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2007-2008 Survey of Florida Public Employment Law

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2007–2008 SURVEY OF FLORIDA PUBLIC EMPLOYMENT LAW

JOHN SANCHEZ*

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I. INTRODUCTION

This survey examines the key developments in constitutional, statutory, regulatory, administrative, and case law governing public employment in Florida during 2007–08. Part II looks at such hiring issues as privatization, background checks, nepotism, immigration, ethics, budget cuts, negligent hiring, and the Hatch Act among others. Part III, Terms of Employment, covers an array of issues, such as hours and wages, health benefits, workers' compensation, unemployment compensation, public pensions, safety issues, the internet, and post-employment restrictions. Part IV addresses legal issues involving discipline, retaliation against whistleblowers, the First Amendment, and remedies. Finally, Part V, Employment Discrimination, surveys the major developments in the past year involving bias on grounds of race, gender, age, disability, religion, and military service. Part VI ends with a roundup of employment discrimination remedies.

II. HIRING ISSUES

A. *Hiring Veterans*

The Department of Labor runs a Web campaign, HireVetsFirst, aimed at raising “employer awareness about the value of hiring veterans.”¹ Despite

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1. Jennifer C. Kerr, *Congress Aims to Improve Veterans Job Assistance*, MIAMI HERALD, Oct. 18, 2007, at 5A.

this effort, veterans groups criticized “a veterans outreach program” that allots \$161 million to states to help vets find employment as substandard.² In 2008, the United States Senate approved a bill that “would help civilian employers keep jobs available for [employees] called to active military duty.”³ In 2007, the Office of Federal Contract Compliance Programs promulgated a rule putting into effect the 2002 Jobs for Veterans Act,⁴ which directs federal contractors not to discriminate against, and to take affirmative action to hire military veterans.⁵

B. *Privatization*

Privatization, the conversion of governmental agencies into private entities,⁶ continued to fuel controversy over the past year in Florida. “For years, state and local governments have been privatizing certain functions, such as trash collection, payroll processing and road maintenance.”⁷ Now, “15 or so [United States] municipalities . . . have outsourced their libraries,” and critics charge that this development constitutes “a backdoor method of union-busting.”⁸ Moreover, “workers will lose the right to participate in [the public] pension system for public employees and instead will qualify for a 401(k) program.”⁹

The Miami-Dade Housing Agency faced “a range of financial and management scandals” since 2006, leading to a “9-month-old federal takeover” of the troubled agency.¹⁰ But under a deal brokered between the federal government and the county, the United States Department of Housing and Urban Development will end its control if the county agrees “to privatize management of the multimillion-dollar rental-assistance program.”¹¹ Again, critics complain that privatizing the agency will free it “of many of the government

2. *Id.*

3. Robert Pear, *Veterans' Benefits Bill Wins Approval in Senate*, N.Y. TIMES, May 23, 2008, at A20 [hereinafter Pear, *Veterans' Benefits Bill*].

4. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Disabled Veterans, Recently Separated Veterans, Other Protected Veterans, and Armed Forces Service Medal Veterans, 72 Fed. Reg. 44,393, 44,393 (Aug. 8, 2007) (to be codified at 41 C.F.R. pt. 60–300).

5. *Id.* at 44,398–99.

6. BLACK'S LAW DICTIONARY 1234 (8th ed. 2004).

7. Julia Silverman, *Some Cash-Strapped Cities Are Privatizing Libraries*, MIAMI HERALD, Oct. 7, 2007, at 10A.

8. *Id.*

9. *Id.*

10. Matthew I. Pinzur, *U.S. Easing Grip on Dade HUD*, MIAMI HERALD, July 15, 2008, at 1A.

11. *Id.*

regulations, as well as the county pay scale, benefits and employment protections.”¹²

In 2007, Broward County “trimmed expenses by privatizing park ranger positions.”¹³ In addition, “Broward County Transportation plans to privatize a handful of bus routes.”¹⁴ As a result of budget cuts, Florida International University plans to “outsource services such as construction management, real estate development and e-mail support.”¹⁵

C. *Background Checks on Employees*

The Census Bureau announced “that it would fingerprint and [undertake] background checks on . . . [500,000] temporary workers who will go door to door for the 2010 [census] count” to weed out criminals.¹⁶ In 2008, a United States House subcommittee held hearings on a measure that would force states to provide specified “state criminal history information to employers of security guards.”¹⁷

The National Association of State Directors of Teacher Education and Certification has compiled a “nationwide list of 24,500 teachers who have been” disciplined for a wide range of misconduct.¹⁸ The “list is the only nationwide” attempt by school districts to weed out “teachers who get into trouble,” but the public is denied access to it.¹⁹

In 2008, Florida’s Department of Children & Families (DCF) “outlined plans to better scrutinize the agency’s 13,500 employees” after “a shocking arrest of a DCF employee,” in which the agency failed to discover he had “a DUI arrest in Georgia and an outstanding warrant for his arrest . . . in Texas.”²⁰ In response, DCF will be fingerprinting “all employees hired after November [6], 2006 . . . as part of a more thorough background check.”²¹ In a similar vein, “Miami-Dade County’s rules for issuing chauffeur’s licenses”

12. *Id.*

13. Amy Sherman, *Deeper Broward Cuts Loom*, MIAMI HERALD, Nov. 8, 2007, at 1B.

14. *Id.*

15. Oscar Corral, *FIU Planning Layoffs to Save Money*, MIAMI HERALD, Apr. 16, 2008, at 1B.

16. *Census Workers to Be Fingerprinted*, N.Y. TIMES, June 12, 2008, at A22.

17. *Many States Not Implementing Checks on Security Guards’ Backgrounds*, *Panel Told*, 76 U.S.L.W. 2519, 2519 (2008).

18. Robert Tanner, *Paper Puts List of ‘Problem’ Teachers Online*, MIAMI HERALD, Dec. 22, 2007, at 8B.

19. *Id.*

20. Carol Marbin Miller, *DCF Will Fingerprint Its Workers*, MIAMI HERALD, Feb. 5, 2008, at 6B.

21. *Id.*

came under scrutiny after learning that “a man who’d killed his grandmother was granted a permit to drive a cab.”²² As a result, “the Consumer Services Department has reassigned the staffer who backgrounded” the cabbie, who was once found unfit for trial by reason of insanity, “[a]nd it is rechecking the backgrounds of the county’s 4200 cab drivers.”²³ The Department also set up “an emergency-only paging system” by which wayward cabbies can have their licenses pulled immediately.²⁴

About seventy percent of employers check applicants’ credit scores “before they decide to hire a candidate.”²⁵ “The fear is that credit problems at home create tension and distraction at work”²⁶ Moreover, employers do not relish having to garnish employee’s wages, sought by creditors, after workers fall behind in their bills.²⁷

D. *Nepotism*

Florida’s Anti-Nepotism Law generally prohibits public employers from hiring members of their families or other relatives.²⁸ In 2008, “[t]he Miami-Dade School Board’s Ethics Advisory Committee . . . proposed a new nepotism policy that would make it more difficult for employees to indirectly supervise their relatives.”²⁹ The Committee framed three recommendations: “1) All employees must disclose relatives employed anywhere in the school system; 2) [d]istrict employees cannot . . . oversee a relative without School Board approval; [and 3) f]ailure to disclose should result in penalties up to and including dismissal.”³⁰

News accounts of preferential treatment, that a “Fort Lauderdale police chief’s wife” received from prosecutors, was incorrectly referred to as nepotism after she was not charged with attempted murder for shooting—but missing—“her husband in their home.”³¹ Instead of nepotism, a criminal law

22. Erika Beras, *Chauffeur Licenses Reviewed*, MIAMI HERALD, Mar. 9, 2008, at 3B.

23. *Id.*

24. *Id.*

25. Julie Sturgeon, *Weak Credit Raises Bills, Threatens Jobs and More*, MIAMI HERALD, July 13, 2008, at 1E.

26. *Id.*

27. *See generally id.*

28. FLA. STAT. §§ 112.3135(2)(a), 760.10(8)(d) (2008).

29. Kathleen McGrory, *Limitations Proposed on School Nepotism*, MIAMI HERALD, Apr. 30, 2008, at 6B.

30. *Id.*

31. Adam H. Beasley & Jennifer Mooney Piedra, *Police Chief’s Wife Coddled, Critics Say*, MIAMI HERALD, July 11, 2008, at B1.

professor more accurately labeled the preferential treatment “a matter of classism.”³²

E. Immigration

1. Federal Developments

a. E-Verify

E-Verify is a voluntary federal program that allows employers to confirm “electronically their newly hired employees’ legal [eligibility] to work in the United States.”³³ In the past year alone, use of the Web-based system grew from 14,265 to 52,000 employers.³⁴ The growth of E-Verify was most pronounced “in Arizona, where a new state law” forces employers to use the system.³⁵ By contrast, Illinois passed a law barring employers from using E-Verify “over questions about its accuracy.”³⁶ In response, the Bush Administration sued Illinois to enjoin the state from implementing its ban on employer use of E-Verify.³⁷ The suit claims that the Illinois law is preempted by federal immigration law.³⁸ In 2008, Virginia employers defeated bills forcing all employers to take part in the E-Verify program.³⁹

E-Verify “matches photographs from green cards and other immigrant work permits against a database of” over 14 million pictures.⁴⁰ Currently, the federal government is drafting “regulations that would require all new federal contractors to use the E-Verify system.”⁴¹ Under the system, “[i]f an employee’s photo doesn’t match, the company has eight days to report the discrepancy to the Department of Homeland Security, which investigates within two days.”⁴² In June 2008, by executive order, federal contractors are forced

32. *Id.*

33. Randal C. Archibold, *U.S. Program to Verify Worker Status Is Growing*, N.Y. TIMES, Feb. 13, 2008, at A19 [hereinafter Archibold, *Worker Status Growing*].

34. *Id.* By June 2008, the number had grown to 69,000 employers. Mickey McCarter, *E-Verify Faulted for Lack of Resources, Protections*, HOMELAND SEC. TODAY, June 11, 2008, available at http://www.hstoday.us/index2.php?option=com_content&do_pdf=1&id=3746.

35. Archibold, *Worker Status Growing*, *supra* note 33.

36. *Id.*

37. Julia Preston, *U.S. Sues Illinois to Let Employers Use Immigrant Databases*, N.Y. TIMES, Sept. 25, 2007, at A18 [hereinafter Preston, *U.S. Sues Illinois*].

38. *Id.*

39. Julia Preston, *Employers Fight Tough Measures on Immigration*, N.Y. TIMES, July 6, 2008, at A1 [hereinafter Preston, *Employers Fight*].

40. Eunice Moscoso, *New Tool Verifies Workers*, MIAMI HERALD, Sept. 26, 2007, at 1C.

41. *Id.*

42. *Id.*

to use E-Verify, “greatly expanding the reach of the administration’s crack-down on employers who hire illegal immigrants.”⁴³ Critics of E-Verify allege that the system is “vulnerable to cheating by immigrants who used real identity documents belonging to other people.”⁴⁴ Already, a “separate rule proposed by the administration that would use the Social Security database to verify immigration status has been blocked by a federal court in San Francisco.”⁴⁵

In 2007, the Department of Homeland Security issued a final rule expanding the definition of “constructive knowledge” of an employee who has provided a fake Social Security number and spells out what steps employers should take in response to no-match letters issued by the Social Security Administration.⁴⁶

In 2007, the United States Citizenship and Immigration Services revised its Employment Eligibility Verification Form, I-9, to implement a rule that modified the types of documents a new hire must hand to an employer in order to prove identity and employment eligibility.⁴⁷

b. *Harsher Penalties Against Employers and Illegal Workers*

One telling index illustrates the growing anti-immigration climate in the United States: Fewer immigrants “are sending money home, and many cite increased difficulties in finding well-paying jobs and mounting discrimination.”⁴⁸ At the same time, “those who do send money home, now send more, an average of \$325 per remittance compared to \$300 in 2006.”⁴⁹ “[P]roponents of stricter immigration enforcement,” however, point to the slower growth of remittances as evidence “that the policies tightening what was once a virtual open door to immigration are working.”⁵⁰

43. Julia Preston, *Bush Orders Contractors to Vet Status of Workers*, N.Y. TIMES, June 10, 2008, at A11.

44. *Id.*

45. *Id.* A California federal district court extended an injunction preventing the federal government from warning employers that they could incur liability for civil and criminal violations of immigration law if, after finding out an employee’s Social Security number does not match government databases, they do not quickly unravel the discrepancy. *Am. Fed’n of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1002, 1005 (N.D. Cal. 2007).

46. *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter*, 72 Fed. Reg. 45,611, 45,612–13 (Aug. 15, 2007).

47. U.S. DEP’T OF HOMELAND SEC., *EMPLOYMENT ELIGIBILITY VERIFICATION, FORM I-9* (2007), available at <http://www.uscis.gov/files/form/I-9.pdf>.

48. Jane Bussey, *Sending Less Money Home*, MIAMI HERALD, May 1, 2008, at 1C.

49. *Id.*

50. *Id.*

In 2008, the federal government announced it would “increase fines against employers who hire illegal immigrants by 25 percent, the first hike in almost a decade.”⁵¹ Plans are also being drafted “to increase criminal penalties against ‘the most egregious employer offenders.’”⁵² “The fines for employers caught knowingly hiring illegal immigrants now range from \$275 to \$11,000.”⁵³ Not all stricter immigration laws, however, have withstood judicial scrutiny. For example, in August of 2007, “a federal judge in San Francisco temporarily held up a new federal rule that would have forced employers to dismiss illegal immigrants after 90 days.”⁵⁴ The “92 criminal arrests of employers still amount to a drop in the bucket of a national economy that includes [six] million companies that employ more than [seven] million unauthorized workers.”⁵⁵

By contrast to the harsher penalties surveyed above, on November 16, 2007, the United States Immigration and Customs Enforcement Agency issued guidelines spelling out “best practices” for agents to follow to identify undocumented workers arrested during worksite enforcement actions who are sole caregivers or have other pressing humanitarian concerns.⁵⁶

c. *Visa Program for Seasonal Farm Workers*

The federal visa program for seasonal farm workers, the H-2A visa program, has been increasingly tapped by farmers despite “its reputation for being bureaucratic and expensive” thanks to “[c]ompetition for unskilled labor” and the crackdown on illegal immigrants.⁵⁷ States have taken the lead with “programs to help farmers get visas for workers . . . [after] Congress failed to pass immigration legislation” in 2007.⁵⁸ “Unlike other visa programs, there’s no cap on the number of temporary agricultural visas”⁵⁹ But the H-2A program fills only a fraction of farmers’ needs and seventy

51. Eunice Moscoso, *Employer Fines Increasing*, MIAMI HERALD, Feb. 23, 2008, at 2C.

52. *Id.*

53. *Id.*

54. Preston, *U.S. Sues Illinois*, *supra* note 37.

55. Spencer S. Hsu, *Bosses Elude Worker Crackdown*, MIAMI HERALD, Dec. 26, 2007, at 3A.

56. Press Release, Kennedy, Delahunt Announce New Guidelines for Immigration Raids (Nov. 16, 2007), http://kennedy.senate.gov/newsroom/press_release.cfm?id=0F91969E-96EB-4AB1-832B-2CF42451B587.

57. Emily Bazar, *Farmers Find Help Getting Workers’ Visas*, USA TODAY, July 3, 2008, at 3A.

58. *Id.*

59. *Id.* In 2007, “the State Department issued 50,791 of the H-2A visas.” *Id.*

percent “of hired help on farms” are illegal immigrants.⁶⁰ Before qualifying for the H-2A program, an employer must “advertise locally to prove the positions [cannot] be filled by U.S. workers.”⁶¹ Once an application is approved, “a farmer is required to provide the workers with transportation to the U.S. and housing.”⁶² The United Farm Workers union “has agreements with Mexico and Thailand to streamline immigrants’ paperwork.”⁶³ The Department of Labor announced on July 3, 2007, steps for obtaining H-2B visas for temporary foreign workers for tree planting and reforestation jobs.⁶⁴

An employer group, “Colorado Employers for Immigration Reform, is pressing Congress for a much larger and more flexible guest worker program.”⁶⁵ Legislators in Arizona took up a bill, that “would have been the first state guest worker program in the country.”⁶⁶

d. *Border Security*

Under Operation Jump Start, a two-year federal program, 6000 National Guard members “in Arizona, California, New Mexico, and Texas . . . help[ed] to secure the border with Mexico.”⁶⁷ Although the program is set to end July 15, 2008, “an effort is intensifying to have [the National Guard] stay put.”⁶⁸ While the Border Patrol aims at doubling its size to 18,000 agents by the end of 2008, state and federal officials worry that the agency will not meet its target.⁶⁹ Moreover, work on a “virtual fence, a suite of cameras, radars and other technology . . . has been plagued with delays and glitches.”⁷⁰ Since the 6000 National Guard members have been deployed at the border, there has been “a 39 percent drop in arrests for illegal border crossings.”⁷¹

60. *Id.*

61. Bazar, *supra* note 57.

62. *Id.*

63. *Id.*

64. See Special Guidelines for Processing H-2B Temporary Labor Certification in Tree Planting and Related Reforestation Occupations, 72 Fed. Reg. 36,337, 36,504 (July 3, 2007).

