. R-Motels, Inc.*, 2010 U.S. Dist. LEXIS 110565, *5 (M.D. Fla. Oct. 8. 2010)(the anti-retaliation provisions of Title VII do not preempt a claim under the Whistleblower Act); *Rivera v. Torfino Enterprises, Inc.*, 914 So. 2d 1087, 1090 (Fla. 4th Dist. Ct. App. 2005).

III. CONSTRUCTIVE DISCHARGE

To prevail on a constructive discharge claim, an employee must show, under an objective standard, that the employer made working conditions so difficult that a reasonable person would feel compelled to resign. *See Shah v. Orange Park Med. Ctr., Inc.*, 2016 U.S. Dist. LEXIS 126074, at *28 (M.D. Fla. Sep. 16, 2016); *Nettles v. LSG Sky Chef*, 211 Fed. Appx. 837, 838 (11th Cir. 2006); *Olson v. Dex Imaging, Inc.,* 2014 U.S. Dist. LEXIS 150227 (M.D. Fla. Oct. 22, 2014) (finding material changes in terms and conditions of employment sufficient to establish constructive discharge); *Cavicchi v. Chertoff*, 2008 U.S. Dist. LEXIS 6192, at *10 (S.D. Fla. Jan. 28, 2008); *Vazquez v. City of Hialeah Gardens*, 874 So. 2d 626 (Fla. 3d Dist. Ct. App. 2004) (per curiam). A failure to complain may preclude a constructive discharge claim. *Joseph v. Publix Super Markets, Inc.*, 983 F. Supp. 1431 (S.D. Fla. 1997) (when an employee fails to resign after suffering "intolerable work conditions," a claim for constructive discharge cannot lie). The threshold for establishing a constructive discharge claim is "quite high," and a court does not consider a plaintiff's subjective feelings. *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F. 3d 1208, 1231 (11th Cir. 2001).

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

Under Florida law, unless a written employment agreement indicates to the contrary, employees are deemed to have an at-will status. *See J.R.D. Mgmt. Corp. v. Dulin*, 883 So. 2d 314, 316 (Fla. 4th Dist. Ct. App. 2004), *rev. denied*, 900 So. 2d 553 (Fla. 2005) (concluding that the statement "[i]f I am terminated for any reason other than good cause at any time during the first twelve months I will be given a severance payment of $15,000" is not an expression of a definite term of employment). Where an employment agreement is indefinite as to the period of employment, the employee may be terminated without cause. *Id. See also Linafelt v. Bev, Inc.*, 662 So. 2d 986, 989 (Fla. 1st Dist. Ct. App. 1995), *citing Bryant v. Shands Teaching Hosp. & Clinics, Inc.*, 479 So. 2d 165, 167 (Fla. 1st Dist. Ct. App. 1985). However, the at-will rule does not apply if (1) the employment agreement expressly provides for termination only upon a showing of cause, *Falls v. Lawnwood Med. Ctr.,* 427 So. 2d 361 (Fla. 4th Dist. Ct. App. 1983), or (2) the agreement provides for a definite term of employment. *Gheorghita v. Royal Caribbean Cruises, Ltd.*, 93 F. Supp. 2d 1237 (S.D. Fla. 2000); *Olsen v. Allstate Ins. Co.*, 759 F. Supp. 782 (M.D. Fla. 1991).

B. Status of Arbitration Clauses

The Revised Florida Arbitration Code, FLA. STAT. §§ 682.01, *et seq*., provides in pertinent part as follows:

> (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.
>
> (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
>
> (3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.
>
> (4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.
>
> . . .

FLA. STAT. § 682.02.

Florida courts have repeatedly recognized that "agreements to arbitrate are favored by the courts." *Brasington v. EMC Corp.*, 855 So. 2d 1212, 1215 (Fla. 1st Dist. Ct. App. 2003) (an arbitrator has the power to award injunctive relief in a Florida Civil Rights Act and Florida Whistleblower's case). *See Rosier v. Safamarwa, Inc.*, 2007 U.S. Dist. LEXIS 80092, at *6 (M.D. Fla. Oct. 27, 2007) (noting "[a]t the state and federal level, courts favor enforcement of arbitration agreements."). An arbitration clause carries a presumption of arbitrability. *Royal Prof'l Builders, Inc. v. Roggin*, 853 So. 2d 520, 522 (Fla. 4th Dist. Ct. App. 2003). In view of the strong public policy favoring arbitration, all questions regarding the scope or waiver of the right to arbitrate should be resolved in favor of arbitration. *Bill Heard Chevrolet Corp. v. Wilson*, 877 So. 2d 15 (Fla. 5th Dist. Ct. App. 2004); *see also Lopez v. Ernie Haire Ford, Inc.,* 974 So. 2d 517, 519 (Fla. 2d Dist. Ct. App. 2008) (failure to read the arbitration provision does not defeat enforceability).

The Florida Supreme Court has held that, under either the Federal Arbitration Act or the Florida Code, there are three elements for courts to consider in ruling on a motion to compel arbitration: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." *Spurgeon v. Marriott Int'l, Inc.*, 2017 U.S. Dist. LEXIS 32095, at *8 (S.D. Fla. Mar. 7, 2017); *Raymond James Fin. Services v. Saldukas*, 896 So. 2d 711 (Fla. 2005), *citing Seifert v. U.S. Home Corp.*, 750 So. 2d 633,636 (Fla. 1999). Accordingly, under either federal or Florida law, when determining the existence of a valid written agreement or an arbitrable issue, the inquiry and result would be the same. Thus, an inquiry into waiver should also yield the same result, regardless of whether the dispute is to be arbitrated pursuant to the Federal Arbitration Act or the Florida Code.

Mere inequality in bargaining power is not a sufficient reason to invalidate an arbitration agreement. An employer may present the agreement on a "take it or leave it"

basis. *Bhim v. Rent-A-Center, Inc.*, 655 F. Supp. 2d 1307 (S.D. Fla. 2006). A party may waive its contractual right to arbitrate; however, there is no requirement for proof of prejudice for there to be an effective waiver. Filing a counterclaim and motion to dismiss simultaneously with a motion to compel arbitration, without more, will not constitute waiver. *Strominger v. AmSouth Bank*, 2008 Fla. App. LEXIS 15914, at *8-10 (Fla. 2d Dist. Ct. App. Oct. 15, 2008); *Waterhouse Constr. Group, Inc. v. 5891 SW 64th St., LLC*, 949 So. 2d 1095, 1100 (Fla. 3d Dist. Ct. App.), *reh'g denied*, 2007 Fla. App. LEXIS 4977 (Fla. 3d Dist. Ct. App. March 27, 2007); *But see Strominger v. AmSouth Bank*, 2008 Fla. App. LEXIS 15914, at *8-10 (Fla. 2d Dist. Ct. App. Oct. 15, 2008) (filing of a motion for summary judgment on the merits will constitute waiver). "Florida courts have recognized circumstances in which a non-signatory [to an agreement to arbitrate] may compel a signatory to arbitration." *See Morales v. Perez*, 952 So. 2d 605, 608 (Fla. 3d Dist. Ct. App. 2007).

Under Florida law, statutory discrimination claims can be the subject of a valid arbitration provision. *See Henry v. Pizza Hut of Am., Inc.,* 2007 U.S. Dist. LEXIS 72193 (M.D. Fla. Sept. 27, 2007) (compelling arbitration of § 1981 claim); *Bolamos v. Globe Airport Sec. Services*, 2002 U.S. Dist. LEXIS 11056, at *6-7 (S.D. Fla. May 20, 2002) (compelling arbitration of FLSA claim), aff'd, 64 Fed. Appx. 746 (11th Cir. 2003); *Bachus & Stratton, Inc. v. Mann*, 639 So. 2d 35 (Fla. 4th Dist. Ct. App. 1994) (Title VII sex discrimination claims are subject to arbitration).

V. ORAL AGREEMENTS

A. Promissory Estoppel

Florida does not recognize an actionable claim for promissory estoppel in the inducement of an employment at will relationship. Leonardi *v. City of Hollywood*, 715 So. 2d 1007, 1009-10 (Fla. 4th Dist. Ct. App. 1998). Promissory estoppel requires reliance on a promise, while equitable estoppel requires reliance on a representation of fact. *See Nova Info. Sys. v. Greenwich Ins. Co*., 365 F.3d 996, 1005 (11th Cir. 2004) (applying Florida law).

