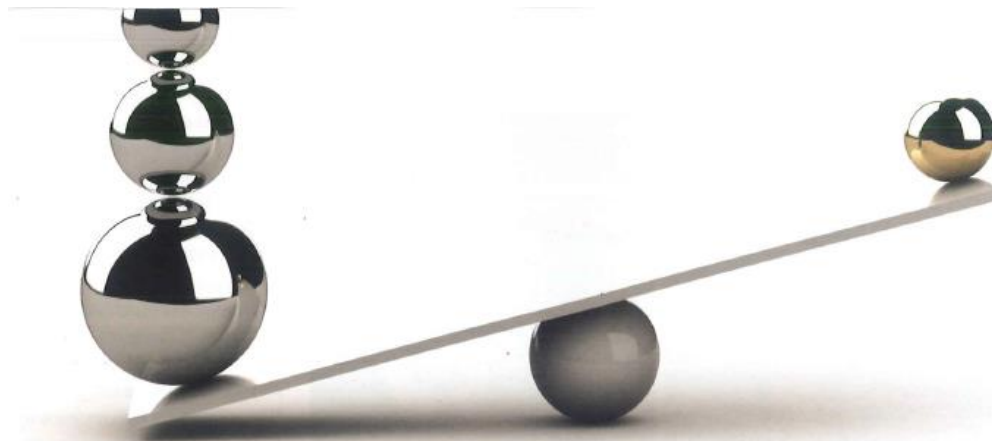


SOUTH FLORIDA LEGAL GUIDE[®]



TRENDS IN LABOR LAW SHIFTING THE BALANCE BETWEEN EMPLOYERS AND EMPLOYEES

DURING THE LONG recession, South Florida employers often held the upper hand in disputes with employees, who were often reluctant to file a lawsuit. Now, the economic recovery – combined with stepped-up enforcement of federal labor laws – is shifting the balance between employers and employees, according to several of the region's leading attorneys.

“When people are fearful of losing their jobs, they will put up with bullying actions by the employer,” said Donna Ballman, who represents employees at Donna M. Ballman, P.A., in Fort Lauderdale. “Now, employers who become abusive will find themselves losing their good employees.”

But it's not just the economic landscape that's changing. Federal regulatory actions, wage and hour lawsuits, healthcare reform, employee privacy and workers' compensation claims are among the issues keeping South Florida employers awake at night.

“The Obama administration is aggressively enforcing labor and employment laws,” said Michael Casey, a partner at Duane Morris in Miami who represents employers. Federal agencies like the Equal Employment Opportunities Commission (EEOC), the National Labor Relations Board (NLRB) and the Office of Federal Contract Compliance Programs (OFCCP) are creating new theories of liability and obligations to impose on employers, according to Casey.

For example, Casey said the EEOC is now looking closely at employers' background screenings for arrests, convictions and credit problems to see if they exclude

blacks and other minorities from employment and violate the federal Civil Rights Act.

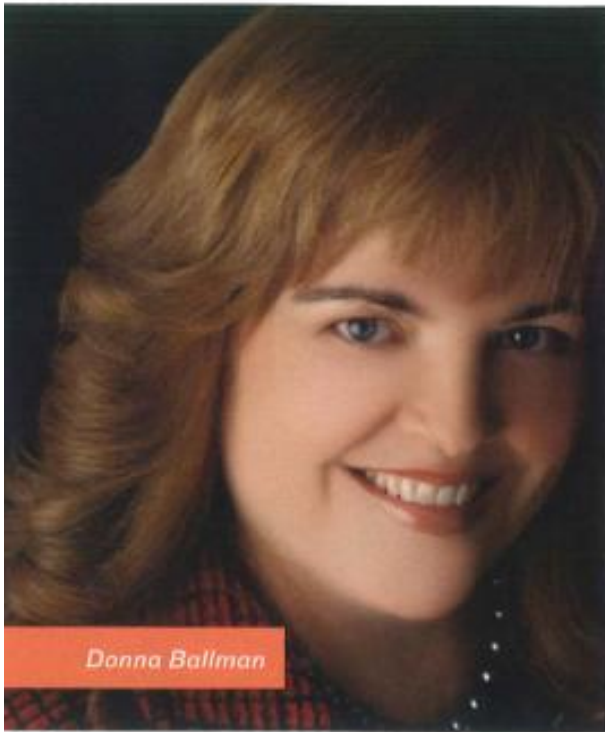
In 2009, the EEOC filed suit against Freeman, a Dallas event-marketing company, followed by similar suits this June against a BMW manufacturing facility in South Carolina, and an Illinois-based discount retailer alleging that their screenings for criminal background records resulted in violations of the Civil Rights Act. In August a federal judge dismissed the EEOC's suit against Freeman saying there were no facts to support the EEOC's claim of improper discrimination.

