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2006-2007 Survey of Florida Public Employment Law

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2006–2007 SURVEY OF FLORIDA PUBLIC EMPLOYMENT LAW

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I. INTRODUCTION

Recent trends on the employment front, both nationwide and in Florida, inspire hope on some fronts, but cause for alarm on others as the following laundry list of employment-related data illustrates:

- ▶ Aging and younger workers are calling for “more work-life flexibility.”¹
- ▶ Rising cost of living makes securing and retaining employ-

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1. Niala Boodhoo, *South Florida's Economic Outlook: South Florida Employers Need to Focus on Retention in 2007, Experts Say*, MIAMI HERALD, Jan. 15, 2007, at 23G [hereinafter Boodhoo, *Focus on Retention*]. Forty percent of the current United States labor force will be eligible for retirement by 2010. *Id.*

ees difficult.²

- ▶ While average age of retirement is sixty-two, many older workers seek instead to opt for part-time work.³
- ▶ Federal Reserve predicted that Florida would be hit hard thanks to its high concentration of housing-related employment.⁴ “In Miami-Dade and Broward Counties, consumer prices [increased] 4.4 percent” in 2007 over prices in 2006, thanks to higher rents, home payments, and property insurance seeing its largest yearly hike in twenty-five years: 8.2%.⁵
- ▶ With a shortage of workers, wages rose in 2005 and 2006.⁶ There is a “critical shortage of health care workers” nationwide.⁷ New nurses are receiving recruiting bonuses; incumbent nurses get retention bonuses.⁸
- ▶ A 2007 study found that 52% “of adults lack the literacy skills they need to compete in the 21st century.”⁹
- ▶ “A [striking] restructuring of the labor market [fueled] by technology and globalization has [created rising] demand for higher-educated workers and will” produce more pronounced income inequality.¹⁰
- ▶ “[T]he workforce will grow at a slower rate over the next 20 years [and] none of the growth will come from native-born Americans between the ages of 25 and 54.”¹¹
- ▶ In 2004, “[t]he expected lifetime earnings of males with a bachelor’s degree” was 96% higher than their counterparts

2. *Id.* “At times, [Miami-Fort Lauderdale area prices] ran 30 percent higher than the U.S. average for urban areas.” Niala Boodhoo, *After Years of Record Growth, 2007 May Be a Year of Moderation for Economy*, MIAMI HERALD, Jan. 15, 2007, at 22G [hereinafter Boodhoo, *Years of Record Growth*]. Main cause: Housing prices and insurance premiums. Boodhoo, *Focus on Retention*, *supra* note 1.

3. *See* Boodhoo, *Focus on Retention*, *supra* note 1.

4. Boodhoo, *Years of Record Growth*, *supra* note 2.

5. Kevin G. Hall, *Fed: Growth Tied to Housing Slump*, MIAMI HERALD, July 19, 2007, at 1C.

6. Niala Boodhoo, *Wage Growth Up in Dade, Broward*, MIAMI HERALD, July 26, 2007, at 3C [hereinafter Boodhoo, *Wage Growth Up*].

7. Boodhoo, *Focus on Retention*, *supra* note 1.

8. *Id.*

9. Gerry Smith, *‘Perfect Storm’ Threatens Economy*, MIAMI HERALD, Feb. 12, 2007, at 4B.

10. *Id.*

11. *Id.*

with only a high school diploma.¹²

- ▶ “2.9 million manufacturing jobs have been lost” since 2001.¹³
- ▶ In 2007, “there was a notable increase in the rate [of] unmarried mothers with children under age 1” in the labor force, “up 4.3 percentage points to 59 percent.”¹⁴
- ▶ In 2007, for the second consecutive year, Florida has achieved “the [number two] spot as the fastest growing high-tech hub.”¹⁵
- ▶ In 2005, Florida ranked “as the fourth largest high-tech state in the nation.”¹⁶ Florida’s “high-tech industry added 10,900 jobs for an industry total of 276,400 tech workers in 2005.”¹⁷

This survey article covers the several phases of public (and at times private) employment in Florida during 2006–07, beginning with the law (common, statutory, constitutional, and regulatory) governing the hiring of public employees and public officials. Part III outlines recent legal developments touching on the terms and conditions of public employment. Among other topics, Part III explores recent legal issues in the Fair Labor Standards Act (FLSA)—a variety of topics concerning wages and hours of employment. The “Benefits” section covers developments involving health care, Family and Medical Leave Act (FMLA) issues, disability and death benefits, workers’ compensation, unemployment compensation, safety issues, and public pensions. Part IV surveys recent cases and statutes governing discipline, retaliation, the First Amendment and the Hatch Act. Part V, “Employment Discrimination,” outlines recent developments in the law relating to race, national origin, affirmative action, gender, age, disability, religion, and concludes with a brief roundup of remedies recoverable in employment discrimination lawsuits.

12. *Id.*

13. Carolyn B. Maloney, *Protect All Workers—Here and There*, MIAMI HERALD, Jan. 16, 2007, at 15A.

14. *Moms Are in Labor Force*, MIAMI HERALD, May 12, 2007, at 1C. “[O]nly 6 percent of companies offer on-site day care centers.” Christina Rexrode, *Next Care Challenge: The Elderly*, ST. PETE. TIMES, Aug. 12, 2007, at 1F.

15. Madhusmita Bora, *High-Tech Strides Earn High Marks*, ST. PETE. TIMES, Apr. 24, 2007, at 1D.

16. *Id.*

17. *Id.*

II. THE LAW GOVERNING PUBLIC EMPLOYMENT

A. *Hiring Issues*

1. Hiring Freezes

In 2007, Governor Charlie Crist ordered “all state agencies to cut 4 percent from their budgets and prepare for 10 percent cuts,” thanks to lower tax collections.¹⁸ In response, public universities and community colleges have imposed a hiring freeze on new faculty.¹⁹ For example, Florida International University (FIU) eliminated eighty positions through attrition.²⁰ Moreover, FIU is considering freezing employee raises.²¹ Overall, eleven Florida public universities must cut \$100 million in spending in 2007 and were told to be prepared to cut another \$150 million.²² In 2007, Dania Beach’s city manager imposed a ninety-day hiring freeze until the Florida Legislature decides “how much money local governments can collect” in property taxes after reforms take effect.²³ Despite budget cuts, Fort Lauderdale will increase its police force to 478 in 2006, and to 498 in 2008, plus twelve frozen positions, which will be hard to fill, in light of the trend of city police officers leaving urban areas for suburbs that offer higher pay and less work.²⁴

2. Hiring Incentives

In 2007, the United States Senate Judiciary Committee approved a bill²⁵ that would set up, “within the U.S. Department of Justice, a student loan repayment program for lawyers who [promise] to [stay] employed for . . . three years [or more] as state or local criminal prosecutors, or as state, local or federal public defenders in criminal cases.”²⁶ While Broward County pays

18. Noah Bierman, *FIU Spares Its Faculty as Others Put Freeze on Hiring*, MIAMI HERALD, July 12, 2007, at 3B [hereinafter Bierman, *FIU Spares Its Faculty*]. Facing lower tax revenues, the Florida Legislature held a special session in September 2007 to balance the state’s \$71.5 billion budget. Gary Fineout & Marc Caputo, *Deeper Budget Cuts on the Way*, MIAMI HERALD, July 25, 2007, at 1A.

19. Bierman, *FIU Spares Its Faculty*, *supra* note 18.

20. *Id.*

21. *Id.*

22. *Id.*

23. *City Manager Imposes 90-Day Hiring Freeze*, MIAMI HERALD, Mar. 14, 2007, at 2B.

24. Diana Moskovitz, *Budget Crunch Impacts Cop Hires*, MIAMI HERALD, Aug. 5, 2007, at 1BR.

25. S. 442, 110th Cong. (2007).

26. Marcia Coyle, *Bill Would Help Pay Loans for Public-Sector Attorneys*, DAILY BUS. REV., Apr. 19, 2007, at A9.

\$2500 of county employees' school tuition annually per worker, Miami-Dade County pays up to "50 percent of county employees' school tuition with no annual limits."²⁷ A *Miami Herald* editorial criticized Miami-Dade County's reimbursement policy as too lenient and too generous, given that the employee need only earn "a 'C' grade and work for the county one year after receiving the degree."²⁸

A severe shortage of bus mechanics forced Broward County Transit, in 2007, to increase starting pay for new mechanics by 39%, which may necessitate the first bus fare hike in the county "in more than 10 years."²⁹ Starting pay will rise "from \$16.64 to \$23.19 an hour."³⁰

B. *Outsourcing and Privatization*

"[O]utsourcing by foreign companies has created more than 6.5 million jobs for American workers."³¹

One of the main causes of the "scandal over treatment of outpatients at Walter Reed Army Medical Center" was the privatization of the hospital's support workforce.³² "[T]he largest federal workers union, blamed pressure on the [United States] Army from the White House's Office of Management and Budget for the decision to privatize its civilian work force."³³ In 2007, the Federal Office of the Director of National Intelligence revealed that "private contracts now account for 70 percent of the intelligence budget."³⁴ One expert urged Congress to exercise better oversight procedures to reduce the "conflicts of interest that [emerge] when agencies and industry[ies] get too close."³⁵ In Dania Beach, Florida, contentious efforts to outsource lifeguards at the beach in order to save money came to the fore in 2007 as it had in 2006.³⁶ Critics claim privatizing beach lifeguards will put lives at risk because the independent contractors "are less skilled, less experienced, and lower-paid than" city employees.³⁷