65. Preston, *Employers Fight*, *supra* note 39.

66. *Id.*

67. Randal C. Archibold, *Second Thoughts on Pulling the Guard from the Border*, N.Y. TIMES, June 12, 2008, at A17.

68. *Id.*

69. See *id.*

70. *Id.*

71. *Id.*

2. State and Local Activity

a. Legislation

In 2008, over “1100 immigration-related bills” were introduced in forty-four states and new laws went into effect in twenty-six states.⁷² In Florida alone, “[t]hirteen bills were introduced” in 2008 dealing with immigration.⁷³ The states seized “the initiative on immigration [in 2007] when Congress abandoned an immigration overhaul pushed by President Bush.”⁷⁴ While some of the legislation includes pro-immigration measures, most clamp down on “immigrant access to services and employment.”⁷⁵ Besides bills forcing employers to use the E-Verify system, many toughened employer sanctions for hiring undocumented workers.⁷⁶ For example, a new law in Arizona would “suspend or revoke business licenses of employers who ‘knowingly’ hire illegal immigrants.”⁷⁷ In 2008, employers won approval in the Arizona Legislature of a measure aimed at narrowing the law to exclude workers hired before 2008.⁷⁸ Immigration bills died in Indiana and Kentucky “in part to warnings from business groups that the measures could hurt the economy.”⁷⁹

In 2008, Mississippi became “the first state to make it a felony for an illegal immigrant to work. The measure also allows terminated employees to sue their employer if they were replaced by an illegal immigrant.”⁸⁰

In the last decade, “over three million new residents settled in Florida;” one-third of them were immigrants.⁸¹ Critics of immigration claim that this influx of immigrants to Florida “is bringing traffic, pollution, overcrowded

72. Dave Montgomery, *States Forge Ahead with Sanctions*, MIAMI HERALD, Apr. 24, 2008, at 3A [hereinafter Montgomery, *States Forge Ahead*]. In 2007, 1562 immigration bills “were introduced in state legislatures . . . and 244 became law.” Julia Preston, *In Reversal, Courts Uphold Local Immigration Laws*, N.Y. TIMES, Feb. 10, 2008, at A22 [hereinafter Preston, *Reversal*].

73. John P. Horan, *Florida Immigration Legislation: From “Fixing Stupid” to “Dumb and Dumber,”* SE. CONSTR., June 2008, at 63.

74. Montgomery, *States Forge Ahead*, *supra* note 72.

75. *Id.*

76. *See id.*

77. Paul Gibling, *Immigration Raid in Arizona Could Test New State Law*, N.Y. TIMES, June 12, 2008, at A19.

78. Preston, *Employers Fight*, *supra* note 39.

79. *Id.*

80. *Id.*

81. Federation for American Immigration Reform (FAIR), *Immigration in Florida*, http://www.fairus.org/site/PageServer?pagename=research_focus3cd6_sup (last visited Nov. 9, 2008).

schools, and lack of affordable housing to the state, decreasing quality of life and straining natural resources.”⁸²

A Haitian-American immigrant organization near Fort Lauderdale, Florida, was being investigated for representing Haitian and other Caribbean immigrants from other states that they could obtain work permits and amnesty if they “paid a \$450 application fee to obtain a Social Security card and a work permit.”⁸³

b. *Judicial Challenges*

In response to the toughest crackdown “in two decades, employers . . . are fighting back in state legislatures, the federal courts and city halls.”⁸⁴ While courts, by and large, in 2007, struck down “state and local laws cracking down on illegal immigration,” several significant federal court decisions have sustained such laws in 2008.⁸⁵ For example, a federal court in Arizona refused to enjoin “what is widely considered the nation’s toughest law against employers who hire illegal immigrants.”⁸⁶ After a trial on the merits, the court rejected plaintiffs’ claims “that the Arizona law invaded legal territory belonging exclusively to the federal government.”⁸⁷ Similarly, a federal district judge in Missouri upheld a local ordinance cracking down on “employers of illegal immigrants.”⁸⁸

By contrast, in 2007, a federal court in Pennsylvania ruled that a local ordinance bolstering sanctions on employers who hired illegal immigrants was preempted by federal immigration law and “violated the due process rights of employers.”⁸⁹

3. Employment Rights of Undocumented Workers

Paradoxes emerge when courts try to reconcile two seemingly conflicting federal labor laws: the 1986 Immigration Reform and Control Act

82. *Id.*

83. US Immigration Lawyers.com, *Immigrants Flock to Florida Seeking Work Permits*, <http://www.usimmigrationlawyers.com/resource.cfm/state/fl/article/7566/Immigrants-Flock-to-Florida-Seeking.html> (last visited Nov. 9, 2008).

84. Preston, *Employers Fight*, *supra* note 39.

85. Preston, *Reversal*, *supra* note 72.

86. Randal C. Archibold, *Judge May Not Step in to Halt Arizona Law*, N.Y. TIMES, Dec. 19, 2007, at A21.

87. Preston, *Reversal*, *supra* note 72.

88. *Id.*

89. *Id.*

(IRCA) and the National Labor Relations Act (NLRA).⁹⁰ While the IRCA “made it illegal for [employers] to knowingly hire undocumented workers,” courts have interpreted the NLRA to make clear that even illegal employees enjoy collective bargaining rights.⁹¹ In 2002, the United States Supreme Court ruled, in *Hoffman Plastic Compounds, Inc. v. NLRB*,⁹² that illegally laid-off undocumented workers could not recover back-pay from employers who violated the NLRA.⁹³ In 2008, however, the United States Court of Appeals for the District of Columbia Circuit ruled that employers must “bargain with unions that” hire undocumented workers even though, under the IRCA, it is illegal to knowingly employ such workers.⁹⁴ The United States Court of Appeals for the District of Columbia Circuit supported its ruling in part on language in the IRCA, making clear “that employer sanctions weren’t meant to ‘undermine or diminish in any way labor protections in existing law.’”⁹⁵

4. Immigration Reform

In 2008, Hispanic organizations urged the two presidential candidates, Senators John McCain and Barack Obama, to “support—and force Congress to pass—comprehensive immigration legislation that would create a guest-worker program and put millions of illegal immigrants on paths to citizenship.”⁹⁶ Moreover, Hispanic organizations urged the candidates “to reverse decades of inadequate representation by Hispanics in the federal workforce. Hispanics constitute about 15 to 16 percent of the population but hold just slightly more than 7 percent of federal jobs.”⁹⁷

Besides “demand[ing] citizenship opportunities for the estimated 12 million illegal immigrants in the U.S.,” immigrant rights activists organized nationwide rallies aimed at ending workplace raids and deportations.⁹⁸

90. See Michael Doyle, *Rulings Diverge on Laborer Rights*, MIAMI HERALD, Jan. 9, 2008, at 3A.

91. *Id.*

92. 535 U.S. 137 (2002).

93. *Id.* at 151–52.

94. Doyle, *supra* note 90.

95. *Id.*

96. Dave Montgomery, *Hispanics Press Candidates on Immigration, Employment*, MIAMI HERALD, July 8, 2008, at A5.

97. *Id.*

98. Sophia Tareen, *Calls for Immigration Reform Are Reignited*, MIAMI HERALD, May 2, 2008, at 3A.

5. How the United States Economy Benefits from Illegal Workers

“The Social Security Administration estimates that about three-quarters of illegal workers pay taxes that contribute to the overall solvency of Social Security and Medicare.”⁹⁹ By one estimate, undocumented workers paid nine billion dollars in Social Security taxes alone in 2005.¹⁰⁰ “[Y]et many illegal immigrants fearful of deportation won’t risk the government attention that will come from filing a return even if they might qualify for a refund.”¹⁰¹ In addition, such illegal workers are unlikely to draw Social Security and Medicare benefits even if they remain in the United States after retirement.¹⁰²

F. Ethics

1. Disclosure Rules

In Miami-Dade County, public officials “can accept gifts of any value, including trips, but any worth more than \$100 must be reported.”¹⁰³ An editorial in the Miami Herald recommends placing a ban on all gifts because “the recipients of the gifts are employed by the county and may be in a position to make business decisions that could affect the givers’ financial well-being.”¹⁰⁴

In 2008, the Miami Police Chief was fined \$500 “for failing to disclose his free use of a luxury vehicle.”¹⁰⁵ The “executive director of the Miami-Dade Commission on Ethics and Public Trust” recommends a blanket ban on “gifts from vendors seeking business.”¹⁰⁶

99. Travis Loller, *Illegal Workers Add Billions to Treasury*, MIAMI HERALD, APR. 13, 2008, at 3A.

100. *Id.*

101. *Id.*

102. See Katie E. Chachere, Comment, *Keeping America Competitive: A Multilateral Approach to Illegal Immigration Reform*, 49 S. TEX. L. REV. 659, 673–74 (2008).

103. Editorial, *Change County’s Policy on Gifts*, MIAMI HERALD, Nov. 28, 2007, at 32A.

104. *Id.*

105. Charles Rabin, *Dade Feels Pressure to Put Tighter Lid on Gifts*, MIAMI HERALD, Feb. 1, 2008, at 1B [hereinafter Rabin, *Dade Feels Pressure*].

106. *Id.*

2. Double-Dipping

Miami-Dade County employees must request permission to moonlight on a second job, a practice known as double-dipping.¹⁰⁷ A former aide to Miami-Dade's Mayor allegedly failed to secure the necessary approval "by working for a private company while he still held a job in county hall."¹⁰⁸

3. Lobbying

Miami-Dade County is also weighing a recommendation "[t]hat lobbyists or their charges report how much they are paid to influence government."¹⁰⁹ Surprisingly, there is no Florida law "against elected officials parlaying their status into lobbying fees—*while still holding office*."¹¹⁰

A 2008 task force warned Miami-Dade commissioners that voters would only approve a pay raise "as part of a package that included term limits and a ban on commissioners holding other jobs."¹¹¹

4. Recovery of Costs and Attorney's Fees in Defense of Ethics Violations

Under Florida law,¹¹² a public official is entitled to recover costs and attorney's fees after successfully defending herself against an ethics violation charge by proving "that 1) the complaint was made with a malicious intent to injure the official's reputation; 2) the person filing the complaint knew that the statements made about the official were false or made the statements about the official with reckless disregard for the truth; and 3) the statements were material."¹¹³ A Florida court read this statutory provision as not requiring the official to prove the actual malice standard of *New York Times Co. v. Sullivan*.¹¹⁴

107. See Matthew I. Pinzur, *Ex-Aide May Have Flouted Job Rules*, MIAMI HERALD, Nov. 23, 2007, at B1.

108. *Id.*

109. Rabin, *Dade Feels Pressure*, *supra* note 105.

110. Fred Grimm, *Real Sludge in This Case Was Lobbying*, MIAMI HERALD, Feb. 17, 2008, at 3B.

111. Matthew I. Pinzur, *Dade Leaders Favor Raises, Not Reforms*, MIAMI HERALD, July 19, 2008, at 5B.

112. FLA. STAT. § 112.317(7) (2008).

113. *Brown v. State*, 969 So. 2d 553, 560 (Fla. 1st Dist. Ct. App. 2007).

114. *Id.* at 560 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

5. Websites and E-Mail Regulation

In 2007, “Cooper City, [Florida] commissioners approved a Web policy [barring] elected officials from [posting] links to personal Web pages on the city’s website.”¹¹⁵ Also, other Florida public employers warned employees that they consider a public record all e-mails sent on publicly-owned computers.¹¹⁶

G. Budget Cuts

On January 29, 2008, Florida voters approved a constitutional amendment that “increase[d] exemptions on homesteads and business properties as well as allow[ed] people to transfer built-up Save Our Homes property tax savings to another homestead.”¹¹⁷ “Revenues could fall further if property values continue dropping”¹¹⁸ As a result, many state and local public employees will either lose their jobs, see a cut in benefits or hours of work, or end up privatized.¹¹⁹ For example, Florida International University must lay off about 200 employees.¹²⁰ “[E]ven tenured professors could lose their jobs if the university decides to eliminate entire programs.”¹²¹ Consequently, the only growth sector is likely to be campus police.¹²²

In Miami-Dade, budget cuts forced “pay cuts and layoffs . . . [of] courthouse employees.”¹²³ The Miami-Dade School Board “discussed changing school police officers’ contracts to reduce their work year from 12 months to 10.”¹²⁴ But in July 2008, Miami-Dade Schools Superintendent “scrapped a proposal to cut 11 schools police officers and restructure the department.”¹²⁵ In the face of deeper cuts in the 2008–09 budget, the school board must ei-

115. Breanne Gilpatrick, *Cities Forced to Tighten Web, E-Mail, Blog Rules*, MIAMI HERALD, Sept. 24, 2007, at 6B [hereinafter Gilpatrick, *Cities Tighten Rules*].

116. *Id.*

117. Sherman, *supra* note 13; Mary Ellen Klas, *Tax Cut Receives Winning Assist in S. Fla.*, MIAMI HERALD, Jan. 30, 2008, at 1A.

118. Matthew I. Pinzur, *Budget Woes Cause Court Cuts, Layoffs*, MIAMI HERALD, May 2, 2008, at 8B [hereinafter Pinzur, *Budget Woes*].

119. *See id.*

120. Corral, *supra* note 15.

121. *Id.*

122. *Id.*

123. Pinzur, *Budget Woes*, *supra* note 118.

124. Nirvi Shah, *Budget Cuts Have Avoided Cutting Jobs*, MIAMI HERALD, May 14, 2008, at 8B.

125. Kathleen McGrory, *Police Jobs Spared Budget Ax*, MIAMI HERALD, July 16, 2008, at 5B.

ther freeze promised increases in teachers' pay "or lay off 1188" employees.¹²⁶

H. *Negligent Hiring, Retention, and Supervision*

Under the emerging torts of "negligent hiring, retention, [and] supervision," an employer may be liable for foreseeable torts committed by its employees against either third parties or co-workers, even if the employee's wrongdoing arises outside the scope of his employment, if the employer should have known of the employee's propensity for wrongdoing.¹²⁷ In 2008, a Florida court ruled that whether a school breached its duty to properly train and supervise field trip chaperones was a question of fact for a jury.¹²⁸ Another Florida court ruled that a child care center was not liable under the theory of negligent supervision for an injury sustained when "a bathroom door slammed on [a child's] hand, partially amputating his pinky finger."¹²⁹ Furthermore, employers planning a holiday party for their employees "should consider whether they want to serve alcohol."¹³⁰ "Things can and do go wrong at company-sponsored gatherings—someone gets drunk and falls down or gets in an accident on the way home. Or an employee can make an unwanted pass at another guest."¹³¹ Even street harassment of passing women by construction workers may lead to discipline.¹³²

I. *Hatch Act*

Modeled after the federal Hatch Act, a measure that regulates the political activities of public employees,¹³³ Florida has enacted its own law in this area governing state and local public employees.¹³⁴ For example, "state law makes it illegal to solicit political contributions from local or state govern-

126. Kathleen McGrory, *Crew's Grim Budget Forecast: Layoffs and Cuts to Programs*, MIAMI HERALD, July 16, 2008, at 1B.

127. 27 AM. JUR. 2D *Employment Relationship* §§ 389, 391 (2004).

128. *Gearhart-Soto v. Delsman*, 976 So. 2d 1150, 1151 (Fla. 4th Dist. Ct. App. 2008); see *Bonica v. Dade County Sch. Bd.*, 549 So. 2d 220, 221 (Fla. 3d Dist. Ct. App. 1989) (per curiam).

129. *Newlan v. Acad. for Little People of W. Palm Beach, Inc.*, 980 So. 2d 1247, 1248 (Fla. 4th Dist. Ct. App. 2008) (per curiam).

130. Joyce M. Rosenberg, *Plan Ahead to Avoid Inviting a Lawsuit to the Office Holiday Party*, MIAMI HERALD, Nov. 5, 2007, at G11.

131. *Id.*

132. See Federica Narancio, *Hey, Baby! Catcalls Are on Decline*, MIAMI HERALD, July 6, 2008, at 3A.

133. See 5 U.S.C. § 7324 (2006).

134. See FLA. STAT. § 110.233 (2007).

ment employees.”¹³⁵ A candidate for Congress apologized in 2008 after “[t]housands of e-mails that promoted a candidate . . . were sent to Miami-Dade County employees.”¹³⁶ Similarly, “[c]ampaigning for a candidate while at a city commission meeting could be misuse of a public position.”¹³⁷ Florida law also imposes “criminal penalties for public officials who campaign while working at their government jobs.”¹³⁸ In 2007, Florida’s Insurance Commissioner apologized for “using a state computer to help a friend’s political campaign.”¹³⁹ “Under [Miami-Dade] School Board rules, the district’s e-mail system cannot be used for political activities.”¹⁴⁰ In 2008, a Miami-Dade School Board member running for reelection was criticized after sending e-mails to teachers endorsing a candidate.¹⁴¹ Under Florida’s Code of Judicial Conduct, candidates running for the bench must “refrain from inappropriate political activity.”¹⁴² The Supreme Court of Florida ruled that the Code of Judicial Conduct is violated when a candidate for the bench commends or criticizes “jurors for their verdict, ‘other than in a court pleading, filing, or hearing in which the candidate represents a party in the proceeding in which the verdict was rendered.’”¹⁴³

“Active-duty military personnel are [also] prohibited from taking part in partisan politics.”¹⁴⁴ By contrast, retired officers enjoy full rights to engage in political activism.¹⁴⁵ In 2008, the Department of Veterans Affairs prohibited voter “registration drives among the veterans living at federally run nursing homes, shelters for the homeless and rehabilitation centers across the country.”¹⁴⁶ “Although veterans are not federal employees, department offi-

135. Charles Rabin, *Martinez Campaign Apologies for E-mails*, MIAMI HERALD, Apr. 18, 2008, at 5B.

136. *Id.*

137. Todd Wright, *Politicking from Dais Angers Candidates in Race*, MIAMI HERALD, Dec. 31, 2007, at 3B.

138. *Commissioner’s Apology Accepted*, MIAMI HERALD, Aug. 22, 2007, at 3C.