Casey also notes that the OFCCP wants employers to hire more women, while the Veterans Administration (VA) encourages employers to give preference to former service personnel, of whom a majority are men.

Juan Enjamio, a partner at Hunton & Williams in Miami who defends companies in complex employment disputes, said these types of “pattern and practice” cases are on the rise. “There is a renewed regulatory vigor, and federal agencies are more active in looking for systemic patterns of discrimination within an organization,” he said.

WAGE AND HOUR CASES

While the number of employment discrimination cases has been fairly steady, Casey said there has been a huge surge in wage and hours litigation under the Fair Labor Standards Act (FLSA). “South Florida is the epicenter for these claims, which have risen by more than 400 percent in the past decade” he said. “We have ten times as many lawsuits filed here than in other parts of the country.”



Donna Ballman



Michael Casey

Casey says the reason is that the plaintiff's bar found that it was more advantageous to bring wage and hour suits than discrimination claims, where a plaintiff must prove "intent" on the part of the employer. "The FLSA rules, which date back to a 1938 law, are complex and vague in many respects," Casey said. "And since only the plaintiffs can get attorney fees, it's not a level playing field."

Another reason for the increase is that South Florida has a large service industry, and many employers are vulnerable to wage and hour claims. "Plaintiffs will make their demands for damages so low that it's not worth litigating," he said. "So employers go ahead and settle those claims."

But settling too many claims can encourage copycats, he added. "Sometimes, it's better to fight the first couple of claims and let the plaintiff's bar know you're not a pushover. The clients who have done that with a long-term view in mind are generally happy with the results."

NON-COMPETE AGREEMENTS

One current area of conflict between employers and employees involves non-compete agreements and trade secrets. "We're seeing more employers impose strict

agreements on everyone who works for them," Ballman said. "Even though Florida is one of the worst states for employees in regard to noncompetes, employers still need to show that they are protecting a legitimate interest. A lot of these agreements are either unenforceable or too broad in their coverage areas."

For example, Ballman represented a client who left his employer to open a competing business in an industry where virtually all businesses got their leads from the same source. "The judge said there was no non-compete violation because the employer did not have a protectable interest," she said. "I've also seen companies publish their customer list online and then claim that their customer information is confidential. You can't have it both ways."

OTHER EMPLOYER CONCERNS

Healthcare reform is one of the biggest concerns for employers, according to Enjamio, who has been counseling many clients about the implementation of the federal Affordable Care Act (ACA), which mandates insurance coverage for individuals. "This is a tremendous concern to many businesses," he says. "They are looking for ways to adjust to the changes. For an em-

ployer that offers health insurance, adding wellness programs can provide a benefit of value to employees, while also helping to manage healthcare costs."

South Florida labor and employment attorneys are also looking closely at cases involving privacy in the workplace, and employees' use of social media sites while on the job. "Clients are calling for advice about the rights of both employers and employees regarding privacy," says Enjamio. "One suggestion is to review employee policies and procedures on an annual basis to be sure they keep up the changing law in regard to employees' rights."

Other timely issues for employers include the U.S. Supreme Court's overturning the Defense of Marriage Act (DOMA), which opened the door for states to approve same-sex marriages. "Many Florida companies have employees in other states who will be affected by this decision," Ballman said. "For instance, more people will be able to be covered under health insurance as a spouse. It's certainly an issue for employers to track."

Legalized marijuana is another social issue that employers need to follow, even though it appears unlikely to be approved in Florida. "It may affect a company's drug testing policy, especially in states that have made it illegal to fire someone who tests positive for marijuana," Ballman added.