To state a cause of action for promissory estoppel, a plaintiff must establish the following three elements: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) a reasonable reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon. *FCCI Ins. Co. v. Cayce's Excavation, Inc*., 901 So. 2d 248, 251 (Fla. 2d Dist. Ct. App. 2005), *citing Almerico v. RLI Ins. Co*., 716 So. 2d 774, 777 (Fla. 1998).

To state a cause of action for equitable estoppel, a plaintiff must prove: (1) a representation of fact by one party contrary to a later-asserted position; (2) a good-faith reliance by another party upon that representation; and (3) a detrimental change in position. *Mobile Med. Indus. v. Quin*, 985 So. 2d 33, 36 (Fla. 1st Dist. Ct. App. 2008), *citing LaCroix Constr. Co. v. Bush*, 471 So. 2d 134, 136 (Fla. 1st Dist. Ct. App. 1985); *In re Estate of Sterile,* 902 So. 2d 915, 922 (Fla. 2d Dist. Ct. App. 2005); *Sun Cruz Casinos, LLC v. City of Hollywood, Fla.,* 844 So. 2d 681 (Fla. 4th Dist. Ct. App. 2003).

B. Fraud

The essential elements of fraudulent misrepresentation are:

1. false or fraudulent misrepresentation of a specific material fact made;

2. for the purpose of inducing another to act or refrain from acting in reliance upon it; and

3. injury resulting from reliance on the representation.

See Alvarez v. Royal Caribbean Cruises, Ltd., 905 F. Supp. 2d 1334, 1342 (S.D. Fla. 2012); *Stires v. Carnival Corp.,* 243 F. Supp. 2d 1313, 1320 (M.D. Fla. 2002) (holding that fraud claim met the sufficient particularity pleading requirement); *Gandy v. Trans. World Computer Tech. Group*, 787 So. 2d 116, 119 (Fla. 2d Dist. Ct. App. 2001) (denying motion to dismiss fraud claim based on allegedly false representation regarding duration of employment). An at will employee can sue for fraudulent inducement of the employment contract. *Tyson v. Viacom, Inc.,* 890 So. 2d 1205, 1209 (Fla. 4th Dist. Ct. App. 2005).

C. Statute of Frauds

Under the Statute of Frauds, any agreement that is not to be performed within one year is not enforceable unless in writing and signed by the party against whom enforcement is sought. FLA. STAT. § 725.01; *see also Gray v. Prime Mgmt. Group, Inc.,* 912 So. 2d 711, 712 (Fla. 4th Dist. Ct. App. 2005) (reversing temporary injunction enjoining two former employees from soliciting existing clients of a former employer because enforcement of the non-compete clause after its expiration violated the statute of frauds). An oral employment contract for an indefinite time is not barred by the Statute of Frauds because it could be performed within one year. *Elliott v. Winslow*, 737 So. 2d 609, 609 (Fla. 2d Dist. Ct. App. 1999).

VI. DEFAMATION

A. General Rule

To state a cause of action for defamation in Florida, a plaintiff must allege that:

1. the defendant published a false and defamatory statement about the plaintiff,

2. to a third party, and

3. defendant did so with "knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person," and

4. that the falsity of the statement caused injury to the plaintiff.

Greene v. Times Publ. Co., 130 So. 3d 724, 729 (Fla. Dist. Ct. App. 2014) (*citing Jews for Jesus v. Rapp*, 997 So. 2d 1098 (Fla. 2008)); *Razner v. Wellington Reg'l Med. Ctr., Inc.*, 837 So. 2d 437, 442 (Fla. 4th Dist. Ct. App. 2002); *see also Cape Publ'ns, Inc. v. Reakes*, 840 So. 2d 277 (Fla. 5th Dist. Ct. App. 2003); *Byrd v. Hustler Magazine*, 433 So. 2d 593, 595 (Fla. 4th Dist. Ct. App. 1983). Florida law requires allegations that identify the speaker, describe the

defamatory statement, and provide when such publication occurred. *Brehm v. Seminole Towne Ctr. Ltd. P'ship,* 2012 US Dist. LEXIS 15897 (M.D. Fla. Jan 12, 2012); *Fowler v. Taco Viva, Inc.*, 646 F. Supp. 152, 157-58 (S.D. Fla. 1986). Florida courts have consistently dismissed defamation claims for failure to specifically plead each of the elements of the tort. *See*, *e.g.*, *Robobar, Inc. v. Hilton Int'l Co.*, 870 So. 2d 864 (Fla. 3d Dist. Ct. App. 2004); *Buckner v. Lower Fla. Keys Hosp. Dist.*, 403 So. 2d 1025 (Fla. 3d Dist. Ct. App. 1981).

B. Libel

Libel is defined as the unprivileged written publication of a false statement. *Perry v. Naples HMA, LLC*, 2014 U.S. Dist. LEXIS 162330, at *27-28 (M.D. Fla. Nov. 19, 2014); *Thompson v. Orange Lake Country Club, Inc.*, 224 F. Supp. 2d 1368, 1376 (M.D. Fla. 2002) (applying Florida Law), *citing Dunn v. Airline Pilots Ass'n*, 193 F. 3d 1185, 1191 (11th Cir. 1999).

C. Slander

Slander is "defined as the speaking of base and defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood." *Spears v. Albertson's, Inc.*, 848 So. 2d 1176 (Fla. 1st Dist. Ct. App. 2003) (citations omitted).

D. References

See the discussion on "Privileges" below.

E. Privileges

1. Common Law

The elements of qualified privilege are: (1) good faith; (2) an interest to be upheld; (3) a statement limited in its scope to this purpose; (4) published on a proper occasion; and (5) published in a proper manner.

As the Florida Supreme Court observed in *Nodar v. Galbreath*, 462 So. 2d 803, 809 (Fla. 1984), there is a broad range of occasions when communication, even if defamatory, is privileged:

> [A] communication made in good faith on any subject matter by one having an interest therein, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which would otherwise be actionable, and though the duty is not a legal one but only a moral or social obligation.

Id. Unless there is express malice, a statement is protected by qualified privilege if the speaker makes a statement to another who shares a legal interest in the subject matter of the statement. *See Crestview Hosp. Corp. v. Coastal*, 203 So. 3d 978, 983 (Fla. Dist. Ct. App. 2016); *Elbana v. Captain D's, LLC*, 2009 U.S. Dist. LEXIS 11425 (M.D. Fla. Feb. 17, 2009); *Cape Publications v. Reakes*, 840 So. 2d 277, 280 (Fla. 5th Dist. Ct. App. 2003). For example, a qualified privilege generally applies to statements made in connection with an investigation.

See Sirpal v. Univ. of Miami, 509 Fed. Appx. 924 (11th Cir. 2013); *Jarzynka v. St. Thomas Univ. Sch. of Law*, 310 F. Supp. 2d 1256, 1267-1268 (S.D. Fla. 2004).

Affidavits submitted in response to an EEOC investigation are absolutely privileged. *Gandy v. Trans World Computer Tech. Group*, 787 So. 2d 116, 119 (Fla. 2d Dist. Ct. App. 2001).

An absolute privilege extends to a witness's testimony in connection with or in the course of an existing judicial proceeding. *Fullerton v. Fla. Med. Ass'n, Inc.,* 938 So. 2d 587 (Fla. 1st Dist. Ct. App. 2006).

An absolute privilege extends to actions in connection with, or in the course of, an existing quasi-judicial proceeding, such as an arbitration hearing. *Kidwell v. GMC*, 975 So. 2d 503, 505 (Fla. 2d Dist. Ct. App. 2007).

2. Statutory

Florida Statute Section 768.095 provides immunity from civil liability to an employer who, pursuant to a request, discloses information about a former or current employee to a prospective employer. The former employee can recover only upon proving by clear and convincing evidence that the information was "knowingly false." FLA. STAT. § 768.095 (2004). The statute is an affirmative defense, so the plaintiff must first demonstrate a prima facie case of defamation. *Linafelt v. Beverly Enterprise-Fla., Inc*., 745 So. 2d 386, 388 (Fla. 1st Dist. Ct. App. 1999). *See Boehm v. Am. Bankers Ins. Group*, 557 So. 2d 91 (Fla. 3d Dist. Ct. App. 1990).