139. *Id.*

140. Kathleen McGrory & Ketty Rodriguez, *Candidate’s Sending of E-mails Questioned*, MIAMI HERALD, July 15, 2008, at 1B.

141. *Id.*

142. *In re* Amendment to the Code of Judicial Conduct—Amendments to Canon 7, 985 So. 2d 1073, 1076 (Fla. 2008).

143. *Id.* at 1074.

144. Thom Shanker, *Military Chief Warns Troops About Politics*, N.Y. TIMES, May 26, 2008, at A10.

145. *Id.*

146. Ian Urbina, *V.A. Ban on Voter Drives Is Criticized*, N.Y. TIMES, June 13, 2008, at A18.

cials based their decision in part on the Hatch Act, which bans federal employees from engaging in partisan political activity.”¹⁴⁷

“A watchdog report found that former Justice Department officials previously broke the law by politicizing decisions on jobs and internships.”¹⁴⁸ The report “found that officials disproportionately weeded out those with liberal credentials over those with conservative affiliations who were applying for the department’s honors program and summer internships.”¹⁴⁹ “The report by the department’s inspector general and Office of Professional Responsibility found that in some instances, especially involving the hiring of immigration judges, the improper screening was ‘systematic.’”¹⁵⁰

J. *Innovative Ways of Recruiting Police Officers*

In South Florida, many cities are having trouble filling vacant police jobs.¹⁵¹ To remedy this chronic shortage of officers, South Florida cities have come up with innovative techniques. For example,

[i]n Fort Lauderdale, recruiters are traveling to New York in hopes of grabbing cops from a top criminal justice college, and to military bases to pursue people leaving the armed services. In Hallandale Beach, police have started a partnership with the local high school in hopes of getting young people interested early. And in Miami-Dade County, police have sponsored radio ads and a recruitment Web page.¹⁵²

Hallandale Beach is even asking retired police officers “to come back and work with rookies.”¹⁵³

K. *Cities Hiring Panhandlers*

In 2008, Daytona Beach, Florida hopes to recruit “panhandlers to clean the city, paying them with a stipend and a place to stay.”¹⁵⁴ Costing the city

147. *Id.*

148. Marisa Taylor, *Past Hiring Bias Found at Justice*, MIAMI HERALD, June 25, 2008, at 3A.

149. *Id.*

150. Marisa Taylor, *Report: Hiring Broke Laws*, MIAMI HERALD, July 29, 2008, at 3A.

151. Diana Moskovitz, *Wanted: Police Officers*, MIAMI HERALD, Sept. 28, 2007, at 1B.

152. *Id.*

153. *Id.*

154. Editorial, *Panhandlers May Be Paid to Clean City*, MIAMI HERALD, July 6, 2008, at 3B.

about \$2500 per person, hired panhandlers would also be put through drug and alcohol screenings.¹⁵⁵

L. *Appointing v. Electing Judges in Wake of Involuntary Retirement*

In 2008, a Florida court ruled that a county court vacancy caused by an involuntary retirement of a judge must be filled by election, rather than gubernatorial appointment, where the vacancy occurred during the statutory qualifying period.¹⁵⁶

III. TERMS OF EMPLOYMENT: INTRODUCTION

A. *Hours and Wages*

1. Fair Labor Standards Act Issues

a. *State of Florida's Economic Growth*

Although "Florida is ranked fourth in the nation for tech industry employment, and South Florida is the state's leading area for the high-tech industry, . . . industry experts say unless state officials nurture this industry, Florida's economy will lose valuable tech businesses to other states."¹⁵⁷ Historically, Florida's economy relied heavily on "tourism, agriculture and the service sector," but a 2003 study highlighted "some of the road blocks on Florida's path to attract high-paying tech jobs, . . . education, investment and innovation."¹⁵⁸ For example, "Florida ranks 31st in the nation in terms of new patents per worker."¹⁵⁹ Florida's workers are "beset by the triple threat of high property taxes, high insurance premiums and falling property values."¹⁶⁰ "Florida has the largest percentage of renters spending 30 percent or more of their income on rent and utilities"¹⁶¹

"Florida's minimum wage [went] . . . up to \$6.79 per hour" on January 1, 2008.¹⁶² "[A]bout 2 percent of the state's workforce earns a minimum

155. See Editorial, *A Homeless Plan*, MIAMI HERALD, July 8, 2008, at 12A.

156. See *In re Advisory Opinion to the Governor re Appointment or Election of Judges*, 983 So. 2d 526, 527–29 (Fla. 2008).

157. Bridget Carey, *Tech Job Base Is Vulnerable*, MIAMI HERALD, Sept. 25, 2007, at 1C.

158. Jim Wyss, *Call Is Out for More Tech Jobs*, MIAMI HERALD, Dec. 5, 2007, at 3C.

159. *Id.*

160. Christina Rexrode, *Fla. Renters Breaking the '30 Percent Rule'*, MIAMI HERALD, Dec. 31, 2007, at G21.

161. *Id.*

162. *Minimum Wage to Rise on New Year's Day*, MIAMI HERALD, Oct. 16, 2007, at 3C.

wage.”¹⁶³ “Florida’s [minimum wage] is higher than the federal standard of \$5.85 an hour.”¹⁶⁴ The federal minimum wage rose to \$6.55 an hour in July 2008 but is still worth less than the 1997 minimum in 2008 dollars.¹⁶⁵

b. Overtime

In 2008, the Government Accountability Office (GAO) charged that the Wage and Hour Division of the Labor Department “mishandled many overtime and minimum-wage complaints and delayed investigating hundreds of cases for a year or more.”¹⁶⁶ The GAO “also faulted the wage division for reducing the number of enforcement actions it pursues each year to 29,584 in the 2007 fiscal year, down 37 percent from 46,758 10 years earlier.”¹⁶⁷

In 2007–08, the Department of Labor (DOL) issued three opinion letters involving overtime issues: 1) Public employees who work part-time and make above the minimum wage can receive compensatory time when they are not eligible for overtime, but work more than their allotted hours;¹⁶⁸ 2) “putting on and taking off” protective safety equipment worn by meat packing employees is not a “principal activity” and, therefore, not compensable under the FLSA;¹⁶⁹ and 3) police officers who work for another city while off-duty are ineligible to have that off-duty time count in the calculation of their overtime or regular rate of pay.¹⁷⁰

The FLSA carves out a number of exemptions from its overtime rules and the following federal cases speak to the nature of these exemptions. In 2007–08, the Eleventh Circuit ruled: 1) The FLSA overtime exemption for recreational and amusement businesses did not apply to two Florida dog racing firms because the firms did not functionally operate as separate units;¹⁷¹ 2) paramedics fall under the exemption from FLSA overtime rules for employees who “have the ‘responsibility to engage in fire suppression’” and so do not qualify for overtime;¹⁷² 3) workers providing services such as plant-

163. *Id.*

164. *Id.*

165. See Holly Sklar, *Raise Too Little, Too Late—Make It \$10 in 2010*, MIAMI HERALD, July 26, 2008, at 27A.

166. Steven Greenhouse, *Department Is Criticized on Disputes over Wages*, N.Y. TIMES, July 15, 2008, at A13.

167. *Id.*

168. See Dep’t of Labor Opinion Letter FLSA2007–9 (May 14, 2007).

169. Dep’t of Labor Opinion Letter FLSA2007–10 (May 14, 2007).

170. See Dep’t of Labor Opinion Letter FLSA2007–12 (Dec. 31, 2007).

171. *Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1159–60 (11th Cir. 2008).

172. *Huff v. Dekalb County*, 516 F.3d 1273, 1282 (11th Cir. 2008).

ing, fertilizing, herbiciding, and harvesting were employed in “secondary agriculture” and thus expressly exempt from FLSA’s overtime rules for “workers ‘employed in agriculture;’”¹⁷³ 4) “mandatory travel time is exempted from [overtime pay] under the Portal-to-Portal Act” amendments to the FLSA;¹⁷⁴ and 5) “the primary duty of [defendant’s] store managers was not management” and, thus, were not exempt under the FLSA’s executive employees’ exemption from overtime rules.¹⁷⁵

In 2007, the U.S. Labor Department’s Wage and Hour Division concluded that “[t]he Florida Department of Children & Families illegally denied overtime to 126 Palm Beach County abuse investigators between August 2004 and September 2005.”¹⁷⁶ Ultimately, “the state agreed to pay \$166,516.51 in back wages.”¹⁷⁷

c. *FLSA Remedies*

A provision of the 2008 Genetic Information Nondiscrimination Act amends the FLSA to raise the penalty for child labor violations from \$10,000 to \$11,000 per violation.¹⁷⁸ House and Senate Democrats introduced the 2008 Civil Rights Act, giving state employees the right to sue their state employers for damages for alleged overtime pay violations, thus overriding the states’ Eleventh Amendment immunity.¹⁷⁹

In 2007–08, the Eleventh Circuit addressed the following issues involving FLSA remedies: 1) while traditional class action suits may be brought under the FLSA, the Act also recognizes a hybrid suit known as a collective action;¹⁸⁰ 2) a trial court should instruct the jury on how to calculate back pay for unpaid overtime according to the regular rate of pay standard spelled out in the DOL bulletin where an employee is hired on a weekly salary basis;¹⁸¹

173. *Sariol v. Fla. Crystals Corp.*, 490 F.3d 1277, 1279 (11th Cir. 2007) (citing 29 U.S.C. § 213(a)(6) (2000)).

174. *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1343 (11th Cir. 2007).

175. *Rodriguez v. Farm Stores Grocery, Inc. (Rodriguez II)*, 518 F.3d 1259, 1265 (11th Cir. 2008).

176. Editorial, *DCF Accused of Coercing Employees to Work Overtime Without Pay*, Nov. 2007, <http://www.local10.com/news/14586090/detail.html>.

177. *Id.*

178. See Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 302(a), 122 Stat. 881, 920 (amending 29 U.S.C. § 216(e)(1)(A)(i)).

179. See Civil Rights Act of 2008, H.R. 5129, 110th Cong. § 467(2)–(4) (2008); Civil Rights Act of 2008, S. 2554, 110th Cong. § 467(2)–(4) (2008).

180. See *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1301 (11th Cir. 2008). The court refused to certify a collective action because pay practices vary among the plants where employees seeking to intervene in collective action work. *Id.*

181. See *Rodriguez II*, 518 F.3d 1259, 1268 (11th Cir. 2008).

3) district court's finding that defendant lacked good faith and post-verdict award of liquidated damages was not inconsistent with jury's verdict that employees failed to establish by "preponderance of the evidence that" defendant "had willfully violated the FLSA;"¹⁸² 4) attorney's fees deducted from overall FLSA settlement amount should be reduced in accordance with the lodestar method of calculation—i.e., hourly rate times number of hours devoted to case;¹⁸³ and 5) in determining reasonable number of hours devoted to case, attorney's fee is limited to "time spent drafting the complaint," not hours that were "either of a clerical nature, unnecessary, duplicative, and/or excessive."¹⁸⁴ An award of attorney's fees is "mandatory for prevailing plaintiffs in FLSA cases."¹⁸⁵

2. Teachers' Pay

Just "[t]o make ends meet," many poorly paid teachers take on second jobs rather than give up working in a profession they love.¹⁸⁶ Nationwide, roughly "16 percent of teachers [work second] jobs outside the [school] district during the school year."¹⁸⁷ The percentage is even greater in urban areas "where the cost of living exceeds the national average."¹⁸⁸

Nationwide, the "average classroom teacher salary for 2005–06 [was] \$49,109 [while t]he average annual salary for Broward [County, Florida] teachers [was] \$44,000. The salary schedule for a teacher with a bachelor's degree tops out at \$70,000" in Broward.¹⁸⁹

The Broward School District proposed an innovative incentive to lure poorly-paid teachers to move here: It is "solicit[ing] ideas from developers for four sites in Fort Lauderdale and Pompano Beach, including some existing school parking lots, on which to create as many as 300 rentals for starting

182. *Rodriguez v. Farm Stores Grocery, Inc. (Rodriguez I)*, 21 Fla. L. Weekly Fed. C353, C357 (S.D. Fla. 2008), *superseded on denial of rehearing*, 518 F.3d 1259 (11th Cir. 2008).

183. *Silva v. Miller*, 547 F. Supp. 2d 1299, 1304–05 (S.D. Fla. 2008).

184. *Azam-Qureshi v. Colony Hotel, Inc.*, 540 F. Supp. 2d 1293, 1299 (S.D. Fla. 2008).

185. *Powell v. Carey Int'l, Inc.*, 547 F. Supp. 2d 1281, 1284 (S.D. Fla. 2008).

186. David A. Lieb, *Poorly Paid Teachers Take on Second Jobs*, MIAMI HERALD, Jan. 10, 2008, at 9A.

187. Kathleen McGrory, *Spurred by the High Cost of Living in South Florida, Teachers Across the Region are Dashing from Their Schools to Second Jobs*, MIAMI HERALD, Feb. 12, 2008, at 1A.

188. *Id.*

189. Hannah Sampson, *Deal Lifts Teachers' Pay 5.6%*, MIAMI HERALD, Aug. 23, 2007, at 1B.

teachers.”¹⁹⁰ One limitation is that “[t]he district can only use land it already owns for the apartments.”¹⁹¹

3. Wage Gap Between Men and Women

On average, men earn more pay than women.¹⁹² Though the gap has narrowed over the years,¹⁹³ several factors contribute to this fact: Women go in and out of the workforce with greater frequency than men to raise families; women prefer to work fewer hours to spend more time with children;¹⁹⁴ and residual sex discrimination still lingers.¹⁹⁵ But times are changing.

According to the United States Census Bureau, “[a]s women have children later [in life, and larger numbers] work outside the home, they are also working longer into pregnancy and returning to work” sooner than was the case in the 1960s.¹⁹⁶

With the increase of the rate of women in college vastly surpassing the increase of men in higher education, “the average inflation-adjusted weekly pay of women has [gone up] 26 percent since 1980,” while men’s pay has risen only “as much as their college graduation rate”—one percent.¹⁹⁷

“The female out-earns the male in one of every three households, a figure that has increased every year since 2000 and will rocket to about half by 2025.”¹⁹⁸

In response to a 2007 United States Supreme Court ruling that set “time restrictions on lawsuits over pay discrimination,” Senate Democrats proposed the Lilly Ledbetter Fair Pay Act, aimed at “giv[ing] those who believe they were discriminated against a fair opportunity to challenge their employers in court.”¹⁹⁹

190. Hannah Sampson, *Board’s Aim: Rental Units for Teachers*, MIAMI HERALD, Sept. 9, 2007, at 1BR.

191. *Id.*

192. See David Leonhardt, *A Diploma’s Worth? Ask Her*, N.Y. TIMES, May 21, 2008, at C1.

193. *Id.*

194. See Cindy Krischer Goodman, *Luring Moms Back to Work*, MIAMI HERALD, Dec. 20, 2006, at 1C.

195. Leonhardt, *supra* note 192.

196. Sam Roberts, *Shifts in Pregnancy and Work*, N.Y. TIMES, Feb. 26, 2008, at A11.

197. Leonhardt, *supra* note 192.

198. Cindy Krischer Goodman, *Who’s the Boss?*, MIAMI HERALD, Feb. 13, 2008, at 1C.

199. Carl Hulse, *G.O.P. Set to Block Bill Easing Limits on Pay Discrimination Suits*, N.Y. TIMES, Apr. 23, 2008, at A11.

