

Nova Law Review

Volume 34, Issue 1

2009

Article 4

2008-2009 Survey of Florida Public Employment Law

John Sanchez*

*

Copyright ©2009 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

2008–2009 SURVEY OF FLORIDA PUBLIC EMPLOYMENT LAW

JOHN SANCHEZ*

I.	INTRODUCTION.....	153
II.	HIRING ISSUES: INTRODUCTION.....	153
	A. <i>Special Programs for Hiring Veterans and Mid-Career Teachers</i>	153
	B. <i>Privatization</i>	154
	C. <i>Background Checks</i>	155
	D. <i>Nepotism</i>	157
	E. <i>Immigration</i>	157
	F. <i>Ethics</i>	159
	1. Supreme Court Decisions.....	159
	2. Executive Orders.....	159
	3. Supreme Court of Florida Decisions.....	159
	4. Florida Legislation.....	159
	5. Public Disclosure Issues.....	160
	6. Conflict-of-Interest Issues.....	160
	7. South Florida Ethics Developments.....	161
	G. <i>Budget Cuts</i>	161
	H. <i>Torts Related to Hiring</i>	162
	1. Respondeat Superior and Florida’s Ridesharing Law.....	162
	2. Defamation.....	162
	3. Negligent Hiring.....	163
	I. <i>Jobs of the Future</i>	164
III.	TERMS OF EMPLOYMENT.....	165
	A. <i>Hours and Wages</i>	165
	1. Fair Labor Standards Act Issues.....	165
	a. <i>Minimum Wage and Overtime Issues</i>	165
	b. <i>Child Labor Issues</i>	167
	c. <i>Proposed Paid Vacation Act</i>	168
	2. Lilly Ledbetter Fair Pay Act.....	168
	3. Gender and Racial Wage Gap.....	169
	4. Farm Workers’ Wages.....	169
	B. <i>Health Benefits</i>	170

* Professor of Law, Nova Southeastern University; B.A. Pomona College (1974); J.D. University of California, Berkeley (1977); L.L.M. Georgetown University Law Center (1984). Professor of Law at NSU since 1988.

1.	Health Insurance	170
2.	Domestic Partnership Benefits.....	170
3.	Insuring the Uninsured and Underinsured	171
4.	Rising Health Insurance Costs	172
5.	Gender and Racial Health Care Gap	173
6.	COBRA Issues	173
7.	HIPAA Issues.....	174
C.	<i>Workers' Compensation</i>	174
D.	<i>Unemployment Issues</i>	177
E.	<i>Public Pensions</i>	180
1.	Federal Regulation	180
2.	Florida's Public Pension Fund	180
F.	<i>Safety Issues</i>	181
1.	Federal Activity	181
2.	Florida Safety Issues	182
G.	<i>Internet, E-mail, and Cell Phone Issues</i>	183
H.	<i>Public Union Issues</i>	183
I.	<i>Family Medical Leave Act Issues</i>	184
IV.	DISCIPLINE, RETALIATION, LAYOFFS, FURLOUGHS, AND TENURE ISSUES.....	185
A.	<i>Discipline</i>	185
1.	On-Duty Misconduct	185
2.	Off-Duty Misconduct.....	186
B.	<i>Retaliation and Whistle-Blowing</i>	186
C.	<i>False Claims Act</i>	188
D.	<i>Layoffs</i>	188
E.	<i>Furloughs</i>	189
F.	<i>Tenure</i>	190
V.	EMPLOYMENT DISCRIMINATION	191
A.	<i>Generally</i>	191
B.	<i>Affirmative Action</i>	191
C.	<i>Gender, Same-Sex, Transsexuals, and Pregnancy Discrimination</i>	192
D.	<i>Age Discrimination</i>	194
E.	<i>Disability Discrimination</i>	194
F.	<i>Genetic Discrimination</i>	196
G.	<i>Religion</i>	196
H.	<i>Remedies</i>	197
VI.	CONCLUSION	197

I. INTRODUCTION

This survey examines the key developments in constitutional, statutory, regulatory, administrative, and case law governing public employment in Florida during 2008–09. Part II looks at such hiring issues as privatization, background checks, nepotism, immigration, ethics, budget cuts, employment-related torts, and jobs of the future. Part III, Terms of Employment, covers a wide array of issues, such as hours and wages, health benefits, workers' compensation, unemployment compensation, public pensions, safety issues, the Internet, public union issues and the Family Medical Leave Act. Part IV addresses legal issues involving discipline, retaliation against whistle-blowers, the False Claims Act, layoffs, furloughs and tenure issues. Finally, Part V, Employment Discrimination, surveys the major developments in the past year involving affirmative action, bias on grounds of gender, age, disability, religion, a new federal law regulating genetic testing and remedies.

II. HIRING ISSUES: INTRODUCTION

Employers recruit employees through a wide array of methods: want ads; “Internet job postings; ‘help wanted’ signs placed in storefronts, employment agencies, executive search firms, union hiring halls, job fairs, college placement offices; referrals from state employment services; and word of mouth.”¹ In Florida, as elsewhere, help wanted advertising has shifted to the Internet.²

A. *Special Programs for Hiring Veterans and Mid-Career Teachers*

In 2008, the Department of Labor’s (DOL) Veterans’ Employment and Training Service published a final rule entitling veterans of the United States Armed Services and spouses of some veterans to enjoy priority for employment, training, and placement services within DOL job training programs.³

1. DAVID J. WALSH, *EMPLOYMENT LAW FOR HUMAN RESOURCE PRACTICE* 78 (2004).

2. See *Number of Jobs Advertised Online in Fla. Is Up*, MIAMI HERALD, June 10, 2009, at C3. “The number of jobs advertised online in the state was up by 5700 to 164,500” *Id.* Moreover, the unemployed are flocking to social networking sites such as Twitter to seek “job leads and listings.” Bridget Carey, *Can You Tweet Your Way to a New Job?*, MIAMI HERALD, July 28, 2009, at A1.

3. See 20 C.F.R. § 1010.100 (2009). While traditionally veterans enjoy “lower unemployment rates than nonveterans,” in recent years, veterans “in their 20s have faced higher unemployment rates” than nonveterans. Lizette Alvarez, *Newest Veterans Hit Hard by Economic Crisis*, N.Y. TIMES, Nov. 18, 2008, at A1.

The rule implements section 2(a)(1) of the 2002 Jobs for Veterans Act and section 605 of the 2006 Veterans' Benefits, Health Care, and Information Technology Act.⁴

By 2013, over one-third of the United States' "3.2 million teachers could retire, . . . a loss of talent that costs school districts millions in recruiting and training expenses."⁵ To meet this challenge, "teacher preparation programs geared toward job-changers is rising sharply."⁶ For example, "[t]he New Teacher Project . . . oversees Teaching Fellows programs . . . established to eliminate the achievement gap by recruiting career-changers and college graduates to work in inner-city schools. Applications . . . are up 80 percent over [2008]."⁷

B. *Privatization*

While the drive to privatize governmental entities such as schools and prisons was at its peak in the 1980s and 90s,⁸ the 2009 economic stimulus bill unintentionally dampened interest in this practice.⁹ Nevertheless, locally, several governmental agencies have been privatized in the past year, usually in an effort to cut costs.¹⁰ For example, "[a] private company will take over adult day-care offered through Pembroke Pines' popular adult day-care center, one of several city functions jettisoned to the private sector to save money" in 2009.¹¹

At times, Florida legislators' efforts to prevent privatization raise conflict of interest questions.¹² For example, when a private company sought to privatize a Florida state hospital, a vocal opponent, a state lawmaker, "never

4. 20 C.F.R. § 1010.100. The final rule was published in the Dec. 19, 2008 issue of the *Federal Register*. Priority of Service for Covered Persons, 73 Fed. Reg. 78,132 (Dec. 19, 2008) (to be codified at 20 C.F.R. pt. 1010).

5. Sam Dillon, *Report Envisions Shortage of Teachers as Retirements Escalate*, N.Y. TIMES, Apr. 7, 2009, at A16.

6. Michael Alison Chandler, *Business Is Brisk for Teacher Training Alternatives*, WASH. POST, July 31, 2009, at B1.

7. *Id.*

8. See David W. Breneman, *For Colleges, This Is Not Just Another Recession*, CHRON. HIGHER EDUC. (Wash., D.C.), June 14, 2002, at B7.

9. Leslie Wayne, *Politics and the Financial Crisis Slow the Drive to Privatize*, N.Y. TIMES, June 5, 2009, at B3.

10. See *id.*

11. Diana Moskovitz, *City Will Outsource Senior Care*, MIAMI HERALD, Aug. 5, 2009, at B1.

12. See Shannon Colavecchio, *Hospital Privatization Is a Special Issue for Lawmaker*, MIAMI HERALD, Apr. 15, 2009, at B6.

mentioned her family-owned assisted living facility's relationship with the state hospital."¹³

Seminole County, Florida, in an effort to cut costs, is privatizing its libraries and there is no assurance that "a private company might keep existing employees or hire its own staff."¹⁴

"The contract to centralize and consolidate the state's massive payroll system was one of the first large-scale privatization efforts to draw fire in Florida, in 2002."¹⁵ Controversy over the privatization of the state's payroll system continues in 2009: "The state's decision to consider a no-bid contract extension for a controversial human-resources company has renewed criticism from a leading state senator who says privatization initiatives have cost taxpayers \$200 million with little to show for the money."¹⁶

Florida "privatized prison health care several years ago, but a legislative watchdog agency said in a report [in] January [2009] that the change has yielded 'mixed results.'"¹⁷ In 2009, the Department of Corrections decided to replace the vendor with a rival even though this new company "would charge the state \$5.5 million more for the same service over a five-year period."¹⁸ The ousted vendor has sued the state accusing it "of illegally favoring a competitor."¹⁹

C. *Background Checks*

In 2008, President Bush issued an executive order, framing rules for the presidential transition that, for the first time, allowed background checks on prospective presidential appointees to begin before the November 4, 2008 election.²⁰

In 2009, labor and employee advocacy groups urged the U.S. Equal Employment Opportunity Commission (EEOC) to investigate, among other entities, a government career center to see if it was violating Title VII by

13. *Id.*

14. Dennis Boyle, *Seminole County to Privatize the Library?*, EXAMINER.COM, June 14, 2009, <http://www.examiner.com/x-10758-seminole-county-Liberal-Examiner~y2009m6d14-seminole-county-to-Privatize-the-Library>.

15. Marc Caputo, *No-bid Contract Draws Fire Again*, MIAMI HERALD, June 4, 2009, at B3.

16. *Id.*

17. Steve Bousquet, *State Accused of 'Secret' Deal*, MIAMI HERALD, June 6, 2009, at B1.

18. *Id.*

19. *Id.*

20. See Exec. Order No. 13,476, 73 Fed. Reg. 60,605, 60,606 (Oct. 9, 2008).

barring individuals with arrest or conviction records from securing bank clerical jobs.²¹

Under the Federal Health Care Quality Improvement Act,²² hospitals are required to report to a national database when a physician resigns from privileges at the hospital while under investigation.²³ The aim of this rule is to bar incompetent physicians from moving from one state to another without the second state being aware of prior problems.²⁴

“Broward County rules stipulate that felons convicted of any crime are not supposed to be hired for positions where they would have contact with children.”²⁵ In 2009, “Broward County officials are investigating how a registered sex offender managed to get a job at the Quiet Waters Park marina, where he allegedly molested a 10-year-old girl.”²⁶

Florida law requires background screenings for “noninstructional contractor[s] who [are] permitted access to school grounds.”²⁷ A federal district court in Florida, in 2008, issued a temporary injunction barring a contractor, who had pled nolo contendere to child abuse charges, “from entering onto School Board property.”²⁸ The court rejected the contractor’s claim that the statute was “unconstitutional as applied to him,” because the statute was enacted after his nolo contendere plea and “retroactively convert[ed] his nolo contendere plea into a conviction.”²⁹

21. See Letter from All of Us or None et al. to Stuart J. Ishimaru, Acting Chairman, EEOC (June 9, 2009), available at http://nelp.3cdn.net/aa8a86751197fa03ef_z2m6b5abc.pdf. “Chicago, Boston, San Francisco, Baltimore, Minneapolis, and St. Paul, Minn. . . . have adopted [a] ‘ban the box’ polic[y]” when it comes to hiring applicants with criminal records. *EEOC Weighs Guidance on Employers’ Use of Criminal Records in Employment Decisions*, 77 U.S.L.W. 2335, 2335 (2008). Under this system, the criminal conviction issue is deleted from the employment application, and the issue is dealt with later in the hiring process. *Id.*

22. Health Care Quality Improvement Act of 1986, Pub. L. No. 99-660, 100 Stat. 3784 (codified as amended in scattered sections of 42 U.S.C.).

23. *Doe v. Leavitt*, 552 F.3d 75, 77 (1st Cir. 2009) (citing 42 U.S.C. § 11133(a)(1)(B)(i) (2006)).

24. *Id.* at 83 (citing 42 U.S.C. § 11101(2) (2006)). In *Leavitt*, the First Circuit ruled that an investigation of a physician, “as [the] word is used in the [Health Care Quality Improvement Act], . . . ends only when a health care [provider’s] decision-making authority either takes a final action or formally closes the investigation.” *Id.* at 86.

25. Sofia Santana & Scott Wyman, *Park Employee Was Convicted Sex Offender*, SUN-SENTINEL, July 23, 2009, at B8.

26. *Id.*

27. FLA. STAT. § 1012.467(2)(a) (2008).

28. *Sch. Bd. of Miami-Dade v. Carralero*, 992 So. 2d 353, 354 (Fla. 3d Dist. Ct. App. 2008).

29. *Id.* at 355.