Communications, either oral or written, by and among the employer, the employee, and the state unemployment agency are privileged. FLA. STAT. § 443.041(3).

F. Other Defenses

1. Truth

If the alleged defamatory statements are true, the claim will be dismissed. *Cape Publications, Inc. v. Reakes*, 840 So. 2d 277, 280 (Fla. 5th Dist. Ct. App. 2003); *Razner v. Wellington Reg'l Med. Ctr., Inc.*, 837 So. 2d 437 (Fla. 4th Dist. Ct. App. 2002). *See also Johnson v. Clark*, 484 F. Supp. 2d 1242, 1252 (M.D. Fla. 2007).

2. No Publication

Publication to someone other than the person defamed is an essential element of the tort of defamation. *Shafran v. Parrish*, 787 So. 2d 177, 179 (Fla. 2d Dist. Ct. App. 2001). *See also Johnson v. Clark*, 484 F. Supp. 2d 1242, 1248-49 (M.D. Fla. 2007).

3. Self-Publication

Florida law does not recognize compelled self-publication as an exception to the publication requirement. *See Valencia v. Citibank Int'l*, 728 So. 2d 330, 330-31 (Fla. 3d Dist. Ct. App. 1999) (an employee who alleged that she was compelled by law to disclose to a

prospective employer her former employer's false reason for her termination failed to satisfy publication requirement).

4. Invited Libel

See immediately preceding subsection.

5. Opinion

Statements of pure opinion cannot constitute actionable defamation and are constitutionally protected. *Magre v. Charles*, 729 So. 2d 440, 442 (Fla. 5th Dist. Ct. App. 1999). A statement is pure opinion if based on facts known to the listener. *Rasmussen v. Collier County Publ'g Co*., 946 So. 2d 567, 571 (Fla. 2d Dist. Ct. App. 2006). However, a statement is not a protected opinion if it implies the existence of undisclosed defamatory facts as its basis. *Scholz v. RDV Sports, Inc.*, 710 So. 2d 618, 628 (Fla. 5th Dist. Ct. App. 1998).

G. Damages

Unless defamation *per se*, the plaintiff must show that the defamatory statements proximately caused damages. *Cape Publ'ns, Inc. v. Reakes*, 840 So. 2d 277, 281 (Fla. 5th DCA 2003). Damages include nominal damages, actual damages, compensatory damages, and punitive damages. To be awarded punitive damages for matters of public concern, the plaintiff must show the defendant knew the statement was false and/or had serious doubts as to its truth *and* that the primary purpose of making the statement was to express ill will, hostility, and intent to harm. *Hunt v. Liberty Lobby*, 720 F.2d 631, 650-51 (11th Cir. 1983); *Army Aviation Heritage Found. & Museum, Inc. v. Buis*, 504 F. Supp. 2d 1254 (N.D. Fla. 2007). For matters that are not of public concern, a plaintiff need only show that the primary purpose of making the statement was to express ill will, hostility, and intent to harm. *In re Std. Jury Instructions in Civil Cases*, Report No. 09-01, 35 So. 3d 666, 724 (Fla. 2010).

H. Job References and Blacklisting Statutes

Florida has a blacklisting statute applicable to agricultural employees. *See* FLA. STAT. § 487.2031(7).

I. Non-Disparagement Clauses

These clauses should be enforceable under general principles governing contracts, although with the caveat that the EEOC is scrutinizing broadly worded non-disparagement clauses.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

It is well-settled in Florida that to prove a claim for intentional infliction of emotional distress, the plaintiff must show: (1) a deliberate or reckless infliction of emotional suffering; (2) by outrageous conduct; (3) which conduct must have caused the suffering; and (4) the suffering must have been severe. *Zorn v. McNeil*, 2016 U.S. Dist. LEXIS 134374, at *29-30

(M.D. Fla. Sep. 29, 2016); Martinez *v. Pavex Corp.,* 2006 U.S. Dist. LEXIS 46602 (M.D. Fla. June 30, 2006) (racial epithets, coupled with threatening gestures, do not meet the standard). The question of whether the actor's conduct is deemed atrocious and utterly intolerable to a civilized community, and thus may form the basis for a claim for intentional infliction of emotional distress, is a question of law. *Winter Haven Hosp., Inc. v. Liles*, 148 So. 3d 507, 515 (Fla. Dist. Ct. App. 2014); *Ponton v. Scarfone*, 468 So. 2d 1009, 1011 (Fla. 2d Dist. Ct. App. 1985). The subjective response of the individual exposed to the conduct does not control. *State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So. 2d 1210 (Fla. 5th Dist. Ct. App. 1995). *See Byrd v. BT Foods, Inc.,* 948 So. 2d 921, 928 (Fla. 4th Dist. Ct. App. 2007) (other employees teasing plaintiff about his HIV condition is not outrageous conduct).

The Florida courts continue to resist claims for intentional infliction of emotional distress in employment cases in the absence of physical contact. *See*, *e.g.*, *Lopez v. Target Corp*., 676 F. 3d 1230 (11th Cir. 2012); *Vance v. S. Bell Tel. & Tel. Co.,* 983 F.2d 1573, 1575 n.7 (11th Cir. 1993) (hanging a noose over an employee's work station, assigning the employee to supervise white women who attacked her, and transporting the employee to the wrong hospital when she had a breakdown was not sufficiently "outrageous" to support an intentional infliction of emotional distress claim); *Studstill v. Borg Warner Leasing*, 806 F.2d 1005, 1008 (11th Cir. 1986) (no cause of action for intentional infliction of emotional distress where plaintiff alleged sexual harassment and that defendant grabbed her breast); *Alina Lezcano Saavedra v. USF Bd. of Trs.*, 2011 U.S. Dist. LEXIS 48748 (M.D. Fla. May 6, 2011)(dismissing claim with prejudice) *Martz v. Munroe Reg'l Med. Ctr., Inc.,* 2007 U.S. Dist. LEXIS 49561, at *8-9 (M.D. Fla. July 9, 2007) (being involuntarily placed on medical leave, employer's failure to find suitable work alternative, and resulting discharge, does not amount to "outrageous, extreme, atrocious, and utterly intolerable" conduct); *Vamper v. UPS*, 14 F. Supp. 2d 1301, 1306 (S.D. Fla. 1998) (intentional infliction of emotional distress "sparingly recognized" and arises "where there is the presence of relentless physical, as well as verbal, harassment"); *Blount v. Sterling Healthcare Group, Inc.,* 934 F. Supp. 1365, 1367 (S.D. Fla. 1996) (no cause of action where plaintiff alleged defendant repeatedly failed to remedy alleged sex discrimination); *Ayers v. Wal-Mart Stores, Inc.*, 941 F. Supp. 1163, 1168 (M.D. Fla. 1996) (no cause of action where plaintiff alleged defendant negligently trained and supervised its managerial employees and retained alleged harasser); *Watson v. Bally Mfg. Corp.,* 844 F. Supp. 1533, 1536 (S.D. Fla. 1993) (no cause of action where plaintiff alleged a pattern of relentless verbal sexual harassment dismissed); *Forde v. Royal's, Inc.,* 537 F. Supp. 1173, 1175-176 (S.D. Fla. 1982) (claim based on allegations of sex harassment); *Valdes v. GAB Robbins N. Am., Inc.,* 924 So. 2d 862 (Fla. 3d Dist. Ct. App. 2006) (dismissal affirmed where employer's workers' compensation carrier filed false criminal charges with the Department of Insurance, the employee was arrested, and the charges were ultimately dropped), *rev. denied*; *Williams v. Worldwide Flight Services Inc.*, 877 So. 2d 869, 870 (Fla. 2d Dist. Ct. App. 2004) (per curiam) (being referred to as the n-word and "monkey" over the walkie-talkie and work radio, as well as being persistently threatened with job termination, is not reprehensible, objectionable, and offensive enough to support a claim of intentional infliction of emotional distress); *Gillyard v. Delta Health Group, Inc.,* 757 So. 2d 601, 602-603 (Fla. 5th Dist. Ct. App. 2000) (claim based on discharge of employee dismissed).