27. Editorial, *Revise Employee Tuition Policies*, MIAMI HERALD, Dec. 28, 2006, at 22A.

28. *Id.*

29. Amy Sherman, *Bus Mechanics Get 39 Percent Pay Increase*, MIAMI HERALD, Feb. 28, 2007, at 1B.

30. *Id.*

31. Pete du Pont, *Ensuring Economic Growth*, MIAMI HERALD, Jan. 16, 2007, at 15A.

32. Steve Vogel & Renae Merle, *Staff Privatization at Walter Reed Under Scrutiny*, MIAMI HERALD, Mar. 11, 2007, at 9A.

33. *Id.*

34. Patrick Radden Keefe, *Don't Privatize Our Spies*, N.Y. TIMES, June 25, 2007, at A19.

35. *Id.*

36. Jasmine Kripalani, *Lifeguards at Risk Now*, MIAMI HERALD, July 16, 2007, at 1B.

37. *Id.*

Learning from the wrenching fight to unionize janitors at the University of Miami, FIU decided in 2006 “to end 10 years of outsourcing custodial work.”³⁸

Confounding the conventional wisdom that privatization saves money, Florida’s agency for aiding disabled residents insists it can cut its budget by hiring more state employees and terminating the private contractors who “now do the work.”³⁹

C. *Background Checks and Surveillance of Employees*

A 2007 government report estimates there are “9.4 million illicit drug users and 10.1 million heavy drinkers [holding down] full-time jobs.”⁴⁰ But “the rate of drug-abusing” and heavy-drinking employees is lower in the South.⁴¹ As a result, more “employers are testing for drug and alcohol abuse.”⁴² “The lowest rate of [illegal] drug use,” 3.4%, was found among firefighters and police officers.⁴³ In 2006, the federal government mulled over whether to include hair analysis in its existing employee drug testing guidelines.⁴⁴

In 2007, the University of Georgia subjected new hires to criminal record checks, prompting a faculty protest.⁴⁵ At a minimum, this screening entailed “running fingerprints through the Federal Bureau of Investigation” (FBI).⁴⁶

Under the Jessica Lunsford Act, contractors who work at public schools while children are present must undergo “fingerprinting and criminal background checks.”⁴⁷ In 2007, thirty-seven workers were put on unpaid leave after local school boards refused to give them clearance owing to minor criminal infractions, committed sometimes decades earlier.⁴⁸ If they are not

38. Ana Menendez, *FIU Opts to Do the Right Thing About Janitors*, MIAMI HERALD, Oct. 1, 2006, at 1B.

39. Gary Fineout, *Agency Urges Firing Firms to Save Cash*, MIAMI HERALD, Aug. 9, 2007, at 6B.

40. Jeff Nesmith, *Millions of Full-Time U.S. Workers Use Drugs*, MIAMI HERALD, July 17, 2007, at 3C.

41. *Id.*

42. *Id.*

43. *Id.*

44. Curtis L. Taylor, *Drug Tests Using Hair Debated*, MIAMI HERALD, Nov. 24, 2006, at 33A.

45. Jonathan D. Glater, *Critics Question Breadth of Background Checks for Hiring at Education Department*, N.Y. TIMES, Feb. 11, 2007, at 18.

46. *Id.*

47. Niala Boodhoo, *Workers’ Pasts May End Jobs*, MIAMI HERALD, Feb. 22, 2007, at 1C.

48. *Id.*

cleared for work, many workers fear they will be fired and “lose pensions and healthcare benefits.”⁴⁹ A 2007 measure “would revise and standardize background screening checks for school contractors.”⁵⁰

In March 2007, the Miami-Dade County School Board modified its background screening standards to allow 500 excluded workers to file appeals for their jobs.⁵¹ The *Florida Statutes* provide that if a person’s criminal record has been expunged, the individual “may lawfully deny or fail to [concede] arrests . . . except when” applying for certain state jobs and school positions.⁵² Moreover, it is “illegal for [an] expunged record to be disclosed” to a prospective employer outside the specified categories.⁵³ “In 41 states, people accused or convicted of crimes . . . can have their criminal records expunged.”⁵⁴

In 2006, the United States Department of Justice urged Congress to extend access to an FBI database consisting of criminal history information to any employer who qualified for access.⁵⁵

A Florida school for the deaf and blind was accused in 2007 of allowing felons on its campus to work on construction projects in violation of state law.⁵⁶ In its defense, the school insisted the felons were monitored “by a full-time off-duty police officer and [it] only hired” them after the school was unable to “find a felon-free construction crew.”⁵⁷

In 2007, a bill proposed in the Florida Legislature would strengthen state regulation of the towing and wrecking industry by imposing “criminal background checks of tow truck operators.”⁵⁸ While Miami-Dade County

49. *Id.* For example, one contractor was not cleared because he publicly urinated on the side of a Florida highway twenty years earlier. *Id.*

50. *Id.*

51. Niala Boodhoo, *Dade Revises Policy, Allows Appeals*, MIAMI HERALD, Mar. 16, 2007, at 3C.

52. FLA. STAT. § 943.0585(4)(a) (2007); see also *Inquiry: How Can One Keep Expunged Record Free of ‘Spies’?*, MIAMI HERALD, Mar. 10, 2007, at 11B [hereinafter *Inquiry*].

53. *Inquiry*, *supra* note 52.

54. Adam Liptak, *Criminal Records Erased by Courts Live to Tell Tales*, N.Y. TIMES, Oct. 17, 2006, at A1. Like Florida, “Illinois . . . prohibits prospective employers from asking about or making decisions based on expunged or sealed criminal histories.” *Id.*

55. See U.S. DEPARTMENT OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 76–77 (2006), available at http://www.usdoj.gov/olp/ag_bgchecks_report.pdf.

56. *Felons Worked on Campus, Paper Says Head of School for Deaf, Blind Defends Action*, SUN-SENTINEL, Mar. 27, 2007, at 8B.

57. *Id.*

58. Monica Hatcher, *Legislature Considers Regulating Towing*, MIAMI HERALD, Mar. 6, 2007, at 1A [hereinafter Hatcher, *Legislature Considers*]; see also Fla. SB 612, § 508.105(3) (2007).

already conducts background checks on tow company owners, Broward County does not.⁵⁹

A 1999 Florida law “requires adults who come in routine contact with children,” including teachers, principals, and coaches, “to report suspected sexual abuse to authorities.”⁶⁰ One Miami school violated this law, in 2006, when school administrators failed to report a sexual encounter between the school’s star football player and an underage girl.⁶¹

In an effort “[t]o protect high-end secure data,” some employers have gone beyond background checks, key cards, and clearance codes, and have embedded microchips in employees for tracking purposes, however, this has raised privacy concerns.⁶² Wal-Mart was accused by a whistleblower, in 2007, of “spy[ing] on company [employees], critics, vendors, and consultants.”⁶³ A growing concern, pitting privacy against security, stems from the employee practice of “forwarding their office e-mail to free Web-accessible personal accounts,” often simply to enable them to continue to work from home.⁶⁴ But increasingly, employers are banning the practice and monitoring outbound e-mail and Web traffic to ensure compliance.⁶⁵

According to a 2007 study by the Centers for Disease Control and Prevention, workplaces are about “40,000 lives a year safer than they were in the 1930s.”⁶⁶ In 2005, workplace deaths came to 5702, about 200 short “of the all-time low in 2003.”⁶⁷

Employers have every incentive for hiring workers who will not expose the employer to vicarious liability over negligent acts by employees, committed within the scope of employment. Florida precedent makes clear that an employer may be liable for injuries caused by an intoxicated employee on his way home from an employer-hosted party.⁶⁸ In 2007, a case went to trial over whether an employee was acting within the scope of employment when

59. Hatcher, *Legislature Considers*, *supra* note 58.

60. David Ovalle, *Athlete’s Sex Case Unreported for Weeks, Police Say*, MIAMI HERALD, Jan. 17, 2007, at 1A.

61. *Id.*

62. Todd Lewan, *High-Tech Helpers or the Tools of Big Brother?*, MIAMI HERALD, July 22, 2007, at 1L.

63. Marcus Kabel, *Wal-Mart Defends Surveillance Tactics*, MIAMI HERALD, Apr. 5, 2007, at 1C.

64. Brad Stone, *Companies Fret as Office E-Mail Is Detoured Past Security Walls*, N.Y. TIMES, Jan. 11, 2007, at A1.

65. *Id.*

66. Frank Greve, *Workplaces Keep Getting Less Deadly*, MIAMI HERALD, Jan. 2, 2007, at 5A [hereinafter Greve, *Workplaces*].

67. *Id.*

68. *E.g.*, *Carroll Air Sys., Inc. v. Greenbaum*, 629 So. 2d 914, 917 (Fla. 4th Dist. Ct. App. 1993).

he attended a luncheon hosted by his employer.⁶⁹ A third party injured by the intoxicated employee sought to hold the employer liable under the doctrine of respondeat superior.⁷⁰

In *Copeland v. Albertson's, Inc.*,⁷¹ a robber sued an employer for injuries inflicted by the employees in capturing him.⁷² While the trial court disposed of plaintiff's case through summary judgment alleging negligent hiring and training,⁷³ the appeals court sent the case back for a determination of whether a Florida statute, which bars a claim for damages based on personal injury sustained by a plaintiff during the commission of a forcible felony, applies.⁷⁴ If the assault occurred after the felony was committed, then the employer is not immune from liability.⁷⁵

In *Garcia v. City of Hollywood*,⁷⁶ a pedestrian sued the City of Hollywood for injuries sustained when she was struck by an off-duty police officer driving his marked police car.⁷⁷ The Florida appeals court allowed the negligence case to proceed to trial, emphasizing that the officer was on his way to work to study for a work-related exam.⁷⁸ Although the court initially held that driving a police car to and from work was within the scope of an officer's employment,⁷⁹ the court later withdrew its opinion and held that such activity was not within the scope of the officer's employment.⁸⁰

D. *Nepotism*

Florida's anti-nepotism law basically prohibits public employers from hiring members of their families or other relatives.⁸¹ In 2006, the Miami-Dade County Police Department was accused of violating the state's anti-nepotism law when the Department hired the police director's son.⁸² An investigation found several other instances in which the county hired rela-

69. *Huffman v. Breezes Full Serv. Car Wash*, 956 So. 2d 1204, 1204 (Fla. 1st Dist. Ct. App. 2007).