In 2009, the Jacksonville city council enacted an ordinance, which among other things, requires employers “contracting with the city . . . to identify potential job opportunities for ex-offenders” and try to hire them.³⁰

D. *Nepotism*

Florida’s anti-nepotism law generally prohibits public employers from hiring members of their families or other relatives.³¹ Pembroke Pines officials may have violated Florida’s anti-nepotism law by giving “a commissioner’s daughter a job managing the city’s art studios.”³² Moreover, “[t]he newly created job was never publicly advertised.”³³

E. *Immigration*

In 2009, Congress passed a law forcing banks receiving “federal bailout money to hire [U.S.] citizens over foreign guest workers.”³⁴

In 2009, the Labor Secretary suspended regulations enacted “by the Bush administration [governing] wages and recruitment of immigrant guest workers for agriculture.”³⁵

In 2009, the Department of Homeland Security issued new rules governing employers receiving Troubled Asset Relief Program funds who seek to hire foreign workers under the H-1B visa program.³⁶ The number of guest workers admitted to the United States under the H-1B temporary visa program for skilled workers dropped in fiscal year 2008 by eleven percent.³⁷ The sharp drop in H-1B visa applications was attributed “to the economic

30. G. Thomas Harper, *Local Ordinances Update*, FLA. EMP. L. LETTER, June 2009, at 2.

31. FLA. STAT. §§ 112.3135(2)(a), 760.10(8)(d) (2009). In an unusual case, the Kansas City, Missouri City Council enacted an anti-nepotism ordinance barring the mayor’s wife from volunteering in the mayor’s office. Andale Gross, *Kansas City Chafes Under Mayor’s Wife*, JOURNAL-GAZETTE, Dec. 8, 2008, at A12. The mayor “vetoed it, and the council overrode the veto.” *Id.* In response, the mayor sued the city, alleging the “ordinance infringed on his authority.” *Id.*

32. Jennifer Golan, *Daughter Hired for City Job*, MIAMI HERALD, July 27, 2009, at B3.

33. *Id.*

34. Rob Hotakainen, *Skilled Foreigners Hurt for Jobs*, MIAMI HERALD, May 1, 2009, at A3.

35. Julia Preston, *Rule Change for Workers on Farms*, N.Y. TIMES, May 29, 2009, at A15.

36. *CIS Announces New Requirements for TARP Recipients on Hiring H-1B Workers*, 77 U.S.L.W. 2588, 2588–89 (2009).

37. RANDALL MONGER & MACREADIE BARR, NONIMMIGRANT ADMISSIONS TO THE UNITED STATES: 2008, 2009 OFF. OF IMMIG. STAT. ANN. REP. 4, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ni_fr_2008.pdf.

downturn and to new restrictions on [banks] that received” federal bailout aid.³⁸

In 2009, the Department of Labor’s Administrative Review Board ruled that a consulting group that neglected to pay a nonimmigrant alien worker’s salary during periods of idleness, despite knowledge of H-1B visa program rules, was liable both for back pay under the Immigration and Nationality Act,³⁹ and for a civil money penalty.⁴⁰

In 2009, the Department of Homeland Security Secretary, Janet Napolitano, said “DHS will ‘strengthen employment eligibility verification’ by . . . mandating the use of E-Verify by federal contractors and by [ending] the . . . ‘no match’ regulation.”⁴¹ In 2008, the Department of Homeland Security modified the list of approved identity documents for the I-9 employment eligibility verification process.⁴² Under the new rule, only unexpired documents may be accepted during the verification process.⁴³

In 2009, the Department of Homeland Security promulgated new rules shifting the agency’s focus “more on criminal prosecution[s] of [employers] hiring illegal immigrants and less on work[site] raids to [arrest illegal] workers.”⁴⁴

In 2009, both the Department of Labor and Department of Homeland Security issued final rules governing the hiring of aliens under the H-2A temporary agriculture system aimed at modernizing the program and enhancing worker protections.⁴⁵ In 2009, the Department of Labor’s Employment and Training Administration published an interim final rule, lengthening the transition period for employers to comply with new recruitment rules governing H-2A visas.⁴⁶ In 2009, the Department of Labor proposed a nine-

38. Kirk Semple, *Applications for Foreign Worker Visas Are Down*, N.Y. TIMES, Apr. 9, 2009, at A18.

39. Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2000 & Supp. V 2007).

40. *Adm’r Wage & Hour Div. v. Pegasus Consulting Group, Inc.*, No. 05-086 at 7 (Dep’t of Labor Apr. 28, 2009) (final admin. review).

41. *DHS Plans to Implement Federal Contractor E-Verify Mandate, Rescind ‘No-Match’ Rule*, 78 U.S.L.W. 2025, 2025 (2009).

42. Documents Acceptable for Employment Eligibility Verification, 73 Fed. Reg. 76,505, 76,505 (Dec. 17, 2008) (to be codified at 8 C.F.R. pt. 274a).

43. *Id.*

44. *DHS Issues New Enforcement Guidelines Focusing on Employer Criminal Prosecution*, 77 U.S.L.W. 2666, 2666 (2009).

45. See Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations, U.S. Citizenship & Immigration Servs., to Field Leadership 1 (June 24, 2009) (on file with author). For the DHS rule, see Changes to Requirements Affecting H-2A Nonimmigrants, 73 Fed. Reg. 76,891, 76,891 (Dec. 18, 2008) (to be codified at 8 C.F.R. pts. 214, 215, 247a).

46. Temporary Agricultural Employment of H-2A Aliens in the United States, 74 Fed. Reg. 17,597, 17,597 (Apr. 16, 2009) (to be codified at 20 C.F.R. pt. 655).

month delay of a final rule governing the hiring of foreign workers under the H-2A temporary agriculture system.⁴⁷

In 2009, the Eleventh Circuit ruled that a federal district court should have certified a class action covering employees of Mohawk Industries on claims that the employer engaged in racketeering activity by hiring illegal workers.⁴⁸

F. *Ethics*

1. Supreme Court Decisions

In 2009, in *Caperton v. A.T. Massey Coal Co.*,⁴⁹ the Supreme Court ruled that due process required a West Virginia justice to recuse himself from a case involving a big donor to the justice's election campaign.⁵⁰

2. Executive Orders

In 2009, President Obama signed an Executive Order enhancing ethics rules for executive branch officials by restricting the “revolving door” between government service and lobbying and prohibiting administration officials from taking gifts from lobbyists.⁵¹

3. Supreme Court of Florida Decisions

In 2009, the Supreme Court of Florida upheld the state's tough lobbyist ethics law, rejecting claims that it violated the constitutional separation of powers and that it “infringe[d] on the Supreme Court's authority to regulate lawyers who work as lobbyists.”⁵²

4. Florida Legislation

In 2009, Florida's Governor “signed into law new rules that will [re-strict] state employees' ability to collect a paycheck and a pension from the

47. *Id.*; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110, 77,110 (Dec. 18, 2008) (to be codified at 20 C.F.R. pt. 655).

48. *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1358–59 (11th Cir. 2009).

49. 129 S. Ct. 2252 (2009).

50. *Id.* at 2257.

51. Exec. Order No. 13,490, 74 Fed. Reg. 4673, 4673, 4678 (Jan. 21, 2009).

52. Bill Kaczor, *Justices Uphold Lobbying Ethics Law*, MIAMI HERALD, Mar. 20, 2009, at B6.

same agency.”⁵³ The law forces “retirees to wait six months before they return to work.”⁵⁴

5. Public Disclosure Issues

“Under Florida law, anyone can request a public record for any reason and expect to get it, no questions asked. But in reality, what residents face are confused public employees and questions: Who are you? Why do you want this? Can you put your request in writing?”⁵⁵ The Miami Herald found that “[a]lmost 43 percent of the offices failed to comply with the law either because they required a name, reason or written request or because they weren’t able to reasonably produce a record.”⁵⁶

For some time, the city of Fort Lauderdale has released a list of the top-paid employees “to make the salaries transparent, and it has continued as a unique practice for local government in South Florida. Though public salaries are a matter of public record, other governments—such as Broward and Miami-Dade counties—do not produce similar annual lists.”⁵⁷

6. Conflict-of-Interest Issues

A report “identified 18 current and recently retired lawmakers who work for or draw income from contracts with state universities and community colleges.”⁵⁸ Critics claim there is an “inherent conflict of interest in having college employees sitting on committees that oversee higher education funding and policy.”⁵⁹ The Florida Commission on Ethics lodged an ethics complaint against a state lawmaker “in connection with his taking a \$110,000 job at his local college.”⁶⁰

53. *Crist Signs Law Restricting Double-Dipping*, MIAMI HERALD, June 19, 2009, at B5.

54. *Id.*

55. *Public-Records Is Law Frequently Violated*, MIAMI HERALD, Nov. 22, 2008, at B5.

56. *Id.* By contrast, “[a] judge ruled that the Alaska governor’s office can use private e-mail accounts to conduct state business” without violating the state’s public records law. Associated Press, *Alaska: Private E-Mail Ruling*, N.Y. TIMES, Aug. 13, 2009, at A20.

57. Amy Sherman, *Public Service Pays Off in Lauderdale*, MIAMI HERALD, Mar. 5, 2009, at A1.

58. Jennifer Liberto, Mary Ellen Klas & Steve Bousquet, *Lawmakers Cash in with Campus Jobs*, MIAMI HERALD, Dec. 21, 2008, at A1.

59. *Id.*

60. Alex Leary, *Sansom Hires Prominent Lawyer*, MIAMI HERALD, Dec. 31, 2008, at B2. “The complaint cites a Florida statute that says no public officer shall ‘corruptly use or attempt to use his or her official position to secure a special privilege, benefit of exemption for himself, herself or others.’” *Id.*

7. South Florida Ethics Developments

The question arose in 2009 whether Miami-Dade County officials were improperly enlisting police officers to serve as personal drivers.⁶¹ In response, the Commission chairman created a new system to track commissioners' use of sergeants after an Internal Affairs review of the practice.⁶²

The 2008 "Broward Ethics Commission has one job: draft a code of ethics to regulate commissioners' behavior. Then it ceases to exist. . . . They'll consider questions like whether gifts to commissioners should be banned, or whether they can moonlight."⁶³

"A series of e-mails among Dania Beach commissioners discussing city businesses may have skirted Florida's open-meetings rules."⁶⁴

G. Budget Cuts

In the face of hard times, public sector employers in Florida are taking a variety of steps to cut costs, including: 1) banning "most out-of-state travel by state employees";⁶⁵ 2) "pay cuts for public officials making over \$100,000";⁶⁶ 3) reducing starting pay for firefighters by "14 percent to about \$35,000";⁶⁷ 4) instituting salary freezes;⁶⁸ 5) abolishing "year-end bonuses or holiday gifts";⁶⁹ 6) "quit rehiring employees who have retired";⁷⁰ 7) increasing all high school teaching schedules to seven-period days;⁷¹ 8) "switching

61. Matthew Haggman & Jack Dolan, *Chairman Pledges to Better Track Use of Cop-Chauffeurs*, MIAMI HERALD, Apr. 22, 2009, at A1.

62. *Id.*

63. Dan Christensen, *New Ethics Panel Gets the Green Light*, MIAMI HERALD, Nov. 5, 2008, at B3.

64. Amy Sherman, *E-Mails May Violate Sunshine Law*, MIAMI HERALD, Jan. 10, 2009, at B1. "Florida's Government-in-the-Sunshine Law forbids elected officials from privately discussing issues that could come before them as an elected body." *Id.*

65. See Steve Bousquet, *Lawmakers' Trips to Cost Public*, MIAMI HERALD, July 15, 2009, at B5. "But the travel restriction doesn't apply to lawmakers themselves. . . ." *Id.* Moreover, "[t]ravel that is related to law enforcement, military, emergency management or public health is exempt from the restriction." *Id.*

66. Amy Sherman, *Taxpayers Will Soon Pay More, Get Less*, MIAMI HERALD, July 26, 2009, at A1.

67. *Id.*

68. See Cindy Goodman, *Surviving a Pay Cut*, MIAMI HERALD, July 15, 2009, at C1.

69. Joyce M. Rosenberg, *Economic Woes Squeeze Holiday Bonuses at Work*, MIAMI HERALD, Oct. 20, 2008, at G12.

70. Nirvi Shah, *Union: Stop Rehiring Teachers*, MIAMI HERALD, Dec. 19, 2008, at B1.

71. Patricia Mazzei, *High Schools Could Get 7-Period Schedule*, MIAMI HERALD, Feb. 11, 2009, at B2.

high schools to four-day weeks”;⁷² 9) cutting “every state worker’s salary by about 5 percent”;⁷³ and 10) colleges going “to a four-day schedule in the summer.”⁷⁴

H. *Torts Related to Hiring*

1. Respondeat Superior and Florida’s Ridesharing Law

Under Florida law, an employer is not liable for injuries sustained by third parties by employees commuting to work.⁷⁵ Florida’s “ridesharing law helps limit respondeat superior liability for scope of employment injuries by defining it as beginning [once the worker] arrives . . . and ending when the employee leaves work.”⁷⁶

2. Defamation

Under Florida law,

[a]n employer who discloses information about a former or current employee to a prospective employer . . . upon request of the prospective employer . . . is immune from civil liability for such disclosure or its consequences unless it is shown by clear and convincing evidence that the information disclosed by the former or current employer was knowingly false.⁷⁷

Employers should take note that “e-mails, Twitter, Facebook and blogs [are] making it easier to [circulate damaging] information about employees.”⁷⁸

Florida’s Fifth District Court of Appeal ruled that while defamatory “[s]tatements made by employees to other employees” are usually entitled to qualified privilege, that “privilege vanishes if the statement is made with malice, or to too wide an audience.”⁷⁹

72. Patricia Mazzei, *4-Day School Week on Table*, MIAMI HERALD, Feb. 25, 2009, at B1.

73. Marc Caputo & Breanne Gilpatrick, *Pay Cuts for Workers Studied*, MIAMI HERALD, Mar. 17, 2009, at B6.

74. Luisa Yanez, *College Cuts to 4-Day Workweek to Save Cash*, MIAMI HERALD, Apr. 3, 2009, at B3.

75. See FLA. STAT. § 768.091(1) (2009).

76. Martin E. Segal, *Are We at Risk for Company Carpool Accidents?*, MIAMI HERALD, Nov. 3, 2008, at G14.

77. FLA. STAT. § 768.095.

78. Tresa Baldas, *Workplace Defamation Suits Rise*, NAT’L L.J., Apr. 13, 2009, at 1.

79. *Glynn v. City of Kissimmee*, 383 So. 2d 774, 776 (Fla. 5th Dist. Ct. App. 1980).

At the federal level, the District of Columbia Circuit Court of Appeals ruled in 2009 that members of Congress enjoy immunity from defamation suits for speech made within the scope of their employment.⁸⁰

3. Negligent Hiring

Florida's Second District Court of Appeal certified the following question for review:

After the legislature created a statutory duty requiring [the Department of Children and Family Services] (DCF) to license and monitor the activities of substance abuse counselors, does a duty in tort arise, owing by DCF to a counselor's client: (1) when DCF negligently licenses the counselor, (2) when the counselor harms a client, and (3) when the client has no relationship with DCF greater than that of any other citizen?⁸¹

It turned out that a Florida Power and Light (FPL) employee who drilled a hole in a nuclear plant pipe causing huge losses "had a long criminal record."⁸² Nevertheless, the Nuclear Regulatory Commission (NRC) concluded "FPL was not liable because it had followed all of NRC's 'rigorous' procedures in hiring and supervising the worker."⁸³

A Miami-Dade jury awarded \$1.2 million to a "man hit in the groin by a batting-cage pitch," concluding that the employer "negligently failed to properly supervise its employees."⁸⁴

In *L.A. Fitness International, L.L.C. v. Mayer*,⁸⁵ a gym patron suffered a cardiac arrest while using a stair-stepping machine.⁸⁶ "The club manager had CPR training but decided not to administer it since he believed the injured person had suffered a stroke."⁸⁷ The Florida court rejected a suit for negligence in failing to properly administer CPR, concluding that "a business

80. See *Wuterich v. Murtha*, 562 F.3d 375, 382 (D.C. Cir. 2009). Congressman John Murtha enjoyed immunity from defending a defamation suit arising from comments made to the press on civilian deaths in Haditha, Iraq. *Id.* at 377-78, 387.