In sum, liability for intentional infliction of emotional distress does not extend to "mere insults, indignities, threats, annoyances, petty oppressions or other trivialities." *Scheller v. Am. Med. Int'l Inc.*, 502 So. 2d 1268, 1271 (Fla. 4th Dist. Ct. App. 1987), *quoting*

RESTATEMENT (SECOND) OF TORTS § 46 (1965). Indeed, the only intentional infliction claims which recently have been allowed to proceed to trial were typically sexual harassment cases involving relentless physical, as well as verbal, harassment. *See, e.g., Perez v. Pavex Corp.,* 2002 U.S. Dist. LEXIS 21871, at *12 (M.D. Fla. Oct. 17, 2002).

B. Negligent Infliction of Emotional Distress

After *Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846, 850 (Fla. 2007), it appears that there is a limited exception to the impact rule if the plaintiff does not experience a physical impact. *See Gomez v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 2871 (S.D. Fla. Jan. 7, 2014). Motions to dismiss negligent retention, training and supervision claims on the grounds that there has been no injury from a physical impact have met with mixed success. *See Latson v. Hartford Ins. Co*., 2005 U.S. Dist. LEXIS 34145, at *11 (M.D. Fla. Dec. 12, 2005).

VIII. PRIVACY RIGHTS

A. Generally

There are four types of privacy claims: "(1) appropriation--the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion--physically or electronically intruding into one's private quarters; (3) public disclosure of private facts--the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye--publication of facts which place a person in a false light even though the facts themselves may not be defamatory." *Allstate Ins. Co. v. Ginsberg,* 863 So. 2d 156, 162 (Fla. 2003). In *Anderson v. Gannet Co.,* 994 So 2d 1048, 1049(Fla. 2008), the Florida Supreme Court recently held that the "false light" cause of action is not recognized under Florida law. *See also Jews for Jesus v. Rapp*, 997 So. 2d 1098 (Fla. 2008).

With respect to category two, the Florida Supreme Court has refused to extend a cause of action for invasion of privacy in the employment context where the plaintiff was subjected to offensive touching and comments. *See Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156 (Fla. 2003) (no cause of action for invasion of privacy where intrusion involves touching of the body; reaffirming the tort embraces intrusion into a "place" where there is a reasonable expectation of privacy).

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Fla. Stat. § 409.2576 requires all employers to report newly hired and rehired employees within 20 days of their start date.

2. Background Checks

There are no state statutes on this topic.

C. Other Specific Issues

1. Workplace Searches

There are no statutes specifically covering searches, and, therefore, this issue is governed by common law. *See Cohen Bros., LLC v. ME Corp.,* 872 So. 2d 321, 324 (Fla. 3d Dist. Ct. App. 2004) ("Society does not recognize an absolute right of privacy in a party's office or place of business."). "Florida courts have consistently held that the constitutional protections of a reasonable expectation of privacy do not extend to an individual's place of business." *Avrich v. State*, 936 So. 2d 739, 742 (Fla. 3d Dist. Ct. App. 2006). "[T]he reasonableness of an employee's expectation of privacy in his or her office or the items contained therein depends on the 'operational realities' of the workplace, and not on legal possession or ownership." *State v. Young*, 974 So. 2d 601, 608 (Fla. 1st Dist. Ct. App. 2008) (citations omitted).

2. Electronic Monitoring

Florida's "Security of Communications Act," Fla. STAT. §§ 934.01 et seq., makes it unlawful to intercept or record any wire, oral or electronic communications unless all the parties to the communication have given prior consent. *See Horning-Keaton v. Employers Ins. of Wausau*, 969 So. 2d 412, 418 n.4 (Fla. 5th Dist. Ct. App. 2007) (applies in the workplace). If the Employee Handbook has a Communications Systems policy that advises employees that the employer's systems may be monitored or intercepted, there should be no expectation of privacy in a company's voicemail, e-mail, or computer systems generally.

An intrusion may be physical or electronic. *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.,* 678 So. 2d 1239, 1252 n.20 (Fla. 1996).

3. Social Media

There are no Florida statutes on this topic.

4. Taping of Employees

Florida law prohibits tape recording of a person's communications, absent permission of the person being recorded. FLA. STAT. § 934.02, *et seq*., states in pertinent part that "any person whose wire or oral communication is intercepted . . . in violation of this chapter shall have a civil cause of action against any person who intercepts . . . such communications. . .." FLA. STAT. § 934.10. The term "person" is defined as "any employee or agent of the State of Florida or political subdivision thereof, of the United States, or of any other state or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation." FLA. STAT. § 934.02(5).

5. Release of Personal Information on Employees

See Tabas v. Shook Hardy & Bacon LLP, Case no. 1:13-cv-20080 (S.D. Fla. 2013)(ordering disclosure, pursuant to confidentiality agreement, of performance evaluations of two attorneys); *Burrows v. Purchasing Power, LLC*, 2012 U.S. Dist. LEXIS 186556 (S.D. Fla. 2012) (denial of motion to dismiss claim under the FDUPTA where Winn Dixie had

transferred personally identifiable data to Purchasing Power without knowledge and consent of the employees).

6. Medical Information

Improper disclosure of medical information under state law would be governed by the common law on invasion of privacy, and may be governed by FLA. STAT. § 456.057(8).

IX. WORKPLACE SAFETY

A. Negligent Hiring

In Florida, liability exists when an employer knowingly keeps a dangerous employee on the premises whom the employer knew or should have known was dangerous and liable to do harm. *Zemba v. Comcast Corp.*, 2015 U.S. Dist. LEXIS 71863, at *6 (S.D. Fla. June 3, 2015) *citing Maliki v. Doe,* 814 So. 2d 347, 364 (Fla. 2002); *Garcia v. Duffy,* 492 So. 2d 435 (Fla. 2d Dist. Ct. App. 1986). The key is foreseeability. *See Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 757-58 (Fla. 1st Dist. Ct. App. 1991) (employer liable for negligent hiring and retention where its employee, a furniture delivery man, attacked a customer in her home and prior to hiring, no interview or background investigation had been done). Statutory claims may not form the basis of a negligent hiring claim. *ACTS Ret.-Life Cmtys. Inc. v. Estate of Zimmer*, 206 So. 3d 112, 114-15 (Fla. Dist. Ct. App. 2016).

In Florida, employers have a presumption of reasonable care in negligent hiring claims, if the employer takes certain steps. FLA. STAT. § 768.096. These steps include at least one of the following: (1) obtain a criminal background investigation by requesting a check of information in the Florida Crime Information Center through the Florida Department of Law Enforcement; (2) make a reasonable effort to contact references and former employers, which should include requests about the prospective employee's suitability for employment; (3) require the prospective employee to complete a job application that includes questions about whether the individual has ever been convicted of a crime, as well as information about whether an applicant has ever been accused in a civil action of an intentional tort and the disposition of the case; (4) if driving is relevant to the work, get the authorization to obtain a driver's license record check; or (5) interview the prospective employee. *Id*.

B. Negligent Supervision/Retention

Negligent supervision requires proof: 1) that an employer had actual or constructive knowledge of the employee's harmful propensities, *ACTS Ret.-Life Cmtys. Inc. v. Estate of Zimmer*, 206 So. 3d 112, 114-15 (Fla. Dist. Ct. App. 2016); *Total Rehab & Med. Centers, Inc. v. E.B.O*, 915 So. 2d 694, 697 (Fla. 3d Dist. Ct. App. 2005) (affirming a directed verdict absent evidence that the employer knew that the employee would commit a battery); and 2) a nexus between the alleged tortious conduct and the alleged prior misconduct. *See Inman v. Am. Paramount Fin,* 517 Fed Appx. 744, 748 (11th Cir. 2013); *Gomez v. Wells Fargo Bank, N.A., supra*, 2014 U.S. Dist. LEXIS 2871; *Giambra v. Wendy's Int'l, Inc.,* 2009 U.S. Dist. LEXIS 50357 (M.D. Fla. June 15, 2009) (no nexus between mental condition of assailant and assault); *Dep't of Envtl. Protection v. Hardy*, 907 So. 2d 655, 661 (Fla. 5th Dist. Ct. App. 2005) ("there must be a connection and foreseeability between the employee's employment history and the current tort committed by the employee"); *Dickinson v. Gonzalez*, 839 So. 2d 709, 713-14

(Fla. 3d Dist. Ct. App. 2003) (no nexus between bad arrest claim and police officer's checkered history).

C. Interplay with Worker's Compensation Bar

There is some debate in the courts on this topic. *See Gerber v. Vincent's Men's Hair Styling, Inc. et al*., 57 So. 3d 935 (Fla. 4th Dist. Ct. App. 2011).