70. *Id.* at 1204-05.

71. 947 So. 2d 664 (Fla. 2d Dist. Ct. App. 2007).

72. *Id.* at 665.

73. *Id.*

74. *Id.* at 668; *see also* FLA. STAT. § 776.085 (2007).

75. *Copeland*, 947 So. 2d at 667.

76. 32 Fla. L. Weekly D1442 (4th Dist. Ct. App. June 6, 2007).

77. *Id.* at D1442-43.

78. *Id.* at D1443.

79. *Id.*

80. *Id.*

81. FLA. STAT. §§ 112.3135(2)(a), 760.10(8)(d) (2007).

82. Charles Rabin, *Review: Son's Hiring a Nepotism Violation*, MIAMI HERALD, Mar. 15, 2007, at 3B.

tives of county employees.⁸³ Specifically, Florida's anti-nepotism law prohibits "public official[s] [with] authority over a particular job [from] employ[ing] or promot[ing] a relative into that job, or [from lobbying] for a relative to get [the public] job."⁸⁴ To fill public positions, Florida public employers must follow a competitive selection process that awards jobs based on merit—not on family connections.⁸⁵

E. *Immigration*

A 2007 study "found that 34 percent of documented and undocumented immigrants arrive without a high school diploma and that 80 percent of immigrants without a diploma cannot speak English well or at all."⁸⁶

In 2006–07, more than one hundred cities in twenty-seven states have proposed measures that would punish employers who hire undocumented immigrants.⁸⁷ Most of these efforts have failed either thanks to legal challenges or the cities themselves have changed their minds.⁸⁸ A powerful legal argument maintains that these local laws are preempted by federal immigration law.⁸⁹ By contrast, New Haven, Connecticut, who offers identification cards to undocumented immigrants, is in sharp departure from migrant restrictions imposed by other cities and states.⁹⁰ Moreover, New Haven "already offers federal tax help to immigrants and [bars] police from asking about immigration status."⁹¹ New Haven's beneficent treatment of undocumented workers has stoked "interest in immigrant-rich South Florida."⁹²

In 2007, a bill was introduced in the Florida Legislature that would fine employers who hire undocumented workers and revoke any tax breaks or benefits they receive from the state.⁹³ At the local level, Palm Bay, Florida,

83. *Id.*

84. *Id.*

85. *See id.*

86. Smith, *supra* note 9.

87. Michael Rubinkam, *Crackdown Against Illegal Immigration Faces Legal Setbacks*, MIAMI HERALD, Jan. 21, 2007, at 14A. According to a study, "35 towns have approved undocumented immigrant laws, 35 have defeated them, and 35 others have ordinances pending." *Id.*

88. *Id.*

89. *Id.*

90. Cara Rubinsky, *Connecticut City Approves IDs for Illegal Immigrants*, MIAMI HERALD, June 6, 2007, at 6A.

91. *Id.*

92. Alfonso Chardy et al., *Local Officials Differ on City's ID Card Idea*, MIAMI HERALD, July 25, 2007, at 1A.

93. Niala Boodhoo & Beth Reinhard, *Bills Target Undocumented Workers*, MIAMI HERALD, Feb. 7, 2007, at 1C.

reversed a 2006 ruling that fined businesses that hired undocumented immigrants.⁹⁴ Likewise, in 2006, the Avon Park Florida City Council narrowly defeated an ordinance that would have sanctioned employers who hire undocumented workers.⁹⁵ Another proposal at the state level would force contractors, who do business with the State of Florida, to take part in the Department of Homeland Security's free internet-based screening.⁹⁶

In 2007, Dunkin' Donuts sought to strip three Key West, Florida donut shops of their franchises after the shops were accused of hiring undocumented workers.⁹⁷ Critics allege "Dunkin' Donuts may be using [immigration] laws as a pretext for terminating franchise agreements."⁹⁸ Key West employers have had a hard time finding workers due to "the lack of affordable housing."⁹⁹

While current federal immigration law leaves it up to employers to verify that they are hiring legal employees, legislation proposed, but defeated in the United States Senate in 2007, would have required that documentation of legal status, such as Social Security numbers, "be run through the [E]lectronic [Employer Verification] System."¹⁰⁰ Under the defeated measure, employers who violate the law could face fines and jail.¹⁰¹ In August 2007, the Department of Homeland Security issued new regulations forcing employers to dismiss workers "whose Social Security numbers and names [do not] match government records."¹⁰² This new crackdown on illegal immigration will likely hurt key Florida industries such as "construction, agriculture, and hospitality."¹⁰³

In 2007, the Department of Labor issued a final ruling prohibiting employers from substituting aliens' names on permanent labor certification in a move to reduce immigration fraud.¹⁰⁴

94. *Id.*

95. Casey Woods, *Immigration Opens Big Split in Small Town*, MIAMI HERALD, Aug. 9, 2006, at 1A.

96. Boodhoo & Reinhard, *supra* note 93.

97. Patrick Danner & Niala Boodhoo, *Dunkin' Donuts Sues Franchise Owner*, MIAMI HERALD, June 6, 2007, at 1C.

98. *Id.*

99. *Id.*

100. Suzanne Gamboa, *Employers Protest Verification Rule*, MIAMI HERALD, May 31, 2007, at 6C.

101. *Id.*

102. Casey Woods & Niala Boodhoo, *ID Rule Rankles Florida Industries*, MIAMI HERALD, Aug. 8, 2007, at 1A.

103. *Id.*

104. Labor Certification for the Permanent Employment of Aliens in the United States, 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. pt. 656).

On remand from the United States Supreme Court, the Eleventh Circuit allowed Mohawk Industries employees—alleging that the carpet-maker conspired with labor recruiters to hire illegal immigrants with the aim of depressing wages for legal workers in Georgia—to press their claim under the Racketeer Influenced Corrupt Organizations Act (RICO).¹⁰⁵

F. *Ethics and Conflicts of Interest*

Many public governments have framed so-called codes of governmental ethics that set standards of conduct for public officials among others.¹⁰⁶ Florida requires that violations of its Code of Ethics be established by clear and convincing evidence of wrongdoing.¹⁰⁷

In 2007, a bill was proposed in the Florida Legislature that would require legislative staff members and lawmakers, but not members of the general public, to speak under oath while addressing the Legislature.¹⁰⁸ Critics of the measure insist the measure will “have a ‘chilling effect’ on debate.”¹⁰⁹

Whether public officials should refuse, on ethical grounds, to buy Super Bowl “tickets at face value” when the general public must pay far higher prices emerged as an issue in South Florida early in 2007.¹¹⁰ The Miami-Dade ethics director ruled that the face value tickets do not amount to a gift, and the public officials did not solicit the tickets.¹¹¹ One public official refused the offer in an effort to “avoid any appearance of receiving unauthorized compensation or benefits.”¹¹²

At the federal level, Democrats taking over Congress in 2007 proposed “new restrictions on gifts, meals or trips paid for by lobbyists.”¹¹³ Moreover, lawmakers would have to reveal their support of pet projects “known as ear-

105. *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1281, 1295 (11th Cir. 2006). The Second and Ninth Circuits also allow such RICO suits. *See Baker v. IBP, Inc.*, 357 F.3d 685, 687 (7th Cir. 2004) (citing *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002); *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001)). However, the Seventh Circuit, in *Baker v. IBP, Inc.*, held that an employer that hired illegal employees did not share a common purpose with recruiters. *Id.* at 689.

106. *See* David D. Kirkpatrick, *States Take Lead on Ethics Rules for Lawmakers*, N.Y. TIMES, Jan. 1, 2007, at A1.

107. *Latham v. Fla. Comm’n on Ethics*, 694 So. 2d 83, 84 (Fla. 1st Dist. Ct. App. 1997).

108. Breanne Gilpatrick, *Legislature Trying Truth or Consequences*, MIAMI HERALD, Apr. 27, 2007, at 6B.

109. *Id.*

110. Jack Dolan et al., *Public Servants Offered Super Bowl Tickets at Face Value*, MIAMI HERALD, Jan. 11, 2007, at 1A.

111. *Id.*

112. *Id.*

113. Kirkpatrick, *supra* note 106.

marks that they [smuggle] into major bills.”¹¹⁴ “An ethics bill passed the House” by a 411 to 8 vote in late July 2007 “aimed at curbing corruption in Congress.”¹¹⁵ Among other reforms, the measure bars spouses “from the payrolls of campaigns.”¹¹⁶ Three days after the ethics reform bill passed the House, the Senate approved an ethics and lobbying law entailing “a battery of new restrictions . . . on gifts, meals and travel paid for by lobbyists.”¹¹⁷

Florida’s “zero tolerance” law that prohibits lawmakers from accepting “gifts or meals from lobbyists” was challenged by lobbyists in 2006.¹¹⁸ According to the lawsuit, by “forcing lobbyists to [disclose] how much they get paid,” the law violates Florida’s constitutional privacy right guarantee.¹¹⁹

In 2006, the Miami-Dade Ethics, Integrity, and Accountability Task Force proposed to frame “a new code of ethics for” the county that would buttress the powers and duties of the County’s Commission on Ethics and Public Trust.¹²⁰ To deal with the complaint that the ethics commission acts in secrecy, one aim will seek to make the body more transparent.¹²¹ Finally, a whistleblower provision would allow the commission to prove claims of retaliation against public employees.¹²² On September 19, 2006, the federal judiciary enacted new rules requiring disclosure of “junkets for judges”¹²³ which raised perceptions that judges may have conflicts of interest when they take part in cases involving corporate sponsors of the conferences.¹²⁴

In 2007, the Florida commission that polices judges filed ethics charges with the Supreme Court of Florida against a Broward County Circuit Judge over “a pattern of arrogant, discourteous, and impatient conduct.”¹²⁵ Since 2005, complaints have been filed against three other judges for a range of

114. *Id.*

115. Margaret Talev, *Ethics Push Gains Ground*, MIAMI HERALD, Aug. 1, 2007, at 3A.

116. *House Backs Barring Political Spouses From Campaign Pay*, N.Y. TIMES, July 24, 2007, at A18.

