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Best Practices in Employment Law 2013:

An Update for Executives, Managers, Business Owners and Human Resources Professionals

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DEFENDING AGAINST WORKERS' COMPENSATION RETALIATION CLAIMS

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Workers' Compensation Retaliation Claims

Fla. Stat. §440.205

- Protects employees from retaliation when they file a valid claim for workers' compensation benefits
- Does not mean employee even has to be awarded comp benefits to have a valid retaliation claim

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Workers' Compensation Retaliation Claims

- Zone of protection for an employee on workers comp or recently on it
- No hard and fast time period

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Workers' Compensation Retaliation Claims

- Protection extends to any adverse employment action
  - Termination
  - Change in job, title, position
  - Change in shift, rate of pay
  - Change in commute

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Workers' Compensation Retaliation Claims

- A retaliation claim is outside of workers comp
- Means no cap of $2500 on attorneys' fees

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Workers' Compensation Retaliation Claims

- Trend is to add on a retaliation claim to a comp claim
- Unless settled, can proceed on retaliation claim even if comp claim resolves

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Workers' Compensation Retaliation Claims

- Most comp carriers will not pay on a retaliation claim

- Goal for employer is to obtain a release at time of settling comp claim

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Workers' Compensation Retaliation Claims

- Steps to avoid liability before a claim:
  - Handbook and policy manual should state no retaliation
  - Train supervisors on no retaliation
  - Have HR involved once a comp claim is filed

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Workers' Compensation Retaliation Claims

- If a comp claimant also raises retaliation ask carrier if they will defend as well
- If the answer is no, get employment counsel involved

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Workers' Compensation Retaliation Claims

Takeaway is goal is to settle retaliation claim at time comp claim settles:

Need separate consideration

Need specialized release

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EXEMPT/NON-EXEMPT CLASSIFICATION ISSUES UNDER FLSA

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COVERAGE

- Low threshold
- Interstate Commerce
- Annual gross volume of sales made or business done of $500,000 or greater

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MINIMUM WAGE

- Effective January 1, 2013, Florida's minimum wage is $7.79 per hour
- Federal minimum wage is $7.25 per hour
- Florida employers are required to pay the higher of the two minimum wages

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OVERTIME

- Employers are required to compensate non-exempt employees who work more than forty hours per week “at a rate not less than one and one-half times the regular rate”

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DEFINING THE WORK WEEK

- Standard unit of time measurement to determine if overtime has been worked
- Fixed and regularly recurring period of 168 hours, consisting of seven consecutive 24 hour periods
- Need not coincide with the calendar week or pay period, and may begin on any day and at any hour of the day
- Once a work week has been established, it remains fixed regardless of the schedule of hours worked by the employee

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EXEMPT vs. NON-EXEMPT STATUS

- Exempt status under the FLSA means that the employee in question is either exempt from both the minimum wage and overtime provisions of the FLSA or from the overtime provisions of the FLSA.
- Burden on employer to prove an exemption.

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MOST COMMON OVERTIME EXEMPTIONS

- Executive Exemption
- Administrative Exemption
- Professional Exemption
- Outside Sales Exemption

Practice Pointer: Job Title or Amount Paid to Individual is Not Determinative

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REQUIREMENTS FOR EXEMPT STATUS FOR EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES

- Salary Level Test - Employee must be paid a minimum salary of at least $455.00 per week (annual salary at this rate is $23,660).
- Salary Basis - Employee must regularly receive each pay period a predetermined amount not subject to reduction because of variation in the quantity or quality of the work performed.
- Duties Test – Employee's primary duty must consist of a certain function or functions. As a rule of thumb, the employee's primary duty should take up at least half of his or her time in an average day.

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EXECUTIVE EXEMPTION

- The Executive Exemption requires that the employee:
  - be paid on a salary basis at least $455.00 per week;
  - have as his or her primary duty management of the enterprise where the employee works or of a customarily recognized department thereof;
  - customarily and regularly direct the work of two or more full-time employees or their equivalent; and
  - have the authority to hire or fire other employees or, at a minimum, have his or her recommendations regarding hiring, firing and performance appraisal being given “particular weight”

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ADMINISTRATIVE EXEMPTION

- The Administrative Exemption requires that the employee:
  - be paid on a salary basis at least $455.00 per week;
  - have as his or her primary duty the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
  - customarily and regularly exercise discretion and independent judgment with respect to matters of significance to the employer.

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PROFESSIONAL EXEMPTION

- The Professional Exemption requires that the employee:
  - be paid on a salary basis at least $455.00 per week;
  - have as his or her primary duty the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; [the “Learned Professional”] or
  - have as his or her primary duty the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. [the “Creative Professional”]

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OUTSIDE SALES EXEMPTION

- The “Outside Sales” Exemption requires that the employee:
  - is not required to meet the salary requirement.
  - must be employed for the purpose of and be customarily and regularly engaged away from his or her employer’s place of business in making sales or obtaining orders or contracts for services for which a consideration will be paid.