D. Firearms in the Workplace

Fla. Stat. § 790.251, "The Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008," prohibits employers from precluding their employees (and independent contractors) from bringing guns to work if kept in their vehicle.

E. Use of Mobile Devices

Florida law bans drivers from texting while driving, but they may text while at red lights or stuck in traffic. FLA. STAT. § 316.305.

X. TORT LIABILITY

A. Respondeat Superior Liability

See Valeo v. East Coast Furniture Co., 95 So. 3d 921 (Fla. 4th Dist. Ct. App. 2012) discussing when employer is liable for employee's criminal act).

B. Tortious Interference with Business/Contractual Relations

The four elements of this tort are: (1) the existence of a business relationship not necessarily evidenced by a written contract; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship. *Ingenuity, Inc. v. Linshell Innovations Ltd.*, 2014 U.S. Dist. LEXIS 40336, at *11 (M.D. Fla. Mar. 25, 2014); *Gunder's Auto Ctr. v. State Farm Mut. Auto. Ins. Co.*, 422 F. App'x 819, 821 (11th Cir. 2011); *Barco Holdings, LLC v. Terminal Inv. Corp.*, 967 So. 2d 281, 293 (Fla. 3d Dist. Ct. App. 2007); *Network IP, LLC v. Spread Enterprises, Inc.*, 922 So. 2d 355 (Fla. 3d Dist. Ct. App. 2006) (protecting a company's own economic interests to reduce the risk of incurring further loss does not constitute intent to damage); *Mariscotti v. Merco Group at Akoya, Inc.,* 917 So. 2d 890 (Fla. 3d Dist. Ct. App. 2005). The tort of interference with a contractual relationship can include attempts to alter or change only a single contractual provision whether the attempt is to extinguish the provision entirely or instead, simply to alter it, so long as the effect is to interfere with benefits otherwise due the plaintiff. *Shands Teaching Hosp. & Clinics, Inc. v. Beech Street Corp.,* 899 So. 2d 1222, 1228 (Fla. 1st Dist. Ct. App. 2005). To satisfy the intent requirement, the plaintiff must show that the defendant's actions were purposely directed at the interference. *MKT REPS S.A. DE C.V. v. Std. Chtd. Bank Int'l (Ams.) Ltd.*, 2012 U.S. Dist. LEXIS 101363, at *9 (S.D. Fla. July 20, 2012) *citing Maxi-Taxi of Fla., Inc. v. Lee County Port Auth.*, 2008 U.S. Dist. LEXIS 35073, at *50 (M.D. Fla. April 29, 2008).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

Covenants not to compete are recognized in Florida and are enforced if they meet the statutory guidelines. Most importantly, the employer seeking enforcement must plead and prove the existence of a legitimate business interest. FLA. STAT. § 542.335(1)(b); *See White v. Mederi Caretenders Visiting Servs. of Se. Fla., LLC*, 226 So. 3d 774, 786 (Fla. 2017) (holding that section 542, 335, Florida Statutes, is non-exhaustive; and, therefore, referral sources may constitute a legitimate business interest); *Zodiac Records, Inc. v. Choice Envtl. Servs.,* 112 So. 3d 587 (Fla. 4th Dist. Ct. App. 2013) (a former employer's customer relationships do not automatically qualify as trade secrets); *Fla. Hematology & Oncology v. Tummala*, 927 So. 2d 135 (Fla. 5th Dist. Ct. App.), *rev. granted*, 937 So. 2d 122 (Fla. 2006). Florida Statute Section 542.335, which applies contracts entered into on or after July 1, 1996, governs restrictive covenants and non-competes. Because the statute was amended in 1990 and 1996, there are three sets of rules governing the enforceability of restrictive covenants in Florida, depending on the effective date of the contract:

Date of Contract	Applicable Statute
Since July 1, 1996	FLA. STAT. § 542.335
Between June 28, 1990 and June 30, 1996	FLA. STAT. § 542.33
Prior to June 28, 1990	FLA. STAT. § 542.33 (prior version)

Continued employment will supply the necessary consideration if clearly is stated in the agreement. *Balasco v. Gulf Auto Holding, Inc.,* 707 So. 2d 858 (Fla. 2d Dist. Ct. App. 1998.

The most recent version of the statute requires that the court apply a general test of reasonableness to the covenant, and extraordinary or specialized training can supply the necessary showing of business necessity. *See, e.g., Fulford v. Drawdy Bros. Constr. II, Inc.,* 903 So. 2d 1007, 1007 (Fla. 4th Dist. Ct. App.) (per curiam), *rev. dismissed*, 2005 Fla. LEXIS 1896 (Fla. Sept. 2, 2005). The employer must show that the interest is actually threatened by the breach of the agreement; the burden may not be met simply by showing the employee is engaged in competition with the former employer. *See Edwards v. Harris*, 964 So. 2d 196, 198 (Fla. 1st Dist. Ct. App. 2007) (reversing an injunction that enjoined employee from competing with employer in any capacity where the only support for the order was the existence of a non-compete agreement); *see also Harden & Associates, Inc. v. Hall*, 764 So. 2d 691 (Fla. 1st Dist. Ct. App. 2000). Further, in situations "where a written employment contract has expired and the employee has continued working under an oral contract, a covenant not to compete contained in the original contract cannot always be enforced." *Gray v. Prime Mgmt. Group, Inc.,* 912 So. 2d 711, 713 (Fla. 4th Dist. Ct. App. 2005), *citing Sanz v. R.T. Aerospace Corp.,* 650 So. 2d.1057 (Fla. 3d Dist. Ct. App. 1995).

It is well established in Florida that "a non-compete period [may] be equitably extended to allow for what was intended in the bargain." *Michele Pommier Models, Inc. v.*

Diel, 886 So. 2d 993, 955 (Fla. 3d Dist. Ct. App. 2004), *citing Capelouto v. Orkin Exterminating Co.,* 183 So. 2d 532, 534 (Fla. 1966); *Kverne v. Rollins Protective Servs. Co.*, 515 So. 2d 1320, 1321 (Fla. 3d Dist. Ct. App. 1987). However, the party seeking enforcement of the non-compete must file suit to extend the time prior to the expiration of the non-compete period. *Michele Pommier Models, Inc.,* 886 So. 2d at 955.

B. Blue Penciling

The Florida statute specifically permits blue penciling where the non-compete is overbroad in geographic and/or temporal scope. *Southernmost Foot & Ankle Specialists, P.A. v. Torregrosa, D.P.M.,* 891 So. 2d 591, 594 (Fla. 3d Dist. Ct. App. 2004), *rev. dismissed*, 901 So. 2d 121 (Fla. 2005); *Open Magnetic Imaging, Inc. v. Nieves-Garcia*, 826 So. 2d 415, 418 n.1 (Fla. 3d Dist. Ct. App. 2002).

C. Confidentiality Agreements

There are no specific statutes on this topic, other than those contained in this section.

D. Trade Secrets Statute

Florida has adopted the Uniform Trade Secrets Act. *See* FLA. STAT. §§ 688.001, *et seq*. In 1997, the statute was amended to further define the term "misappropriation" as follows:

> b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
>
> 1. Used improper means to acquire knowledge of the trade secret; or
>
> 2. At the time of disclosure or use, knew or had reason to know that her or his knowledge of the trade secret was:
>
> a. Derived from or through a person who had utilized improper means to acquire it;
>
> b. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>
> c. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
>
> 3. Before a material change of her or his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Id. § 688.002(2).

E. Fiduciary Duty and Other Considerations

See discussion above.

F. Choice of Law Provisions in Contracts for Employee Outside of Florida

Employers who employ persons outside of Florida may opt to include Florida choice-of-law provisions in their non-compete agreements. Under such provisions, courts are required to apply Florida law when enforcing the parties' agreement. Such choice-of-law provisions take advantage of Florida's non-compete laws even when the company seeks to enforce the non-compete agreement outside of Florida.

However, it is important to note that several states have declined to enforce Florida's non-compete law even when the employment agreement requires Florida law to apply.

Some states (including California, North Dakota, and Oklahoma) have banned non-compete agreements outright with few exceptions. In those states, courts will likely not apply Florida law when ruling on the enforceability of a non-compete agreement even in the presence of a Florida choice-of-law provision. *See, e.g.*, *Sw. Stainless, L.P. v. Sappington*, 07-CV-0334-CVE-PJC, 2008 WL 918706, at *6 (N.D. Okla. Apr. 1, 2008) (declining to honor a non-compete agreement's choice-of-law provision requiring application of Florida law because "the parties' choice of law [providing for Florida law] 'violate[s] the provisions of Oklahoma law … [and] Florida law contravenes Oklahoma public policy").