117. Jeff Zeleny & Carl Hulse, *Congress Votes to Tighten Rules on Lobbyist Ties*, N.Y. TIMES, Aug. 3, 2007, at A1.

118. Gary Fineout, *Suit Targets Ban on Freebies*, MIAMI HERALD, Sept. 29, 2006, at 8B.

119. *Id.*

120. Charles Rabin, *Ethics Board Seeks to Broaden Its Reach*, MIAMI HERALD, Mar. 22, 2007, at 8B.

121. *Id.*

122. *Id.*

123. Ruth Marcus, *Issues Groups Fund Seminars for Judges*, WASH. POST, Apr. 9, 1998, at A1.

124. Press Release, Admin. Office of the U.S. Courts, Conference Moves to Enhance Judges’ Accountability, Ethical Compliance (Sep. 19, 2006), available at http://www.uscourts.gov/Press_Releases/judicialconference091906.html.

125. Nikki Waller, *Judge Faces Ethics Charges*, MIAMI HERALD, Feb. 7, 2007, at 1B.

misconduct.¹²⁶ While the Supreme Court of Florida “rarely removes judges from the bench,” it has imposed “[o]ther forms of discipline, such as fines, reprimands, and suspensions.”¹²⁷

State ethics charges have also been threatened against Florida public university professors over trips paid for by textbook publishers.¹²⁸ Weeks after such a trip, a professor’s “three-member committee selected the publisher’s book as required reading for all anatomy students at [Miami-Dade College’s] Kendall campus.”¹²⁹ Nationwide, colleges struggle “with how to [frame] conflict-of-interest policies without” trampling on professors’ authority to select textbooks.¹³⁰

In the past, Florida law required “‘persons seeking any federal public office’ . . . to resign from one office to run for another.”¹³¹ But “a giant loophole [was created in 2007] in the resign-to-run law.”¹³² Now, anyone in public office in Florida can “run for Congress without having to resign from their current [position].”¹³³

G. *Affordable Housing for Employees*

Sixty percent of Miami-Dade County business owners “said the rising cost of housing in” South Florida has eroded “their ability to recruit employees.”¹³⁴ In response, most employers raised salaries or added relocation assistance.¹³⁵ Other innovative programs aimed at recruiting employees include: 1) funding up to \$300,000 of a new employee’s mortgage; 2) offering signing bonuses; and 3) offering forgivable loans for employees “who are buying a first home.”¹³⁶ In 2005, “the average wage in Miami-Dade County” was \$40,610; virtually pricing out many teachers and police officers from home ownership.¹³⁷

126. *Id.*

127. *Id.*

128. Noah Bierman, *Colleges Review Ethics of Textbook Selection*, MIAMI HERALD, Feb. 16, 2007, at 1A.

129. *Id.*

130. *Id.*

131. Steve Bousquet, *Resign to Run: Politicians Welcome Loophole*, MIAMI HERALD, May 16, 2007, at 19A (quoting Sen. Charlie Justice).

132. *Id.*

133. *Id.*

134. Niala Boodhoo, *Firms Unwilling to Tackle Housing Issues, Survey Says*, MIAMI HERALD, Nov. 15, 2006, at 1C.

135. *Id.*

136. *Id.*

137. *Id.*

One private hospital is contemplating purchasing distressed developments or building new homes on tracts of land it already owns.¹³⁸ The hospital “already has a program helping . . . employees who are first-time homebuyers with . . . forgivable loans to help with down payments.”¹³⁹ A 2007 study found that health care workers are unable to afford home ownership, especially in South Florida.¹⁴⁰ The study found that an average “of \$93,500 [is] needed to qualify for a mortgage . . . median-priced home,” far above incomes earned by health care workers.¹⁴¹

In 2007, a real estate developer funded a \$5 million grant to address the long commute that many South Florida teachers and nurses endure thanks to the lack of affordable “housing near their jobs.”¹⁴² The Urban Land Institute aims to add “3500 units of workforce housing in . . . three [targeted] markets within five years.”¹⁴³ Hallandale Beach is addressing the housing shortage for lower-wage earners by launching a program lending the 20% down payment for eligible workers who need not repay the loan until the property is sold.¹⁴⁴

In 2007, the Miramar Florida City Commission voted unanimously to approve a proposal by a developer to discount twenty-one townhouses by \$30,000 for public service workers, including teachers and police officers.¹⁴⁵ Moreover, Miramar is assessing the feasibility of “modular housing, shotgun homes and denser development lots as [ways of solving] its affordable housing crisis.”¹⁴⁶ The Broward County School Board hopes to solicit bids from developers in October 2007 to build 300 affordable rental housing units for new teachers on “four sites in Fort Lauderdale and Pompano Beach.”¹⁴⁷

138. John Dorschner, *Housing Fix for Employees in Works*, MIAMI HERALD, Jan. 5, 2007, at 1A.

139. *Id.*

140. Jane Bussey, *Home Ownership Hindered*, MIAMI HERALD, Jan. 11, 2007, at 3C.

141. *Id.*

142. Lesley Clark, *Grant Targets Housing Woes*, MIAMI HERALD, Feb. 2, 2007, at 5B.

143. *Id.*

144. Jasmine Kripalani, *Town Payments*, MIAMI HERALD, July 29, 2007, at 1BR.

145. *City OK's Revised Offer from Builder*, MIAMI HERALD, Apr. 5, 2007, at 3B.

146. Natalie P. McNeal, *Miramar Targets Its Housing Crisis*, MIAMI HERALD, Apr. 18, 2007, at 1B.

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

III. RECENT LEGAL DEVELOPMENTS IN PUBLIC EMPLOYMENT

A. *Hours and Wages*

1. Fair Labor Standards Act Issues

The FLSA governs minimum wage, overtime pay, and child labor in both the public and private employment sectors.¹⁴⁸ The federal minimum wage was frozen at \$5.15 an hour from September 1997 until July 24, 2007, when the minimum wage rose “70 cents to \$5.85 an hour,” ending “the longest period without an increase since . . . 1938.”¹⁴⁹ “Legislation signed in May [2007] increases the [rate] 70 cents each summer until 2009, when it will reach \$7.25 an hour.”¹⁵⁰ Critics of minimum wage increases insist they do not reduce poverty, but instead, “reduce the number of jobs for low-skilled workers.”¹⁵¹ Columnist George Will opposes increases in the minimum wage, in part on the bald assertion that “most of the 0.6 percent (479,000 in 2005) of America’s wage workers earning the minimum wage are not poor.”¹⁵² Moreover, he cites studies that indicate that increases in the minimum wage encourage more teens to drop out of school.¹⁵³ Some economists insist that “a higher minimum wage” prompts employers to move jobs offshore.¹⁵⁴ By contrast, one survey of small business owners found that they can handle the boost in the minimum wage.¹⁵⁵

“Frustrated by Congress’ inaction” until 2007, twenty-eight states—including Florida—enacted “minimum wages above the federal floor, [covering] 70 percent of the work force.”¹⁵⁶ For example, the minimum wage in Florida is currently \$6.67 an hour.¹⁵⁷ By constitutional amendment, Florida’s minimum wage will be “adjusted each fall for inflation.”¹⁵⁸ Florida “[b]usinesses that pay minimum wage”, covering about 400,000 of the state’s 8.7 million workers, “must post signs in English and Spanish stating

148. See generally 29 U.S.C. §§ 201–219 (2000).

149. *Minimum Wage Goes Up*, N.Y. TIMES, July 24, 2007, at A17.

150. *Id.*

151. Steven Greenhouse, *Tax Cut Measure Could Be Stumbling Block for Increase in Minimum Wage*, N.Y. TIMES, Jan. 10, 2007, at A18 [hereinafter Greenhouse, *Tax Cut*].

152. George F. Will, *The Right Minimum Wage*, WASH. POST, Jan. 4, 2007, at A17.

153. *Id.*

154. *Experts Seek Wage Reform*, MIAMI HERALD, Oct. 12, 2006, at 1C.

155. *Study: Small Businesses Can Handle Wage Boost*, MIAMI HERALD, Dec. 27, 2006, at 3C.

156. Greenhouse, *Tax Cut*, *supra* note 151.

157. Niala Boodhoo, *Florida’s Minimum Wage Rises 27 Cents Today*, MIAMI HERALD, Jan. 1, 2007, at 5G.

158. *Id.*

the minimum [wage] and the rights of employees.”¹⁵⁹ About 3% of all workers in Florida earn minimum wage.¹⁶⁰ Since Florida raised its minimum wage, the unemployment rate dropped to 3.3% from 4.4%, belying critics who predicted increased unemployment in the wake of higher minimum wage laws.¹⁶¹

The FLSA also governs overtime pay. In 2007, the United States Supreme Court, in *Long Island Care at Home, Ltd. v. Coke*,¹⁶² resolved conflicting provisions of the FLSA’s home companion exemption from overtime rules as it applies to third-party employers.¹⁶³ According to one study, “3 million people work in direct-care jobs . . . as nursing assistants, home health aides, and personal care aides.”¹⁶⁴ Their wages average “less than \$10 per hour” and 25% of such workers lack health insurance.¹⁶⁵ The Court’s unanimous decision denying these health care workers overtime pay was criticized as “another blow to struggling, low-wage women.”¹⁶⁶ The Eleventh Circuit Court of Appeals ruled in 2007 that companionship services are exempt from the overtime provisions of the FLSA.¹⁶⁷

In 2005, the United States Supreme Court ruled that under the FLSA, time spent walking between the area where workers put on and take off protective gear, an activity that is “integral and indispensable”¹⁶⁸ to the principal activity, plus time spent waiting to doff, is compensable.¹⁶⁹ By contrast, time devoted to waiting to put on the first article of gear is excluded from the scope of the FLSA under section 4(a)(2) of the Portal-to-Portal Act.¹⁷⁰ Similarly, in 2006, the Eleventh Circuit Court of Appeals ruled that under the

159. *Id.*

160. Gregg Fields, *Florida’s Great Low-Wage, High-Wage Debate*, MIAMI HERALD, Feb. 5, 2007, at 13G.

161. *Id.*

162. 127 S. Ct. 2339 (2007).