81. *Dep't of Children & Family Servs. v. Chapman*, 9 So. 3d 676, 686-87 (Fla. 2d Dist. Ct. App. 2009) (alteration in original).

82. *FPL Customers Pay for Others' Mistakes*, MIAMI HERALD, Nov. 14, 2008, at A16.

83. *Id.*

84. Jennifer Lebovich, *Man Hit at Batting Cage Awarded \$1.2M*, MIAMI HERALD, Nov. 12, 2008, at B3.

85. 980 So. 2d 550 (Fla. 4th Dist. Ct. App. 2008).

86. *Id.* at 552.

87. Martin E. Segal, *Does Health Club Have Legal Obligation to Give Medical Aid?*, MIAMI HERALD, Oct. 6, 2008, at G16.

owner satisfies its legal duty to come to the aid of a patron experiencing a medical emergency by summoning medical assistance within a reasonable time.”⁸⁸

I. *Jobs of the Future*

By 2016, jobs in health care⁸⁹ and those requiring postsecondary education will see the largest gains while manufacturing will continue its gradual decline.⁹⁰ According to the Labor Department, the fastest growing occupations are systems and data analysts and home care aides.⁹¹ Even though South Florida hospitals suffer from extreme shortages in nurses, until recently the high cost of housing here “saw a lot of nurses resigning, moving away from this area—to North Florida, Tennessee, Georgia, the Carolinas.”⁹² Besides the demand for nurses, the United States economy has created demand for people with specialized skills such as pharmacists and engineers even amid a recession.⁹³

Workers furloughed from dwindling manufacturing jobs “are training as truck drivers and welders,” jobs thought at least to last through the “deep recession.”⁹⁴ Moreover, “[t]he tough job market is prompting a growing number of women across the country to dance in strip clubs, appear in adult movies, or pose for magazines” such as *Hustler*.⁹⁵

88. *Id.* (quoting *L.A. Fitness Int'l, L.L.C.*, 980 So. 2d at 558).

89. See Editorial, *Caring for the Caregivers*, N.Y. TIMES, Jan. 28, 2009, at A30. “In December [2008], employers added 32,000 health-related positions [nationally].” *Id.* In 2009, “only the healthcare sector has gained jobs in South Florida.” Scott Andron & Joel Poelhuis, *Where’s the Work?*, MIAMI HERALD, June 20, 2009, at A1.

90. Catherine Rampell, *Job Growth in Health Is Expected to Be Strong*, N.Y. TIMES, July 14, 2009, at B3.

91. Douglas Martin, *Evelyn Coke, 74, Dies; Home Care Aide Fought Pay Rule*, N.Y. TIMES, Aug. 10, 2009, at A16. “Home care agencies are . . . expected to employ nearly two million aides by 2014.” *Id.*

92. John Dorschner, *Nurses Lured from S. Fla.*, MIAMI HERALD, Oct. 30, 2008, at C3. “Nurses in some South Florida hospitals are now averaging over \$30 an hour, and some are getting signing bonuses of \$5,000. They can earn \$45,000 to \$69,000 a year . . .” *Id.*

93. See Christopher S. Rugaber, *Even in the Recession, Some Jobs are Out There*, ORLANDO SENTINEL, Mar. 10, 2009, at A7.

94. Louis Uchitelle, *Bad Times Spur a Flight to Jobs Viewed as Safe*, N.Y. TIMES, Jan. 25, 2009, at A1.

95. Karen Hawkins, *Recession, Unemployment Give Some Reason to Dance*, CHARLESTON GAZETTE, Mar. 23, 2009, at A6.

III. TERMS OF EMPLOYMENT

A. *Hours and Wages*

1. Fair Labor Standards Act Issues

a. *Minimum Wage and Overtime Issues*

In 2009, the Federal Government Accountability Office found that the Labor Department's Wage and Hour Division is failing in its role of "enforcing minimum wage, overtime, and many other labor laws."⁹⁶ But "[d]uring the first six months of the [Obama administration], the Department of Labor recovered more than \$82 million in back wages for almost 107,000 minimum-wage workers."⁹⁷

On July 24, 2009, the federal minimum wage increased from \$6.55 to \$7.25 per hour.⁹⁸

Owing to the "Great Recession"⁹⁹ in 2009, the average workweek shrank to "33 hours—the shortest ever recorded."¹⁰⁰ "Wages have fallen each month since October [2008]—a total of 5 percent over the past eight months."¹⁰¹ "Two surveys found employers have increased salaries [in 2009] by the smallest percentage in decades"¹⁰² Florida alone has seen the personal income of state residents decline for nine months—the longest in sixty-one years.¹⁰³ "Florida recorded a 0.9 percent fall in personal income in the first quarter of [2009], compared with the fourth quarter of 2008."¹⁰⁴

96. Steven Greenhouse, *Labor Agency Is Failing Workers, Report Says*, N.Y. TIMES, Mar. 25, 2009, at A14.

97. Hilda Solis, *Minimum-Wage Increase Can Make a Difference*, MIAMI HERALD, July 25, 2009, at A23.

98. *Id.* "Eighteen states and the District of Columbia already have minimum wages that are higher or equal to \$7.25 an hour." *Minimum Wage Will Go Up Friday*, MIAMI HERALD, July 20, 2009, at A3.

99. Editorial, *Dangers of the D-Word*, N.Y. TIMES, Feb. 17, 2009, at A32 ("Alan Greenspan said a depression required 15 percent unemployment for three to nine months or 12 percent unemployment for nine months or more. . . . President Ronald Reagan said: 'A recession is when your neighbor loses his job. A depression is when you lose yours.'").

100. Roger Lowenstein, *The New Joblessness*, N.Y. TIMES MAG., July 26, 2009, at 11, 12.

101. Christopher Leonard, *Any Job at All, Just to Pay the Bills*, MIAMI HERALD, Aug. 8, 2009, at C4 [hereinafter Leonard, *Any Job at All*]. In the private sector with 109 million jobs, during the last 10 years, the annual growth rate for jobs was an anemic 0.01 percent. Floyd Norris, *Job Growth Lacking in the Private Sector*, N.Y. TIMES, Aug. 8, 2009, at B3.

102. *Raises Among Tiniest*, MIAMI HERALD, July 22, 2009, at C1.

103. Harriet Johnson Brackey, *Personal Income Slides*, SUN-SENTINEL, June 19, 2009, at D1.

104. *Id.*

“Florida’s first-quarter decline was larger than income cuts in all but seven states.”¹⁰⁵ One report “ranks South Florida No. 85 among the nation’s 100 largest metropolitan areas in economic performance, as of March 2009, based on employment, unemployment rates, wages, gross metropolitan product, housing prices, and foreclosure rates.”¹⁰⁶ According to the Commerce Department, Florida “ranked 45th among the 50 states for growth in per-person income.”¹⁰⁷ In Florida, per-capita income for 2008 “was \$39,070, up 1.7 percent from \$38,417 the previous year.”¹⁰⁸ “National per-capita income [in 2008] was \$39,751, up 2.9 percent from the previous year.”¹⁰⁹

The plight of home health care workers drew renewed attention with the death of Evelyn Coke who sued “[i]n a case that reached the Supreme Court in 2007 . . . to reverse federal labor regulations that exempt home care agencies from having to pay overtime.”¹¹⁰ Although the Court rejected her claim, in 2009, “15 senators and 37 House members wrote to Hilda L. Solis, secretary of labor, urging her to eliminate the exemption for home attendants.”¹¹¹

In 2009, the Department of Labor’s Wage and Hour Division issued the following opinion letters: 1) a letter making clear that an employer may insist that employees who are exempt from the minimum wage and overtime provisions of the Fair Labor and Standards Act (FLSA) use their accrued vacation time amid a temporary plant closure without losing their exempt status or violating the FLSA;¹¹² and 2) three opinion letters making clear that employers assessing whether time spent by employees in training is compensable under the FLSA, must consider the timing and goal of the training and its relationship to a worker’s usual duties.¹¹³

105. *Id.*

106. Clifford M. Marks, *Report: South Florida Recovery May Be Near*, MIAMI HERALD, June 17, 2009, at C1.

107. Scott Andron, *Income Trails Inflation*, MIAMI HERALD, Mar. 25, 2009, at C3.

108. *Id.*

109. *Id.*

110. Martin, *supra* note 91.

111. *Id.*

112. Opinion Letter from Alexander J. Passantino, Acting Adm’r, U.S. Dep’t of Labor, Employment Standards Admin., Wage & Hour Div., No. FLSA2009-2, 1 (Jan. 14, 2009), available at http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009_01_14_02_FLSA.pdf.

113. Opinion Letter from Alexander J. Passantino, Acting Adm’r, U.S. Dep’t of Labor, Employment Standards Admin., Wage & Hour Div., No. FLSA2009-1, 1 (Jan. 7, 2009), available at http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009_01_07_01_FLSA.pdf; Opinion Letter from Alexander J. Passantino, Acting Adm’r, U.S. Dep’t of Labor, Employment Standards Admin., Wage & Hour Div., No. FLSA2009-13, 2 (Jan. 15, 2009), available at http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009_01_15_13_FLSA.pdf; Opinion Letter from Alexander J. Passantino, Acting Adm’r, U.S. Dep’t of Labor, Employment Stan-

Under proposed federal legislation, the Civil Rights Act of 2008, compensatory and punitive damages would be recoverable under the FLSA.¹¹⁴ The bill would also amend the Equal Pay Act “to make it more difficult for employers to use the ‘bona fide factor other than sex’ defense.”¹¹⁵

Sugar companies invoked a nineteenth century Florida law requiring workers suing for back wages to each post a \$100 bond.¹¹⁶ Critics contend “‘the de facto function of the bond is to [bar court] access . . . on the basis of poverty.’”¹¹⁷

The Eleventh Circuit ruled that plaintiffs who were employed as either firefighter/emergency medical technicians or rescue supervisors fell within an exemption from overtime applicable to employees who engage in fire protection activities where plaintiffs “have been trained in fire suppression, have been issued ‘turn-out’ gear, and can be required on pain of disciplinary action to engage in fire suppression.”¹¹⁸

The City of Fort Lauderdale plans to cut overtime pay to its police officers from \$6.1 million in 2009 to less than \$2 million in the future.¹¹⁹

“Some employment lawyers anticipate more salespeople who work on commission will be filing lawsuits over pay issues such as minimum-wage violations as layoffs climb in the faltering economy.”¹²⁰

b. *Child Labor Issues*

“Businesses at three South Florida malls let 50 underage employees operate dangerous equipment” in violation of the FLSA’s provisions governing child labor.¹²¹ “Although it’s legal to employ minors in most workplaces, federal law prohibits them from performing certain jobs deemed dangerous, such as roofing, coal mining, operating a meat slicer, making explosives, using power saws and scrap compacting.”¹²²

dards Admin., Wage & Hour Div., No. FLSA2009-15, at 2 (Jan. 15, 2009), available at http://www.dol.gov/esa/whd/opinion/FLSA/2009/2009_01_15_15_FLSA.pdf.

114. John B. Phillips, *The Obama White House and HR: Possible Changes Based on Pending Laws*, FLA. EMP. L. LETTER, Dec. 2008, at 6.

115. *Id.*

116. Laura Wides-Munoz, *Cane Workers See Last Chance to Recover Fla. Wages*, ASSOCIATED PRESS, June 5, 2009.

117. *Id.*

118. *Gonzalez v. City of Deerfield Beach*, 549 F.3d 1331, 1334–36 (11th Cir. 2008).

119. Brittany Wallman, *Police Overtime Pay Being Cut*, MIAMI HERALD, May 26, 2009, at B3.

120. Patrick Danner, *Car Salespeople See Less Pay*, MIAMI HERALD, Jan. 21, 2009, at C3.

121. Evan S. Benn & Laura Figueroa, *Teen Labor Violations Cited*, MIAMI HERALD, Jan. 24, 2009, at B3.

122. *Id.*

c. Proposed Paid Vacation Act

In 2009, a Florida congressman introduced a bill—the Paid Vacation Act—that would make paid vacation a requirement under the FLSA.¹²³ Employers of more than one hundred employees would be required to give full-time and part-time employees a week of paid vacation after working one year.¹²⁴ Three years after the law is in place, employees who put in one year would be entitled to two weeks of paid vacation, but employers with “50 or more employees” would only have to provide one week.¹²⁵

A 2009 survey found that thirty-four percent of U.S. employees will not “use all of their earned vacation time in 2009,” citing work-related pressures.¹²⁶ Employees “will give back an average of three vacation days each.”¹²⁷ “[W]omen are more likely than men to feel guilty about taking time off from work.”¹²⁸

2. Lilly Ledbetter Fair Pay Act

In 2009, Congress overturned the Supreme Court ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*¹²⁹ by enacting the Lilly Ledbetter Fair Pay Act,¹³⁰ making clear that the deadline for filing a claim of pay discrimination under Title VII runs from when an employee receives unequal pay, not from the time the employer first decided to discriminate.¹³¹ But one “South Florida labor lawyer says until women make different choices, their incomes won’t rise, no matter how many bills are signed into law. By choices, he’s talking about the careers they pursue, the hours they work, the jobs within their industries they hold and the parenting decisions they make.”¹³²

123. Paid Vacation Act of 2009, H.R. 2564, 111th Cong. (2009).

124. H.R. 2564 § 3(c)(1).

125. H.R. 2564 § 3(c)(2).

126. G. Thomas Harper, *Workplace Trends*, FLA. EMP. L. LETTER, June 2009, at 6.

127. *Id.*

128. *Id.*

129. 550 U.S. 618 (2007).

130. Lilly Ledbetter Fair Pay Act of 2009, S. 181, 111th Cong. (2009).

131. *See id.* S. 181 § 3. “A broader bill aimed at combating gender-based wage discrimination remains stalled in Congress.” Editorial, *Paycheck Fairness*, N.Y. TIMES, June 24, 2009, at A24.