4. Farm Workers' Wages

In 1996, the Eleventh Circuit ruled that farm owners, not labor contractors, are the legal employers of farm workers “and must bear the burden of complying with federal wage and hour laws.”²⁰⁰ In 2008, Haitian field workers filed a class action “lawsuit against a South Miami-Dade farmer . . . alleging they and hundreds of others were paid less than minimum wage.”²⁰¹

In 2008, “[f]arm-worker advocates sought to present more than 80,000 signatures to Burger King officials . . . urging the fast-food giant to join McDonald’s and Taco Bell and help boost the wages of Florida tomato pickers.”²⁰² Burger King resisted this pressure “because it buys tomatoes from repackers, not from growers, so it says it has no way to get money to the workers.”²⁰³

5. Income Inequality

A 2008 study “found that the wealth gap in [Florida] has been increasing every year.”²⁰⁴

[Overall], Florida ranks 15th in income inequality, and the gap between Florida’s richest families and those in the middle is 7th largest in the nation . . . [M]edian household income in Broward, adjusted for inflation, increased just 7 percent from 1990 through 2006 and was flat in Miami-Dade for the same time period.²⁰⁵

Even among Miami-Dade government workers, bonuses are “heavily skewed toward the bureaucracy’s top earners. Of the nearly 400 [bonuses], only 14 went to employees earning less than the county’s median salary of about \$45,000. More than half, 211, went to employees earning more than \$100,000.”²⁰⁶

200. Tere Figueras Negrete, *Field Laborers Sue for Wages*, MIAMI HERALD, Jan. 9, 2008, at 1C.

201. *Id.*

202. Laura Wides-Munoz, *Food Firm Prodded on Wage Issue*, MIAMI HERALD, Apr. 29, 2008, at 3C.

203. Lesley Clark, *Tomato Pickers’ Pay-Probe Sought*, MIAMI HERALD, Apr. 16, 2008, at 1C.

204. Nancy Dahlberg, *This Trifecta Shows We’re Stuck in Our Tracks*, MIAMI HERALD, Apr. 14, 2008, at G3.

205. *Id.*

206. Matthew I. Pinzur & Charles Rabin, *Records Show Bonuses Were Paid*, MIAMI HERALD, Oct. 28, 2007, at 6B.

6. Unpaid Wages

A Florida court ruled that a bonus agreement entered into by a lawyer with her paralegal, while in violation of Florida Bar Rules prohibiting fee-sharing with nonlawyers, was enforceable because the paralegal “was not *in pari delicto*” with the attorney.²⁰⁷ The Fourth District Court of Appeal distinguished *Chandris, S.A. v. Yanakakis*,²⁰⁸ where the Supreme Court of Florida ruled “that a contingent fee agreement that does not [measure up] to the Rules of Professional Conduct is void as against public policy.”²⁰⁹

7. Wage Gap Between Races

According to a 2007 study, “[i]ncomes among black men have . . . declined in the past” thirty years while black women have made gains.²¹⁰ Among the reasons for the gap between black and white wage earners, the study blamed racial discrimination in employment.²¹¹ “In 2004, a typical black family had an income that was only 58 percent of a typical white family’s. In 1974, median black incomes were 63 percent of those of whites.”²¹² The gap might have been greater but for the role unions have played in raising African-Americans’ wages.²¹³

[A 2008] study found that unions have been especially important for black Americans, helping them earn 12 percent more than their nonunion colleagues and increasing the chance that they receive health and retirement benefits. . . . Black union members earn an average of \$17.60 per hour, compared to \$12.74 for nonunion black workers.²¹⁴

207. *Patterson v. A Law Office of Lauri J. Goldstein, P.A.*, 980 So. 2d 1234, 1237–38 (Fla. 4th Dist. Ct. App. 2008).

208. 668 So. 2d 180 (Fla. 1995).

209. *Patterson*, 980 So. 2d at 1236 (citing *Chandris*, 668 So. 2d at 185–86).

210. Stephen Ohlemacher, *Black-White Income Gap up*, MIAMI HERALD, Nov. 13, 2007, at 3C.

211. *See id.*

212. *Id.*

213. *See* Scott Andron, *Study: Unions Helped Blacks*, MIAMI HERALD, Apr. 1, 2008, at 1C.

214. *Id.*

B. *Health Benefits*

1. Health Insurance

In 2007, the United States Senate passed the Mental Health Parity Act, directing employers to offer identical medical benefits for mental health care as they do for other medical conditions when it comes to patient deductibles, copayments, annual and lifetime coverage limits, and covered hospital days and visits.²¹⁵

Nationwide, in 2007, the cost of health insurance “rose by 10.1 percent.”²¹⁶ In 2007, the seven largest health insurers in Florida “made \$550 million in total profits . . . irk[ing] those individuals and employers paying higher health insurance costs.”²¹⁷ In response, some Florida public school districts have “decided to self-insure—meaning [they] would pay [their] own medical bills instead of the insurer.”²¹⁸ For the last decade, Miami-Dade teachers did not have to pay premiums for health insurance and a 2008 proposal forcing teachers to pay part of their health insurance premiums for the first time was soundly rejected.²¹⁹ “[B]aby boomers who retire or are laid off before 65” are finding that it costs “at least \$300 in monthly premiums for single coverage Early retirees once could depend on employer-subsidized health plans until Medicare began at 65, but companies hit by new accounting rules and escalating medical costs have scaled back retiree health coverage.”²²⁰ Recently, however, “a number of insurers have begun to market policies specifically geared to the 50-to-64 age group.”²²¹ Florida “law says that if you have a health policy, an insurer can’t dump you, although it can raise the rates. If you have no coverage, an insurer can reject you for many reasons.”²²²

A 2008 Miami Herald survey found that South Florida employers “pay about 20 percent of [employees’ health insurance] premiums, compared with the national average of 16 percent. For families, South Florida employees

215. See Mental Health Parity Act of 2007, S. 558, 110th Cong. § 712A (2007).

216. Kevin G. Hall, *Prices Slam Middle Class*, MIAMI HERALD, Jan. 17, 2008, at 3C.

217. Phil Galewitz, *Health Insurers’ Profits Rankle*, MIAMI HERALD, Apr. 18, 2008, at 3C.

218. *Id.*

219. Kathleen McGrory, *Teachers Reject Health Insurance Increase*, MIAMI HERALD, Feb. 12, 2008, at 8B.

220. Bob Moos, *Some Insurers Consider Bridging Health Coverage for the Pre-Medicare Crowd*, MIAMI HERALD, Mar. 23, 2008, at 1E.

221. *Id.*

222. John Dorschner, *Should You Cuddle up with COBRA?*, MIAMI HERALD, July 27, 2008, at 1E.

pay 25 percent of premiums compared with the national average of 20 percent.”²²³

While, nationally, more employers are moving away from Health Maintenance Organizations (HMOs) for their employees and toward Preferred Provider Organizations (PPOs), Florida employers “are more likely to have workers participate in [HMOs].”²²⁴

2. Wellness Programs

Ten “of the 15 states with the largest percentage of obese adults are in the South.”²²⁵ “In 2007, 22.9 percent of Floridians were considered obese . . . putting Florida 34th among all states.”²²⁶

In an effort to reduce their health care costs, employers encourage healthy habits in efforts known as “wellness programs.”²²⁷ A 2007 survey “found that 46 percent of employers offer [wellness programs with] economic incentives and another 26 percent plan to do so in 2008.”²²⁸ For example, a 2007 survey found that one third of employers with two hundred or more employees “offer smoking cessation as part of their employee benefits package.”²²⁹ The University of Miami School of Medicine’s Wellness program “focuses on preventative care, lifestyle management and fitness programs.”²³⁰

“More employers are covering preventive medical care and even preventive drugs at 100 percent and not subjecting these to a deductible.”²³¹ A 2007 study found that “[p]eople will lose weight for money, even a little money . . . when the payout is as little as \$7 for dropping just a few

223. Cindy Krischer Goodman, *Insurance Is Top Issue for Many*, MIAMI HERALD, Jan. 28, 2008, at G20.

224. Cindy Krischer Goodman, *When a Paycheck Is Not Enough*, MIAMI HERALD, Jan. 28, 2008, at G20.

225. Fred Tasker, *More Floridians Packing on the Fat*, MIAMI HERALD, Aug. 28, 2007, at 4A.

226. *Id.*

227. Michelle Singletary, *Changing Health Plans Could Save You Money*, MIAMI HERALD, Sept. 30, 2007, at 3E.

228. *Id.*

229. Milt Freudenheim, *Seeking Savings, Employers Help Smokers Quit*, N.Y. TIMES, Oct. 26, 2007, at A1. Smoking “is blamed for 435,000 premature deaths . . . each year” and it costs over seventy-five billion dollars annually in healthcare. *Id.*

230. Nancy Cole, *Employers Promote Healthy Living*, MIAMI HERALD, Dec. 31, 2007, at 13G.

231. Editorial, *At Open Enrollment, Look for New Healthcare Trends*, MIAMI HERALD, Oct. 8, 2007, at G21.

pounds.”²³² Fire departments in South Florida “have used a portion of \$660,000 in Fire Act Grants awarded between 2002 and 2006 to buy treadmills, recumbent bikes, and other exercise equipment.”²³³

Relying on the Supreme Court of Florida’s precedent that public employers can refuse to hire smokers,²³⁴ Escambia County government, starting October 1, 2008, will require all applicants to take a drug test.²³⁵ “Any applicant testing positive for tobacco will not be eligible.”²³⁶

3. Domestic Partnership Benefits

To date, “[d]omestic partnerships are recognized in Broward and Palm Beach counties, and insurance benefits are offered in the Miami-Dade school district.”²³⁷ But, in 2008, Miami-Dade County is close to officially recognizing domestic partnerships for all county employees by “guaranteeing hospital visitation rights and allowing county workers to buy health insurance for their partners.”²³⁸ In this regard, domestic partnerships are defined as “[a]ny pair of unmarried adults who live together and are not related by blood . . . regardless of sexual orientation.”²³⁹

In 2008, “[t]he Florida Attorney General’s Office . . . agreed to [permit] employees to use sick leave to care for their [ill] domestic partners.”²⁴⁰

Perversely, “pets of Palm Beach Community College employees . . . qualify for discounted group medical insurance . . . but domestic partners are” not entitled to similar benefits.²⁴¹

232. Editorial, *Dieting for Cash Works*, MIAMI HERALD, Sept. 25, 2007, at C1.

233. Charles Rabin, *Security Grants Used for Gym Gear*, MIAMI HERALD, Nov. 6, 2007, at 1B.

234. See *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028–29 (Fla. 1995) (holding that there was no privacy violation for the city to require job applicants to sign affidavits avowing they have not used tobacco for a year).

235. Editorial, *County Adopts Tobacco-Free Hiring Policy*, MIAMI HERALD, July 29, 2008, at 3C.

236. *Id.*

237. Steve Rothaus & Matthew I. Pinzur, *Dade Weighs Domestic Partner Rights*, MIAMI HERALD, Feb. 13, 2008, at 5B.

238. *Id.*

239. *Id.*

240. Juan Carlos Rodriguez, *State Attorney General Allows Sick Leave to Care for Ill Domestic Partners*, EXPRESS GAY NEWS, Jan. 10, 2008, at 5.

241. Kimberly Miller, *College Covers Pets but Not Partners*, MIAMI HERALD, Nov. 24, 2007, at 5B.

4. Insuring the Uninsured and Underinsured

The ranks of the uninsured rose “to 47 million in 2006, a one-year increase of 2.2 million.”²⁴² The percentage of employees who enjoy employer-based health coverage fell “to 60 percent from 64 percent in 2000.”²⁴³ According to a 2008 study, “each percentage-point rise in” the jobless rate amid an economic downturn increases the ranks of the “uninsured by 1.1 million.”²⁴⁴ “The number of Floridians under 65 without health insurance rose from 2.8 million—20.5 percent—in 2000 to 3.7 million, or 24.4 percent, in 2005.”²⁴⁵

In 2008, Florida enacted a law “aimed at providing low-cost health [insurance] to the uninsured by allowing the sale of [bare bones] insurance policies” that may sell for \$150 a month, “about 60 percent less than the average cost of a policy for a single person in Florida.”²⁴⁶

The policies would be available to any Floridian 19 to 64 who has been uninsured for at least six months and who is not eligible for public insurance. In a critical provision, insurers would be prohibited from rejecting applicants based on age or health status. . . . The low-cost plans have to include preventive services, office visits, screenings, surgery, prescription drugs, durable medical equipment and diabetes supplies.²⁴⁷

A 2008 study found that twenty-five million Americans are underinsured, defined as lacking sufficient coverage to protect them from financial straits should “they end[] up in the emergency room or [become] seriously ill.”²⁴⁸ The biggest increase in the ranks of the “underinsured were middle-class families [shouldering] . . . medical costs equal to 10 percent . . . of their incomes.”²⁴⁹

242. Kevin Sack, *States' Widening of Health Care Hits Roadblocks*, N.Y. TIMES, Dec. 25, 2007, at A1 [hereinafter Sack, *States' Widening of Health Care*].

243. *Id.*

244. Kevin Sack, *Study Warns That Job Losses Will Strain Government Health Costs*, N.Y. TIMES, Apr. 29, 2008, at A12.

245. John Dorschner, *Health Premiums Outpace Incomes*, MIAMI HERALD, Apr. 29, 2008, at 1C [hereinafter Dorschner, *Health Premiums Outpace Incomes*].

246. Kevin Sack, *New Florida Law Allows Low-Cost Health Policies*, N.Y. TIMES, May 22, 2008, at A22.

247. *Id.*

248. Reed Abelson, *Ranks of Underinsured Are Rising, Study Finds*, N.Y. TIMES, June 10, 2008, at C4.

249. *Id.*

5. Rising Health Costs

“National health spending first exceeded \$1 trillion in 1995;” it exceeded \$2 trillion in 2006.²⁵⁰ “Health spending by [employers rose] 5.7 percent in 2006, . . . the slowest rate of increase since 1997.”²⁵¹ Private businesses pay 25 percent of all health costs.²⁵² Nationwide, “the cost of employer-sponsored [health] premiums [went up] 6.1 percent in 2007, more than double the inflation rate.”²⁵³ A 2007 study found that “job-based [sic] family health coverage rose from \$6,351 to \$12,106 from 2000 to 2007. Workers’ share of the premium increased from \$1,656 to \$3,281.”²⁵⁴

In Florida, “the number of employers offering health coverage increased from 195,622 in 2001 to 209,474 in 2005, although . . . [t]he percentage of people under 65 who had private coverage in Florida fell from 67.6 percent in 2000–01 to 63.1 percent in 2005–06.”²⁵⁵ “About “3.9 million nonelderly Floridians—about a quarter of the state’s under-65 population . . . are expected to spend more than 10 percent of their income on healthcare in 2008 That’s a 62 percent increase over the 2.4 million who paid more than 10 percent of income in 2000.”²⁵⁶ “In Florida, 1.21 million non-elderly people—nearly three quarters of whom have insurance—are in families that will spend more than 25 percent of their pretax income on healthcare costs in 2008.”²⁵⁷

In Florida, between 2001 and 2005, “[f]amily health-insurance premiums [rose] 29 percent . . . while median family income remained almost flat.”²⁵⁸ “The average Floridian spent \$5,483 on healthcare in 2004 That’s above the national average of \$5,283”²⁵⁹

A 2007 study found that Florida faced “\$69 billion in lost productivity” and “\$18 billion to treat some 10 million reported cases of the most common

250. Robert Pear, *Health Spending Exceeded Record \$2 Trillion in 2006*, N.Y. TIMES, Jan. 8, 2008, at A20.

251. *Id.*

252. *See id.*

253. Sack, *States’ Widening of Health Care*, *supra* note 242.

254. John Dorschner, *Health Costs Plague Nonelderly*, MIAMI HERALD, Dec. 19, 2007, at 1C [hereinafter Dorschner, *Health Costs Plague Nonelderly*].

255. Dorschner, *Health Premiums Outpace Incomes*, *supra* note 245.

256. Dorschner, *Health Costs Plague Nonelderly*, *supra* note 254.

257. Families USA, Editorial, *Rising Health Costs Take Toll on Floridians*, MIAMI HERALD, Dec. 22, 2007, at A22.

258. Dorschner, *Health Premiums Outpace Incomes*, *supra* note 245.

259. *Floridians Pay More*, MIAMI HERALD, Sept. 18, 2007, at 1C.

chronic ailments in 2003, including diabetes, heart disease, hypertension and pulmonary conditions.”²⁶⁰

6. Health Care Gap by Race and Region

A 2008 study found that “[r]ace and place of residence [play a key factor] on the course and quality of . . . medical treatment a patient receives.”²⁶¹ For example, African-Americans “with diabetes or vascular disease are . . . five times more likely than whites to have a leg amputated and that women in Mississippi are far less likely to have mammograms than those in Maine.”²⁶²

7. Retiree Health Care

In the face of new federal accounting rules, state and local employers must disclose each year the cost of present and future liability for retirees’ health care.²⁶³ Public employers have a huge financial incentive to reduce such liability or else risk lower credit ratings, making the cost of borrowing more expensive.²⁶⁴

While vested retiree health benefits usually cannot be reduced or modified without violating either the Contract Clause in federal or state constitutions, public employers are capitalizing on ambiguous contract language to reduce or eliminate retiree health benefits.²⁶⁵

An actuarial study conducted for the Broward Sheriff’s Office (BSO) found that “2,005 employees had accrued \$270 million in retirement health benefits.”²⁶⁶ Broward County must pay \$40 million a year “to fully pre-fund those retirement benefits without borrowing.”²⁶⁷ “Covered BSO retirees and their dependents get a 2 percent monthly discount for every year of service

260. Monica Hatcher, *Fla. Pays High Cost of Chronic Diseases*, MIAMI HERALD, Oct. 5, 2007, at 3C.

261. Kevin Sack, *Research Finds Wide Disparities in Health Care by Race and Region*, N.Y. TIMES, June 5, 2008, at A18.

262. *Id.*

263. GOVERNMENTAL ACCOUNTING STANDARDS BOARD, OTHER POSTEMPLOYMENT BENEFITS: A PLAIN-LANGUAGE SUMMARY OF GASB STATEMENTS NO. 43 AND NO. 45, at 4 (2005), available at http://www.gasb.org/project_pages/opeb_summary.pdf.

264. *See id.*

265. *See* Mary Williams Walsh, *Government Accounting Body Scrutinizes Rules for Pensions*, N.Y. TIMES, July 11, 2008, at C1 [hereinafter Walsh, *Rules for Pensions*].