But even some states that allow non-competition agreements have declined to apply Florida law even when the employment agreements requires the application of Florida law.

Generally, courts outside of Florida have taken issue with Florida's non-compete statute that prohibits courts from considering "any individualized economic or other hardship that might be caused to the person against whom enforcement is sought." Fla. Stat. § 542.335(1)(g).

The highest court in New York, for example, declined to apply Florida law when ruling on a non-compete agreement despite the fact that the agreement included a choice-of-law provision requiring Florida law to apply. *See Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 364, 368–70, 34 N.E.3d 357, 360–61 (2015). Similarly, an appellate court in Illinois declined to apply Florida law to a non-compete agreement despite the agreement's Florida choice-of-law provision. *See Brown & Brown, Inc. v. Mudron*, 887 N.E.2d 437, 440 (Ill. App. Ct. 2008). And a federal court in Illinois subsequently also declined to apply Florida law despite the non-compete agreement's Florida choice-of-law provision. *See Del Monte Fresh Produce, N.A., Inc. v. Chiquita Brands Intern. Inc.*, 616 F. Supp. 2d 805, 816 (N.D. Ill. 2009), (holding that "Illinois law governs this dispute" despite the parties "including Florida law in the contract" because "the laws of Florida regarding restrictive covenants are contrary to the fundamental policy of the laws of Illinois"). Appellate courts in Georgia have also declined to apply Florida law despite contractual choice-of-law provisions. *See Burbach v. Motorsports of Conyers, LLC*, 871 S.E.2d 63, 66 (Ga. Ct. App. 2022).

XII. DRUG TESTING LAWS

A. Public Employers

The public sector Drug Free Workplace Act regulates the drug testing of public employees and encourages employers to provide employees who have drug use problems with an opportunity to participate in an employee assistance program or an alcohol and drug rehabilitation program. FLA. STAT. § 112.0455. The Act sets forth the types of testing allowed and the procedures for the testing, as well as procedures for employee protection and confidentiality of results.

B. Private Employers

The Drug Free Workplace Act as it applies to the private sector was enacted as a part of the workers' compensation scheme. FLA. STAT. § 440.102. If an employee is discharged because of a positive, confirmed drug test, the claimant is not entitled to unemployment compensation. FLA. STAT. § 443.101.

An employer who elects not to operate a drug-free workplace program under FLA. STAT. § 440.102 is not prohibited from conducting drug testing. *See Laguerre v. Palm Beach Newspaper, Inc.,* 20 So. 3d 392 (Fla. 4th Dist. Ct. App. 2009).

There is no private right of action for an employee under FLA. STAT. § 440.102. *See McCullough v. Nesco Res., LLC*, 2019 WL 117486 (11th Cir. Jan. 7, 2019) (upholding the dismissal of an employee's claim that an employer was liable for requiring the employee to submit to a drug test without offering employment).

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

The Florida Civil Rights Act of 1992 ("FCRA") (formerly called the Florida Human Rights Act), FLA. STAT. §§ 760.01-11, prohibits discrimination based on a broad number of protected categories, and includes a retaliation provision. *See Donovan v. Broward County Bd. of Commissioners,* 974 So. 2d 458 (Fla. 4th Dist. Ct. App. 2008).

In Florida, no employer shall discriminate on the basis of sex by paying wages to employees at a rate less than the rate at which he pays wages to employees of the opposite sex for equal work, except when such payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a deferential based on any reasonable factor other than sex. FLA. STAT. § 448.07. Any employer who violates the statute is liable to the employee for the difference between the amount the employee was paid and the amount he or she should have been paid. *Id*. The aggrieved employee must file the claim for unpaid wages within six months after termination of employment. *Id*.

Further, no public sector employer may discriminate in the employment of any person solely because of age, unless age restrictions have been specifically established through published specifications for a position. FLA. STAT. § 112.043.

A. Employers/Employees Covered

The FCRA covers employers with 15 or more employees. FLA. STAT. § 760.02(7).

B. Types of Conduct Prohibited

The FCRA prohibits discharge or discrimination against an employee based on race, religion, color, sex, national origin, age, disability, or marital status. The statute is modeled after Title VII and is interpreted in accordance with federal case law. *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217, 1223 n.14 (M.D. Fla. 2004), *citing Fla. Dep't of Cmty. Affairs v. Bryant*, 586 So. 2d 1205 (Fla. 1st Dist. Ct. App. 1991). The issue of whether the FCRA covers pregnancy claims has recently been resolved in favor of coverage. *Delva v. Cont'l Group, Inc.,* 137 So. 3d 371 (Fla. 2014). The FCRA's protection of marital status, age (any), and disability is in addition to the protection afforded by the mirror federal statutes. *See, e.g., Mullins v. Direct Wireless*, 2006 U.S. Dist. LEXIS 18194 (M.D. Fla. April 10, 2006) (citing cases). *But see Rosales v. Keyes Co.,* 2007 U.S. Dist. LEXIS 32 (S.D. Fla. Jan. 2, 2007). Protection based on sexual orientation is covered by some local ordinances. *See, e.g.,* Broward County Human Rights Act, Broward County Code, Chapter 16½.

C. Administrative Requirements

As with Title VII claims, the plaintiff must exhaust certain administrative remedies prior to bringing a civil action under the FCRA. The plaintiff has 365 days from the date of the violation to file a complaint with the Florida Commission on Human Relations ("FCHR"). Within 180 days, the FCHR must complete its investigation and determine whether there is reasonable cause to believe that the claimed discriminatory practice has occurred.

Effective July 1, 2020, the FCRA was amended to require the FCHR to issue a notice to complainant if the FCHR failed to conciliate or determine whether there is reasonable cause within 180 days. This notice would provide the complainant with a statement of their right to file a civil action within one year of the date the notice was mailed. FLA. STAT. § 760.11(8). This revision greatly limits the statute of limitations, but it does not appear to apply retroactively. Thus, Courts are likely to apply the standard set out in *Joshua v. City of Gainesville*, 768 So. 2d 432, 433 (Fla. 2000). In *Joshua*, the Florida Supreme Court held that when the FCHR fails to make a determination within 180 days, the four-year limitations period applies. If no reasonable cause is found, the complaint will be dismissed. The plaintiff has thirty-five days to request an administrative hearing. If no request for hearing is brought, the claim is barred from going further and cannot be litigated in a civil action. However, where a claim is dual filed with the FCHR and EEOC, and the EEOC issues a Dismissal and Notice of Rights Form 161 indicating that "the EEOC is unable to conclude that the information obtained establishes violations of the statutes," the claimant may file suit without pursuing administrative appellate remedies. *Woodham v. Blue Cross Blue Shield of Fla.,* 829 So. 2d 891, 892 (Fla. 2002).

It is unclear how Courts will apply the amendment to the limitations period in situations where the FCHR fails to issue a notice as required under the statute.

D. Remedies Available

Under the FCRA, plaintiffs may recover back pay, damages for mental anguish, loss of dignity, and other intangible injuries. Plaintiffs can also recover punitive damages not to exceed $100,000.00, and the prevailing party may recover attorneys' fees. There are no caps on compensatory damages, including mental anguish. FLA. STAT. § 760.11(5).

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

No employee may be discharged or threatened with discharge for participating in jury service. FLA. STAT. § 40.271. One court has held that there is individual liability under the statute. *Pier 66 Co. v. Poulos*, 542 So. 2d 377, 381 (Fla. 4th Dist. Ct. App.), *rev. denied*, 551 So. 2d 462 (Fla. 1989). The statute applies only to jury service in the state courts. *Scott v. Estalella*, 563 So. 2d 701 (Fla. 3d Dist. Ct. App. 1990).

No employee may be discharged for taking time off to testify at a judicial proceeding upon receipt of a subpoena. The statute also prohibits dismissal based on the nature of the testimony involved. FLA. STAT. § 92.57. If an employee is terminated for taking time off to testify in a judicial proceeding in response to a subpoena, the employee may file an action against the employer for actual damages, punitive damages, and attorney's fees. *Id.*

B. Voting

An employer who discharges or threatens to discharge an employee for voting or not voting is guilty of a third degree felony. FLA. STAT. § 104.081. There are also several local ordinances on this subject.