132. Cindy Krischer Goodman, *Matters of Money*, MIAMI HERALD, Jan. 28, 2009, at C1 [hereinafter Goodman, *Matters of Money*].

“In one of the first decisions to interpret the scope of the . . . Fair Pay Act, a federal judge . . . refused to apply the law’s relaxed time limits to failure-to-promote claims.”¹³³

3. Gender and Racial Wage Gap

“In Florida, women made no significant gains in winning top corporate jobs and even lost board director positions over the past two years.”¹³⁴ But “more women are advancing into the executive offices by holding the position of chief financial officer.”¹³⁵ “One percent of senior corporate officers are black women . . . compared with 3 percent for black men, 14 percent for white women and 77 percent for white men.”¹³⁶

“[W]omen make only 77 cents for every dollar paid to men.”¹³⁷ In Miami-Dade County, women earn “72 cents for every dollar a man earns.”¹³⁸ Moreover, “wage theft, or the nonpayment of money owed for work, is rampant in Miami-Dade County. This may be because immigrant women make up 63 percent of the female workforce.”¹³⁹

4. Farm Workers’ Wages

At the national level, “[t]ens of thousands of Mexicans who labored in the United States under a World War II-era guest worker program will be eligible to collect back pay under a settlement to a long-fought lawsuit.”¹⁴⁰ “Under the settlement . . . Mexico would give each bracero, or a surviving heir, \$3500.”¹⁴¹

133. Shannon P. Duffy, *Judge: Ledbetter Act Doesn’t Apply to Lost Promotion Suit*, LAW.COM, May 27, 2009, <http://www.law.com/jsp/article.jsp?id=1202430992687> (last visited Nov. 7, 2009).

134. Cindy Krischer Goodman, *Fewer Women Winning Jobs in Executive Suites*, MIAMI HERALD, Feb. 11, 2009, at C1 [hereinafter Goodman, *Fewer Women Winning Jobs in Executive Suites*].

135. *Id.*

136. Jesse Washington, *Study: Networking Hinders Black Women Execs*, CONN. POST, Jan. 7, 2009.

137. Goodman, *Matters of Money*, *supra* note 132.

138. Cindy Krischer Goodman, *Working Women Worse Off in Dade*, MIAMI HERALD, Apr. 17, 2009, at C3 [hereinafter Goodman, *Working Women Worse Off in Dade*].

139. *Id.*

140. Pam Belluck, *Settlement Will Allow Thousands of Mexican Laborers in U.S. to Collect Back Pay*, N.Y. TIMES, Oct. 16, 2008, at A19.

141. *Id.*

In the past, Florida tomato growers refused calls for farm “workers to be paid at least another penny per pound of tomatoes picked.”¹⁴² But “to combat the perception that they are not helping improve the lives of farmworkers . . . growers [have] launched the Farmworker Community Support Foundation to fund programs related to farmworkers’ child care, education and healthcare.”¹⁴³ Despite these efforts, “[f]arm workers from Immokalee traveled to Tallahassee to ask the state to fight ‘modern-day slavery’ and improve working conditions.”¹⁴⁴ In 2008, “five farm bosses pleaded guilty to a scheme to enslave Mexican and Guatemalan nationals as farm workers in Immokalee. Prosecutors said the farm bosses were paying the workers minimal wages and had threatened them with violence.”¹⁴⁵

B. *Health Benefits*

1. Health Insurance

“Surveys suggest that rising premiums have prompted more than half of small businesses to reduce benefits, raise deductibles or require workers to shoulder a larger share of an ever more expensive pie.”¹⁴⁶

Since 1990, “the number of employers who have switched to self insurance has increased dramatically,” starting with big employers and spreading to smaller employers.¹⁴⁷

2. Domestic Partnership Benefits

By presidential memorandum in 2009, federal employees may add same-sex domestic partners to their long-term care insurance plans and can “use their sick leave to take care of domestic partners and [their] non-biological, non-adopted children.”¹⁴⁸ Moreover, foreign service employees’

142. Elaine Walker, *Tomato Growers Give Workers a Lift*, MIAMI HERALD, Mar. 24, 2009, at C3.

143. *Id.*

144. Breanne Gilpatrick, *Farm Workers Protest Conditions*, MIAMI HERALD, Mar. 10, 2009, at B6.

145. *Id.*

146. Kevin Sack, *Small Payroll, but Big Woes on Insurance*, N.Y. TIMES, Feb. 3, 2009, at A1.

147. HealthInsurance.info, *Self-Insured Employers*, <http://www.healthinsurance.info/HISELFI.HTM> (last visited Nov. 7, 2009).

148. Press Release, Office of the Press Sec’y, *Fact Sheet: Presidential Memorandum on Federal Benefits and Non-Discrimination (June 17, 2009)* [hereinafter *Press Release, Fact Sheet*] (on file with author); see Press Release, Office of the Press Sec’y, *Memorandum for the Heads of Executive Dep’ts and Agencies (June 17, 2009)* (on file with author).

same-sex domestic partners may use medical facilities at posts overseas, be eligible for medical evacuations, and be included in housing allocations.¹⁴⁹

In 2009, Miami commissioners “unanimously passed a domestic partnership ordinance giving employees with same-sex or opposite-sex partners the same rights and benefits as married couples.”¹⁵⁰ “Gay activists say it’s only a matter of time before legal challenges are filed to domestic partnership laws in Miami-Dade, Broward and other parts of the state.”¹⁵¹ Indeed, a charter amendment has already been proposed “in Hillsborough County that would pre-emptively outlaw spending taxpayer dollars on same-sex benefits.”¹⁵²

3. Insuring the Uninsured and Underinsured

“By some estimates, about half of the nation’s uninsured are people who are self-employed or work for a small business.”¹⁵³ “Workers in firms with fewer than 25 workers are now twice as likely to be uninsured as those in larger firms.”¹⁵⁴ “[S]ome 70 percent of uninsured Americans come from families with one or two full-time workers.”¹⁵⁵

More than two dozen states allow “parents to claim these [uninsured] young adults as dependents for [health] insurance purposes up to age 29.”¹⁵⁶

“At least one-fifth of Florida’s population lacks health coverage. Florida’s uninsured rate is the third-highest in a nation where about 50 million people are uninsured”¹⁵⁷ According to a report by Families USA, more

149. Press Release, Fact Sheet, *supra* note 148. In 2009, suit was filed in Massachusetts alleging that the federal government violates equal protection by denying same-sex couples federal benefits. Abby Goodnough & Katie Zezima, *Suit Seeks to Force Government to Extend Benefits to Same-Sex Couples*, N.Y. TIMES, Mar. 3, 2009, at A12. Although over 1100 federal laws distinguish on the basis of marital status, the lawsuit focuses on “Social Security, federal income tax, federal employees and retirees, and the issuance of passports.” *Id.*

150. Charles Rabin, *Domestic-Partner Ordinance Passed*, MIAMI HERALD, June 12, 2009, at B5.

151. Beth Reinhard, *Activists Ready to Fight Threat to Partnerships*, MIAMI HERALD, Nov. 21, 2008, at A1.

152. *Id.*

153. Reed Abelson, *Health Insurers Balk at Changes for Small Business*, N.Y. TIMES, June 3, 2009, at B1.

154. Sack, *supra* note 146.

155. Editorial, *Health Reform and Small Business*, N.Y. TIMES, Aug. 13, 2009, at A20.

156. Cara Buckley, *For Uninsured Young Adults, Do-It-Yourself Medical Care*, N.Y. TIMES, Feb. 18, 2009, at A1.

157. Marc Caputo, *Crist Touts Limited Health Plan*, MIAMI HERALD, Aug. 9, 2009, at B1 [hereinafter Caputo, *Crist Touts Limited Health Plan*].

[A]ccording to research from the Economic Policy Institute . . . 58 percent of [Floridians] under age 65 were covered by employer-sponsored plans in 2006-07 . . . down 4.2 percent since

than 3500 Floridians per week will lose healthcare coverage through 2010.¹⁵⁸ “Fewer women who work full time in Miami-Dade County have healthcare coverage from their employers than the national average.”¹⁵⁹

Florida Governor “Crist’s new Cover Florida healthcare proposal has signed up only 3757 people in a state with nearly four million uninsured. [Meanwhile,] an estimated 77,250 Floridians have lost health-insurance coverage since Cover Florida began releasing statistics in March.”¹⁶⁰

Blue Cross Blue Shield of Florida is offering the uninsured discount cards.¹⁶¹ “It’s not insurance, but the program boasts it can offer discounts of 5 to 40 percent for those providers who take the card. . . . But the plan doesn’t cover hospital costs—a crucial gap if anyone . . . gets seriously ill.”¹⁶² “The FamilyBlue card costs \$20 a month to get discounts on doctor visits, prescription drugs, dental care, vision care, hearing care, diabetic supplies and vitamins.”¹⁶³

4. Rising Health Insurance Costs

“U.S. health care spending in 2007 grew at its lowest rate in nine years, due mainly to a slowdown in prescription drug spending and lower administrative costs for the Medicare program”¹⁶⁴ “Premiums for job-based health insurance [rose] 5 percent in 2008 and have more than doubled since 1999, a growth rate that far [exceeds] inflation and the [slow rise] in workers’ wages over the same period”¹⁶⁵

Miami ranked number one “for healthcare costs [for seniors] among the 307 metropolitan areas surveyed”—“\$16,351 a year—twice the national av-

2000–01. For workers, 64.9 percent were covered by employer plans in 2006–07, down 4.7 percent from 2000–01. For children under 18, 54.9 percent were covered by employer plans in 2006–07, down 3.3 percent from 2000–01.

G. Thomas Harper, *Florida News in Brief*, FLA. EMP. L. LETTER, Dec. 2008, at 5.

158. See John Dorschner, *Coverage Losses Per Week in State: 3500*, MIAMI HERALD, July 16, 2009, at C2.

159. Goodman, *Working Women Worse off in Dade*, *supra* note 138. “Only 51 percent of women working full-time have healthcare coverage from their employer. The national average is 66 percent.” *Id.*

160. Caputo, *Crist Touts Limited Health Plan*, *supra* note 157. In Massachusetts, after a three year effort, “97 percent of [its] residents have health insurance—by far the highest rate in the nation.” Editorial, *The Massachusetts Model*, N.Y. TIMES, Aug. 9, 2009, at WK7.

161. See John Dorschner, *Discount Healthcare?*, MIAMI HERALD, Nov. 30, 2008, at E1.

162. *Id.*

163. *Id.*

164. Tony Pugh, *Growth Rate of Health Spending Slows in U.S.*, MIAMI HERALD, Jan. 6, 2009, at A5.

165. Tony Pugh, *Job-Based Premiums Rise 5%*, MIAMI HERALD, Sept. 25, 2008, at C1.

erage of \$8304.”¹⁶⁶ Fort Lauderdale ranked twenty-third—“with an average cost per senior of \$9,816 a year.”¹⁶⁷

5. Gender and Racial Health Care Gap

A 2008 study found “a widespread gap in the cost of health insurance, [with] women pay[ing] much more than men of the same age for individual insurance policies” offering the same coverage.¹⁶⁸ “[W]omen [even] pay more than men for insurance that does not cover maternity care.”¹⁶⁹ Overweight and obese women earn less than their slimmer counterparts.¹⁷⁰ “In 1981, the thinner women earned about 4.29 percent more than their heavier counterparts. But by 2000, that difference grew to 7.47 percent . . .”¹⁷¹ This year, “[t]he Florida Legislature . . . may consider a bill to end one of the thorniest situations in healthcare—women paying more for health insurance than men.”¹⁷²

6. COBRA Issues

The 2009 “federal stimulus package will pay 65 percent of the cost of COBRA health insurance for those being laid off.”¹⁷³ “To get the full subsidy, adjusted gross income must be less than \$125,000 if single or \$250,000 if married and filing a joint tax return.”¹⁷⁴ The subsidy ends “once income exceeds \$145,000 for singles and \$290,000 for joint filers.”¹⁷⁵ Under the 2009 American Recovery and Reinvestment Act, employers must notify all em-

166. John Dorschner, *Miami Care Costliest in Nation*, MIAMI HERALD, Feb. 26, 2009, at C1.

167. *Id.* “Some leading South Florida doctors maintain high costs are driven by the large number of malpractice lawsuits, which increase liability insurance prices and cause many doctors to go without coverage.” *Id.*

168. Robert Pear, *Women Buying Health Policies Pay a Penalty*, N.Y. TIMES, Oct. 30, 2008, at A1.

169. *Id.* “Insurers say they have a sound reason for charging different premiums: Women ages 19 to 55 tend to cost more than men because they typically use more health care, especially in the childbearing years.” *Id.*

170. Brett Graff, *Women Make Gains by Losing Weight*, MIAMI HERALD, Feb. 15, 2009, at E1.

171. *Id.*

172. John Dorschner, *Bill Seeks Gender Equity in Insurance Premiums*, MIAMI HERALD, Mar. 1, 2009, at E1.

173. John Dorschner, *COBRA’s a Conundrum for Many Who Lose Jobs*, MIAMI HERALD, Mar. 29, 2009, at E1.

174. Eileen Ambrose, *Stimulus Package has COBRA Expense Relief*, MIAMI HERALD, Mar. 4, 2009, at C2.

175. *Id.*

ployees who were laid-off between September 1, 2008 and December 31, 2009 that they are eligible for the sixty-five percent government-funded COBRA discount.¹⁷⁶ The premium reduction ends 1) when the individual becomes eligible for Medicare or other group coverage; 2) after nine months of the discount; or 3) when the maximum period of COBRA coverage ends, whichever occurs first.¹⁷⁷

“In Florida, the average monthly family COBRA premium is \$1037, which is more than the average monthly unemployment benefit of \$1013. For an individual policy in Florida, COBRA is \$371 monthly—more than a third of the unemployment check.”¹⁷⁸

7. HIPAA Issues

In 2009, a nurse was charged with HIPAA violations after she took pictures of a patient with a sex device lodged in his rectum and “posted them on her Facebook page.”¹⁷⁹

C. Workers’ Compensation

Penalties against Florida employers who fail to provide workers’ compensation insurance can be severe.¹⁸⁰ “The penalty for not carrying workers’ [compensation] coverage for employees may be \$1000 or a formula based on the premium the employer would have paid, multiplied by 1.5. The penalty can go back three years and may be stiffer for riskier businesses, such as roofing.”¹⁸¹ To encourage compliance, a new whistle-blower website aims at “mak[ing] it easier for workers to check their companies’ coverage and to complain anonymously if their employer does not carry workers’ [compensation].”¹⁸²

176. See Marjorie Glover & Edward Smith, *New COBRA Subsidy Requirements Impact Employers, Insurers and Health Plan Participants*, LAW.COM, Apr. 22, 2009, <http://www.law.com/jsp/PubArticle.jsp?id=1202430059402>.