266. Dan Christensen, *Retiree Benefits Drain County Dry*, MIAMI HERALD, July 14, 2008, at 1B.

267. *Id.*

up to a maximum of 50 percent off the total cost of their future health insurance premiums. Retired employees are covered for life.”²⁶⁸

C. Workers' Compensation

Effective January 1, 2008, “[w]orkers’ compensation rates paid by Florida employers [dropped] 18.4 percent,” owing to a decrease in the “frequency of injured workers’ claims.”²⁶⁹ Since an overhaul of the system in 2003, employers’ workers’ compensation rates have fallen fifty percent, “mainly because of less fraud and abuse.”²⁷⁰

“Workers’ comp rates are set by job type. Roofers pay some of the highest rates for the insurance because of the perilous nature of their work.”²⁷¹ In 2008, roofers “could see their rates drop more than 20 percent. That would put workers’ comp rate[s] at their lowest level since mid-1980s.”²⁷²

In 2003, the Florida Legislature “eliminated hourly fees for plaintiff attorneys as part of [an] overhaul of the workers’ comp system.”²⁷³ Under the new system, “judges now must follow a lower, set fee schedule for trial attorneys when they prevail—10 percent to 20 percent of the award.”²⁷⁴ As a result, thousands of “employees feel they have been shut out of the legal system.”²⁷⁵ At the same time, “[w]orkers’ comp rates in Florida, at times the highest in the nation, have come down more than 50 percent.”²⁷⁶

Even though Florida law presumes job-related stress contributes to “heart attacks suffered by firefighters and police officers,” such public employees may still be fired if deemed unable to do the job and face the loss of workers’ compensation benefits and health benefits.²⁷⁷

In 2007–08, Florida courts have ruled on a number of workers’ compensation issues. What follows is a sampling of key decisions:

268. *Id.*

269. *Florida Workers’ Comp to Drop—Again*, MIAMI HERALD, Nov. 1, 2007, at 3C.

270. *Id.*

271. Beatrice E. Garcia, *Workers Comp Rate Reduction Ordered*, MIAMI HERALD, Oct. 24, 2007, at 3C.

272. *Id.*

273. Randy Diamond, *Changes in Law Shut Out Workers*, MIAMI HERALD, Jan. 3, 2008, at 1C.

274. *Id.*

275. *Id.*

276. *Id.*

277. Jasmine Kripalani, *Union Supporting Fired Officers Who Had Heart Attacks*, MIAMI HERALD, Mar. 7, 2008, at 1B.

- A judge of compensation claims erred in denying an award of expenses for water and utility bills—in addition to rent—on the ground that the expenses “were not medically necessary.”²⁷⁸
- An employer failed to rebut the presumption that heart attacks sustained by firefighters and police officers are covered by workers’ compensation under heart and lungs acts, because the employer did not offer “evidence of a specific non-occupational cause of” the police officer’s heart disease.²⁷⁹
- Injuries sustained when an employee tripped “on a pile of debris left in a county right-of-way” after a hurricane, while walking from his vehicle parked “in the parking lot of a nearby shopping center” to his workplace, are compensable under the special hazard exception if claimant’s means of travel to and from work was usual, and if claimant was not expressly banned from parking in the shopping center parking lot by his employer.²⁸⁰
- Where “claimant worked an average of 36 hours a week in the year” before his injury, a question of fact is raised over whether he was a full or part-time employee.²⁸¹ Calculation of average weekly wages will depend on which subsection of section 440.14(1) of the *Florida Statutes* applies.²⁸²
- A prevailing employer may recover court costs even if the claim for workers’ compensation “benefits was not fraudulent or frivolous.”²⁸³
- A workers’ compensation settlement agreement does “not comply with section 440.20(11) [of the] *Florida Statutes* if claimant was not represented by counsel when he signed the release.”²⁸⁴
- Workers’ compensation is the exclusive remedy for claims against an employer for negligent hiring, retention, supervision and training of a store manager who allegedly “assaulted and sexually battered” a sales clerk.²⁸⁵

278. *Desir v. Nouveau Assocs.*, 969 So. 2d 1089, 1090 (Fla. 1st Dist. Ct. App. 2007).

279. *Punsky v. Clay County Sheriff’s Office*, 33 Fla. L. Weekly D1820, D1820 (Fla. 1st Dist. Ct. App. 2008).

280. *Kramer v. Palm Beach County*, 978 So. 2d 836, 838–39 (Fla. 1st Dist. Ct. App. 2008).

281. *Stubbs v. Bob Dale Constr.*, 977 So. 2d 718, 721 (Fla. 1st Dist. Ct. App. 2008).

282. *See id.*

283. *See Guckenberger v. Seminole County*, 979 So. 2d 407, 409 (Fla. 1st Dist. Ct. App. 2008) (per curiam).

284. *Vallecillo v. Bachiller Ironworks*, 982 So. 2d 734, 735 (Fla. 1st Dist. Ct. App. 2008) (per curiam).

285. *See Doe v. Footstar Corp.*, 980 So. 2d 1266, 1267 (Fla. 2d Dist. Ct. App. 2008).

- A workers' compensation claimant was not the statutory employee of an employee leasing company where the employee leasing company was not a contractor in privity of contract with a third party.²⁸⁶

D. *Unemployment Issues*

1. Federal Legislation

"[E]mployers pay a federal unemployment tax . . . —\$56 per employee per year—and state unemployment taxes as well. On average, benefits replace about a third of a worker's previous weekly earnings and run out after 23 weeks [O]nly about one-third of jobless workers qualify to collect benefits."²⁸⁷

In 2007, Congress considered bills that would give "\$7 billion over five years to states that" pass overdue reforms to their unemployment programs such as offering "better coverage for part-time workers, families with children, workers who [enroll in] retraining programs and the long-term unemployed."²⁸⁸ Under a measure introduced in Congress in 2008, the longstanding rule that unemployment compensation claimants "must have worked full time for at least 20 weeks to qualify for benefits" would be eliminated.²⁸⁹ In 2008, the United States Senate voted seventy-five to twenty-two to "extend unemployment benefits by 13 weeks nationwide, with an additional 13 weeks for [employees] in states with high unemployment."²⁹⁰

2. Unemployment Rates

In 2008, the rate of unemployment among Latino workers stood at "6.5 percent, compared with 4.7 percent" jobless rate among non-Latin workers.²⁹¹ Latinos in the construction industry were particularly hard hit, with "7.5 percent unemploy[ed] in the first three months of 2008."²⁹² "[T]he job market of 2008 is shaping up as the weakest in more than half a century for

286. See *Crum Servs. v. Lopez*, 975 So. 2d 1184, 1186 (Fla. 1st Dist. Ct. App. 2008).

287. Editorial, *More Help Needed for Tougher Times*, N.Y. TIMES, Sept. 14, 2007, at A20.

288. *Id.*

289. Carl Hulse, *In Close Vote, House Rejects Bill to Extend Aid to Jobless*, N.Y. TIMES, June 12, 2008, at A17.

290. Pear, *Veterans' Benefit Bill*, *supra* note 3.

291. Julia Preston, *Latino Immigrants Hit by Jobs Shortage*, N.Y. TIMES, June 5, 2008, at A22.

292. *Id.*

teenagers looking for summer work . . . ”²⁹³ “Employment among American teenagers has been sliding continuously for the last decade . . . dropping steadily since the late 1970s, when nearly half of all 16- to 19-year-olds had summer jobs.”²⁹⁴ In 2008, black leaders in South Florida met to talk about summer jobs for black teenagers.²⁹⁵ For the first time,

[W]omen in their prime earning years . . . are retreating from the work force, either permanently or for long stretches . . . [a]fter moving into virtually every occupation, women are being afflicted on a large scale by the same troubles as men: downturns, layoffs, outsourcing, stagnant wages or the discouraging prospect of an outright pay cut. And they are responding as men have, by dropping out or disappearing for a while.²⁹⁶

“More and more mid-grade officers and enlisted soldiers are leaving the military as multiple deployments to war take its toll . . . For the Department of Defense, unemployed veterans are costly. In 2006, the agency paid \$518 million in unemployment benefits, and \$365 million through the first three quarters of 2007.”²⁹⁷

Between June 2006 and June 2007, “Florida lost more jobs . . . — 74,700—than any other state in the nation.”²⁹⁸ By contrast, in 2005, Florida was “No. 1 in jobs created in the entire country.”²⁹⁹ By the end of July 2008, “Florida’s job-loss rate will be higher [than] the nation’s for the first time since 2002.”³⁰⁰ The only growth areas were “in the health, education and the low-paying services fields.”³⁰¹ Oddly enough, Florida’s “unemployment rate actually went down” during the same period, to 5.5 from 5.6 percent.³⁰² “The June 2007 rate was 4 percent.”³⁰³ While South Florida lost 17,400 jobs

293. Peter S. Goodman, *Toughest Summer Job This Year Is Finding One*, N.Y. TIMES, May 25, 2008, at A1.

294. *Id.*

295. Andrea Robinson, *Black Leaders to Discuss Lack of Jobs*, MIAMI HERALD, May 1, 2008, at 9B. While Miami-Dade “[C]ounty offers some [summer] jobs through parks and recreation,” the city of Miami Gardens does not. *Id.*

296. Louis Uchitelle, *Women Are Now Equal as Victims of Poor Economy*, N.Y. TIMES, July 22, 2008, at A1.

297. John Milburn, *War May Be Ugly, but So Is Job Hunt*, MIAMI HERALD, Nov. 29, 2007, at 5C.

298. Marc Caputo, *A Bleak Forecast for Florida*, MIAMI HERALD, July 17, 2008, at 1C.

299. *Id.*

300. *Id.*

301. *Id.*

302. Scott Andron, *Florida Loses 78,100 Jobs—Worst in U.S.*, MIAMI HERALD, July 19, 2008, at 1A.

303. *Id.*

between June 2007 and June 2008, local government employment actually rose by 4400 new jobs.³⁰⁴ For “the first time since 1992 Florida . . . experienced 10 straight months of consecutive job declines in [construction]” in 2007.³⁰⁵

“Job loss ranks in the top 10 most traumatic things that can happen to a person.”³⁰⁶

E. *Public Pensions*

1. Accounting Rules

In 2008, the Governmental Accounting Standards Board investigated “whether the accounting rules must be changed to stop [government employers from] systematically undercounting [public] pension costs.”³⁰⁷ Cities and states have used an array of subterfuges to disguise the true cost of future public pension liabilities.³⁰⁸ For example:

[M]any places had given retirees retroactive pension increases without recognizing the added cost. . . . [N]early one-fourth of large public pension plans had used “skim funds”—accounting devices that allow officials to declare certain investment income to be “excess,” skim it out of the pension fund, and [use] it on other things. Skim funds are not allowed in the private sector.³⁰⁹

Critics of more stringent accounting rules, however, warn “[t]hese changes are so daunting and potentially costly that some governments are likely to stop offering pensions altogether and start giving their workers inferior benefits.”³¹⁰

2. Deferred Retirement Option Plans

A Deferred Retirement Option Plan (DROP) is a form of retirement benefit that allows employees to continue working while accumulating a savings account consisting of the benefits that would have been received had

304. *Id.*

305. Niala Boodhoo, *Labor Pains*, MIAMI HERALD, Jan. 19, 2008, at 1C.

306. Cindy Krischer Goodman, *Layoff Burden Takes Toll on Families*, MIAMI HERALD, July 9, 2008, at A1.

307. Walsh, *Rules for Pensions*, *supra* note 265.

308. *See id.*

309. *Id.*

310. *Id.*

the employee actually retired.³¹¹ In other words, it is a chance for an employee to earn two incomes at the same time, with one of them being saved and invested without current tax liability.³¹²

In 2007, a public school principal in Weston regretted that he enrolled in DROP: “The program lets educators earn retirement money and their salary when they enroll. They collect the money when the five years is up, but they must stop working.”³¹³ The school principal wants to continue as school principal, but such a decision will cost him dearly.³¹⁴ If DROP enrollees return to work as teachers, their retirement payments continue intact.³¹⁵ “If they return as an administrator, however, they lose 11 months of their retirement checks.”³¹⁶ In 2008, the Miami-Dade School Board turned down a school principal’s offer to continue working “for \$1 a year plus benefits” after five years elapsed as a DROP enrollee because a “position budgeted at \$1 a year plus benefits could not be filled if [the principal] left before year’s end.”³¹⁷

A 2001 amendment “allowed DROP retirees to work their five years, take 30 days off and go right back onto the public payroll.”³¹⁸ But this loophole has cost Florida \$300 million with “8,000 ‘retired’ public employees collecting both a pension and a salary, including 131 employees collecting two state pensions—triple dippers.”³¹⁹ Miami-Dade schools stand to save \$13.9 million by closing the DROP loophole and critics consider ending the loophole statewide, a “sensible policy.”³²⁰

311. See, e.g., *In re Marriage of Davis*, 16 Cal. Rptr. 3d 220, 223 (Cal. 2d Ct. App. 2004).

312. See generally *id.*

313. Nirvi Shah, *School’s ‘Kahuna’ on Retirement Wave*, MIAMI HERALD, Aug. 29, 2007, at 1B.

314. See *id.*

315. *Id.*

316. *Id.*

317. Kathleen McGrory, *Principal’s \$1-a-Year Pay Offer Turned Down*, MIAMI HERALD, Apr. 30, 2008, at 1A.

318. Fred Grimm, *\$1 Principal Not a Pricey Double Dipper*, MIAMI HERALD, May 8, 2008, at 1B.

319. *Id.*

320. *Id.*

3. Investments

In 2008, “[t]he Florida Senate passed a bill allowing the state to invest up to 1.5 percent of state retirement funds, or about \$1.8 billion, into high-growth industries in Florida.”³²¹

Along with California, Louisiana, and Missouri, Florida refuses to invest state pension funds in companies “doing business in Iran.”³²²

In 2007, the State Board of Administration, the Florida agency charged with handling investments, “reported that it has more than \$2.5 billion in downgraded investments in several accounts, including the state retirement fund.”³²³ Florida’s public “pension fund has \$756 million in investments that have fallen below purchase guidelines,” largely stemming from “the turmoil in the mortgage industry.”³²⁴

4. Litigation

In 2008, “[a] Broward County police union threatened to file a lawsuit against Hallandale Beach after the city introduced a law that would ban residents from serving on the police and fire pension board.”³²⁵ After the city ultimately did pass the measure allowing only city commissioners to serve on the police and fire pension board, the union claimed “that city commissioners are serving two offices, which is against state law.”³²⁶

In 2007, several South Florida public pension plans brought arbitration claims against Merrill Lynch, accusing it “of conflicts of interests in its role as consultant to government pension plans . . . [seeking] to generate excessive fees and commissions for itself . . . [r]ather than looking out for the interests of city employees.”³²⁷ At the same time, federal regulators were “investigating a Merrill Lynch pension fund consultant for misleading public

321. *Retirement Funds Bill OKs Investing in State Industries*, MIAMI HERALD, Apr. 18, 2008, at 3C (“SB 2310 asks state administrators to first consider investing in Florida industries such as aerospace, computer technology and the life sciences.”).

322. Jesse McKinley, *California: State to Divest Iran Holdings*, N.Y. TIMES, Sept. 25, 2007, at A20.

323. Gary Fineout, *\$2.5B Falls Below State Standards*, MIAMI HERALD, Dec. 6, 2007, at 1C.

324. *Id.*

325. Jasmine Kripalani, *Battle Brews over a Board Proposal*, MIAMI HERALD, Mar. 1, 2008, at 3B.

326. *Commissioners Keep Posts on Pension Board*, MIAMI HERALD, Mar. 6, 2008, at 3B.

327. Patrick Danner, *South Miami Takes on Merrill*, MIAMI HERALD, Dec. 1, 2007, at 1C.

officials throughout Florida about the fees he collected and the reasons he recommended money managers.”³²⁸

In 2008, the Jacksonville Police and Fire Pension Fund sued “embattled American International Group . . . accus[ing] the insurance giant and a number of its top executives . . . of understating the company’s exposure to the subprime mortgage crisis in order to inflate its stock price artificially.”³²⁹

Although traditional pension plans, known as defined benefit plans, are more common in the public sector than defined contribution plans, increasingly, government employers are converting defined benefit plans into defined contribution plans—e.g., 401(k)s—as yet another way of cutting labor costs.³³⁰ In 2008, the United States Supreme Court ruled that employees can file lawsuits against employers or firms suspected of mishandling their 401(k) accounts.³³¹

5. Forfeiture of Pension

A Florida court ruled that a retired police officer, who had given “a false, sworn statement to investigators to hide the actions of his fellow officers” and had been adjudicated guilty in federal court of “conspiracy to obstruct justice and deprive . . . citizens of rights, privileges, and immunities,” forfeited any portion of his public pension other than his own accumulated contributions as required by Florida law.³³² Any felony involving breach of public trust triggers the state forfeiture statute, and the administrative forfeiture determination is not a civil proceeding subject to the four-year limitations period under Florida law.³³³

A former Broward County Sheriff, who “plead[ed] guilty to mail fraud conspiracy and tax charges,” appealed Florida’s decision that his public pension was forfeited since “his crimes were job-related.”³³⁴ The former

328. Jeff Ostrowski, *Fla. Fund Consultant Probed*, MIAMI HERALD, Nov. 3, 2007, at 3C.

329. Jenny Anderson, *Florida Pension Fund Is Suing A.I.G.*, N.Y. TIMES, May 22, 2008, at C3.

330. RODERICK B. CRANE ET AL., DEFINED CONTRIBUTION PENSION PLANS IN THE PUBLIC SECTOR: A BEST PRACTICE BENCHMARK ANALYSIS 4, 7 (2008), available at <http://www.tiaa-crefinstitute.org/research/articles/docs/DCPlansinPublicSectorCraneHellerandYako.pdf>.