163. *Id.* at 2351–52. Compare 29 C.F.R. § 552.109(a) (2006) (includes third-party employers under the exemption), with 29 C.F.R. § 552.3 (2006) (provides an exemption to employers employed by an individual needing companionship care). “In 1974, Congress amended the [FLSA] to [grant] minimum wage and overtime protections to maids, cooks, and . . . domestic service workers [while] exempt[ing] baby sitters and workers who [offered] companion services for the” sick and elderly. Steven Greenhouse, *Day in Court for Queens Home-Care Aide*, N.Y. TIMES, Apr. 17, 2007, at B2.

164. David Crary, *Caregiver Shortage Looms*, MIAMI HERALD, June 24, 2007, at 1E.

165. *Id.*

166. Pete Yost, *Home-Care Employees Not Entitled to Overtime*, MIAMI HERALD, June 12, 2007, at 3C.

167. *Buckner v. Fla. Habilitation Network, Inc.*, 489 F.3d 1151, 1156 (11th Cir. 2007).

168. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29 (2005) (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956)(quotations omitted)).

169. *Id.* at 30.

170. *Id.* at 42.

Portal-to-Portal Act, an employee's time spent commuting to the job site in an employer-owned vehicle was compensable under the FLSA, even though the employer insisted that the vehicle be parked overnight at a secure parking lot.¹⁷¹ In 2007, a Florida appeals court ruled that construction workers at Miami International Airport cannot be paid "for time spent on parking-lot shuttles and clearing security checkpoints to get to their job site."¹⁷² In 2007, airline workers at Fort Lauderdale-Hollywood International Airport sued their employer after "they were forced to work through lunch breaks without getting paid."¹⁷³ Federal law requires greater airport security when the national terror threat is raised to "orange, or high, threat level."¹⁷⁴ As a consequence, "the Broward Sheriff's Office has spent [over] half a million extra dollars [every] month to pay [officers] working overtime at Fort Lauderdale-Hollywood International Airport."¹⁷⁵

The FLSA also regulates child labor. The recent trend at the Department of Labor is to relax the rules governing teenage workers.¹⁷⁶ For example, in 2004, an FLSA amendment authorized, under certain conditions, employing fourteen to eighteen-year-olds in workplaces "that use machinery to process wood products."¹⁷⁷ The Department of Labor proposed rules in 2007 that would, for example, allow fifteen-year-olds to work as lifeguards at swimming pools and water amusement parks, but not at beaches.¹⁷⁸

At the same time that the Department of Labor is relaxing restrictions on teen employment, a 2007 study found significant numbers of teens "performing [hazardous] tasks or working too late on school nights."¹⁷⁹ According to federal statistics, "[h]undreds of thousands of U.S. teenagers are injured at work" annually and about seventy die each year from work-related injuries.¹⁸⁰

171. *Burton v. Hillsborough County, Fla.*, No. 05-10247, 2006 WL 1374493, at *8-9 (11th Cir. May 18, 2006).

172. Jim Wyss, *Pay Denied for Security Delays*, MIAMI HERALD, June 7, 2007, at 1C.

173. Ina Paiva Cordle, *Workers Sue AirTran over Unpaid Breaks*, MIAMI HERALD, Feb. 7, 2007, at 1C.

174. Breanne Gilpatrick & Diana Moskovitz, *Terror Level Raises Security Costs at Airport*, MIAMI HERALD, Aug. 8, 2007, at 6B.

175. *Id.*

176. *See* Child Labor Regulations, Orders and Statements of Interpretation, 72 Fed. Reg. 19337 (proposed Apr. 17, 2007) (to be codified at 29 C.F.R. pt. 570).

177. *Id.*

178. *Id.* at 19345-46.

179. Carla K. Johnson, *Teens Tell of Labor Violations*, MIAMI HERALD, Mar. 5, 2007, at 10A.

180. *Id.*

2. Teachers' Pay

A 2006 survey found that “the average teacher salary [in the United States] increased by only \$1,000 from 1994 to 2004, [far] less than the average [raise] for other professionals.”¹⁸¹ In 2004, “the average annual salary for teachers was \$46,597.”¹⁸² For 2005 to 2006, “the national average classroom teacher salary” was \$49,109.¹⁸³ In Broward County, the 2005 to 2006 average salary was \$44,000.¹⁸⁴

In 2006, the Florida Legislature approved a measure setting aside \$147.5 million “to reward outstanding teachers.”¹⁸⁵ “Under the Special Teachers Are Rewarded, or STAR program,” merit pay is tied to “how much a teacher’s students improve their scores on the Florida Comprehensive Assessment Test, or FCAT.”¹⁸⁶ The STAR program has been challenged by a statewide teachers’ union claiming that any merit system “is premature until base salaries . . . [equal] the national average.”¹⁸⁷

Less than a year after the passage of the STAR program, however, the Florida Legislature scrapped the plan after teachers protested that it did not reward enough teachers and that it was unduly based on FCAT scores.¹⁸⁸ In its place, in 2007, the legislature adopted a plan that still calls for school “districts to evaluate teachers based on” FCAT scores, but also takes into account “how principals rate teachers.”¹⁸⁹ Bonuses “can range between five and [ten] percent of a teacher’s annual salary.”¹⁹⁰

A perennial pay equity issue at the college level stems from the gaping disparity between the salaries earned by professors and those earned by football and basketball coaches.¹⁹¹ While the University of Florida professors’ “salaries rank 55th among 60 peer schools,” the head coaches earn a combined salary of \$4 million.¹⁹² While academic departments face budget cut-

181. Erin Aigner, *Teachers' Paychecks*, N.Y. TIMES, Dec. 27, 2006, at B7.

182. *Id.*

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

184. *Id.*

185. *State Ok's Teacher Merit-Pay Plan*, MIAMI HERALD, Oct. 18, 2006, at 8B. The first performance-pay plan in the state was approved for Hillsborough County (Tampa). *Id.*

186. *Id.*

187. *Id.*

188. Gary Fineout, *Teacher Bonus Plan in Peril*, MIAMI HERALD, Mar. 8, 2007, at 1B.

189. Gary Fineout, *Teacher Pay Plan Revised*, MIAMI HERALD, June 30, 2007, at 7B.

190. *Id.*

191. See Fred Grimm, *Taxpayers are Propping up the Jockocracy*, MIAMI HERALD, Oct. 31, 2006, at 1B.

192. *Id.*

backs, “[a]thletic department budgets [grow] wildly.”¹⁹³ A United States Congressman for California, Bill Thomas, has challenged this state of affairs, stating: “Why should the federal government subsidize the athletic activities of educational institutions [through tax-exempt status] when that subsidy is being used to help pay for escalating coaches’ salaries, costly chartered travel and state-of-the-art athletic facilities?”¹⁹⁴

Controversy erupted in 2006, at Florida State University (FSU), over a \$29.5 million gift to the university by one of its chemistry professors who made millions for himself and the university from development of the anti-cancer drug Taxol.¹⁹⁵ The professor stipulated that the money be used, not only to build a chemistry building, but also to endow four professorships.¹⁹⁶ But when building costs soared, the university decided to drop the endowed positions, leading to a lawsuit and an order that FSU “return \$11 million plus interest . . . to the professor’s foundation.”¹⁹⁷

In 2006, Broward Community College approved a new faculty contract calling for “faculty salary [raises] of [around] 4 percent.”¹⁹⁸ Trouble brewed at Florida Agricultural and Mechanical University, “the state’s only public [and] historically black college,” when in 2007, 150 of the college’s 400 “adjunct professors and graduate assistants” went for months without receiving a pay check.¹⁹⁹ Even “some full-time professors who teach outside their” fields went unpaid.²⁰⁰ The college has been rocked by scandal and financial wrongdoing over the years.²⁰¹

3. Longevity Bonuses and “Living Wages” for Public Employees

In the wake of severe budget cuts in 2007, Miami-Dade County entered negotiations with county employees to reduce bonuses guaranteed by contract.²⁰² “Cost-of-living raises alone will cost the county \$56 million” in

193. *Id.*

194. *Id.*

195. Samuel G. Freedman, *Bricks and Mortar or Professors and Research? Florida State’s Choice*, N. Y. TIMES, Dec. 6, 2006, at A25.

196. *Id.*

197. *Id.*

198. Breanne Gilpatrick, *BCC Trustees Ok Faculty Contract*, MIAMI HERALD, Nov. 23, 2006, at 3B.

199. Brent Kallestad, *FAMU Failed to Pay Part-Time Instructors*, MIAMI HERALD, Feb. 17, 2007, at 8B.

200. *Id.*

201. *Id.*

202. See Mathew I. Pinzur, *Miami-Dade Weighs Reducing Annual Raises*, MIAMI HERALD, July 16, 2007, at 1A [hereinafter Pinzur, *Miami-Dade Annual Raises*].