177. *Id.*

178. John Dorschner, *Report: COBRA Cost Is Too Much*, MIAMI HERALD, Jan. 10, 2009, at C3.

179. *Nurses Fired over Cell Phone Photos of Patient*, WISN.COM, Feb. 25, 2009, <http://www.wisn.com/cnn-news/18796315/detail.html>.

180. See Marcia Heroux Pounds, *Firms Without Coverage Nabbed*, MIAMI HERALD, Aug. 14, 2009, at C1.

181. *Id.*

182. *Id.*

In 2008, in *Murray v. Mariner Health*,¹⁸³ the Supreme Court of Florida ruled “that an attorney representing injured employees” in workers’ compensation cases “should collect ‘reasonable fees.’”¹⁸⁴ Critics of the decision feared it would result in a “return to an hourly fee structure for attorneys in workers’ comp cases, eliminating the schedule set up by the 2003 law” responsible for workers’ comp rates falling sixty percent.¹⁸⁵ In fact, in 2009, Florida’s insurance commissioner “raise[d] workers’ compensation rates 6.4 percent in response to” the *Murray* ruling.¹⁸⁶

A year after the Supreme Court of Florida struck down the attorneys’ fee limits law for workers’ compensation, the Florida Legislature passed a new law overruling the high state court and “restor[ing] caps on fees for lawyers who represent workers in compensation appeals for on-the-job injuries.”¹⁸⁷ “[T]rial lawyers and unions say the [new law is] unfair to workers who are hurt and help companies that can spend more on lawyers, raising constitutional problems.”¹⁸⁸ In response to the new law, Florida’s insurance commissioner rescinded the 6.4 percent “workers’ compensation rate increase that went into effect April 1.”¹⁸⁹

In *Sanders v. City of Orlando*,¹⁹⁰ the Supreme Court of Florida settled a state court split over a 2001 amendment to the state’s workers’ compensation statute dealing with how lump-sum settlements are approved.¹⁹¹ The Court ruled that the change did not divest judges of compensation claims of their ability to set aside improper settlements.¹⁹²

183. 994 So. 2d 1051 (Fla. 2008).

184. Beatrice E. Garcia, *Workers’ Comp Rate May Rise Close to 19%*, MIAMI HERALD, Nov. 18, 2008, at C3 [hereinafter Garcia, *Workers’ Comp Rate*]; *Murray*, 994 So. 2d at 1062. The attorney representing “an injured nurse was initially awarded \$685 after 80 hours of work. The court ruling reset his fees to \$16,000.” David Decamp, *Panel OK’s Limits on Attorney Fees*, MIAMI HERALD, Mar. 18, 2009, at B6.

185. Garcia, *Workers’ Comp Rate*, *supra* note 184. “Changes in the law passed in 2003 imposed a strict fee schedule for attorneys.” *Bill on Attorney Fees Heads to the House*, MIAMI HERALD, Mar. 18, 2009, at 3C.

186. *Workers’ Compensation Rates Raised 6.4 %*, MIAMI HERALD, Jan. 27, 2009, at C3. The increase was the first one in over five years. *Workers Compensation Insurance Rates Rise*, MIAMI HERALD, Feb. 11, 2009, at C3.

187. Associated Press, *New Law Caps Lawyers’ Fees for Workers’ Comp*, MIAMI HERALD, May 30, 2009, at B3.

188. Decamp, *supra* note 184.

189. Bill Kaczor, *Workers’ Comp Hike Rolled Back*, MIAMI HERALD, June 4, 2009, at C1.

190. 997 So. 2d 1089 (Fla. 2008).

191. *See id.* at 1094.

192. *See id.* at 1095.

Under Florida's Heart-and-Lung Act, hypertension "applies only to arterial or cardiovascular hypertension."¹⁹³ Florida's workers' compensation statute creates a presumption that hypertension leading to disability of firefighters, law enforcement officers, or correctional officers are compensable.¹⁹⁴ Invoking this presumption, a 50-year-old retired Miami police officer's health insurance carrier denied his hundreds of thousands of dollars in medical claims, "saying it is the responsibility of workers' compensation because he had a preexisting condition at the time of his first heart attack in 2007."¹⁹⁵

In *Bifulco v. Patient Business & Financial Services, Inc.*,¹⁹⁶ plaintiff brought a retaliation claim for filing a workers' compensation claim against a public entity.¹⁹⁷ Florida courts are split over whether workers' compensation claims against public entities are tortious in nature, which triggers a notification process enabling the public entity to decide whether to waive its sovereign immunity.¹⁹⁸ This court distinguished workers' compensation claims from common law tort claims, thus dispensing of the notification requirement.¹⁹⁹

*Cabrera v. T.J. Pavement Corp.*²⁰⁰ interpreted the 2003 change in workers' compensation law regarding when an employee can sue the employer in tort and is not bound by the exclusivity of workers' compensation.²⁰¹ The 2003 law made it harder for employees to sue their employers in tort by changing the substantially certain "standard with the virtually certain standard."²⁰²

In *Houck v. Lee County Board of County Commissioners*,²⁰³ under the workers' compensation law in effect at the time of the plaintiff's accident, an injured worker need only establish that his injuries were "catastrophic" to prove a claim for permanent total disability.²⁰⁴ To rebut, the employer must offer conclusive evidence that the worker had "a substantial earning capaci-

193. *Bivens v. City of Lakeland*, 993 So. 2d 1100, 1102 (Fla. 1st Dist. Ct. App. 2008).

194. FLA. STAT. § 112.18(1) (2009); see *Bivens*, 993 So. 2d at 1102.

195. Jennifer Lebovich, *Ill Ex-Officer's Bills in Limbo*, MIAMI HERALD, Apr. 20, 2009, at B4.

196. 997 So. 2d 1257 (Fla. 5th Dist. Ct. App. 2009).

197. *Id.* at 1257.

198. See *id.* at 1257-58.

199. *Id.* at 1258.

200. 2 So. 3d 996 (Fla. 3d Dist. Ct. App. 2008).

201. *Id.* at 998-99.

202. *Id.* at 999 n.4.

203. 995 So. 2d 1102 (Fla. 1st Dist. Ct. App. 2008).

204. *Id.* at 1104.

ty.”²⁰⁵ The case was remanded for an analysis of this allocation of burdens of proof.²⁰⁶

D. *Unemployment Issues*

“[T]his recession has been the most punishing job destroyer in at least 60 years, slashing a net total of 6.7 million jobs. All told, 14.5 million people were out of work [in July 2009], with a jobless rate of 9.4 percent.”²⁰⁷ In South Florida, the unemployment rate for Miami-Dade in June 2009 was 10.6 percent “and 9.4 percent for Broward.”²⁰⁸ Florida “ranked second in the United States for job losses in 2008 . . . Florida lost 255,200 jobs last year, more than any other state except California.”²⁰⁹ “State forecasters also are predicting an unemployment rate near 11 percent—with close to 1 million out-of-work Floridians—through the end of 2011.”²¹⁰

In 2009, nine million Americans received unemployment compensation, with payments averaging around \$300 per week,²¹¹ varying by state and work history.²¹² Laid-off workers in half the states are eligible for up to seventy-nine weeks of benefits, the longest period ever.²¹³ As a result, unemployment

205. *Id.*

206. *Id.*

207. Leonard, *Any Job at All*, *supra* note 101. “All told, nearly 25 million Americans were either unemployed, underemployed, or had given up looking for a job in April [2009].” Frank Bass, *Even Part-Time Workers Losing Jobs*, MIAMI HERALD, June 6, 2009, at C4. “U.S. births fell in 2008, the first full year of the recession, marking the first annual decline in births since the start of the decade and ending an American baby boomlet.” Mike Stobbe, *Births Fell 2 Percent as Recession Began*, MIAMI HERALD, Aug. 8, 2009, at A7.

208. Editorial, *Tough Choices Ahead for South Florida*, MIAMI HERALD, July 20, 2009, at A16. Miami-Dade’s unemployment rate is “the worst jobless rate since September 1983, when it was 10.8 percent.” Scott Andron, *1 in 9 Out of Work in County*, MIAMI HERALD, July 18, 2009, at A1. In January 1983, Miami-Dade’s jobless rate was 13.7 percent. *See id.*

209. Scott Andron, *State Economy Not Quite Worst*, MIAMI HERALD, Jan. 28, 2009, at C1.

210. Scott Andron & Marc Caputo, *Later Florida Recovery Seen*, MIAMI HERALD, July 22, 2009, at C1.

211. Erik Eckholm, *Prolonged Aid to Unemployed Is Running Out*, N.Y. TIMES, Aug. 2, 2009, at A1. In Florida, the maximum weekly unemployment check is \$275. *See* Michael Luo, *Extended Benefits Are a Lifeline for Many Unemployed*, N.Y. TIMES, Dec. 21, 2008, at A30 [hereinafter Luo, *Extended Benefits*].

212. Eckholm, *supra* note 211. In Florida,

[y]ou must have worked in the state for a minimum period of time, earned a certain amount of money and have been dismissed from your last job for reasons other than “misconduct.” In this context, misconduct means a willful disregard of the employer’s interests; poor job performance is not necessarily misconduct.

Scott Andron, *Some Tips on Filing Jobless Claims*, MIAMI HERALD, Aug. 2, 2009, at E1.

213. Eckholm, *supra* note 211. “[U]nemployment benefits are exempt from Social Security and Medicare taxes.” Richard Perez-Pena, *As It Cuts Jobs, Gannett Also Cuts Severance*

funds are being exhausted.²¹⁴ States are borrowing billions of dollars to pay idled workers who wait far longer for benefits to begin.²¹⁵

In 2008, the Department of Labor's Employment and Training Administration issued a final rule barring unemployment compensation claimants with multistate wages from forum shopping.²¹⁶ While Florida accepted nearly two billion dollars in federal stimulus money in 2009 to extend the duration of jobless benefits by up to twenty weeks and to pay an extra \$25 per week, the state rejected \$444 million which would have extended benefits to some part-time employees and to those who quit out of necessity.²¹⁷

In Florida,

only 32 percent of jobless state residents are able to access unemployment benefits. Many of the remaining workers fall through the cracks because of outdated eligibility rules that do not count their most recent work. . . . The result often prevents low-wage workers and those in high-turnover fields from getting unemployment compensation²¹⁸

Pay, N.Y. TIMES, July 27, 2009, at B5. But “[m]any jobless Americans find their problems aggravated by bank fees on their unemployment benefits.” Christopher Leonard, *Bank Fees Compound Problems of Jobless*, MIAMI HERALD, Feb. 20, 2009, at C1. “Through the first quarter of 2009, employment for 16- to 24-year-olds dropped by 5 percent, the largest decline for any age cohort. . . . This produced the lowest employment rates for young people in almost 40 years.” Morley Winograd & Michael D. Hais, *Young Adults Remain Optimistic*, MIAMI HERALD, June 25, 2009, at A15. “For instance, the government does not consider so-called ‘discouraged’ workers, who have given up looking for a job, as part of the labor force. And part-time workers who want full-time jobs, but can’t find them, are considered employed.” Scott Andron & Joel Poelhuis, *Where’s the Work?*, MIAMI HERALD, June 20, 2009, at A1. “Currently, people can draw benefits for up to 79 weeks in 24 states and from 46 weeks to 72 weeks in others.” Eckholm, *supra* note 211.

214. Eckholm, *supra* note 211.

215. Lawrence Downes, *Scrambled States of America*, N.Y. TIMES, July 27, 2009, at A20. Some banks are “lower[ing] mortgage payments for some homeowners to an average of \$500 a month for three months as part of a new program to help the unemployed.” *Citigroup to Aid Jobless on Loans*, SUN-SENTINEL, Mar. 4, 2009, at D3.

216. Employment and Training Administration, 73 Fed. Reg. 63,068, 63,069 (Oct. 23, 2008) (to be codified at 20 C.F.R. pt. 616).

217. Alex Leary, *State Rejects Some Jobless Funds*, MIAMI HERALD, Apr. 30, 2009, at B6. Federal stimulus money would also mean that “the nearly 10 percent of Floridians receiving food stamps should get \$27 more a month.” Marc Caputo, *\$13.5 Billion Stimulus Could Boost Food Stamps, Jobless Aid*, MIAMI HERALD, Mar. 5, 2009, at B6. “Florida added 50 staff members to its unemployment insurance division in [2008], bringing its total to around 870. It also recently added 345 lines to its phone system for a total of just over 1,000, and has extended its call-in hours.” Luo, *Extended Benefits*, *supra* note 211.

218. Arthur J. Rosenberg, *Too Few Eligible for Assistance*, MIAMI HERALD, Apr. 6, 2009, at A15. “Two bills before the Florida Legislature, SB 516 and H 1333, would modernize this

In 2009, a new law amended Florida's unemployment compensation law governing the "calculation of employers' tax rates and the Unemployment Compensation Trust Fund[s] solvency."²¹⁹ The new law lowers that part of an employee's wage that is not subject to the unemployment tax until 2015.²²⁰ Afterwards, taxable wages revert to \$7000.²²¹ In sum, for five years, "employers will be taxed on an additional \$1,500" of income to restore solvency to Florida's Unemployment Compensation Trust Fund.²²² Moreover, the new law raises "the positive fund balance adjustment factor from 3.7 percent of taxable payrolls to 4 percent."²²³

"Unemployment among black Floridians could reach almost 17 percent" by Spring 2010, up from 14.6 percent in 2009, while the overall jobless rate is estimated to be 11.8 percent in Spring 2010.²²⁴ "Much of the disparity is due to a concentration of blacks and Hispanics in construction, blue-collar or service-industry jobs that have been decimated by the economic meltdown."²²⁵

"If the recession continues, women are poised to surpass men on the nation's payrolls . . . because most large-scale layoffs have been in male-dominated industries."²²⁶

[A] full 82 percent of the job losses have befallen men, who are heavily represented in distressed industries like manufacturing and construction. Women tend to be employed in areas like education and health care, which are less sensitive to economic ups and downs, and in jobs that allow more time for child care and other domestic work.²²⁷

system. They would give part-time workers, victims of domestic violence and low-wage earners a lifeline" *Id.*

219. Fla. Senate Comm. on Commerce, SB 810 (2009): Summary of Legislation Passed 43 (June 16, 2009), available at <http://www.flsenate.gov/data/Publications/2009/Senate/reports/summaries/pdf/sessionsummary09.pdf>.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Scott Andron, *Black Joblessness Could Leap*, MIAMI HERALD, July 28, 2009, at C3.