331. Carrie Johnson, *Supreme Court Rules Employees Can Sue Over 401(k) Misconduct*, WASH. POST, Feb. 21, 2008, at A1.

332. *Hames v. City of Miami Firefighters’ & Police Officers’ Trust*, 980 So. 2d 1112, 1113, 1117 (Fla. 3d Dist. Ct. App. 2008).

333. See FLA. STAT. § 95.11(3)(n) (2008).

334. Joan Fleischman, *Money Matters*, MIAMI HERALD, May 4, 2008, at 8A.

public official argues that his crimes are not on the list of specific crimes “that call for pension forfeiture.”³³⁵

F. *Safety Issues*

1. Anti-Bullying Bill

One study “reported that the emotional toll of workplace bullying is more severe than that of sexual harassment.”³³⁶ The study unearthed a few surprises: Many “bullying cases involve health care settings . . . academia and the legal profession . . . [and] 40 percent of workplace bullies are women.”³³⁷

In 2008, “legislation has been introduced in 13 states to allow people to sue their employers for bullying or offensive behavior even when the conduct doesn’t meet standards for discrimination or infliction of emotional distress.”³³⁸ A recent poll “revealed that 37 percent of U.S. workers, or 54 million people, have been bullied at work.”³³⁹ “[E]mployers generally have a defense if they have used reasonable care to prevent and/or correct the problem and employees failed to avail themselves of the measures.”³⁴⁰

On April 30, 2008, the Florida Senate unanimously approved, and on June 10, 2008, Governor Crist signed, the Jeffrey Johnston Stand Up for All Students Act,³⁴¹ a bill that while largely aimed at prohibiting bullying directed at students, also prohibits “bullying or harassment of any . . . school system employee for any reason.”³⁴² “Money for ‘safe schools’ programs—nearly \$77 million statewide . . . would only be released to districts once their policies on bullying and harassment are approved by the state.”³⁴³ In July 2008, Broward became “the first Florida school district to put in place a new anti-bullying policy . . . as required by law.”³⁴⁴ “The Florida Depart-

335. *Id.*

336. Tara Parker-Pope, *When the Bully Sits in the Next Cubicle*, N.Y. TIMES, Mar. 25, 2008, at F5.

337. *Id.*

338. Wendy N. Davis, *No Putting up with Putdowns*, A.B.A. J., Feb. 2008, at 16.

339. *Id.* at 17.

340. *Id.*

341. Jeffrey Johnston Stand up for All Students Act, ch. 2008–123, 2008 Fla. Laws 1 (codified at FLA. STAT. § 1006.147).

342. Hannah Sampson, *Bill Aims to Stop School Bullying*, MIAMI HERALD, Apr. 28, 2008, at 1B [hereinafter Sampson, *School Bullying*]; Ch. 2008–123, 2008 Fla. Laws 1.

343. Sampson, *School Bullying*, *supra* note 342.

344. Ely Portillo, *Schools Get Tough on Bullies*, MIAMI HERALD, July 29, 2008, at 1B.

ment of Education will use Broward's policy as a model for the state's 66 other school districts."³⁴⁵

2. Violence in the Workplace

On January 7, 2008, a new federal law, the Court Security Improvement Act of 2007, went into effect, aiming at bolstering security measures for federal and state judges and prosecutors, among others.³⁴⁶

Law enforcement officers are "two or three times more" likely to commit suicide.³⁴⁷ "[T]he stress of the job and easy access to" firearms may account for this higher risk.³⁴⁸ Between 400 to 450 officers die by their own hands, "compared with 150 to 200 who die in the line of duty."³⁴⁹

3. Overcrowded Classrooms

The Broward school district's safety director recommended that a Lauderdale Lakes charter school be closed "for packing too many kids into classrooms."³⁵⁰ The school's president "faces 10 second-degree misdemeanor charges" stemming from the overcrowding and a string of fire code violations.³⁵¹

4. Guns at the Workplace

In April 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."³⁵² "Business groups have heatedly opposed the bill on the grounds it impinges on their private property rights and their ability to lay the ground rules for employment."³⁵³ The law exempts the following worksites: "[S]chools, correctional institutions, nuclear-power facilities, defense and homeland-

345. *Id.*

346. Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 1, 121 Stat. 2534 (2008) (codified as amended at 28 U.S.C. § 566).

347. Alison Leigh Cowan, *Police Struggle with a Threat Deadlier than a Criminal's Gun: Suicide*, N.Y. TIMES, Apr. 8, 2008, at B1.

348. *Id.*

349. *Id.*

350. Ani Martinez et al., *School Is Cited over Safety*, MIAMI HERALD, Aug. 25, 2007, at 1B.

351. *Id.*

352. Monica Hatcher, *Governor Signs Gun Law*, MIAMI HERALD, Apr. 16, 2008, at 2C.

353. Monica Hatcher, *Gun-in-Car Law Approved*, MIAMI HERALD, Apr. 10, 2008, at 1C.

security firms and employers whose ‘primary business’ concerns explosives and combustibles.”³⁵⁴

In 2008, Florida business groups challenged the constitutionality of the new guns-at-work law, claiming it “violates private property rights and conflicts with the federal Occupational Safety and Hazard Act.”³⁵⁵ It remains to be seen what impact the 2008 Supreme Court ruling upholding an individual right to bear arms, *District of Columbia v. Heller*,³⁵⁶ will have on this issue, especially in light of the fact that the High Court decision only narrowly applies to the federal government.³⁵⁷

Walt Disney World claims its employees are exempt from Florida’s new guns-at-work law, citing the law’s exemption “for employers with a federal explosives permit, which Disney has for its massive, daily fireworks shows.”³⁵⁸ Acting on this assumption, Walt Disney World fired a guard after he refused “to let Disney authorities search his car.”³⁵⁹ “[T]he company maintains a zero-tolerance policy for employees who bring guns onto the property.”³⁶⁰

G. *Websites and E-mail*

“[M]ore governments have turned to clear-cut e-mail and Web policies aimed at erasing gray areas in cyberspace.”³⁶¹ Florida’s public employers are “reminding employees and [public] officials to be careful what they send, because on city- or county-owned e-mail accounts, they consider everything a public record.”³⁶² Florida “law generally requires [government e-mails] to be kept on e-mail servers or on disk for at least three years.”³⁶³

354. Marc Caputo, *Disney’s Gun Stance Draws Fire*, MIAMI HERALD, July 11, 2008, at 1A [hereinafter Caputo, *Disney’s Gun Stance*].

355. Editorial, *Business Groups Sue over New Gun Law*, MIAMI HERALD, Apr. 22, 2008, at 3C. “A federal court recently halted a similar . . . law in Oklahoma because it ran afoul of OSHA regulations requiring employers to provide a safe work environment.” *Id.*

356. 128 S. Ct. 2783 (2008).

357. *See id.* at 2799.

358. Caputo, *Disney’s Gun Stance*, *supra* note 354.

359. Editorial, *Disney Fires Guard in Gun-Law Challenge*, MIAMI HERALD, July 9, 2008, at 3C.

360. *Id.*

361. Gilpatrick, *Cities Tighten Rules*, *supra* note 115.

362. *Id.*

363. *Id.*

H. *Post-Employment Restrictions*

Non-disclosure provisions, barring departing employees from talking “about the circumstances of their departure or even disclosing the existence of the agreements” “in order to obtain severance pay or benefits,” while usually found in the private sector, are now also cropping up in public employment.³⁶⁴ “Some experts said that the nondisclosure agreements run counter to the presumption in state law that public employees are free to speak about the function and conduct of government agencies.”³⁶⁵ The fear exists that such confidentiality agreements will silence whistleblowers.³⁶⁶

A Florida appellate court ruled that a preliminary injunction may be issued to enforce the terms of a non-competition covenant where “‘actual threat of harm exists when an employee possesses knowledge of an employer’s trade secrets and begins working in a position that causes him or her to compete directly with the former employer or the product line that the employee formerly supported.’”³⁶⁷

I. *Family Medical Leave Act*

[I]f you work for a company with more than 50 workers: You are one of the 96 million people covered by The Family Medical and Leave Act of 1993. The FMLA allows you to take time off work for up to 12 weeks a year and still hang on to your job.³⁶⁸

On December 12, 2007, the United States House of Representatives adopted the National Defense Authorization Act for Fiscal Year 2008 conference report,³⁶⁹ which includes provisions to extend the FMLA to family

364. See Nicholas Confessore, *Some Severance Deals at Utility Required Silence*, N.Y. TIMES, June 22, 2008, at A21.

365. *Id.*

366. See *id.*

367. *Nelson Tree Serv., Inc. v. Gray*, 978 So. 2d 198, 201 (Fla. 1st Dist. Ct. App. 2008) (quoting *Procter & Gamble Co. v. Stoneham*, 747 N.E.2d 268, 278 (Ohio 1st Ct. App. 2000)).

368. Cindy Krischer Goodman, *Taking Time off*, MIAMI HERALD, Mar. 12, 2008, at 1C [hereinafter Goodman, *Taking Time*].

369. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3.

members of wounded soldiers.³⁷⁰ Under the measure, families of wounded military personnel are entitled “to six months of unpaid leave.”³⁷¹

In 2008, the United States House approved a measure, the Airline Flight Crew Technical Corrections Act, extending FMLA protection to flight attendants and pilots.³⁷²

In 2008, the Department of Labor (DOL) proposed changes to update its FMLA regulations.³⁷³ The changes address “joint employers, waivers of FMLA rights, . . . the relationship between employer approval,” and the commencement of leave and medical notification requirements.³⁷⁴ One DOL proposal “would guarantee [employees] up to seven paid sick days a year.”³⁷⁵ In a defeat for employers, the DOL declined to alter the period of time an employee can take intermittent leave of less than a day.³⁷⁶

Under Florida’s 2007 Domestic Violence Leave Law, persons living in households hit by domestic violence are entitled “to take up to three days off during any twelve month period to: 1) seek an injunction for protection; 2) obtain medical care; 3) obtain mental health care; 4) [bolster] household security . . . ; or, 5) [secure] legal [aid] or either prepare for or attend court-related proceedings.”³⁷⁷

IV. DISCIPLINE, RETALIATION AGAINST WHISTLEBLOWERS, FIRST AMENDMENT AND REMEDIES

A. *Discipline*

1. Job-Related Misconduct

Increasingly, public employees are being disciplined for activities involving the Internet, websites, e-mail, and blogging. Typically, the public

370. BROWN, RUDNICK, BERLACK, & ISRAELS, L.L.P., THE NATIONAL DEFENSE AUTHORIZATION ACT 1 (2008), http://www.brownrudnick.com/nr/pdf/alerts/Brown_Rudnick_Client_Alert_-_NOAA_2-08.pdf.

371. *Id.*

372. Airline Flight Crew Technical Corrections Act, H.R. 2744, 110th Cong. § 2(a) (2008).

373. Labor Department Prepared to Issue Proposed Regulations Updating FMLA, 76 U.S.L.W. 2443, 2443 (Jan. 29, 2008).

374. *Id.*

375. Goodman, *Taking Time*, *supra* note 376.

376. See Family and Medical Leave Act of 1993, 73 Fed. Reg. 7876, 7893 (Feb. 11, 2008) (to be codified at 29 C.F.R. pt 825).

377. Loring N. Spolter, *Domestic Violence Victims Get New Job Rights*, MIAMI HERALD, Sept. 24, 2007, at 7G.

employee makes improper use of an employer-owned computer either at work or at home. For example, Burger King “fired two employees following the disclosure that a top official secretly posted blogs slamming a farmworker advocacy group.”³⁷⁸ The fired employees “participated in unauthorized activity on public websites which did not reflect the company’s views and which were in violation of company policy.”³⁷⁹ A judge on the Ninth Circuit Court of Appeals was criticized for “contribut[ing] to a Web site that featured sexually explicit materials” and was weighing whether to disqualify himself from presiding over an obscenity case.³⁸⁰ A candidate for the position of Broward’s “airport director lost the job after MiamiHerald.com posted the vulgar e-mails he sent from his last government job, in which he insulted Broward commissioners and the county’s main airport.”³⁸¹ A “Pompano Beach High School teacher was suspended without pay after an investigation concluded he showed his students his MySpace page, which included profanity and talk about drugs and sex.”³⁸² A North Florida state representative “outraged many of Miami-Dade’s legislators when he used his state-issued e-mail account to forward a cartoon implying taxpayers were subsidizing illegal aliens.”³⁸³

“A confidential, nationwide list of 24,500 teachers who have been punished for a wide array of offenses was made available to the public” in 2007.³⁸⁴ “Sexual misconduct, financial misconduct, criminal convictions and other misbehavior all can bring disciplinary actions against teacher licenses.”³⁸⁵ A Tampa public school teacher had her teacher’s license revoked for “academic fraud” after “she helped students taking the FCAT.”³⁸⁶ “The number[] of what is officially called ‘academic fraud’ [is] tiny when compared to about 15,000 investigations the state has conducted since 1997 for all types of teacher misconduct, including drug, alcohol, sexual and physical abuse.”³⁸⁷ In 2007, Broward’s school district weighed whether “to fire a teacher with a history of drinking alcohol at school.”³⁸⁸

378. Laura Wides-Munoz, *BK Fires Secret Bloggers*, MIAMI HERALD, May 14, 2008, at 3C.

379. *Id.*

380. Adam Liptak, *Chief Judge Contributed to Racy Web Site*, N.Y. TIMES, June 12, 2008, at A17.

381. Gilpatrick, *Cities Tighten Rules*, *supra* note 115.

382. *Id.*

383. *Id.*

384. Tanner, *supra* note 18.

385. *Id.*

386. Bill Kaczor, *Teacher: Penalty Was Excessive*, MIAMI HERALD, Apr. 7, 2008, at 6B.

387. *Id.*

388. *Teacher May Lose Job over Drinking at School*, MIAMI HERALD, Dec. 6, 2007, at 3B.

In 2008, Florida's Judicial Qualifications Commission found that a state appellate court judge "violated judicial ethics by writing a concurring opinion suggesting that another appellate judge cast a corrupt vote."³⁸⁹ Apparently, no Florida judge or any other judge on record, "has ever been disciplined for what he or she wrote in an appellate opinion."³⁹⁰

In 2008, the Judicial Conference of the United States released compulsory guidelines on how complaints alleging wrongdoing by federal judges should be processed.³⁹¹ Judicial wrongdoing covers areas such as conflicts of interest, bias, incompetence, and claims that a judge's mental or physical disability undermines his or her ability to manage a case.³⁹²

2. Off-Duty Misconduct

A few states, like "Colorado and Minnesota have laws explicitly protecting all employees from discrimination for engaging in any lawful activity off premises during nonworking hours."³⁹³

But not Florida. For example, a Key West police officer lost her "job after pictures she posted on her MySpace page were deemed 'conduct unbecoming' of an officer."³⁹⁴ In another instance, Miami's personnel director warned all employees about "zooming through highway toll plazas by choosing the automated SunPass lane—without paying" in city vehicles.³⁹⁵ Miami's personnel director warned that "[d]isregard for the law as well as for city policies will result in disciplinary action."³⁹⁶

"[P]ublic officials have historically been removed from office only for felonies or misdemeanors having to do with their public duties, such as theft from city coffers."³⁹⁷ A former Miami City Commissioner sued to be reinstated, arguing that his conviction for misdemeanor battery and disorderly

389. *Judge Rebuked for Written Opinion*, MIAMI HERALD, July 19, 2008, at 6B.

390. *Id.*

391. See generally JUDICIAL CONFERENCE OF THE UNITED STATES, RULES FOR JUDICIAL CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2008), available at http://www.uscourts.gov/library/judicialmisconduct/jud_conduct_and_disability_308_app_B_rev.pdf.

392. *Id.* Rule 3, at 3–4.

393. Randall Stross, *How to Lose Your Job on Your Own Time*, N.Y. TIMES, Dec. 30, 2007, at 3.

394. *Officer Loses Job over Racy Pictures*, MIAMI HERALD, July 21, 2008, at 2B.

395. Michael Vasquez, *City Employees Rack up Tollbooth Tickets*, MIAMI HERALD, Nov. 17, 2007, at 1A.

396. *Id.*

397. Michael Vasquez, *Ousted Commissioner Sues for a Comeback*, MIAMI HERALD, Aug. 26, 2007, at 3B.

intoxication while off-duty does not fall within any type of crime that should disqualify him from reinstatement.³⁹⁸

B. *Retaliation Against Whistleblowers*

In 2008, the United States Supreme Court handed down two decisions prohibiting employers from retaliating against employees who charge age and race discrimination.³⁹⁹ In *Gomez-Perez v. Potter*,⁴⁰⁰ by a vote of six to three, the Court ruled that even though the statute barring age discrimination against federal employees does not specifically prohibit retaliatory discharges, “that understood in the context of its enactment, the provision did cover retaliation.”⁴⁰¹ In *CBOCS West, Inc. v. Humphries*,⁴⁰² by a vote of seven to two, the Court “held that Congress intended to cover retaliation claims brought under the provision of the Civil Rights Act of 1866 that is usually referred to as Section 1981.”⁴⁰³

“The federal whistle-blower law, known as the False Claims Act (FCA), has been a potent tool for keeping government contractors honest since it was last amended in 1986.”⁴⁰⁴ In 2008, members of a Senate committee are weighing changes to the FCA that would make it easier for whistle-blowers to prevail on their claims of governmental corruption.⁴⁰⁵ One contentious issue is whether the Act “allow[s] government employees to file suit under the False Claims Act.”⁴⁰⁶ One senator recommends “allow[ing] government employees to sue under the [False Claims Act] if they first exhausted all other channels without success.”⁴⁰⁷ For its part, the Justice Department opposes allowing “government officials [to] sue contractors on the basis of information they collected in the ordinary course of doing their jobs.”⁴⁰⁸

In 2008, the United States Supreme Court resolved a circuit court split over whether liability under the FCA requires presentment of a fraudulent

398. *Id.*

399. Linda Greenhouse, *Justices Say Law Bars Retaliation over Bias Claims*, N.Y. TIMES, May 28, 2008, at A1 [hereinafter Greenhouse, *Law Bars Retaliation*].