Employers also need to respect employee rights in nonunionized workplaces, Ballman added, noting the NLRB is playing an active role in these types of matters. "Employees can discuss working conditions and compare wages and benefits in person or online," she said. "I recently represented a client who was fired for discussing wages, but that's a protected right and employers should respect that right."

WORKERS' COMPENSATION ISSUES

From his defense perspective, Heath S. Eskalyo, principal partner and CFO at Kelley Kronenberg in Fort Lauderdale, says many plaintiffs' attorneys look at workers' compensation cases from the perspective of fees, as well as their clients' injuries. "The trend seems to be to look at

the case and see if there are other areas of litigation," he said. "Overall, the volume of workers' compensation cases seems to be decreasing as plaintiffs' attorneys find other avenues to pursue."

Over the last few years, the Florida Legislature has changed its methods of calculating attorney's fees in workers' compensation cases, and now a percentage of the benefits obtained go to the attorney, rather than basing the fee on an hourly rate." If the case involves a minor surgery that costs \$5,000, for instance, the attorney would get a \$1,000 fee. The plaintiff's bar is challenging the constitutionality of those fee calculations.

Meanwhile, many plaintiffs' attorneys are trying to turn workers' compensation claims into larger employment-related cases, adds Eskalyo. "An attorney might take preliminary discovery on workers' compensation claim and look at the wages and hours issues to see if the client was paid for overtime work," he said.

An employer with workers' compensation insurance is usually immune from pain and suffering damages, based on state law. But if an on-the-job accident results in serious body injury or death, the plaintiff may try to show that the employer had knowledge of a defect, such as malfunctioning equipment, and then hid the defect, said Eskalyo. "If the plaintiff can do that, the case becomes a circuit court action with no cap on damages."

While the volume of workers' compensation cases may be declining, the settlements are getting larger, Eskalyo said. That's because the federal Medicaid program is mandating that money be set aside to cover the projected future costs of the worker's medical care. "After the expert calculations are done, Medicare will review the reports and set a certain dollar amount for that set-aside, which needs to be figured into the overall settlement," Eskalyo said. "If you don't protect Medicare's interest, the agency can come after the employer, the carrier and both attorneys in the case."

In workers' compensation cases, Eskalyo advises employers to be an active participant in the claims negotiation and litigation process. "Don't rely on your



Heath S. Eskalyo

carrier to know your company in the same way you do," he said. "Employers should look at how else the company might be attacked and select a defense counsel that can look at the broader picture."

MORE ADVICE FOR EMPLOYERS

South Florida attorneys say there are several basic steps for employers to maintain good relations with their employees, and minimize the risk of litigation or regulatory action.

"Large employers need to be very active in employee relations," Enjamio said. "Be sure you understand employee concerns, and don't allow problems to fester. If you listen carefully and address the issues up front, you are less likely to be sued by employees and avoid union-related issues."

Ballman emphasizes the importance of training human resources (HR) personnel and listening to their advice. "This area of the law changes so fast that if you blink, you'll risk messing up," she said. "So make sure your HR people are well trained and are keeping up on the law."

One of the most important steps for employers is to enact policies that comply with the federal and state laws while allowing a company to accomplish its busi-



Juan Enjamio

ness objectives, said Casey. "Since some blanket policies will raise a red flag with the regulators today, you need to design and implement hiring and employment policies that are both lawful and effective."

South Florida attorneys say employers should be sure to document any warnings or disciplinary actions and be sure the employee is aware of the problem. "Some managers don't want to confront an employee or give a bad evaluation," Casey said. "When the employee is fired, he will say 'Why didn't you tell me so I could fix it.' So, one suggestion is to use a "last-chance" agreement giving the employee a final chance to improve his or her performance."

Finally, Casey emphasizes the importance of careful hiring practices. "I recommend spending a lot of time in the screening process to avoid hiring a 'bad apple' who can hinder your operations," he said. "Look at new hires closely during the probationary period, and if you've made a mistake, correct it quickly. A negative individual with a chip on the shoulder is more likely to sue you at some point and cause problems. Try to hire the right people who will help you achieve your organization's goals." ●