225. Jesse Washington, *Firing Habits Favor Whites—Traditional Layoff Formula Increases Minority Job Loss*, SUN-SENTINEL, Mar. 24, 2009, at D3.

226. Goodman, *Fewer Women Winning Jobs in Executive Suites*, *supra* note 134.

227. Catherine Rampell, *U.S. Women Set to Surpass Men in Labor Force*, N.Y. TIMES, Feb. 6, 2009, at A1. "The unemployment rate for males in April 2009 was 10 percent, versus only 7.2 percent for women, the largest absolute and relative gender gap in unemployment rates in the post-World War II period." Bob Herbert, *No Recovery in Sight*, N.Y. TIMES, June 27, 2009, at A17.

“Workers ages 45 and over form a disproportionate share of the hard-luck recession category, the long-term unemployed—those who have been out of work for six months or longer”²²⁸

E. Public Pensions

1. Federal Regulation

In 2009, the Securities and Exchange Commission proposed new rules to end the practice known as “pay to play,” an unspoken arrangement whereby public pension fund “investors are chosen [by fund managers] not for their low fees and high skills but for their connections.”²²⁹

Nationally, “[s]tate pension funds lost \$865.2 billion in 2007–2008. . . . And assets for 109 state funds declined about 30 percent” in that period.²³⁰

2. Florida’s Public Pension Fund

Amid the economic recession of 2008–09, Florida’s public employee pension plan “lost \$37.9 billion—27 percent—over 13 months.”²³¹ While Florida’s retirement fund enjoyed “an \$8.2 billion surplus” in 2008, it sustained “an \$8.7 billion deficit” in 2009.²³² Despite these losses, “[t]he director of the Florida’s \$90 billion state retirement fund says the pension account is in good shape.”²³³

Florida’s State Board of Administration (SBA) “manages more than \$122.6 billion of the state’s investments,” including billions of dollars in Florida employees’ pension funds.²³⁴ A bill is likely to be introduced in the 2009 “legislative session that would expand the SBA’s investment advisory committee to include qualified representatives from the pension plans.”²³⁵

228. Michael Luo, *Longer Periods of Unemployment for Workers 45 and Older*, N.Y. TIMES, Apr. 13, 2009, at A11 [hereinafter Luo, *Longer Periods*].

229. Editorial, *A \$2.2 Trillion Temptation*, N.Y. TIMES, July 28, 2009, at A24.

230. Donya Currie, *State Pensions Go Downhill*, AARP BULLETIN, Mar. 2009, at 6. “Pension costs were blamed for bankrupting Vallejo and pushing other California cities to the brink.” Fred Grimm, *Warnings Not Heeded About Pension Burden*, MIAMI HERALD, June 14, 2009, at B1.

231. Bill Kaczor, *State Pension Fund Takes Hit, but Still Above Water*, MIAMI HERALD, Nov. 18, 2008, at C1.

232. Grimm, *supra* note 230.

233. *Pension Boss Says Florida’s Fund Is Stable*, MIAMI HERALD, Mar. 25, 2009, at C3. “The fund has 93 percent of what it needs to cover everyone entitled to a pension.” *State Fund Suffers Loss*, MIAMI HERALD, Aug. 6, 2009, at C1.

234. Beatrice Garcia, *Full Disclosure*, MIAMI HERALD, Jan. 19, 2009, at 16.

235. *Id.*

The SBA's new executive director said, "Florida will still have a conservative and diversified investment strategy with a focus on the long term."²³⁶ "In 2007, the state Legislature passed a bill that required the pension plans to divest any stock issued by any company or its subsidiaries that did business with Iran or Sudan."²³⁷

In June 2009, Governor Crist "signed into law new rules that will limit state employees' ability to collect a paycheck and a pension from the same agency."²³⁸

The amount of overtime put in by police officers and firefighters has a dramatic effect on their public pensions which are based on an employee's five highest-paid years.²³⁹ Some "deputies and fire rescue workers bumped up those averages considerably, some nearly doubling base salaries with [overtime]."²⁴⁰

Under Florida law, public officials who commit certain crimes stand to forfeit their public pensions.²⁴¹ The former Broward sheriff lost his \$130,000-a-year pension after "admitting he took tens of thousands of dollars from BSO vendors and lied on his income-tax returns."²⁴² An administrative law judge ruled in 2009 that the crimes the disgraced former sheriff pleaded guilty to constituted a felony under Florida law.²⁴³

F. Safety Issues

1. Federal Activity

In 2009, reversing a Bush administration policy, President Obama instructed executive departments and agencies that state law should be preempted sparingly.²⁴⁴ "Throughout our history, [s]tate and local govern-

236. Bill Kaczor, *Pension Chief's Approach Conservative, Diversified*, SUN-SENTINEL, Nov. 28, 2008, at B10.

237. Beatrice E. Garcia, *Florida Retirement System Often Votes Its Shares for Change*, MIAMI HERALD, Jan. 19, 2009, at 19.

238. *Crist Signs Law Restricting Double-Dipping*, *supra* note 53. In 2009, some school districts began to "no longer allow[] teachers to work [beyond] their planned early retirement—unless they agree to work in a disadvantaged school." Patricia Mazzei, *Teacher Rehiring Considered*, MIAMI HERALD, Apr. 17, 2009, at B3.

239. Grimm, *supra* note 230.

240. *Id.*

241. See Dan Christensen, *Jenne's Pension Hopes Dim*, MIAMI HERALD, Mar. 4, 2009, at B1.

242. *Id.*

243. *Id.*

244. Memorandum from President Barak Obama to the Heads of Exec Dept's & Agencies, 74 Fed. Reg. 24,693, 24,693 (May 20, 2009).

ments have frequently protected health, safety, and the environment more aggressively than has the national Government.”²⁴⁵

In 2008, the Department of Transportation’s Federal Motor Carrier Safety Administration issued interim regulations permitting commercial motor vehicle drivers “to drive up to 11 hours” within a single workday.²⁴⁶

2. Florida Safety Issues

In 2008, “Gov[ernor] Charlie Crist signed [the] so-called guns-at-work legislation . . . allowing employees with concealed-weapons permits to begin stashing their firearms in their locked cars at work starting July 1.”²⁴⁷ In the first case to assess the validity of the new law, a federal district court ruled that the Florida statute forcing employers to allow employees with permits to carry concealed weapons to keep guns secured in their vehicles in the employer’s parking lot is, for the most part, likely valid.²⁴⁸ Other lawsuits alleging violations of the new concealed-arms law include a security guard who sued Walt Disney World “after he was terminated for having a weapon in his car at work.”²⁴⁹ The first South Florida case involves a funeral home employee who claims his firing violated the new state law.²⁵⁰

“Five employees at Broward County’s main courthouse have filed lawsuits saying mold at the building made them sick.”²⁵¹

The Palm Beach County Public School Board “is considering amending the requirements of a new anti-bullying policy, mandated by state law, to specifically prohibit harassing students [or staff members] who believe they

245. *Id.* The White House memorandum was published in the May 22, 2009 issue of the Federal Register, 74 Fed. Reg. 24,693. *Id.*

246. Hours of Service of Drivers, 73 Fed. Reg. 69,567, 69,567 (Nov. 19, 2008) (to be codified at 49 C.F.R. pts. 385, 395). The final rule was published in the November 19, 2008 issue of the Federal Register, 73 Fed. Reg. 69,567. *Id.*

247. Monica Hatcher, *Governor Signs Gun Law*, MIAMI HERALD, Apr. 16, 2008, at C2.

248. Fla. Retail Fed’n Inc. v. Att’y Gen. of Fla., 576 F. Supp. 2d 1281, 1289–91 (N.D. Fla. 2008). In 2007, a federal judge found the Oklahoma concealed-arms law was preempted by the “[F]ederal Occupational Safety and Health Act, which requires employers to maintain a safe work environment.” Patrick Danner, *Fired Worker’s Suit Tests New Concealed-Arms Law*, MIAMI HERALD, Jan. 29, 2009, at C1.

249. Danner, *Fired Worker’s Suit*, *supra* note 248.

250. *Id.* In 2008, Disney World agreed “to restrict its employee gun ban to company property only. Employees who work outside the Walt Disney World Resort area will be allowed to keep guns locked in their cars if they have a concealed-weapons permit, keep the guns hidden, and leave them in their cars.” G. Thomas Harper, *Disney Relaxes Hard-Line Stance Against Guns at Work, Tweaks Policy*, FLA. EMP. L. LETTER, Oct. 2008, at 6.

251. Diana Moskovitz, *Court Staff: Building Mold Made Us Sick*, MIAMI HERALD, Apr. 1, 2009, at B1.

were born the wrong sex and those who may be perceived as being too masculine or too feminine for their gender.”²⁵²

G. *Internet, E-mail, and Cell Phone Issues*

Many employers are still struggling to shape their online policies.²⁵³ While both wide-open Internet access and fully closed approaches are untenable, employers should conduct employee training on topics such as “online liability and confidentiality.”²⁵⁴ One option is for employers to grant employees online access to some sites, but limit what they can do there.²⁵⁵

“A national safety group is advocating a total ban on cell-phone use while driving” and says “businesses should prohibit employees from using cell phones while driving on the job.”²⁵⁶

H. *Public Union Issues*

In 2008, “[u]nion membership in the United States rose . . . by the largest amount in a quarter-century, a gain of 428,000 members . . . [and] most of the new members were government employees.”²⁵⁷ In 2008, “36.8 percent of government employees belong to unions, compared with just 7.6 percent of workers in the private sector.”²⁵⁸ In 2008, “[t]he number of unionized government workers grew by 275,000 . . . and the number of unionized private sector workers grew by slightly more than 150,000.”²⁵⁹

In 2009, in *Locke v. Karass*,²⁶⁰ a unanimous United States Supreme Court ruled that a local union can charge a service fee to objecting non-members for a share of the national union’s litigation expenses without violating the First Amendment.²⁶¹ Those costs, the Court made clear, are properly related to collective bargaining.²⁶² Also in 2009, in *Ysursa v. Pocatello Education Ass’n*,²⁶³ the United States Supreme Court ruled that an Idaho law

252. Laura Green, *School District Explores New Protection for Gay Students*, MIAMI HERALD, Nov. 6, 2008, at C1.

253. See Martha Irvine, *Opening Up the Internet*, MIAMI HERALD, July 18, 2009, at C3.

254. *Id.*

255. *Id.*

256. Joan Lowy, *Group to Drivers: Hang up Phone*, CHI. TRIB., Jan. 12, 2009, at 6.

257. Steven Greenhouse, *Union Growth in 2008 Was Largest in 25 Years*, N.Y. TIMES, Jan. 29, 2009, at A18.

258. *Id.*

259. *Id.*

260. 129 S. Ct. 798 (2009).

261. *Id.* at 806–07.

262. *Id.* at 807.

263. 129 S. Ct. 1093 (2009).

banning local government employers from allowing payroll deductions for political activities does not violate the public unions' First Amendment free speech rights.²⁶⁴

In 2009, charter schools, "which are publicly financed but managed by groups separate from school districts," have become targets of unionization drives.²⁶⁵ Some question whether unions will enhance "the charter movement by stabilizing its . . . transient teaching force, or weaken it by" barring employers from dismissing incompetent teachers.²⁶⁶

While the Civil Service Reform Act of 1978 granted collective bargaining rights to federal employees, it permits the President to remove some classes of employees from coverage.²⁶⁷ Exercising this option, in 2008, President Bush, by executive order, ruled out collective bargaining rights for "8600 federal employees who work in law enforcement, intelligence and other agencies" tied to national security.²⁶⁸

A federal district court in Florida ruled that a public union did not violate its duty of fair representation by refusing to represent an employee dismissed "for filing a false worker's compensation claim . . . in the grievance process against the County,"²⁶⁹ concluding that "the Union did not act arbitrarily, discriminatorily, or in bad faith."²⁷⁰

I. *Family Medical Leave Act Issues*

The Defense Department's authorization bill for fiscal year 2008 included provisions amending the Family Medical Leave Act (FMLA) to offer two new leave options—military caregiver leave and qualifying exigency leave.²⁷¹ Eligible employees who are family members of soldiers are entitled to take up to six months of leave in a twelve month period to care for a seriously ill or wounded soldier whose injury occurred in the line of duty while on active duty.²⁷²

264. *Id.* at 1096.

265. Sam Dillon, *As More Charter Schools Unionize, Educators Debate the Effect*, N.Y. TIMES, July 27, 2009, at A1.

266. *Id.*

267. Robert Pear, *Some Federal Workers Lose Bargaining Rights*, N.Y. TIMES, Dec. 2, 2008, at A20.

268. *Id.*

269. *Wimberly v. Miami-Dade County*, 8 So. 3d 1160, 1161 (Fla. 3d Dist. Ct. App. 2009).

270. *Id.* at 1162.

271. Family Medical Leave Act of 1993, 29 C.F.R. § 825.100(a) (2009).

272. 29 C.F.R. § 825.127(a). New Department of Labor regulations implementing these statutory amendments took effect January 16, 2009. *Id.*

Federal legislation proposed, in 2008, the Federal Employees Paid Parental Leave Act,²⁷³ which would allow federal employees to take four weeks of paid leave after the birth or adoption of a child.²⁷⁴ The worker would also be entitled to four additional weeks of accrued paid sick leave.²⁷⁵

Proposed federal legislation, the Healthy Families Act,²⁷⁶ among other things, requires employers with fifteen or more employees to provide paid sick leave based on a formula set out in the bill.²⁷⁷

In 2009, a Labor Department opinion letter made clear that a 1995 regulation interpreting the phrase notice as soon as is practicable in the FMLA usually meant notification within one or two business days no longer applied.²⁷⁸ Instead, under the new rule, an employee is not guaranteed an allowance of a specific number of days within which to provide notice of unforeseen FMLA leave.²⁷⁹

In *Martin v. Brevard County Public Schools*,²⁸⁰ the Eleventh Circuit ruled that a public school employee, who was fired for not completing a performance improvement plan while on approved leave, may pursue FMLA interference and retaliation claims against her former employer.²⁸¹

IV. DISCIPLINE, RETALIATION, LAYOFFS, FURLOUGHS, AND TENURE ISSUES

A. *Discipline*

1. On-Duty Misconduct

Fort Lauderdale's Office of Professional Standards is conducting an investigation over whether the police department "purportedly rewards officers for making arrests and handing out citations, while penalizing those who don't go along by revoking overtime and voluntary details."²⁸² "Quotas for

273. Federal Employees Paid Parental Leave Act of 2008, H.R. 5781, 110th Cong. (2008).

274. *Id.* § 2(a)(3)(A).

275. *Id.* § 2(a)(3)(A)–(B).

276. Healthy Families Act, S. 910, 110th Cong. (2007).

277. *Id.* §§ 4(3)(B)(i)(I), 5(c).

278. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA2009-1-A (Jan. 6, 2009), available at http://www.dol.gov/esa/whd/opinion/FMLA/2009/2009_01_06_1A_FMLA.pdf.

279. *See id.*

280. 543 F.3d 1261 (11th Cir. 2008).

281. *Id.* at 1267–68.

282. Jennifer Mooney Piedra, *Quotas for Arrests Alleged*, MIAMI HERALD, Oct. 27, 2008, at A1.

making arrests and writing tickets are widely criticized in law enforcement circles.”²⁸³

In 2007, a Florida circuit judge, “a longtime criminal court judge, was transferred to the civil division after making a racially-charged comment about a case involving a black defendant and several black victims and witnesses.”²⁸⁴

2. Off-Duty Misconduct

“A Weston middle school principal said a sleeping disorder led him to try to strangle his wife.”²⁸⁵ Even though the principal was charged with battery by strangulation, his public employer said the principal’s “arrest is ‘not what we consider to be a school-related matter. It doesn’t have any impact on the school district or this individual’s ability to function as a school principal.’”²⁸⁶

“Sixteen Broward Sheriff’s Office employees, including 15 deputies, have been moved to desk jobs while they are investigated for possible steroid use . . . [t]hat lead to the group’s being told to submit to drug tests.”²⁸⁷ Subsequently, nine deputies “were cleared after tests showed they were steroid-free.”²⁸⁸

B. Retaliation and Whistle-Blowing

In 2009, in *Crawford v. Metropolitan Government*,²⁸⁹ the Supreme Court ruled that an employee who did not initiate a job discrimination complaint, but spoke up about harassment when questioned during her employ-

283. Jennifer Mooney Piedra, *System Widely Criticized but Sometimes Used*, MIAMI HERALD, Oct. 27, 2008, at A2.

284. Todd Wright, *Minority Lawyers Eye Judge Vacancies*, MIAMI HERALD, Nov. 20, 2008, at B1.

285. David Smiley, *Principal Cites Sleep Disorder*, MIAMI HERALD, Jan. 8, 2009, at B1.

286. *Id.*

287. Diana Moskovitz, *16 Investigated for Possible Steroid Use*, MIAMI HERALD, Feb. 25, 2009, at B3.

288. Diana Moskovitz, *Nine Cleared in BSO Steroid Case*, MIAMI HERALD, Mar. 18, 2009, at B3. “BSO prohibits the use of steroids unless obtained ‘through a legitimate physician/patient relationship and prescription.’ BSO policy also outlaws the use of masking agents to hide steroid use.” *Id.*

289. 129 S. Ct. 846 (2009). “Lower courts had ruled Crawford was not protected under the federal anti-retaliation law, Title VII of the Civil Rights Act, because she had not ‘instigated or initiated’ the complaint, but merely answered questions in a case already under way.” Robert Barnes, *Court Sides with Employee Who Was Fired*, MIAMI HERALD, Jan. 27, 2009, at A3.

er's internal investigation of sex bias allegations, is protected from retaliation by her employer under Title VII.²⁹⁰

Florida's Fourth District Court of Appeal ruled that a "building-inspection supervisor and whistle-blower fired by the Broward School Board should get her job back."²⁹¹

A Miami-Dade prosecutor was suspended after a memo raising doubts about the Miami-Dade State Attorney's independence from the Miami-Dade Police Department was posted on his blog "and linked it to a popular Miami-Dade legal website for the world to see."²⁹² The veteran prosecutor claims his employer "trampled on his First Amendment free-speech rights by retaliating against him for posting his own memo to the 'Justice Building' blog."²⁹³ The employer, citing *Garcetti v. Ceballos*,²⁹⁴ asserts that "'state-ments made by public employees pursuant to their official duties are not pro-ected under the First Amendment."²⁹⁵

The Republican Party of Palm Beach County refused to seat a white su-remacist, the winner of an "election as a committeeman because he failed to sign a loyalty oath."²⁹⁶ The Republican Party claims "Mr. Black's associa-tions appear to violate the oath he failed to sign, which requires that candi-dates avoid activities that are 'likely to injure the name of the Republican Party.'²⁹⁷

In *Bruley v. Village Green Management Co.*,²⁹⁸ the plaintiff alleged wrongful discharge in violation of public policy.²⁹⁹ The employee invoked the public policy supporting the exercise of his right to bear arms.³⁰⁰ The court dismissed the plaintiff's claim, given that he was an at-will employee and Florida does not recognize the common law doctrine of wrongful dis-charge in violation of public policy absent a specific statute creating the cause of action.³⁰¹

290. *Crawford*, 129 S. Ct. at 849.

291. Hannah Sampson, *Court: Give Job Back to Whistle-Blower*, MIAMI HERALD, Jan. 8, 2009, at B3.

292. Jay Weaver, *Free-Speech Suit Rocks State Office*, MIAMI HERALD, Mar. 21, 2009, at A1.

293. *Id.*

294. 547 U.S. 410 (2006).

295. Weaver, *supra* note 292 (citing *Garcetti*, 547 U.S. at 421).

296. Damien Cave, *A Local Election's Results Raise Major Questions on Race*, N.Y. TIMES, Dec. 12, 2008, at A22.

297. *Id.*

298. 592 F. Supp. 2d 1381 (M.D. Fla. 2008).

299. *Id.* at 1384.

300. *Id.* at 1386.

301. *See id.* at 1386-88.

C. *False Claims Act*

Under the Fraud Enforcement and Recovery Act of 2009 (FERA),³⁰² the False Claims Act's (FCA) reverse false claim provision was amended to make clear that the knowing retention of an overpayment is a violation of the statute.³⁰³ In addition, FERA expands liability under the FCA to eliminate the requirement that a false claim be presented to a federal official or that it directly involve federal funds.³⁰⁴

D. *Layoffs*

A 2009 study found that most workers laid-off in a recession, "on average, had not returned to their old wage levels, . . . even 15 to 20 years later."³⁰⁵ Moreover, "earnings were about 15 percent to 20 percent less than they would have been had they not been laid off."³⁰⁶

Laid-off "[w]orkers ages 45 and over . . . were out of work 22.2 weeks in 2008, compared with 16.2 weeks for younger workers."³⁰⁷ Even when finally re-employed, older workers face a "steeper [decline] in earnings than their younger counterparts."³⁰⁸

Public employees, however, "have faced fewer layoffs and pay cuts than those in the private sector."³⁰⁹

"There is robust social science evidence that there is serious workplace discrimination against mothers, and that in the context of this economic downturn it appears that mothers are encountering lots of what they see as 'mommy RIFs,'"³¹⁰ or reductions in force.³¹¹

"The Broward Teachers Union filed a lawsuit [in July 2009] to stop the school district's plans to hire new teachers until the union can review public

302. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended at 31 U.S.C. §§ 3729-32).

303. *Id.* § 4.

304. *See id.* § 4.

305. Michael Luo, *Years After Layoffs, Many Still Struggle to Match Old Salaries*, N.Y. TIMES, Aug. 4, 2009, at A1.

306. *Id.* A new reinsurance provider, PayCheck Guardian, pays policyholders "\$1,500 a month for six months" if they "lost [their] job through no fault of [their] own." Ron Lieber, *Insure Yourself Against a Job Loss? Good Luck*, N.Y. TIMES, Aug. 8, 2009, at B1.

307. Luo, *Longer Periods*, *supra* note 228.

308. *Id.*

309. Marc Caputo, *State Officials' Pay to Be Cut 2 Percent*, MIAMI HERALD, May 30, 2009, at B1.

310. Jonathan D. Glater, *Job Cuts Cause Boom in Lawsuits*, N.Y. TIMES, Jan. 31, 2009, at B1 (internal quotations omitted).

311. *Id.*

records to make sure Broward is first bringing back as many laid-off teachers as possible.”³¹²

E. Furloughs

Furloughs—temporary, usually unpaid, leave—are popular compared to layoffs.³¹³ While some workers take the time off, others work through furloughs, out of fear of losing their jobs.³¹⁴ “[F]urloughs have become increasingly common in the public and private sectors as employers” search for ways to avoid layoffs.³¹⁵ During the 2008–09 recession, even if employees “avoid being laid off, many employers have [retrenched] in other ways, reducing employees’ hours, imposing furloughs, and even” reducing salaries.³¹⁶ The number of people working part-time has increased sharply during the recession.³¹⁷

Furloughs may be voluntary or involuntary.³¹⁸ For example, in Broward County, Florida, the sheriff “asked law enforcement and detention deputies to take voluntary furloughs” in order to avoid layoffs.³¹⁹

As for salaried workers, “[f]urlough rules are clear: [i]f . . . any work [is performed] at all during a week-long furlough—[even] answering an e-mail, . . . [the employee] is owed the entire week’s salary.”³²⁰

One furloughed-worker even “started a website called furloughhouseswap.com, where [the furloughed] can swap [houses] for a week in another city.”³²¹

Seventeen states have adopted “work-sharing,” under which “employers reduce their workers’ weekly hours and pay, often by 20 or 40 percent, and then states make up some of the lost wages, usually half, from their unemployment funds.”³²²

312. Patricia Mazzei, *Union Sues over Rehiring*, MIAMI HERALD, July 30, 2009, at B1.

313. Susan Saulny & Robbie Brown, *On a Furlough, but Never Leaving the Cubicle*, N.Y. TIMES, June 15, 2009, at A1.

314. *Id.*

315. Amy Sherman, *Wanted: Furlough Volunteers*, MIAMI HERALD, July 14, 2009, at B1.

316. Michael Luo, *Still Working, but Forced to Make Do with Less*, N.Y. TIMES, May 29, 2009, at A1.

317. *Id.*

318. *See* Sherman, *Wanted: Furlough Volunteers*, *supra* note 315.

319. *Id.*

320. Cindy Krischer Goodman, *The New F-word [Furloughs] Are Forcing Employees to Do the Unthinkable—Shut off from Work Completely*, MIAMI HERALD, Apr. 15, 2009, at C1.

321. *Id.*

322. Steven Greenhouse, *Out of Work, Part Time*, N.Y. TIMES, June 16, 2009, at B1.

Some of the biggest legal challenges faced by employers as a result of furloughs include: 1) its impact on exempt employees, i.e., salaried employees who get paid if they work twenty hours or sixty hours.³²³—if not careful, such employees may become “non-exempt employees” entitled to overtime; 2) whether to “force employees to use accrued vacation [or] make it optional;” 3) its impact on 401(k) plans; and 4) whether WARN Act notification duties are triggered.³²⁴

F. Tenure

In 2008, the chancellor of the Washington public schools proposed huge raises, up to “\$40,000, financed by private foundations, for teachers willing to give up tenure.”³²⁵

In 2009, the Florida Legislature considered a bill, HB 1411, which “would take teachers hired after July 1 five years, instead of three, to reach a less-protective tenure. . . . A tenured teacher would be limited to a five-year contract and could be [dismissed] without cause when it expires . . . [or] at any time if their students underachieve.”³²⁶

In 2009,

Florida Atlantic University professors . . . filed a formal complaint against the school, claiming the layoffs of tenured faculty members violate their union contract.

. . . .

Under the union contract, less-experienced faculty members must be laid off before tenured professors when they are all in the same program, or “lay off unit.”³²⁷

323. Amanda Bronstad, *Mandatory Employee Furloughs Carry a Long List of Legal Concerns for Employers*, NAT'L L.J., Feb. 25, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202428552132&slreturn=1&hblogin=1>.

324. *Id.*

325. Sam Dillon, *School Chief Takes on Tenure, and Stirs a Fight*, N.Y. TIMES, Nov. 13, 2008, at A1.

326. Associated Press, *Teaching Contracts New Teachers Could Get Less Job Security*, MIAMI HERALD, Apr. 8, 2009, at B8. By contrast, New York law bars “the use of student test scores in teacher tenure decisions.” Sam Dillon, *Administration Takes Aim at State Laws on Teachers*, N.Y. TIMES, July 24, 2009, at A11.

327. Kimberly Miller, *Four FAU Professors Challenging Layoffs*, MIAMI HERALD, June 30, 2009, at B5.

V. EMPLOYMENT DISCRIMINATION

A. *Generally*

In 2008, charges of age discrimination rose by 28.7 percent (24,582 claims); allegations of race discrimination rose by 11 percent; retaliation claims rose 22.6 percent; and sex discrimination claims rose 14 percent.³²⁸

In 2009, the Supreme Court ruled in *Pearson v. Callahan*³²⁹ that the two-step analysis, required in *Saucier v. Katz*,³³⁰ for assessing whether defendants in a civil rights action are entitled to qualified immunity,³³¹ is flexible.³³² Courts need not always start by settling whether a constitutional violation occurred, but may begin the inquiry by asking whether the alleged right was clearly established at the time.³³³

Under proposed federal legislation, the Civil Rights Act of 2008, the damage caps under Title VII would be removed.³³⁴

B. *Affirmative Action*

In 2009, in *Ricci v. DeStefano*,³³⁵ the Supreme Court set a new rule of law on when an employer can intentionally discriminate to avoid a lawsuit.³³⁶ Ruling in favor of white firefighters, the Court concluded the city violated Title VII by throwing out the results of tests used for firefighter promotions because minorities did not make the cut.³³⁷ The Court made it clear that the city's fear of a disparate impact lawsuit was an insufficient basis for discarding the test results, thereby relying on race to the detriment of successful test-takers.³³⁸

“To avoid charges of discrimination, many cities have already been moving away from such tests in favor of other methods of hiring and promot-

328. Sam Hananel, *Complaints of Job Bias Hit a Record*, MIAMI HERALD, Mar. 12, 2009, at C6.

329. 129 S. Ct. 808 (2009).

330. 533 U.S. 194 (2001).

331. *See id.* at 201.

332. *Pearson*, 129 S. Ct. at 818.

333. *Id.* at 819 (quoting *Motley v. Parks*, 432 F.3d 1072, 1078 (2005)).

334. Phillips, *supra* note 114, at 6.

335. 129 S. Ct. 2658 (2009).

336. *See id.* at 2681.