2008, while merit raises come to \$46.5 million.²⁰³ One solution proposed was to eliminate 1200 jobs, among other cuts.²⁰⁴ Another proposal would suspend merit raises for executive employees.²⁰⁵

One controversial benefit reaped by Miami-Dade County government workers, known as longevity bonuses, has come under scrutiny as the county is forced by budget cuts to tighten its belt.²⁰⁶ While all but unheard of in the private sector, these bonuses, ranging from \$350 to over \$2000, that are in addition to cost-of-living raises, cost the county \$15.9 million in 2006.²⁰⁷ An editorial in the *Miami Herald* urged an end to this entitlement at the taxpayers' expense, where "county employees with 15 years or more on the job get a bonus paycheck just for sticking around."²⁰⁸

Shrinking sales tax revenue in 2007 is forcing the Broward County School District to employ fewer crossing guards, and instead of hiring 400 new teachers, it will only take on 200.²⁰⁹ Broward County's "living wage law," adopted in 2003, requires county employees to be paid \$10.63 an hour, although the law does not govern contracts entered into before 2003.²¹⁰

4. The Wage Gap Between Men and Women

Women make about 80% of the salaries their male counterparts do one year after college.²¹¹ After ten years working, the gap widens further.²¹² Apart from sex discrimination, the gap stems in part from people's choices. For example, some employers assume that young women will leave their jobs when they have children.²¹³ For women without a college degree, the pay gap with men has narrowed slightly since the mid-1990s.²¹⁴

In May 2007, the United States Supreme Court ruled against a woman who failed to sue "within the 180-day statute of limitations from when her

203. *Id.*

204. *Id.*

205. *Id.*

206. See Matthew I. Pinzur, *Longevity Bonus Stretches Payroll*, MIAMI HERALD, July 24, 2007, at 1A.

207. *Id.*

208. *In Another World on Taxpayers' Dime*, MIAMI HERALD, July 27, 2007, at 24A.

209. Nirvi Shah, *School Cuts: Bus Service, Traffic Aides*, MIAMI HERALD, July 27, 2007, at 1B [hereinafter Shah, *School Cuts*].

210. Amy Sherman, *Shuttle Drivers Due Raises*, MIAMI HERALD, Feb. 21, 2007, at 3B.

211. Ellen Simon, *Gender Pay Gap Widens Over Years*, MIAMI HERALD, Apr. 24, 2007, at 3C.

212. *Id.*

213. *Id.*

214. See David Leonhardt, *Scant Progress on Closing Gap in Women's Pay*, N.Y. TIMES, Dec. 24, 2006, at A1.

first paycheck showed evidence of sex-based pay discrimination.”²¹⁵ The trouble with this ruling, however, is that given the secrecy shrouding pay figures, women may not know what their male peers earned until it is too late.²¹⁶ Critics regard the decision as a “severe weakening of civil rights.”²¹⁷ In August 2007, the House of Representatives “voted to reverse the Supreme Court’s [ruling] limiting the time workers have to sue their employers for pay discrimination.”²¹⁸

Men, on average, earn more money than women.²¹⁹ “[A] woman earns only 77 percent as much as her male counterpart with the same job description and experience.”²²⁰ Among many possible reasons for this gap is that traditionally, how much each employee earns has been shrouded in secrecy.²²¹ One proposed remedy that would enable women to know about wage disparities between men and women would be legislation forcing all employers to post salaries.²²² Even absent legislation, several internet websites, such as Salary.com, PayScale.com, and Payscale.com, try to level the playing field by providing salary information to the forty-seven million people looking for jobs each month, and to the untold “others who think they are underpaid at the ones they have.”²²³ Surprisingly, a 2007 analysis of recent census data found that young women in several of the country’s largest cities, working full-time, earned 117% of men’s wages for the twenty-one to thirty age group.²²⁴

5. Wage Growth in South Florida

In 2007, Miami-Dade County’s wage growth was the fastest among the largest counties in the United States.²²⁵ While Miami-Dade County was up 8%, wage growth rose only 5.6% in Broward County between 2005 and

215. Diane Stafford, *Court Ruling Complicates Pay-Disparity Issue*, MIAMI HERALD, July 9, 2007, at 30G (discussing *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007)).

216. *See id.*

217. *Id.*

218. *Supreme Court: House Against Pay Ruling*, MIAMI HERALD, Aug. 1, 2007, at 1C.

219. *See* David Leonhardt, *Women Outpace Men in Wage Gains*, TIMES UNION, Feb. 17, 2003, at A1.

220. *Seeing Red*, MIAMI HERALD, Apr. 26, 2006, at 1C.

221. *See* Susan E. Reed, Op-ed., *Show Us the Money*, N.Y. TIMES, June 4, 2007, at A23.

222. *Id.*

223. Damon Darlin, *Using Web to Get Boss to Pay More*, N.Y. TIMES, Mar. 3, 2007, at C1.

224. Sam Roberts, *For Young Earners in Big City, Gap Shifts in Women’s Favor*, N.Y. TIMES, Aug. 3, 2007, at A1.

225. Boodhoo, *Wage Growth Up*, *supra* note 6.

2006.²²⁶ While such statistics may be good news for the average worker, people at the lower end of the pay scale face unexpected hardship. For example, “wages have not kept pace” with the higher fines imposed for most traffic violations.²²⁷ As a result, many Floridians “fail to pay their tickets and [end] up with a suspended license.”²²⁸ It is estimated that 1.8 million Floridians have had their driver’s licenses either revoked or suspended.²²⁹ Since 900,000 of these Floridians drive anyway, a bill was introduced in 2007 that would authorize police to “impound or boot vehicles operated by anyone with a suspended or invalid license.”²³⁰ Two-time offenders could receive a year in prison.²³¹

While \$165,200 annual salaries, in the abstract, sounds like a lot of money, such “low” pay is compelling some of the nation’s best judges to leave the federal court bench, eroding the quality of the federal judiciary according to the testimony of Supreme Court Justice Anthony Kennedy before Congress in 2007.²³² With “first-year lawyers at leading [law] firms in large cities . . . earning almost as much as district judges,” nineteen federal judges have left the bench since 2004, many “to take higher-paying jobs.”²³³ In 2007, the United States Senate passed a bill that would raise federal judges’ salaries to keep pace with inflation.²³⁴

6. The Mommy Track and Part-Time Worker Issues

A 2007 study found a “notable increase in the rate among unmarried mothers with children under age 1” in the labor force, “up 4.3 percentage points to 59 percent.”²³⁵ Another 2007 study found that “[t]he marriages of women who work outside the home are more likely to stay together than the marriages of those who don’t.”²³⁶ This finding runs counter to the view of many economists who insist “that the specialization of a traditional mar-

226. *Id.*

227. Larry Lebowitz, *Bill Puts Brakes on Drivers Who Have Suspended Licenses*, MIAMI HERALD, Mar. 5, 2007, at 1B.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Mark Sherman, *Salary Lament: ‘I’m Losing My Best Judges,’* MIAMI HERALD, Feb. 15, 2007, at 5A.

233. *Id.*

234. *Id.*

235. *Moms Are in Labor Force*, *supra* note 14.

236. Frank Greve, *Working Wives Help Marriages*, MIAMI HERALD, May 23, 2007, at 7A [hereinafter Greve, *Working Wives*].

riage—a bread winner and a homemaker—[is] more efficient and productive.”²³⁷ The Bureau of Labor Statistics found an increase of roughly “8 percent in the number of married women at home with infants from 1997 to 2004,” with the biggest growth “among mothers with college degrees.”²³⁸ All too often, stay-at-home mothers find that even a short break from their careers takes a “huge economic toll . . . over a lifetime.”²³⁹

An emerging alternative between stay-at-home and full-time working moms is the rise in the appeal of part-time work.²⁴⁰ One study found that 60% of working mothers favor part-time over full-time work, an increase of 12% since 1997.²⁴¹ “[A] new generation of working mothers” cherish flexibility, “but only 24 percent of them” achieve it.²⁴² “A decade ago, 49 percent [of unmarried mothers] preferred full-time hours,” today only 26% do.²⁴³ By contrast, 72% of fathers “say the ideal situation is a full-time job.”²⁴⁴

Bucking the national trend, 60% of women and 67% of men “working part time in Miami-Dade County want to work full time.”²⁴⁵ This departure from the national norm may be explained, in part, by the fact that only 20% of part-time workers have employer health insurance.²⁴⁶

B. Health Benefits

1. Generally

Roughly “43.6 million people in the United States, or 14.8 percent of the population,” lacked health insurance in 2006.²⁴⁷ In Florida, over three million people do not have health insurance.²⁴⁸ “More than 1.5 million full-time [employees in Florida] are without health insurance.”²⁴⁹ Nearly “9.3

237. *Id.* In the new “egalitarian marriages,” . . . husbands and wives share decision-making power more equally and housekeeping and child-care duties more equitably.” *Id.*

238. Ellen Goodman, *New Direction for Mommy Track*, MIAMI HERALD, Jan. 9, 2007, at 15A.

239. *Id.*

240. Cindy Krischer Goodman, *More Moms: Less Work*, MIAMI HERALD, July 13, 2007, at 1C.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. Cindy Krischer Goodman, *Trapped in a Part-Time World*, MIAMI HERALD, May 23, 2007, at 1C.

246. *Id.*

247. *Survey Finds 43.6 Million Uninsured in U.S.*, N.Y. TIMES, June 26, 2007, at A13.