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PERMISSIBLE DEDUCTIONS FROM EXEMPT EMPLOYEES

- Exempt employees are not required to be paid for any week in which they perform no work.
- Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons other than sickness or disability.
- Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by such sickness or disability.
- Deductions from pay may be made as penalties imposed in good faith for infractions of safety rules of major significance relating to the prevention of serious danger in the workplace or to other employees.

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PERMISSIBLE DEDUCTIONS FROM EXEMPT EMPLOYEES *(Continued)*

- Deductions from pay may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees.
- An employer is not required to pay the full salary in the initial or terminal week of employment.
- An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid FMLA leave; the employer may pay a proportionate part of the full salary for the time actually worked.
- An employer may offset any amounts received by an employee as jury fees, witness fees, or military pay for a particular week against the salary due for that particular week.

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COMMON FLSA PITFALLS

- Failing to Include Incentive Pay/Bonuses in the Overtime Calculation
- Automatically Deducting for Lunches
- Failing to Maintain and Preserve Time Records
- Failing to Recognize that “On-Call” Time May be Compensable
- Failing to Recognize the Compensability of Travel Time
- Rest/Break Periods
- Attendance at Training Programs
- Retaliation Prohibited

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AGE DISCRIMINATION OVERVIEW

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One of the fastest growing categories of claims filed with EEOC

Why?

- Aging workforce
- Baby boomers are well into protected category
- Layoffs and RIFs abound
- People are working longer for many reasons

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3 things that make this so scary for employers:

- People in this category usually have resources to use for litigation
- People in this age group usually do have a harder time finding a job
- Juries have older jurors now—may have had a negative job experience

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- In 1997 we had 15,785 age claims filed with the EEOC
- Peaked in 2008 with 24,582 age claims filed
- Only backed down to 22,857 age claims filed 2012

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Damages include:

- Back pay
- Front pay
- Reinstatement
- Liquidated damages if willful

**** FCRA allows unlimited compensatory and up to $100,000 in punitive damages

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Total value of monetary benefits for those 22,857 claims in 2012:

$91.6 Million

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AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

- Passed in 1967
- Applies to business with 20 or more employees
- Prohibits discrimination based on age for people aged 40 and older

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Not the only law covering age:

- Florida Civil Rights Act—no minimum age requirement, 15 employees
- Hillsborough/Pinellas County —applies to businesses with 5 or more employees

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- When these come up usually dual filed with EEOC and FCHR
- Investigated
- Right to sue letter (may be requested after 60 days)
- Then can sue (under ADEA must file lawsuit within 90 days)

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What can an employer do?

- Either show age was not the motivating factor; or
- If it was, that age was a “bona fide occupational qualification” for the job

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Direct Evidence

- Smoking gun statement
- Emails can be particularly damaging

Circumstantial Evidence

- Show Plaintiff was at least 40, otherwise qualified, adverse action and replaced by a younger employee

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Coded age related comments by decision makers:

- Not a good fit
- Overqualified
- Inflexible
- Can’t do the job like they used to

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Plaintiff establishes the prima facie case

Employer must show a legitimate, nondiscriminatory reason for the decision

Burden then shifts back to Plaintiff

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One strong defense to an employer--Same Actor Inference

Same decision makers hired the employee when they were already over 40

Only an inference—can be overcome

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- Takeaway should be to make sure we have documented, non-discriminatory reasons for adverse employment actions, especially for those over 40
- Separation Agreement can waive claims with special statutory language

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THE GOOD, THE BAD, AND THE UGLY IN EMPLOYEE HANDBOOKS

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POLICIES EVERY EMPLOYER SHOULD HAVE

- At-Will Policy
- Equal Employment Opportunity Policy
- Sexual Harassment Policy
- Introductory Period
- Employee Classifications
- Overtime
- Timekeeping Policy

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POLICIES EVERY EMPLOYER SHOULD HAVE

- Employee Benefits
  - Holiday
  - Vacation/PTO
  - Health Insurance
- Confidentiality
- Conflict of Interest
- Technology Policy
- Immigration Law Compliance
- Military Leave of Absence

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POLICIES EVERY EMPLOYER SHOULD HAVE

- Worker's Compensation
- Safety Policy
- Absenteeism and Tardiness
- Code of Conduct
- Performance Review
- Right to Revise
- Employee Acknowledgement

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POLICIES FOR EMPLOYERS TO CONSIDER

- Family and Medical Leave Act
- Social Media
- Drug-Free Workplace Under Florida law
- Employment of Relatives
- Gifts
- Exit Interviews

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STATEMENTS TO AVOID

- “For more information about your rights, go to the EEOC website”
- “We have a zero tolerance policy for guns anywhere on our property”
- “Employees’ wages are confidential and must not be discussed with any other employee.”

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STATEMENTS TO AVOID

- Strict progressive discipline policy
- Omitting a protected classification from an EEO policy
- Employees will not be paid for hours worked over 40 in a workweek unless they have prior approval from their supervisor.