C. Family/Medical Leave

There is no state statute covering private employers, other than the general prohibition on disability discrimination contained in the FCRA. Florida does have a family medical leave statute applicable to public employers. FLA. STAT. § 110.221.

D. Pregnancy/Maternity/Paternity Leave

See above.

E. Day of Rest Statutes

Florida does not have a uniform day of rest statute.

F. Military Leave

No employee may be discharged because of obligations as a reservist in the Armed Forces, or because of active duty in the Florida National Guard. FLA. STAT. §§ 250.481-250.482.

Unemployment benefits cannot be denied because of voluntary resignation because of a relocation due to an employee's or the employee's spouse's change of station, activation, or unit deployment orders. FLA. STAT. § 443.101(1)(a)(1).

G. Domestic Violence Leave

In Florida, employers with fifty or more employees must provide employees who have worked for three months or longer with up to three days of unpaid leave in any rolling twelve-month period if the employee (or a family or household member of an employee) is the victim of domestic violence. FLA. STAT. §741.313. The three days of leave may be used to seek an injunction for protection, obtain medical care or mental health counseling for either the employee or a family or household member, obtain services from a victim services organization (such as a shelter or rape crises center), make the employee's home secure, or seek legal assistance or prepare for court-related proceedings. An employee seeking leave under this statute must exhaust all annual or vacation leave, personal leave, and sick leave that is available to the employee. However, the employer may waive this requirement. Employees are required to provide "appropriate notice" before taking leave under this statute unless the employee (or the employee's family/household member) is in imminent danger. "Appropriate notice" is not defined by the statute, but is to be interpreted pursuant to the employer's policy on providing notice ahead of other leaves afforded by the employer. FLA. STAT. §741.313(4)(a).

The employer must keep all information relating to an employee's use of this leave confidential. FLA. STAT. §741.313(4)(c).

No employer may interfere with an employee's use of leave under this statute, or discharge, demote, suspend, or retaliate against an employee who exercises his or her rights under the statute. Employees may file a civil suit for damages in circuit court and is able to recover damages including wages and benefits. The statute does not provide for attorney's fees. FLA. STAT. §741.313(5)(a).

Miami-Dade County has an ordinance that provides additional leave and other protection for victims of domestic violence. Miami-Dade County Ordinance §11A-61.

H. Other leave laws

Florida does not have any other statutes regarding other forms of leave.

XV. STATE MINIMUM WAGE AND OVERTIME HOUR LAWS

A. Current Minimum Wage in State

The Florida Minimum Wage Act, FLA. STAT. §448.110, governs the minimum wage hourly rates to be charged to Florida employees and includes an anti-retaliation provision. Florida's minimum wage is reviewed and adjusted on September 30 of each year. Adjusted minimum wage rates take effect January 1 of the following year. On November 3, 2020, Florida voters approved Amendment 2, which increases the minimum wage and amends Florida's Constitution. Under the new law, Florida's minimum wage will increase to $10 per hour in September 2021 and by $1 per hour each year until it reaches $15 per hour in 2026.

In 2017, the Third District Court of Appeal invalidated a City of Miami Beach ordinance which gradually raised the minimum wage private employers would be required to pay employees. *City of Miami Beach v. Fla. Retail Fed., Inc.*, 233 So.3d 1236 (Fla. 3d Dist. Ct. App. 2017). In February 2019, the Florida Supreme Court declined review of that decision.

B. Deductions from Pay

There are no statutes on this topic.

C. Overtime Rules

There is a statute on this topic, but one court has held that it does not apply to individuals compensated on an hourly basis. *Quaker Oats Co. v. Jewell*, 818 So. 2d 574 (Fla. 5th Dist. Ct. App. 2002) (questioning whether statute is unconstitutionally vague). And one federal court has held the statute is constitutionally infirm. *Posely v. Eckerd Corp.*, 433 F. Supp. 2d 1287 (S.D. Fla. 2006).

D. Time for payment upon termination

There is no state statute dictating when an employee must be paid upon termination. However, both Broward and Miami-Dade Counties have enacted "Wage Theft" ordinances, which have significant penalties for failure to pay wages in a timely manner.

E. Breaks and Meal Periods

Florida does not have any laws requiring an employer to provide a meal period or breaks to employees eighteen years of age or older.

F. Employee Scheduling Laws

There are no statutes on this topic.

XVI. MISCELLANEOUS STATE STATUTES AND LOCAL ORDINANCES REGULATING EMPLOYMENT PRACTICES

A. Smoking in the Workplace

The Florida Clean Indoor Air Act, Fla. Stat. § 386.201 *et seq.*, prohibits smoking in enclosed, indoor spaces.

B. Health Benefit Mandates for Employers

Title XXXVII details requirements on health insurance coverage provided by HMOs in Florida.

C. Immigration Laws

Effective July 1, 2023, employers with more than 25 employees are required to use the Federal E-Verify system to verify the employability status of new employees. This

additional requirement does not replace or affect the employers' I-9 obligations. Fla. Stat. § 448.095(2). Employers are required certify on its first return each calendar year to the tax service provider that it is in compliance with Section 448.095 when making contributions to or reimbursing the state's unemployment compensation or reemployment assistance system. *Id.* Employers are also required to retain a copy of the documentation provided and any official verification generated for at least 3 years. *Id.*

Beginning on July 1, 2024, if an employer is determined to have failed to use the E-Verify system to verify the employment eligibility of employees at least three times in any 24-month period, the employer will be subject to a fine of $1,000 per day until the employer provides sufficient proof to the Department of Economic Opportunity that the noncompliance is cured. Fla. Stat. § 448.095(6)(b). Noncompliance may also result in suspension of all licenses issued by a licensing agency until the noncompliance is cured. *Id.*

D. Right to Work Laws

Article I, § 6 of the Florida constitution provides that: "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike."

E. Lawful Off-duty Conduct (including lawful marijuana use)

Fla. Stat. § 381.986, originally enacted on June 16, 2014, permits the use of low-THC and medical cannabis under very limited circumstances, and only by patients with a terminal condition. It should be noted that the statute does not permit administration of cannabis by smoking.

On November 8, 2016, Florida voters approved an amendment to the Florida Constitution expanding the circumstances under which medical marijuana can be used. *See* Art. X, § 29, Fla. Const. On March 19, 2019, Gov. Ron DeSantis signed legislation which repealed Florida's ban on smoking medical marijuana, amending FLA. STAT. §381.986.

F. Gender/Transgender Expression

There is no state statute governing gender/transgender expression, but there are a number of local ordinances prohibiting discrimination based on gender identity (e.g., City of Miami Beach, Miami-Dade County). Additionally, after the United States Supreme Court issued its ruling in *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020), the Florida Commission on Human Relations ("FCHR") issued a notice in June 2020 advising that it was committed to investigating claims of sex discrimination based on gender identity or sexual orientation.

G. CROWN Act-type Local Ordinances

There is no Florida statute prohibiting discrimination on the basis of hair style or texture. But Broward County and the City of Miami Beach have codified ordinances prohibiting such discrimination. *See* Broward Code of Ord. § 16½-3(ss) ("*Race* includes traits

historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles such as braids, locs, and twists."); City of Miami Beach Ord. § 62-31 ("*Classification category* means each category by which discrimination is prohibited [which include] … hair texture and/or hairstyle ….").

A bill to codify the CROWN Act statewide in the education system was introduced in 2022 and 2023, but it died in 2023. *See* SB 590 (2023); HB 51 (2023).

H. Individual Freedom Act a/k/a Stop WOKE Act

As of July 1, 2022, it is an unlawful employment practice to subject any individual, as a condition of employment, to training, instruction, or any other required activity that "espouses, promotes, advances, inculcates, or compels such individual to believe" that any of the following constitutes discrimination based on race, color, sex, or national origin under this section:

1) Members of one race, color, sex, or national origin are "morally superior" to members of another race, color, sex, or national origin.

2) An individual, by virtue of his or her race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.

3) An individual's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, sex, or national origin.

4) Members of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.

5) An individual, by virtue of his or her race, color, sex, or national origin, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, sex, or national origin.

6) An individual, by virtue of his or her race, color, sex, or national origin, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.