248. Menendez, *supra* note 38.

249. *County Pay Boosts Families*, MIAMI HERALD, Aug. 19, 2007, at 3L.

percent of children under 18 lacked [health] insurance,” down from 13.9% in 1997.²⁵⁰ A bill in Congress proposes to extend health insurance to more uninsured children, but President Bush opposes the measure as one step toward socialized medicine.²⁵¹

“About 47 percent of parents in families earning” under \$40,000 annually lack “health insurance through their employers”—9% less than in 1997.²⁵² After Texas, Florida has the highest percentage of uninsured children at 16.9%.²⁵³

“The percentage of large and medium-size employers paying 100 percent of [employees’] individual [health insurance] premiums [dropped] to 17 percent in 2004 from 29 percent in 2000.”²⁵⁴ Only “6 percent of employers in 2004” paid the full premium for family coverage, down from 11% in 2000.²⁵⁵ Moreover, employees “are paying more in co-payments for doctor visits and for drug benefits.”²⁵⁶

In 2005, health care spending rose 6.9%—the lowest increase in six years.²⁵⁷ The slower pace is owed in part to a bigger reliance on generic drugs.²⁵⁸ At the same time, 2005 spending on hospital care rose 7.9%, about the same as in previous years.²⁵⁹ About 2% of the U.S. population accounts for a third of health care expenditures.²⁶⁰ “Health insurance premiums . . . rose 7.7 percent [in 2006], twice the rate of inflation.”²⁶¹

250. Gail Moorstein, *Private Sector Compensations Rise Incrementally in First Quarter*, CAREER JOURNAL, July 9, 2007, <http://www.careerjournal.com/hrcenter/briefs/20070709-bna.html>.

251. Robert Pear, *House Passes Children’s Health Plan 225-204*, N.Y. TIMES, Aug. 2, 2007, at 13A.

252. *See Employee Benefits Eroding*, MIAMI HERALD, Mar. 14, 2007, at 1C.

253. *Id.*

254. Milt Freudenheim, *Fewer Employers Totally Cover Health Premiums*, N.Y. TIMES, Mar. 23, 2007, at 1C.

255. *Id.*

256. *Id.*

257. Kevin Freking, *Costs Rose More Slowly in 2005*, MIAMI HERALD, Jan. 9, 2007, at 4C.

258. *See id.*

259. *Id.*

260. *Id.*

261. Ellen Simon, *Firms Use ‘Twinkie Taxes’ to Make Workers Healthy*, MIAMI HERALD, Dec. 5, 2006, at 5C [hereinafter Simon, ‘Twinkie Taxes’].

2. National Developments

a. Federal Legislation

In his January 23, 2007 State of the Union address, President Bush proposed changes to the Internal Revenue Code.²⁶² Under the plan, employer-provided health insurance would be treated as taxable income.²⁶³ A standard deduction would be provided: \$15,000 for families, \$7500 for individuals.²⁶⁴

On April 25, 2007, the House passed legislation that will make it illegal for employers or health insurers to discriminate against individuals based on their genetic information or test results.²⁶⁵

In 2007, “[a] bipartisan coalition in Congress [proposed] a mental health-parity bill, which would [force] group health plans to [provide similar] coverage for mental and physical illnesses.”²⁶⁶ The bill prohibits insurers from having “different co-payments, deductibles and out-of-pocket limits for mental-health benefits and medical/surgical benefits.”²⁶⁷

In 2007, the House of Representatives passed a measure forcing the federal “government to negotiate lower drug prices for the Medicare prescription drug program.”²⁶⁸ President Bush said he would veto the bill because it would be “tantamount to price controls.”²⁶⁹

b. Innovative State Health Programs

In 2006, a Massachusetts law required all residents to have health insurance coverage, but the governor vetoed a provision that forced employers with eleven or more employees to provide employee health coverage, or pay

262. See The White House, *Strengthening Health Care*, <http://www.whitehouse.gov/news/releases/2007/02/20070223-4.html> (last visited Nov. 3, 2007) [hereinafter The White House, *Strengthening Health Care*].

263. The White House, *2007 State of the Union, Affordable, Accessible, and Flexible Health Care Coverage*, <http://www.whitehouse.gov/stateoftheunion/2007/initiatives/healthcare.html> (last visited Nov. 3, 2007).

264. The White House, *Strengthening Health Care*, *supra* note 262.

265. Genetic Information Nondiscrimination Act of 2007, H.R. 493, 110th Cong., at 2 (2007). This would amend Title VII, among other federal laws. *Id.* at 69.

266. Rob Hotakainen, *Congress Tackles Once-Taboo Issue*, MIAMI HERALD, Mar. 12, 2007, at 1A.

267. *Id.*

268. Tony Pugh, *Conflict Builds over Drug Costs*, MIAMI HERALD, Jan. 13, 2007, at 3A.

269. *Id.*

an annual per worker assessment.²⁷⁰ On October 1, 2006, a Massachusetts agency issued final regulations forcing all employers of eleven or more workers to start making minimum contributions to employee health insurance.²⁷¹ Of the four states with plans aimed at universal health care coverage, “only Massachusetts has mandated individual coverage.”²⁷²

In 2007, California Governor Arnold Schwarzenegger proposed a plan that forced employers “with 10 workers or more to buy insurance for their workers or pay a fee of 4 percent of their payroll into a program” to cover the uninsured.²⁷³ The plan would also cover individuals otherwise denied health insurance thanks to pre-existing medical conditions.²⁷⁴ Already, “71 percent of California employers offer [employees] health insurance.”²⁷⁵

Maryland’s innovative Fair Share Health Care Fund Act, which is aimed at forcing Wal-Mart Stores to spend more on employee health care, was successfully challenged in court.²⁷⁶ In *Retail Industry Leaders Ass’n v. Fielder*,²⁷⁷ the Fourth Circuit ruled that the Act was preempted by the federal Employee Retirement Income Security Act.²⁷⁸ Meanwhile, Wal-Mart Stores announced in 2007 that “the number of [employees] enrolled in [its] health plan rose 8 percent” in late 2006, thanks to “its introduction of cheaper insurance policies.”²⁷⁹

In Utah, an entrepreneur proposed that small businesses “should stop [offering] group health insurance and instead” offer individual policies.²⁸⁰ Critics counter that people who are uninsurable, due to pre-existing illnesses, will suffer.²⁸¹

270. H. 4850, § 32, 2006 Leg. (Mass. 2006), available at <http://www.mass.gov/legis/bills/house/184/ht04pdf/ht04850.pdf>; see also Brian C. Mooney et al., *Ambitions Grow and the Stances Shift*, BOSTON GLOBE, June 30, 2007, at A1.

271. 114.5 MASS. CODE REGS. 16.01 (2006).

272. Kevin Sack, *California’s Ambitious Health Plan Stalls*, N.Y. TIMES, Sept. 9, 2007, at A30.

273. Jordan Rau, *Healthcare Overhaul Sought*, MIAMI HERALD, Jan. 9, 2007, at 2A.

274. *Id.*

275. *Id.*

276. See Michael Barbaro, *Appeals Court Rules for Wal-Mart in Maryland Health Care Case*, N.Y. TIMES, Jan. 18, 2007, at C4.

277. 475 F.3d 180 (4th Cir. 2007).

278. *Id.* at 183.

279. Michael Barbaro & Reed Abelson, *Wal-Mart Says Health Plan Is Covering More Workers*, N.Y. TIMES, Jan. 11, 2007, at C13.

280. Chad Terhune, *Second Opinion: Employers Turn to Alternative for Insuring Staff Despite Legal Concerns, Workers Are Encouraged to Use Individual Policies*, WALL ST. J., July 30, 2007, at A1.

281. *Id.*

3. Florida Developments

Health care experts met in Miami in 2007 to discuss ways of “cover[ing] America’s 46 million uninsured.”²⁸² One plan, called Insurance-for-All, calls for “\$25 billion in federal tax funding,” with the balance paid by “subscribers who would pay \$94 a month for coverage with a \$1,000 deductible and 20 percent co-pays.”²⁸³ Florida’s new secretary of the Agency for Health Care Administration favors covering all children “for preventive and catastrophic care.”²⁸⁴

In 2007, Miami-Dade County weighed becoming self-insured to cover family members of county employees against spending thousands of dollars annually on insurance premiums.²⁸⁵ Already, county workers have “free HMO coverage for themselves, but family coverage” is expensive.²⁸⁶ But instead of passing on savings to employees by going self-insured, the county may have to use the fund to pay cost-of-living increases in light of the mayor’s plan to cut \$222 million from the county’s budget.²⁸⁷

The North Broward Hospital District announced plans in 2007 “to set up walk-up clinics in up to six Wal-Mart superstores.”²⁸⁸ The clinics will charge \$50 to treat simple medical problems and write common prescriptions, but will refer more complex cases to one of its hospitals.²⁸⁹ Wal-Mart already has six clinics in Florida.²⁹⁰

4. Wellness Programs

Thanks to mounting health care costs, many employers have set up wellness programs aimed at encouraging workers to switch to healthier habits that might reduce the incidence of diseases tied to “eating poorly and being overweight or inactive.”²⁹¹ So-called “twinkie taxes” increase the price

282. John Dorschner, *Who Pays for Uninsured?*, MIAMI HERALD, Jan. 24, 2007, at 1C.

283. *Id.*

284. *Id.*

285. Matthew I. Pinzur, *Dade May Offer Own Health Plan*, MIAMI HERALD, Mar. 3, 2007, at 1C.

286. *Id.*

287. Pinzur, *Miami-Dade Annual Raises*, *supra* note 202.

288. John Dorschner, *Wal-Mart Getting Walk-Up Clinics*, MIAMI HERALD, Jan. 26, 2007, at 5B.

289. *Id.*

290. *Id.*

291. Simon, *‘Twinkie Taxes’*, *supra* note 261.

of fatty foods in company cafeterias and lower the price for salads and fruits.²⁹²

According to one expert, “if healthcare costs keep rising, they could consume 100 percent of the gross domestic product by 2026.”²⁹³ But wellness programs face an uphill battle given that the food industry spends \$25 billion annually to promote mostly unhealthy food choices while the federal government spends only \$1 million promoting fruits and vegetables per day.²⁹⁴

Of the 63% of major U.S. companies who said they would become more involved in the health of their employees, about half in 2007 offered incentives for workers to take part “in exercise or other wellness programs.”²⁹⁵ Some employers build gyms in the workplace,²⁹⁶ offer personal “coaches and computerized health tracking.”²⁹⁷ One study found that health care costs could be cut “in half if the employee is a nonsmoker, nonobese and engages in physical activity three times a week.”²⁹⁸ While some employers charge smokers more for health insurance, few have been willing to charge overweight workers more.²⁹⁹ Other employers use the carrot, not the stick, such as lower deductibles for employees with “weight, cholesterol and blood pressure under control.”³⁰⁰

“The head of Florida’s prison system” warned correctional employees to get physically fit by 2009 or run the risk of losing their jobs.³⁰¹ Under the plan, male workers over the age of fifty must “walk or run 1.5 miles in 17 minutes, do 19 push-ups in two minutes and a minimum of 27 sit-ups.”³⁰² While Florida’s governor endorses the plan, some say the proposal is hurting employee morale.³⁰³

The health of truck drivers has come under scrutiny given studies showing that many truckers do not “wear seat belts because their stomachs get in

292. *Id.*

293. John Dorschner, *Wellness Programs Can Save Big Money*, MIAMI HERALD, June 6, 2007, at 3C.

294. *Id.*

295. John Dorschner, *Shaping up the Workforce*, MIAMI HERALD, Apr. 29, 2007, at 1E [hereinafter Dorschner, *Shaping up*].