400. 128 S. Ct. 1931 (2008).

401. Greenhouse, *Law Bars Retaliation*, *supra* note 407; *Gomez-Perez*, 128 S.Ct. at 1943.

402. 128 S. Ct. 1951 (2008).

403. Greenhouse, *Law Bars Retaliation*, *supra* note 407; *Humphries*, 128 S. Ct. at 1955–58.

404. Mary Williams Walsh, *Senate Panel Seeks to Alter Law for Whistle-Blowers*, N.Y. TIMES, Feb. 28, 2008, at C3.

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

claim to the government.⁴⁰⁹ In *Allison Engine Co. v. United States ex rel. Sanders*,⁴¹⁰ the Court ruled that proof that “government money was used to pay [a] fraudulent claim” is insufficient to support a plaintiff’s claim under two FCA sections that do not require actual presentment of a claim to the government.⁴¹¹

In the past year, Congress has also weighed strengthening the 1989 Whistle-Blower Protection Act.⁴¹²

The reforms would provide stronger outside review protection for whistle-blowers and would make it more difficult for their security clearances to be revoked, a common shunning device. Workers would also be freer to share classified information with Congress—when necessary to reveal the details of abuse and fraud—and would have a strengthened court review process for appealing disputed cases.⁴¹³

Other possible changes include “extending whistle-blower protection to workers at the F.B.I. and national intelligence agencies.”⁴¹⁴

C. First Amendment

In *Garcetti v. Ceballos*,⁴¹⁵ the United States Supreme Court severely limited what public employee speech is protected by the First Amendment by ruling that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.”⁴¹⁶ Post-*Garcetti* cases raise thorny questions about what public employee speech is job-related and therefore, unprotected, and what speech is not job-related.⁴¹⁷ For example, the Eleventh Circuit Court of Appeal ruled, in *Green v. Barrett*,⁴¹⁸ that a public employee’s in-court testimony is

409. *Allison Engine Co. v. United States ex rel. Sanders (Allison Engine II)*, 128 S. Ct. 2123, 2128 (2008).

410. *Id.* at 2123.

411. *Id.* at 2125–26 (quoting *Allison Engine Co. v. United States ex rel. Sanders (Allison Engine I)*, 471 F.3d 610, 622 (6th Cir. 2006)).

412. Editorial, *Protection for Endangered Whistle-Blowers*, N.Y. TIMES, Dec. 27, 2007, at A28; see, e.g., Federal Employee Protection of Disclosures Act, S. 274, 110th Cong. (2007) (engrossed in Senate), available at <http://www.govtrack.us/data/us/bills.text/110/s/s274.pdf>.

413. *Protection for Endangered Whistle-Blowers*, *supra* note 420.

414. *Id.*

415. 547 U.S. 410 (2006).

416. *Id.* at 421.

417. See, e.g., *Green v. Barrett*, 226 F. App’x 883, 886 (11th Cir. 2007) (per curiam).

418. *Id.* at 883.

protected under the First Amendment when speech is not performed *pursuant* to his or her official duties, but is merely based on facts that the employee learned *because* of his or her employment.⁴¹⁹

In 2008, “[t]he panel that oversees Florida’s public university system has asked a federal judge to overturn part of a 2006 state law that bans universities from spending money to travel to Cuba and four other nations on the U.S. terrorist list.”⁴²⁰ The panel contends that “the travel act’s prohibition runs afoul of the academic freedom accorded to universities under the First Amendment.”⁴²¹ Surprisingly, “[o]ne of the defendants, the board that runs the state’s university system, has sided with the plaintiffs” that the ban “is an unconstitutional curtailment of academic freedom.”⁴²²

D. Remedies

Under Florida’s Whistle Blower Act, a prevailing plaintiff may recover “back pay and future wages.”⁴²³ The Act bars employers “from taking retaliatory action against employees for objecting to illegal conduct.”⁴²⁴

An issue arose in 2008 over whether a former Miami city attorney who pleaded no-contest to misdemeanors involving misuse of city funds should be entitled to \$120,000 in severance pay.⁴²⁵ An editorial in the Miami Herald made its position clear: “City officials who abuse the public trust shouldn’t be rewarded as they slink out the door.”⁴²⁶

The doctrine of “election of remedies” posits that at some point a plaintiff in a civil suit must make up his or her mind over which one of two or more remedies he or she is seeking.⁴²⁷ For example, in a breach of contract case, the plaintiff must choose whether to sue on the contract and ask for damages or seek to unravel the agreement through rescission.⁴²⁸ The two

419. *See id.* at 886.

420. Gary Fineout, *Board: Undo Law on Travel to Cuba*, MIAMI HERALD, Jan. 2, 2008, at 1B.

421. *Id.*

422. Editorial, *An Unwarranted Curb on Academic Freedom*, MIAMI HERALD, Jan. 9, 2008, at 20A.

423. Patrick Danner, *Ex-Worker Challenges Firing*, MIAMI HERALD, Feb. 6, 2008, at 3C.

424. *Id.*

425. Opinion, *Punish Wrongdoing; Don’t Pay for It*, MIAMI HERALD, Feb. 22, 2008, at 20A.

426. *Id.*

427. *See, e.g., City of Jacksonville v. Cowen*, 973 So. 2d 503, 506 (Fla. 1st Dist. Ct. App. 2007).

428. *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1279 (11th Cir. 2004).

remedies are mutually exclusive.⁴²⁹ The issue of election of remedies arose in a 2007 Florida appellate court case where the issue was whether an enforcement officer “had waived his right to” arbitrate his disciplinary dismissal under a collective bargaining agreement by electing to appeal an earlier suspension “to the Civil Service Board and then having that appeal dismissed.”⁴³⁰ The court ruled that whether the plaintiff had waived his right to arbitration was a question for the trial court, not the arbitrator, but because no waiver occurred “the parties must participate in arbitration as ordered by the trial court.”⁴³¹

V. EMPLOYMENT DISCRIMINATION

A. Generally

In 2007–08, the United States House of Representatives considered bills to overturn *Ledbetter v. Goodyear Tire & Rubber Co.*,⁴³² making clear that the time limit for filing pay discrimination claims begins to run each time an employee receives a paycheck that reflects discrimination, not only when the employer makes a discriminatory pay decision.⁴³³ In the Senate version, time limits for filing pay bias claims begin to run when the employee “knew or should have known” of the discrimination.⁴³⁴

On June 9, 2008, the United States Supreme Court ruled in *Engquist v. Oregon Department of Agriculture*⁴³⁵ that public employees who are the targets of arbitrary treatment by their employers may not bring a class of one equal protection claim, unless the discrimination is grounded on “race, sex, or another protected [class].”⁴³⁶

In 2007, the Eleventh Circuit rendered two decisions bearing on elements of the prima facie case for employment discrimination under Title VII.⁴³⁷ In *Crawford v. City of Fairburn*,⁴³⁸ the court ruled that when an em-

429. *Id.* (quoting *Deemer v. Hallett Pontiac, Inc.*, 288 So. 2d 526, 527–28 (Fla. 3d Dist. Ct. App. 1974) (per curiam)).

430. *Cowen*, 973 So. 2d at 506.

431. *Id.* at 504.

432. 127 S. Ct. 2162 (2007).

433. Editorial, *Pass the Fair Pay Act*, N.Y. TIMES, Apr. 23, 2008, at A20; see Lilly Ledbetter Fair Pay Act of 2007, H.R. 2831, 110th Cong. (2007).

434. Fair Pay Act of 2008, S. 2945, 110th Cong. (2008); see Susan Estrich, *Remember Lilly Ledbetter in November*, MIAMI HERALD, May 3, 2008, at A25.

435. 128 S. Ct. 2146 (2008).

436. *Id.* at 2148–49; Linda Greenhouse, *Justices Reject ‘Class of One’ Argument*, N.Y. TIMES, June 10, 2008, at A15.

437. See *Crawford v. City of Fairburn*, 482 F.3d 1305 (11th Cir. 2007); *McMillan v. DeKalb County*, 211 F. App’x 821 (11th Cir. 2006) (per curiam).

ployer produces multiple legitimate, non-discriminatory reasons for firing an employee, the employee needs to rebut each and every reason—rebutting one is now sufficient.⁴³⁹ In *McMillan v. DeKalb County*,⁴⁴⁰ the court noted a circuit split over the proper application of the qualified immunity defense in mixed-motive cases.⁴⁴¹

In 2008, the Equal Employment Opportunity Commission (EEOC) issued a final rule deleting a regulation allowing dismissal of federal employment discrimination claims when the plaintiff could not be found, was uncooperative, or rejected a fair remedy.⁴⁴² Instead, under the new rule, the EEOC authorizes dismissal of a charge only when the agency finds no rational basis for the claim, or the charge does not state a claim on which relief can be granted.⁴⁴³

B. Race

The Eleventh Circuit and a federal district court in the Eleventh Circuit each decided one notable race discrimination case in 2008.⁴⁴⁴ In *Goldsmith v. Bagby Elevator Co.*,⁴⁴⁵ the court ruled that an African-American fired after refusing to sign a waiver of an EEOC charge pending against his employer, established a causal relation between the filing of plaintiff's complaint of discrimination and his dismissal, especially since a white employee, who refused to sign a waiver, was given an opportunity to reconsider.⁴⁴⁶ By contrast, the Eleventh Circuit ruled in another case that the employer was entitled to summary judgment owing to plaintiff's failure "to establish a prima facie case of rac[ial] discrimination."⁴⁴⁷ The plaintiff was unable to show that similarly situated employees were treated differently or that she was qualified for the job she lost.⁴⁴⁸ Even if plaintiff did establish a prima facie

438. 482 F.3d at 1305.

439. *Id.* at 1308.

440. 211 F. App'x at 821.

441. *Id.* at 822–23.

442. Equal Employment Opportunity Commission, 73 Fed. Reg. 3387, 3388 (Jan. 18, 2008) (to be codified at 29 C.F.R. pt. 1601.18).

443. *Id.* at 3387–88.

444. *See, e.g.,* *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1267 (11th Cir. 2008); *Dawson v. Miami-Dade County*, No. 07-20126 CIV, 2008 WL 1924266, at *1 (S.D. Fla. Mar. 11, 2008) ("Order Granting (1) Defendant's Motion for Summary Judgment as to Plaintiff's Claims and (2) Denying Defendant's Motion for Partial Summary Judgment on Defendant's Counterclaim").

445. 513 F.3d at 1261.

446. *See id.* at 1271–77.

447. *Dawson*, 2008 WL 1924266, at *19.

448. *Id.* at *8.

case, she failed to show that the defendant's non-discriminatory reason for her dismissal was pretextual.⁴⁴⁹ In *Davis v. Coca-Cola Bottling Co.*,⁴⁵⁰ the Eleventh Circuit, along with three other circuits, rejected the EEOC's view that "a pattern or practice claim may be brought [either] as an individual action or a class action as the plaintiff chooses."⁴⁵¹

A Miami-Dade jury, in 2008, ruled that "Florida International University discriminated against a black employee when it reorganized his department and fired him in 2004."⁴⁵²

A former North Miami Police Chief filed a complaint with the EEOC in 2007, "saying she was fired out of retaliation for filing previous complaints with the same board. . . . She claimed she was discriminated against based on race and gender."⁴⁵³

Presidential candidates John McCain and Barack Obama disagree on the issue of affirmative action in employment.⁴⁵⁴ While McCain backs "an effort to end state and locally run minority preferences . . . Obama say[s] policies that consider race need to continue."⁴⁵⁵

C. *Gender, Same-Sex, Transsexuals*

Since the 1960's, "a number of developments [provide] more opportunities for pregnancy leave, paid and unpaid, and increased protections for pregnant women against job discrimination."⁴⁵⁶ But, a backlash has recently emerged from employees without children who oppose special benefits for pregnant workers and employees with children.⁴⁵⁷ "Childless singles feel put upon, taken for granted and exploited—whether because of fewer benefits, less compensation, longer hours, mandatory overtime or less flexible schedules or leaves—by married and child-rearing co-workers"⁴⁵⁸

449. *Id.* at *19.

450. 516 F.3d 955 (11th Cir. 2008).

451. *Id.* at 967 n.25, 969 n.30 (concluding that a pattern or practice claim against employer not filed as class action was properly dismissed).

452. *FIU Loses Discrimination Lawsuit*, MIAMI HERALD, July 23, 2008, at 3B.

453. Carli Teproff, *Fired Police Chief Fights Dismissal, Says Bias Involved*, MIAMI HERALD, Nov. 22, 2007, at 5B.

454. See William Douglas, *Rivals Battle on Race Policy*, MIAMI HERALD, July 28, 2008, at 5A.

455. *Id.*

456. Roberts, *supra* note 196.

457. See Paul B. Brown, *The Revolt of the Childless*, N.Y. TIMES, Oct. 13, 2007, at C5.

458. *Id.*

Three cases from the United States Court of Appeals for the Eleventh Circuit have addressed the prima facie case for proving sexual harassment.⁴⁵⁹ In *Reeves v. C.H. Robinson Worldwide, Inc.*,⁴⁶⁰ the court ruled that “harassment in the form of offensive language can be ‘based on’ the plaintiff’s membership in a protected group even when the plaintiff was not the target of the language and other employees were equally exposed to the language.”⁴⁶¹ In a second decision, the court found that a “[c]ounty exercised reasonable care to prevent and correct any . . . harassing behavior, and that [the plaintiff] unreasonably failed to take advantage of [the] employers [sic] corrective measures or to avoid any harm to her.”⁴⁶² In addition, the plaintiff failed to demonstrate that failure to transfer plaintiff to a school resource officer position at a certain middle school was in retaliation for plaintiff’s complaints about workplace harassment.⁴⁶³ In *Dar Dar v. Associated Outdoor Club, Inc.*,⁴⁶⁴ the court ruled that “two sexually inappropriate comments and two incidents” when a woman’s buttocks was touched, were no more serious than conduct deemed insufficient to constitute hostile work environment in governing precedent.⁴⁶⁵

In 2008, Attorney General Michael B. Mukasey signed a new equal employment opportunity policy that bans discrimination on the basis of sexual orientation at the Department of Justice.⁴⁶⁶ Moreover, an organization for gay, lesbian, bisexual, and transgender employees and contractors of the Department of Justice received permission to use department bulletin boards and other avenues of communication.⁴⁶⁷

In 2007, Congress considered a measure, the Employment Non-Discrimination Act (ENDA),⁴⁶⁸ “which would put bias involving sexual orientation and gender identity in the workplace on the same legal footing as

459. See generally *Reeves v. C.H. Robinson Worldwide, Inc.*, 525 F.3d 1139 (11th Cir. 2008); *Webb-Edwards v. Orange County Sheriff’s Office*, 525 F.3d 1013 (11th Cir. 2008); *Dar Dar v. Assoc. Outdoor Club, Inc.*, 248 F. App’x 82 (11th Cir. 2007).

460. 525 F.3d at 1139.

461. *Id.* at 1143. Daily exposure to male-co-workers’ use of “bitch” to refer to women was pervasive enough to be actionable. *Id.* at 1141, 1147.

462. *Webb-Edwards v. Orange County Sheriff’s Office*, 525 F.3d 1013, 1016 (11th Cir. 2008).

463. *Id.* at 1028.

464. 248 F. App’x 82 (11th Cir. 2007).

465. *Id.* at 85–86 (citing *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 585 (11th Cir. 2000)).

466. U.S. DEPARTMENT OF JUSTICE, EQUAL EMPLOYMENT OPPORTUNITY POLICY, available at <http://www.usdoj.gov/jmd/eeos/08-eeo-policy.pdf>.

467. See Darryl Fears, *Attorney General Reverses Curbs on Gay Group at Justice Department*, WASH. POST, Feb. 5, 2008, at A17.

468. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).

discrimination on the basis of race, color, gender, religion, national origin, age and disability.”⁴⁶⁹ Thirty-one states do not ban sexual orientation discrimination in employment.⁴⁷⁰ Before the United States’ House passed ENDA by a 235-184 vote,⁴⁷¹ however, the provision protecting transgendered employees was eliminated, “fractur[ing] the nation’s gay organizations.”⁴⁷²

Some courts accord transgendered workers protection under Title VII under the doctrine of sexual stereotyping developed by the United States Supreme Court in *Price Waterhouse v. Hopkins*,⁴⁷³ which outlaws discrimination against an employee based on “stereotyped notions of appropriate female [or male] appearance and behavior.”⁴⁷⁴

In 2008, Broward County made “it illegal to deny housing or jobs to transgender or pregnant residents.”⁴⁷⁵ In 2007, “Oakland Park became the eighth city in Florida to enact legal protections for transgendered people. West Palm Beach, Miami Beach, Gulfport, Tequesta, Key West, Largo, and Lake Worth each have included gender identity and expression in their policies.”⁴⁷⁶

In 2008, gay-rights groups rated eighty-eight hospitals “on how they treat[ed] same-sex partners.”⁴⁷⁷

D. Age Discrimination

In 2008, the United States Supreme Court handed down four decisions involving age discrimination in employment. In *Federal Express Corp. v. Holowecki*,⁴⁷⁸ the Court ruled that any document filed with the EEOC that may fairly be read as a request for agency action to safeguard a worker’s rights, or otherwise resolve a dispute with the employer, counts as a “charge” that triggers the waiting period for filing a suit under the Age Discrimination

469. Rob Hotakainen, *Job Bill Fueling Gay-Rights Debate*, MIAMI HERALD, Sept. 16, 2007, at 21A.

470. *Id.*

471. See Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).

472. Steve Rothaus, *Gay-Rights Legislation Clears House*, MIAMI HERALD, Nov. 8, 2007, at 8A.

473. 490 U.S. 228, 258 (1989).