337. *Id.*

338. *Id.*

ing employees in places like fire and police departments. They say written tests are often not the best way to determine who can perform best.”³³⁹

In 2009, fifty advocacy groups “asked President Barack Obama to issue an executive order . . . encourag[ing] the hiring and training of minorities, women, and low-income residents to work on federal construction projects, [specifically] those funded by the economic stimulus package.”³⁴⁰

“A plan to devote construction contracts from a new ballpark to black-owned businesses fell apart . . . because [the] Miami-Dade County Attorney . . . said the pact would violate court rulings prohibiting governments from awarding contracts based on race.”³⁴¹

C. Gender, Same-Sex, Transsexuals, and Pregnancy Discrimination

In 2009, in *Fitzgerald v. Barnstable School Committee*,³⁴² the Supreme Court ruled that Title IX does not preclude filing a gender discrimination suit under the equal protection clause against a school system under the federal civil rights damages statute, 42 U.S.C. § 1983.³⁴³

In 2009, in *AT&T Corp. v. Hulteen*,³⁴⁴ the Supreme Court resolved a circuit court split over whether an employer violated the Pregnancy Discrimination Act (PDA) by calculating a woman’s current retirement benefits based on the employer’s pre-PDA practice of denying service credit for pregnancy leave.³⁴⁵ The Court rejected arguments that the PDA applied retroactively.³⁴⁶

A federal district court in Florida ruled that an employer unlawfully fired a worker in retaliation for filing a charge of gender and pregnancy discrimination under the participation clause of the Florida Civil Rights Act.³⁴⁷

Florida state courts and federal district courts in Florida are split over whether the Florida Civil Rights Act encompasses pregnancy discrimina-

339. Steven Greenhouse, *For Employers, Ruling Offers Little Guidance on How to Make Their Hiring Fair*, N.Y. TIMES, June 30, 2009, at A13.

340. Tony Pugh, *Diversity Sought in Stimulus Hiring*, MIAMI HERALD, Apr. 9, 2009, at C3.

341. Jack Dolan & Charles Rabin, *Race-Based Deal Crumbles*, MIAMI HERALD, Mar. 18, 2009, at B5. In 2008, “[i]n Nebraska, a proposed ban on affirmative action passed easily with nearly 58 percent of the vote. But in Colorado, a nearly identical proposal was narrowly rejected, marking the first time a state’s voters chose to retain such preferences.” Dan Frosch, *Vote Results Are Mixed on a Ban on Preference*, N.Y. TIMES, Nov. 9, 2008, at A19.

342. 129 S. Ct. 788 (2009).

343. *Id.* at 797.

344. 129 S. Ct. 1962 (2009).

345. *Id.* at 1973.

346. *Id.* at 1971.

347. *See Carter v. Health Mgmt. Assocs.*, 989 So. 2d 1258, 1266 (Fla. 2d Dist. Ct. App. 2008).

tion.³⁴⁸ In *Carsillo v. City of Lake Worth*,³⁴⁹ the state court concluded in the affirmative.³⁵⁰ By contrast, a federal district court, in *Boone v. Total Renal Laboratories, Inc.*,³⁵¹ ruled that the Florida law does not cover pregnancy discrimination.³⁵²

A federal district court in Florida ruled that “offensive language need not . . . be targeted at the plaintiff in order to support a claim of hostile workplace environment” sexual harassment.³⁵³

In *Scott v. Publix Supermarkets*,³⁵⁴ the court found that the plaintiff did not put her employer on notice regarding sexual harassment but allowed the case to go to trial on the issue of whether denial of a transfer request constitutes an adverse employment action.³⁵⁵

In 2009, more than one hundred female employees filed a lawsuit against Florida’s Department of Corrections, “alleging they were subject to constant sexual harassment from male inmates.”³⁵⁶ “The Corrections Department changed its rules . . . [in 2008] to make the intentional exposing of genitals or masturbating by an inmate subject to 60 days in disciplinary confinement and the loss of 90 days of gain time.”³⁵⁷

In 2009, “[a] bipartisan group of U.S. representatives . . . introduced legislation that would make it illegal for employers to discriminate on the basis of sexual orientation or gender identity.”³⁵⁸ At present, discrimination on the basis of sexual orientation or gender identity “is legal in 30 states based on sexual orientation and in 38 states based on gender identity.”³⁵⁹

Lake Worth and Palm Beach County added provisions to their anti-discrimination codes that “prevent discrimination based on gender identity,”

348. *Id.* at 1265–66.

349. 995 So. 2d 1118 (Fla. 4th Dist. Ct. App. 2008).

350. *Id.* at 1121.

351. 565 F. Supp. 2d 1323 (M.D. Fla. 2008).

352. *Id.* at 1327. While pregnancy discrimination is actionable under Title VII, in this case plaintiff’s Title VII claim was time-barred. Defendant’s Motion to Dismiss & Alternative Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 12(b)(6) at 4; *Boone*, 565 F. Supp. 2d at 1323.

353. *Blizzard v. Appliance Direct, Inc.*, 34 Fla. L. Weekly D1604, D1606 (5th Dist. Ct. App. 2009).

354. No. 07-60624-CIV, 2008 WL 2940672 (S.D. Fla. July 28, 2008).

355. *Id.* at *7, *9.

356. Alex Leary, *Female Prison Employees Sue Over Inmates’ Sexual Harassment*, MIAMI HERALD, Mar. 20, 2009, at B6.

357. *Id.*

358. Steve Rothaus, *Bill Tackles Discrimination at Work*, MIAMI HERALD, June 25, 2009, at A3.

359. *Id.*

following the firing of the former Largo city manager for undergoing a sex change.³⁶⁰

D. Age Discrimination

In 2009, in *Gross v. FBL Financial Services, Inc.*,³⁶¹ the Supreme Court made it substantially harder for employees to win age discrimination claims by ruling that employees bringing disparate treatment claims under the Age Discrimination in Employment Act (ADEA) must prove “that age was the ‘but-for’ cause of the . . . adverse employment action.”³⁶² The Court made it clear that, unlike Title VII disparate treatment cases where employees need only prove that illegal bias was just a motivating factor,³⁶³ the ADEA bars discrimination “‘because of’” the employee’s age,³⁶⁴ which means “‘by reason of [or] on account of.’”³⁶⁵ In essence, the *Price Waterhouse v. Hopkins*³⁶⁶ burden-shifting framework for mixed-motive cases under Title VII does not apply to ADEA cases.³⁶⁷

In 2009, the EEOC issued a technical assistance document aimed at helping employees and employers understand the rules governing waivers of ADEA claims, including a checklist for employees to consult before signing a waiver as well as a sample release for employers.³⁶⁸

E. Disability Discrimination

In 2009, the EEOC approved a rule implementing the 2008 Americans with Disabilities Act Amendments Act,³⁶⁹ which overturned four United States Supreme Court rulings that Congress concluded had misread the ADA

360. Willie Howard, *A Transgender Triumph*, MIAMI HERALD, Apr. 9, 2009, at B5.

361. 129 S. Ct. 2343 (2009).

362. *Id.* at 2352.

363. *Id.* at 2349.

364. *Id.* at 2350 (quoting 29 U.S.C. § 623(a)(1) (2006)).

365. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966)).

366. 490 U.S. 228 (1989).

367. *Gross*, 129 S. Ct. at 2351–52; see *Mora v. Jackson Mem’l Found., Inc.*, 21 Fla. L. Weekly Fed. D407, D411 (S.D. Fla. Sept. 26, 2008) (“Age discrimination claims” under Florida’s Civil Rights Act “are analyzed under the same framework as ADEA claims.”).

368. See U.S. Equal Employment Opportunity Commission, *Understanding Waivers of Discrimination Claims in Employment Severance Agreements*, http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html (last visited Nov. 7, 2009).

369. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 1, 122 Stat. 3553, 3553 (2008) (codified in scattered sections of 29 and 42 U.S.C.).

and unduly restricted the statute's coverage.³⁷⁰ Among other things, the new rule "identifies impairments that 'will obviously be "substantially limiting,"' including cancer, diabetes, HIV/AIDS, major depression, post-traumatic stress disorder, and schizophrenia."³⁷¹

In 2009, the EEOC issued guidelines on how employers should handle a possible swine flu pandemic without violating the ADA.³⁷² Under the guidelines, an employer may require new hires to submit to a medical exam to determine exposure to the flu virus after extending a conditional job offer, but before the new hire begins work, so long as all new employees in the same job class face the same examination.³⁷³ Employees may also be required to wear personal protective gear, subject to the right of reasonable accommodations.³⁷⁴

The Second, Seventh, Tenth, and Eleventh Circuits have ruled that driving is not a major life activity under the ADA.³⁷⁵ In 2009, the Eleventh Circuit ruled that the U.S. Marshals Service's (USMS) ban on the use of hearing aids by court security officers during mandatory hearing tests did not violate the ADA because the USMS established that the ban was both job-related and a business necessity.³⁷⁶

370. See ADA Amendments Act of 2008 §§ 3–4. The 2008 ADA Amendments Act rejected the United States Supreme Court's interpretation of "disability" in the ADA in *Sutton v. United Air Lines* and *Toyota Motor Manufacturing v. Williams*. See *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 187, 195–98 (2002); *Sutton v. United Airlines*, 527 U.S. 471, 481–82 (1999).

371. EEOC Clears Notice of Proposed Rule Interpreting the ADA Amendments Act, 77 U.S.L.W. 2780, 2781 (June 23, 2009) (quoting Christopher Kuczynski, EEOC assistant legal counsel and director of EEOC's Office of Legal Counsel's ADA policy division).

372. U.S. Equal Employment Opportunity Commission, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, http://www.eeoc.gov/facts/pandemic_flu.html (last visited Nov. 7, 2009) [hereinafter *Pandemic Preparedness*].

373. *Id.*

374. *Id.*

375. *E.g.*, *Winsley v. Cook County*, 563 F.3d 598, 603 (7th Cir. 2009) (nurse with excessive absenteeism after being diagnosed with a stress disorder following a car accident that made her anxious about driving had no ADA claim) (citing *Kellog v. Energy Safety Serv. Inc.*, 544 F.3d 1121, 1126 (10th Cir. 2008); *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329–30 (11th Cir. 2001); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998)).

376. *Allmond v. Akal Sec., Inc.*, 558 F.3d 1312, 1317 (11th Cir. 2009). Plaintiff's proposed reasonable accommodation, removing the ban, was not reasonable given public safety concerns. *Id.* at 1318.

F. Genetic Discrimination

In 2008, the Genetic Information Non-Discrimination Act (GINA)³⁷⁷ was signed into law, prohibiting employment discrimination based on the genetic information of an individual and his or her family members.³⁷⁸ GINA prohibits employers from obtaining or disclosing such information.³⁷⁹ The Act's coverage, enforcement, and remedial provisions mirror those under Title VII and the Americans with Disabilities Act, as amended by the 1991 Civil Rights Act.³⁸⁰ GINA took effect on Nov. 21, 2009.³⁸¹ Unlike Title VII, however, GINA expressly rules out disparate impact claims.³⁸²

In 2009, the EEOC published a proposed rule that incorporates references to GINA into some of the EEOC's existing regulations that cover procedures under Title VII and the ADA.³⁸³

G. Religion

A "midnight" regulation issued by the Department of Health and Human Services in December 2008, aimed at barring bias against providers who prefer not to supply emergency contraceptives and other reproduction services to women, was challenged as unconstitutional.³⁸⁴

In 2009, the Department of Health and Human Services published a proposal to rescind a regulation barring employment discrimination against health care workers who refuse to provide abortion-related services owing to religious objections.³⁸⁵

377. Genetic Information Non-Discrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (to be codified at 42 U.S.C. §§ 2000ff–2000ff11).

378. *Id.* § 203(a).

379. *Id.* § 203(b).

380. *See id.* § 20711

381. *See id.* § 213.

382. Genetic Information Non-Discrimination Act of 2008 § 208(a).

383. *See* Amendment of Procedural and Administrative Regulations to Include the Genetic Information Nondiscrimination Act of 2008 (GINA), 74 Fed. Reg. 23,674, 23,674 (May 20, 2009) (to be codified at 29 C.F.R. pts. 1601, 1602, 1603, 1607, 1610, 1611, 1614, 1625, 1690).

384. Complaint for Declaratory & Injunctive Relief at 4–5, *Connecticut v. United States*, No. 09-CV-54 (D. Conn. Jan. 16, 2009).

385. Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law"; Proposal, 74 Fed. Reg. 10207, 10208–09 (proposed Mar. 10, 2009) (to be codified at 45 C.F.R. pt. 88).

In *Equal Employment Opportunity Commission v. Papin Enterprises, Inc.*,³⁸⁶ the court rejected the employer's claim that it need not reasonably accommodate an employee's religiously-based right to wear a nose ring on food safety grounds.³⁸⁷

H. Remedies

In 2009, in *14 Penn Plaza, L.L.C. v. Pyett*,³⁸⁸ the Supreme Court ruled "that a collective-bargaining agreement that clearly and unmistakably requires" employees to arbitrate claims under the ADEA is enforceable.³⁸⁹

Under proposed federal legislation, the Civil Rights Act of 2008, the Federal Arbitration Act would be amended to bar "clauses requiring arbitration of federal constitutional or statutory claims (unless an employee knowingly and voluntarily consents to this clause after a dispute has arisen), as part of a [collective bargaining agreement], or after a dispute has arisen."³⁹⁰ Under proposed federal legislation, the Arbitration Fairness Act of 2009, the Federal Arbitration Act would be amended "to invalidate all predispute arbitration agreements that require the arbitration of employment disputes or any conflict arising under any statute intended to protect civil rights."³⁹¹

In *Board of Trustees of Florida State University v. Esposito*,³⁹² a Florida court concluded that the Florida Civil Rights Act limits damage awards against the state to \$100,000,³⁹³ but the twenty-five percent attorney's fee limitation does not apply to claims against the state.³⁹⁴

VI. CONCLUSION

This survey dipped into a wide array of public employment issues emerging in 2008–09. Every stage of employment, from hiring, to the terms of employment, to discipline and retaliation against whistle-blowers, to employment discrimination, has witnessed a flurry of activity at the federal,

386. *Equal Employment Opportunity Comm'n v. Papin Enters., Inc.*, No. 6:07-cv-1548-Orl-28GJK (M.D. Fla. July 28, 2009) (order denying injunctive relief and punitive damage).

387. *See id.* at 2, 8.

388. 129 S. Ct. 1456 (2009).

389. *Id.* at 1474.

390. Phillips, *supra* note 114, at 6.

391. *Supreme Court Affirms Arbitration for Union Member Discrimination Claims*, FLA. EMP. L. LETTER, May 2009, at 3.

392. 991 So. 2d 924 (Fla. 1st Dist. Ct. App. 2008).

393. *Id.* at 927–28 (citing *Gallagher v. Manatee County*, 927 So. 2d 914, 917 (Fla. 2d Dist. Ct. App. 2006)).

394. *Id.* at 927.

state, and local levels. As evidenced by the countless citations to new articles, public sector employment issues draw high-profile media attention, and news stories (whether found in newspapers or on the Internet) provide a wealth of insight and supplement the usual source of legal precedent: constitutional, statutory, regulatory, administrative, and the common law.