7) An individual, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the individual played no part, committed in the past by other members of the same race, color, sex, or national origin.

8) Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were

created by members of a particular race, color, sex, or national origin to oppress members of another race, color, sex, or national origin.

On August 18, 2022, the U.S. District Court for the Northern District of Florida entered a temporary injunction prohibiting the enforcement of this Act in the context of employment. *See Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159 (N.D. Fla. 2022). The court ruled that the Act "unconstitutionally discriminates on the basis of viewpoint in violation of the First Amendment and is impermissibly vague in violation of the Fourteenth Amendment." *Id.* at 1185. An appeal of this Order was filed on June 22, 2022. As of the date of this document (i.e., January 17, 2024), the appeal has been fully briefed and oral argument has been held. But the Eleventh Circuit Court of Appeals has not yet issued an opinion.

I. Other Key State Statutes

1. Limits on Punitive Damages

The punitive damages statute provides that an award of punitive damages cannot exceed the greater of (1) three times the amount of compensatory damages or (2) $500,000, unless the jury finds that the wrongful conduct "was motivated solely by unreasonable financial gain" and "the unreasonably dangerous nature of the conduct . . . were actually known" by a policy maker, in which case the award cannot exceed the greater of (1) four times the amount of compensatory damages, or (2) $2,000,000. FLA. STAT. § 768.73. This statute is not applicable to the FCRA, which has its own limitation of $100,000 on a punitive damages award. FLA. STAT. § 760.11(5).

2. Employee Leasing

This statute provides some limited protection for employers in a joint employment relationship who, among other things, lack the requisite day-to-day control over the employees. FLA. STAT. § 768.098.

3. Attorney's Fees for Successful Litigants in Actions for Unpaid Wages

The court may award to the prevailing party in an action for unpaid wages costs of the action and a reasonable attorneys' fee. FLA. STAT. § 448.08. An award is permissive, not mandatory. *See Ruffa v. Saftpay, Inc.,* 2015 Fla. App. LEXIS 6215 (Fla. 3d Dist. Ct. App. April 29, 2015) (denial of fees reviewed for abuse of discretion).

The term "wages" has been broadly defined as compensation paid to an employee for services rendered to his employer. *Ocean Club Cmty. Ass'n, Inc. v. Curtis*, 935 So. 2d 513 (Fla. 3d Dist. Ct. App.) (tennis director who prevailed on his claim that all converted fees earned from lessons was entitled to fees and costs), *reh'g denied*, 2006 Fla. App. LEXIS 15229 (Fla. 3d Dist. Ct. App. Aug. 31, 2006); *Elder v. Islam*, 869 So. 2d 600 (Fla. 5th Dist. Ct. App. 2004).

Broadly read, this definition embraces salaries, commissions, bonuses, vacation pay, and severance pay. *See Strasser v. City of Jacksonville*, 655 So. 2d 234 (Fla. 1st Dist. Ct. App. 1995) (annual leave credits); *Ivens Corp. v. Cohen*, 593 So. 2d 529 (Fla. 3d Dist. Ct. App. 1992) (commission); *Woods v. United Indus. Corp.*, 596 So. 2d 801 (Fla. 1st Dist. Ct. App. 1992)

(severance); *Cmty. Design Corp. v. Antonell*, 459 So. 2d 343 (Fla. 3d Dist. Ct. App. 1984) (bonus).

One court has held that an employer was entitled to recover fees under FLA. STAT. §448.08 where it prevailed on a statute of limitations defense. *Ultimate Makeover Salon & Spa, Inc. v. DiFrancesco*, 41 So. 3d 335 (Fla. 4th Dist. Ct. App. 2010).

4. Abortion

No employee of a hospital or a physician may be discharged for refusing to participate in an abortion procedure. FLA. STAT. § 390.0111(8).

5. Worker's Compensation

No employee may be retaliated against for filing a workers' compensation claim. FLA. STAT. § 440.205. The statute is not limited to claims involving discharge, but also applies to retaliatory intimidation or coercion even in the absence of an employee's termination. *Chase v. Walgreen Co.,* 750 So. 2d 93 (Fla. 5th Dist. Ct. App. 1999), *rev. denied*, 2000 Fla. LEXIS 1766 (Fla. Aug. 29, 2000). A plaintiff can prevail even if there is a mixed motive for the discharge and the plaintiff does not have to establish a specific retaliatory intent. *Hornfischer v. Manatee County Sheriff's Office*, 136 So. 3d 703 (Fla. 2d Dist. Ct. App. 2014). *See Stallworth v. Okaloosa County Sch. Dist.,* 2011 U.S. Dist. LEXIS 113250 (N.D. Fla. Sept. 30, 2011). However, a failure to provide work which respects an employee's physical limitations is not actionable under FLA. STAT. § 440.205. *Coker v. Morris*, 2008 U.S. Dist. LEXIS 56525, at *27 (N.D. Fla. July 22, 2008).

Claims under FLA. STAT. §440.205 are not removable. *Jackson v. Burke*, 2010 U.S. Dist. LEXIS 60729 (M.D. Fla. May 28, 2010).

6. Payroll Deductions for Alimony and Child Support

No employee may be discharged because of the enforcement of an income deduction order relating to alimony or child support payments. FLA. STAT. § 61.1301(2)(j)(2).

7. Membership in Labor Organization

No employee may be discriminated against in his employment on account of membership or non-membership in any labor organization. FLA. STAT. § 447.17.

8. Employee's Right to Trade With Merchants of Choice

It is a criminal offense to discharge an employee for trading or refusing to trade with any particular merchant or other person in any business calling. FLA. STAT. § 448.03.

9. Discharge on Basis of Sickle-Cell Trait

No employee may be discharged because he has the sickle-cell trait, and employment cannot be conditioned upon submitting to testing for the sickle-cell trait. FLA. STAT. §§ 448.075-076.

10. Discharge on Basis of AIDS

Persons with AIDS or HIV are entitled to every protection made available to handicapped persons. An employer cannot require as a condition of employment that an employee submit to HIV testing, and no employee may be subjected to adverse job action for being so tested absent a showing that the absence of HIV is a bona fide occupational qualification of the job in question. FLA. STAT. § 760.50. This statute, unlike the Florida Civil Rights Act, does not require proof that the employee's HIV condition amounts to a disability. *Byrd v. BT Foods, Inc.*, 948 So. 2d 921 (Fla. 4th Dist. Ct. App. 2007).

XVII. RECENT DEVELOPMENTS THAT HAVE NOT YET BEEN ADJUDICATED IN FLORIDA

A. The NLRB *McLaren Macomb* ruling

In *McLaren Macomb*, the National Labor Relations Board found non-disparagement and non-disclosure clauses in severance agreements may violate the employees' NLRA § 7 rights. In other words, if the severance agreement provides that the employee agrees not to disparage the former employer and not to disclose the terms of the agreement, such a provision may be considered an unlawful violation of the employee's Section 7 rights.

Courts in Florida have not yet issued a published opinion interpreting the *McLaren Macomb* opinion.

B. The FTC's Proposed Non-Compete Ban

On January 5, 2023, the Federal Trade Commission proposed a Non-Compete Clause Rule, which provided that it is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; to maintain with a worker a non-compete clause; or, under certain circumstances, to represent to a worker that the worker is subject to a non-compete clause. The proposed rule also would require employers to rescind existing non-compete clauses by the rule's compliance date. Moreover, the proposed rule defined "non-compete clauses" broadly to include not just bans on competition but also "non-disclosure agreement … that is written so broadly that it effectively precludes the worker from working in the same field."

In light of the large number of comments it received on the proposed rule, the FTC is not expected to vote on the proposed rule until some time in 2024.

Florida law on non-competition agreements "has been dubbed the most 'pro-business' non-compete statute in the country." *In re Mainous*, 610 B.R. 916, 922 (Bankr. S.D. Ala. 2019). The FTC's proposed rule, therefore, would have a significant impact in Florida.

C. Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act ("PWFA") became effective on June 27, 2023. This new law provides, among other protections, that it is an unlawful employment practice to not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee, unless the accommodation can be shown as imposing an undue hardship. *See* 42 U.S.C.A. § 2000gg-1(1). The PWFA also makes

it unlawful to require the employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided. *Id.* at § 2000gg-1(4). Employees protected by the PWFA are no longer required to have a pregnancy-related disability or to identify other similarly situated employees.