474. Jennifer S. Lee, *Sexual Stereotypes, Civil Rights and a Suit About Both*, N.Y. TIMES, Oct. 10, 2007, at B4.

475. Breanne Gilpatrick, *Transgender Rights OK’d*, MIAMI HERALD, Feb. 13, 2008, at 1B.

476. Juan Carlos Rodriguez, *Local Governments Pass Trans Ordinances*, EXPRESS GAY NEWS, Sept. 20, 2007, at 5.

477. David Crary, *Gay-Rights Groups Rate 88 Hospitals*, MIAMI HERALD, May 13, 2008, at 4A.

478. 128 S. Ct. 1147 (2008).

in Employment Act (ADEA).⁴⁷⁹ In *Kentucky Retirement Systems v. Equal Employment Opportunity Commission*,⁴⁸⁰ the Court ruled that a public pension plan that intentionally affords differing amounts of retirement benefits to employees based on their age does not violate the ADEA.⁴⁸¹ In *Sprint/United Management Co. v. Mendelsohn*,⁴⁸² the Court ruled that evidence introduced by an ADEA plaintiff that other workers at the firm sustained age bias by bosses outside of plaintiff's supervisory chain is "neither *per se* admissible nor *per se* inadmissible."⁴⁸³ In *Gomez-Perez v. Potter*,⁴⁸⁴ the Court ruled that federal employees may bring retaliation claims based on age even though the ADEA is silent on the issue.⁴⁸⁵

Since 1960, the Federal Aviation Administration (FAA) has imposed mandatory retirement for airline pilots at age sixty.⁴⁸⁶ In 2007, thirty House members asked the FAA to waive its age cap for one year while Congress framed legislation "to raise the mandatory retirement age."⁴⁸⁷ On December 13, 2007, the United States House of Representatives approved legislation, the Fair Treatment for Experienced Pilots Act, raising the mandatory retirement age for airline pilots to sixty-five from age sixty.⁴⁸⁸

In 2008, House and Senate Democrats introduced the Civil Rights Act of 2008, aimed at entitling state employees the right to sue their state employers for damages for alleged age discrimination.⁴⁸⁹

In 2007, the EEOC published a final rule amending 29 C.F.R. part 1625 to reflect that the ADEA does not bar employers from favoring older workers over younger ones, even if all employees are older than forty.⁴⁹⁰ In 2007, the EEOC issued a final rule permitting employers to alter, reduce, or eliminate retiree health benefits once a retiree becomes eligible "for Medicare or com-

479. *Id.* at 1159.

480. 128 S. Ct. 2361 (2008).

481. *Id.* at 2370.

482. 128 S. Ct. 1140 (2008).

483. *Id.* at 1143.

484. 128 S. Ct. 1931 (2008).

485. *See id.* at 1937.

486. *House Members Request One-Year Waiver of FAA's Age 60 Limit for Commercial Pilots*, 76 U.S.L.W. 2037 (2007).

487. *Id.*

488. Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, § 44729, 121 Stat. 1450, 1450 (2007).

489. *See* Civil Rights Act of 2008, H.R. 5129, 110th Cong. § 303 (2008); Civil Rights Act of 2008, S. 2554, 110th Cong. § 303 (2008).

490. *See* Coverage Under the Age Discrimination in Employment Act, 72 Fed. Reg. 36,873 (July 6, 2007) (to be codified at 29 C.F.R. pt. 1625).

parable [s]tate health benefits program[s]” without committing age discrimination.⁴⁹¹

In 2008, the United States Court of Appeals for the Eleventh Circuit ruled, in *Van Voorhis v. Hillsborough County Board of County Commissioners*,⁴⁹² that plaintiffs may establish disparate treatment either by direct or circumstantial evidence.⁴⁹³

E. *Disability Discrimination*

In 2008, the House of Representatives passed a measure aimed at overturning *Murphy v. United Parcel Service, Inc.*,⁴⁹⁴ by instructing courts not to “consider the effects of ‘mitigating measures’” in assessing whether a worker is disabled.⁴⁹⁵ In addition, the proposed legislation would delete the words “‘substantially limits’” and replace it with “‘materially restricts’ a major life activity,” rendering far more workers disabled under the Americans with Disabilities Act (ADA).⁴⁹⁶

In 2008, President Bush signed a law that prohibits genetic discrimination in employment.⁴⁹⁷ The Genetic Information Nondiscrimination Act bars employers from dismissing, refusing to hire, or in any way targeting employees on grounds of genetic information.⁴⁹⁸ The law bans the gathering of genetic information by employers but permits workplace genetic testing only in specified circumstances, such as monitoring the harmful effects of toxic workplace exposures.⁴⁹⁹

In 2008, the EEOC issued an opinion letter discouraging periodic medical exams for city bus drivers whose job, unlike police officers and firefighters, “does not exist for the [key] purpose of [shielding] the public from outside harm.”⁵⁰⁰

491. Age Discrimination in Employment Act; Retiree Health Benefits, 72 Fed. Reg. 72,938 (Dec. 26, 2007) (to be codified at 29 C.F.R. pt. 1625, 1627).

492. 512 F.3d 1296 (11th Cir. 2008).

493. *Id.* at 1300. Employer’s statement that he “‘didn’t want to hire any old pilot’” constituted direct evidence of age bias that warranted a jury trial under the ADEA. *Id.*

494. 527 U.S. 516 (1999).

495. Robert Pear, *House Votes to Expand Civil Rights for Disabled*, N. Y. TIMES, June 26, 2008, at A14.

496. *Id.*

497. See Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 202 122 Stat. 881, 907.

498. See *id.* § 202(a)(1).

499. See *id.* § 202(b)(5).

500. EEOC *Notes Issues in Periodic Medical Exams for City Bus Drivers, Says Other Options Exist*, 76 U.S.L.W. 2633 (2008).

In 2007, a New York Times editorial bemoaned the fact that “[i]t still takes almost half a year for the average veteran’s claim for disability benefits to be decided in a tortuous process that can involve four separate hearings . . . [and urged] wholesale changes in the veterans’ benefit system, which hasn’t been modernized since 1945.”⁵⁰¹

A 2007 study found that chronic diseases like “diabetes and hypertension cost the” United States economy over one trillion dollars annually in lost productivity.⁵⁰² Another study found that “[e]mployers who screen and guide depressed [employees] through treatment [programs enjoy] an average of three extra weeks of productivity” from such employees annually.⁵⁰³ Finally, a 2007 study found that seven percent of full-time employees suffered from depression, women were more likely to suffer from it, and that younger employees scored “higher rates of depression than older” workers.⁵⁰⁴ Three categories of workers battled depression the most: “11 percent of personal-care workers,” 10.3 percent of “[w]orkers who prepare and serve food,” and 9.6 percent of healthcare and social workers.⁵⁰⁵

Three Eleventh Circuit Court of Appeals cases dealt with disability issues in 2007.⁵⁰⁶ In *Sheely v. MRI Radiology Network, P.A.*,⁵⁰⁷ relying on Title VI and Spending Clause precedents, the court ruled that victims of intentional discrimination may recover non-economic damages under the Rehabilitation Act.⁵⁰⁸ In *Smith v. Olin Corp.*,⁵⁰⁹ the court ruled that in a retaliation case, in assessing the proximity of an adverse employment activity to a protected activity, the causal connection analysis runs from the date of the latest protected activity, and not from the earliest ADA protected activity.⁵¹⁰ In *Littleton v. Wal-Mart Stores, Inc.*,⁵¹¹ the court noted a circuit split over

501. Editorial, *Slogging on the Home Front*, N.Y. TIMES, Oct. 6, 2007, at A18.

502. *Diseases Take Their Toll*, MIAMI HERALD, Oct. 4, 2007, at 1C.

503. Kyung M. Song, *Aid for Depression Benefits Businesses*, MIAMI HERALD, Oct. 8, 2007, at GB2.

504. Kevin Freking, *Depression Hits Care Workers Hardest*, MIAMI HERALD, Oct. 14, 2007, at 3A.

505. *Id.*

506. See generally *Littleton v. Wal-Mart Stores, Inc.*, 231 F. App’x 874 (11th Cir. 2007) (per curiam); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007); *Smith v. Olin Corp.*, No. 06-15830 (11th Cir. May 23, 2007).

507. 505 F.3d at 1173.

508. *Id.* at 1191–92 (allowing recovery of emotional distress damages).

509. No. 06-15830 (11th Cir. May 23, 2007).

510. See Brief of Appellee at 38–40, *Smith v. Olin Corp.*, 225 F. App’x 852 (11th Cir. 2007) (No. CV101-137).

511. 231 F. App’x at 874.

whether interaction with others, or social interaction, amounts to a “major life activit[y]’ under the ADA.”⁵¹²

F. Religion

In 2008, “[t]he Bush administration wants to require all recipients of aid under federal health programs to certify that they will not refuse to hire nurses and other providers who object to abortion and even certain types of birth control.”⁵¹³ “Such certification would also be required of state and local governments, forbidden to discriminate, in areas like grant-making, against hospitals, and other institutions that have policies against providing abortion.”⁵¹⁴

G. Veterans

“Many veterans have a hard time transitioning from the military life into civilian work.”⁵¹⁵ One survey “found that 76 percent of veterans felt unable to effectively translate their military skills in civilian terms and 72 percent felt unprepared to negotiate a salary.”⁵¹⁶

Under the Federal Uniformed Services Employment and Reemployment Rights Act (USERRA),⁵¹⁷ employers are prohibited “from discriminating against military personnel.”⁵¹⁸ In 2008, “the Justice Department settled a class-action USERRA suit against American Airlines over allegations the company didn’t allow 353 pilots to accrue vacation time and sick-leave benefits while on military leave.”⁵¹⁹ In 2007, “[t]he Labor Department opened 1,366 USERRA cases . . . [o]f those, 75 were in Florida, down from 81 in 2006.”⁵²⁰ In 2007, “[t]he Defense Department’s Employer Support for the Guard and Reserve, which mediates disputes between employers and reservists, reported having 100 cases in Florida.”⁵²¹ “A Pentagon survey of reservists in 2005–2006 . . . found that 44 percent [of returning troops] said they

512. See *id.* at 876 (quoting 29 C.F.R. § 1630.2(i) (2003)).

513. Robert Pear, *Abortion Proposal Sets Condition on Aid*, N.Y. TIMES, July 15, 2008, at A17.

514. *Id.*

515. Milburn, *supra* note 297.

516. *Id.*

517. See generally 38 U.S.C. §§ 4301–33 (2000).

518. Patrick Danner, *Suit Says Service Cost Vet His Job*, MIAMI HERALD, May 1, 2008, at 1C.

519. *Id.*

520. *Id.*

521. *Id.*

were dissatisfied with how the Labor Department handled their complaint of employment discrimination based on their military status, up from 27 percent in 2004.”⁵²²

In 2007, the United States House Veterans’ Affairs Subcommittee on Economic Opportunity questioned “whether federal money dedicated to finding vets employment is being spent wisely and fairly.”⁵²³ The Labor Department “runs a separate Web campaign called HireVetsFirst that aims to raise employer awareness about the value of hiring veterans.”⁵²⁴

H. Remedies

The Class Action Fairness Act of 2005,⁵²⁵ aimed at removing most class action suits from state courts to federal courts where it was thought such suits would be assessed more objectively.⁵²⁶ A 2006 study found that CAFA had an immediate effect and time-series analysis show statistically significant increases in class action filings and removals after the effective date of CAFA for certain natures of suit.⁵²⁷

A measure introduced in both houses of Congress, the 2008 Civil Rights Act,⁵²⁸ would, among other things, eliminate the cap on Title VII damage awards and curtail the use of mandatory arbitration clauses in individual employment contracts.⁵²⁹

Under the Federal Arbitration Act (FAA),⁵³⁰ a court must confirm an arbitration award unless it is vacated or modified on grounds such as fraud in procuring the award or arbitrator partiality.⁵³¹ In 2008, resolving a circuit split, the United States Supreme Court ruled, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,⁵³² that the FAA’s grounds for vacating and modifying

522. Hope Yen, *Reservists Want Jobs Back*, MIAMI HERALD, Nov. 10, 2007, at 1C.

523. Kerr, *supra* note 1.

524. *Id.*

525. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

526. *Id.* § 2.

527. THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005: SECOND INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 12–13 (2006), available at http://www.uscourts.gov/rules/CAFA_Report_0906.pdf.

528. Civil Rights Act of 2008, S. 2554, 110th Cong. § 1 (2008).

529. *Id.* § 423.

530. 9 U.S.C. § 9 (2006).

531. *See id.* §§ 9–10.

532. 128 S. Ct. 1396 (2008).

an arbitration ruling are exclusive and may not be expanded by agreement of parties seeking judicial review.⁵³³

In 2008, the Eleventh Circuit handed down two decisions involving remedies.⁵³⁴ In *Advanced Bodycare Solutions, L.L.C. v. Thione International, Inc.*,⁵³⁵ the court ruled that mediation is not arbitration for purposes of compelling the mediation process under the FAA, in contrast with several district court rulings that mediation contracts are enforceable under the FAA.⁵³⁶ In *Davis*, the court joined three other circuits in rejecting the EEOC's view "that a pattern or practice claim may be brought [either] as an individual action or [as] a class action as the plaintiff chooses."⁵³⁷

VI. PUBLIC SECTOR UNIONS

"[U]nion membership as a share of the total work force rose [in 2007] for the first time in a quarter-century, inching up to 12.1 percent from 12 percent the year before. A total of 7.5 percent of private-sector workers were in unions, and 35.9 percent of public-sector workers."⁵³⁸

Surprisingly, "George W. Bush is in line to be the first president since World War II to preside over an economy in which federal government employment rose more rapidly than employment in the private sector."⁵³⁹ "Under [Bush], federal job growth has averaged 0.73 percent per year, but employment rolls at state and local governments have grown even more rapidly, at rates of 0.88 percent for state governments and 1.21 percent for local governments."⁵⁴⁰

According to a 2007 study, the ranks of tenured professors is thinning out as the ranks of part-time instructors and contract professors have grown, owing largely to administrators' need for greater "flexibility in hiring, firing and changing course offerings."⁵⁴¹ In response, the American Federation of

533. *Id.* at 1404.

534. *See* *Advanced Bodycare Solutions, L.L.C. v. Thione Int'l, Inc.*, 524 F.3d 1235, 1241 (11th Cir. 2008); *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 967 (11th Cir. 2008).

535. 524 F.3d 1235 (11th Cir. 2008).

536. *See id.* at 1238-40.

537. *Davis*, 516 F.3d at 967, n.25, 969 (holding that pattern or practice claim against employer not filed as class action was properly dismissed).

538. Steven Greenhouse, *Union Membership up 311,000 in '07, Biggest Rise Since '83*, N.Y. TIMES, Jan. 26, 2008, at A11.

539. Floyd Norris, *Job Growth Where Bush Didn't Want It*, N.Y. TIMES, Feb. 9, 2008, at C3.

540. *Id.*

541. Alan Finder, *Decline of the Tenure Track Raises Concerns at Colleges*, N.Y. TIMES, Nov. 20, 2007, at A1.

Teachers is supporting measures “in 11 states to [require] that 75 percent of classes be taught by tenured or tenure-track teachers.”⁵⁴²

After five bargaining sessions over raises between the Miami-Dade teachers’ union and the school district, little progress toward a compromise was made.⁵⁴³ The union “declared an impasse in negotiations,” triggering a procedure whereby “a state-appointed special magistrate . . . will issue a nonbinding opinion The School Board will then have to decide whether to accept the magistrate’s recommendation about the raises.”⁵⁴⁴

The Police Benevolent Association (PBA) has represented Broward Sheriff’s Office “deputies for more than a decade,” but that may change as deputies vote over whether to stay with the PBA or to switch to the International Union of Police Associations, a rival public union promising “smoother relations between management and the rank and file.”⁵⁴⁵

VII. CONCLUSION

This survey merely skims the tip of the iceberg of Florida public employment law in 2007–08. Every stage of employment, from hiring, to the terms of employment, to discipline and retaliation against whistleblowers, to employment discrimination, creates a wide array of legal issues at the federal, state, and local levels. As evidenced by the pervasive citation to news articles, public sector employment invites widespread media attention, and news stories provide a wealth of insight and supplements the usual source of legal precedent: constitutional, statutory, regulatory, administrative, and the common law.

542. *Id.*

543. See Kathleen McGrory, *Unions Intensify Battle over Raises*, MIAMI HERALD, July 8, 2008, at 1A.

544. *Id.*

545. Jennifer Lebovich, *BSO Deputies Urged to Switch Unions*, MIAMI HERALD, Oct. 2, 2007, at 3B.