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RECENT CASE LAW UPDATE

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Lamonica v. Safe Hurricane Shutters, Inc., *2013 WL 811906 (11th Cir. Mar. 6, 2013)*

- Background – Two employees successfully sued their former employers for unpaid overtime wages under the Fair Labor Standards Act (FLSA). The employers appealed, arguing that the employees could not recover under the FLSA because they were undocumented aliens not authorized to work in the U.S.

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Lamonica v. Safe Hurricane Shutters, Inc., ***2013 WL 811906 (11th Cir. Mar. 6, 2013)***

- Holding – The Court held that the employer was liable for unpaid overtime despite the plaintiffs' illegal immigration status, because the plaintiffs had actually worked the hours they claimed.

- What This Means for Employers – Employers are liable for unpaid wages and overtime under the FLSA regardless of the immigration status of its employees. The employees' own wrongdoing is not a valid defense.

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Moore v. Appliance Direct, Inc., *708 F.3d 1233 (11th Cir. 2013)*

- Background – Two employees filed an FLSA claim against their employer and were subsequently terminated, ostensibly because of outsourcing. The employees filed a separate FLSA retaliation claim against the employer and were awarded a jury verdict for $30,000 each. The Court denied the plaintiffs' motion for liquidated damages, and plaintiff's appealed, arguing that such an award was mandatory under the FLSA.

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Moore v. Appliance Direct, Inc., *708 F.3d 1233 (11th Cir. 2013)*

- Holding – The award of liquidated damages in a retaliation claim under the FLSA is within the broad discretion of the trial court and is not mandatory, unlike with wage claims. The employer is not required to meet the "good faith" exemption.

- What This Means for Employers – This ruling give employers significant protection against liquidated damages in FLSA retaliation cases. It is still possible for a plaintiff to get liquidated damages, but the burden is no longer on the employer to show good faith. As a practical matter, however, it will still benefit the employer if it can show that it reasonably attempted to comply with the FLSA.

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Comcast Corp. v. Behrend,
2013 WL 1222646 (U.S. Mar. 27, 2013)

- Background – Plaintiff purported to represent a class of more than 2 million cable subscribers in the Philadelphia market alleging that Comcast unfairly restrained competition. Comcast appealed certification of the class on grounds that plaintiffs had failed to demonstrate class-wide damages.

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Comcast Corp. v. Behrend, *2013 WL 1222646 (U.S. Mar. 27, 2013)*

- Holding – The Court held that even at the certification level, plaintiffs must do more than simply show that they *could* prove their claims through common evidence at trial. Instead, plaintiffs have an affirmative burden to show, likely through expert testimony, that there is reliable and admissible evidence of common injury and damages among the class members.

- What This Means for Employers – Certification is often the most important decision in a class action, because certification creates significant pressure for employers to settle, regardless of the merits. This decision will make it much more difficult for plaintiffs to certify a class action.

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Standard Fire Ins. Co. v. Knowles, *2013 WL 1104735 (U.S. Mar. 19, 2013)*

- Background – Plaintiff filed a class action lawsuit against his insurance company. In order to remain in state court, he stipulated that the class' claims would be below the $5 million threshold which entitles a defendant to remove a class action to federal court.

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Standard Fire Ins. Co. v. Knowles, ***2013 WL 1104735 (U.S. Mar. 19, 2013)***

- Holding – The Court unanimously held that the plaintiff could only bind himself, but not other class members, through his stipulation. Thus, the defendant was entitled to remove the case to federal court.

- What This Means for Employers – This is a positive ruling for employers, as federal court is generally a preferable forum when defending an employment lawsuit. This ruling makes it difficult for employees to keep large class actions in state court.

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Lineberry v. Richards, *2013 WL 438689 (E.D. Mich. Feb. 5, 2013)*

- Background – Employee was on FMLA leave for a back injury with significant restrictions on her ability to stand and to lift objects over 10 pounds. Through Facebook, other employees discovered that she had taken a trip to Mexico and was pictured riding in a motorboat and also carrying her two grandchildren. When questioned by her employer, she initially claimed that she had been in a wheelchair to make it through her trip, but she later recanted after being told that airports have security cameras. She was terminated pursuant to an employer policy against dishonesty and falsifying or omitting information. The employee sued, claiming interference with her FMLA rights and FMLA retaliation.

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Lineberry v. Richards,
2013 WL 438689 (E.D. Mich. Feb. 5, 2013)

- Holding – The court held that because the FMLA grants employees no greater right to reinstatement than if they had remained continuously employed, the employer only needed to show an honest belief based on the facts, that the employee had misused the FMLA.
- What This Means for Employers – An employer has the right to use reasonable means to verify the legitimate use of FMLA leave. This includes the right to review an employee's public Facebook postings. On the other hand, it would likely violate the FMLA to require access to an employee's Facebook page prior to FMLA leave. For a variety of reasons, we also do not recommend that employers require such access in connection with employment generally. However, as a practical matter, many Facebook postings are public, and/or can be accessed by other employees who have "friended" each other.