296. *E.g.*, John Dorschner, *UM Invests \$14M in Employee Gym*, MIAMI HERALD, Apr. 29, 2007, at 2E.

297. Dorschner, *Shaping up*, *supra* note 295.

298. *Id.*

299. *Id.*

300. *Id.*

301. Brent Kallestad, *Prison’s Leader Pitches Fitness Requirements*, TAMPA TRIB., Jan. 5, 2007, at 4.

302. *Id.*

303. *Id.*

the way,” 28% of them suffer from sleep apnea, and 50% of them smoke.³⁰⁴ Already, commercial drivers cannot be licensed if their blood pressure is too high or if they suffer from severe heart conditions.³⁰⁵ One employer of truckers offers free “blood pressure and cholesterol checks,” while another employer offers a twelve-week weight-loss program.³⁰⁶ Another provides drivers, who suffer from apnea, with “air masks to help them sleep.”³⁰⁷

The insurance company, Phoenix, is the first insurer to offer 20% discounts “on life-insurance policies to customers whose” body-fat ratio is low.³⁰⁸

In light of the fact “that 9.4 million illicit drug users and 10.1 million heavy drinkers have full-time jobs,” many employers, in addition to instituting drug testing, are providing “benefits such as education and treatment.”³⁰⁹

5. Retiree Health Benefits

“[After] years of [massive] layoffs, employee buyouts and sending jobs offshore, corporate America has helped create a pool of about 800,000 early retirees who now find themselves in a health care bind.”³¹⁰ Too young for Medicare and unable to afford their own health insurance, former employees aged fifty-five to sixty-four welcome some big employer plans offering health insurance.³¹¹ Significantly, under these innovative plans, “no one could be [denied] coverage [over pre-existing] medical condition[s].”³¹² While the policies come with high annual deductibles and monthly premiums ranging from \$400 to \$1200, this is far less than these early retirees would pay on their own.³¹³ Over four million people ages fifty-five to sixty-four are jobless and increasingly unable to afford health insurance.³¹⁴ Only 18% of large employers defray part of the cost of health insurance for retirees under age sixty-five.³¹⁵

304. Emily Fredrix, *Road Hazards*, MIAMI HERALD, July 11, 2007, at 1C.

305. *Id.*

306. *Id.*

307. *Id.*

308. Stephen Singer, *Drop Pounds, and We Will Drop Rates, Insurer Says*, ORLANDO SENT., Mar. 1, 2007, at A14.

309. Nesmith, *supra* note 40.

310. Milt Freudenheim, *Keeping Early Retirees Afloat*, N.Y. TIMES, June 23, 2007, at B1.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. Freudenheim, *supra* note 310.

Under new rules effective in 2007, state and local public employers must “disclose the value of the health care they have” pledged for their retirees.³¹⁶ The rule was enacted in 2004 by the Federal Governmental Accounting Standards Board to counter the common practice among public employers who promise retiree health care without disclosing the cost.³¹⁷ Many states with open-ended care obligations oppose the standard because these states will likely find their credit ratings being lowered.³¹⁸

New Jersey public employees were promised free health care when they retired, provided they had worked twenty-five years.³¹⁹ But in 1994, the state stopped contributing to the health care fund and, today, New Jersey has almost “no money in reserve to cover” the \$58 billion needed to cover health care for current and future retirees.³²⁰ One solution requires “retirees [to] pay for part of their health premiums” and shifts “retirees into a network of doctors at negotiated fees.”³²¹

6. Domestic Partnership Benefits

Some states, and many cities and counties, extend dependent health benefits to spousal equivalents of its public employees.³²² In 2005, the Supreme Court of Alaska ruled that the state’s grant of health insurance to married employees’ spouses, but not to same-sex domestic partners of employees who could not legally marry, violated the Alaska Constitution’s Equal Protection Clause.³²³ In 2006, Alaska Governor Sarah Palin pledged that the state would obey the ruling affording health “benefits to same-sex partners of state employees.”³²⁴

316. Mary Williams Walsh, *Texans Want to Strike Rule on Projecting Retiree Care*, N.Y. TIMES, Mar. 12, 2007, at C1.

317. *Id.*

318. *Id.*

319. Mary Williams Walsh, *A \$58 Billion Shortfall for New Jersey’s Retiree Health Coverage*, N.Y. TIMES, July 25, 2007, at A14.

320. *Id.*

321. *Id.*

322. See *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 791–92 (Alaska 2005). As of 2007, while Massachusetts is the only state that recognizes gay marriage, the District of Columbia and five states offer civil unions or domestic partnerships to gay couples. *The Sky Isn’t Falling*, WASH. POST, July 5, 2007, at 16A. In August 2007, Kathleen Sebelius, Governor of Kansas, “signed an executive order” extending protection to most state employees from sexual orientation discrimination. *Kansas: Governor Signs Ban on Bias Based on Sexuality*, N.Y. TIMES, Sept. 1, 2007, at A12. The order also extends protection to “people who have had surgery for sex changes.” *Id.*

323. *Alaska Civil Liberties Union*, 122 P.3d at 793–94.

324. *Same-Sex Partners to Get State Benefits*, MIAMI HERALD, Dec. 21, 2006, at 3A.

In 2007, California became “the first state to” force businesses holding “state contracts to offer domestic partners” of its employees the same benefits that spouses enjoy.³²⁵

The Broward County, Florida, law granting “marriage-like benefits to unmarried domestic partners of employees, homosexual or heterosexual,” was allowed to stand by the Supreme Court of Florida.³²⁶

7. Disability and Death Benefits

According to a 2007 survey, “22 million Americans live and work in chronic pain,” up from 15 million in 1996.³²⁷ Part of the blame is owed to ever-growing workloads.³²⁸ Another 2007 study found that when formerly “uninsured people became eligible for Medicare, they had 13 percent more doctor visits, 20 percent more hospitalizations, and reported 51 percent greater medical expenditures than those with the same diseases who had insurance all along.”³²⁹ According to the Social Security Administration, one-third of twenty-year-old workers in 2007 will become disabled by age sixty-seven and the key cause of disability will be chronic disease, not work-related illnesses, injuries, or non-workplace accidents.³³⁰ “About 42 percent of full-time workers have no short or long-term disability” insurance.³³¹

In 2007, “Veterans Affairs Secretary Jim Nicholson” launched a plan to guarantee that disabled veterans “receive state benefits they might” have no knowledge of, owing to federal privacy law.³³² Among other state benefits, veterans are entitled to job training.³³³ In Florida, “[t]en severely disabled veterans” received valuable state benefits “during a four-month tryout of the plan.”³³⁴

325. *In California, Equal Benefits for Partners Are Mandated*, N.Y. TIMES, Oct. 14, 2003, at A23.

326. Caroline J. Keough, *Broward Same-Sex Benefits Survive High Court Won't Hear Attack on Law*, MIAMI HERALD, Apr. 7, 2001, at 1A.

327. *Study: Many Americans Work/Live in Pain*, MIAMI HERALD, Apr. 10, 2007, at 3C.

328. *Id.*

329. Gina Kolata, *Some Chronically Ill Adults Wait for Medicare to Arrive*, N.Y. TIMES, July 12, 2007, at A14.

330. Hillary Chura, *Disability, the Insurance That Is Often Sadly Overlooked*, N.Y. TIMES, June 30, 2007, at B7.

331. *Id.*

332. Suzanne Gamboa, *Veterans' Chances to Collect Benefits Improved*, MIAMI HERALD, Feb. 13, 2007, at 3A.

333. *Id.*

334. *Id.*

In 2007, injured Iraq War veterans sued the federal government over delays in securing disability pay and health care.³³⁵ Among other allegations, the lawsuit accuses the Veterans Benefits Administration of knowingly cheating some vets by reclassifying post-traumatic stress disorder claims as pre-existing personality disorders to avoid paying benefits.³³⁶

Under the Federal Hometown Heroes Act, “if an emergency responder dies of a heart attack or stroke within 24 hours of duty, there is a ‘presumption’ that the person died in the line of duty,” entitling survivors to death benefits.³³⁷ In 2006, of the 106 firefighters who died in the line of duty, thirteen were entitled to death benefits under the Hometown Heroes Act.³³⁸ However, nationwide, over 200 survivors of such heroes have not received the \$295,194 in death benefits, outraging advocates for fallen firefighters and police officers.³³⁹

Under the federal Public Safety Officers’ Benefits Act (PSOBA), Congress extended death benefits to families of firefighters or police officers “who enforce the criminal law rather than only civil law.”³⁴⁰ The Federal Circuit ruled that a deputy sheriff, who did not actually enforce criminal laws and was accidentally killed in a wild horse roundup, was not entitled to PSOBA death benefits.³⁴¹

8. Family Medical Leave Act Issues

Under the FMLA, all state and local government eligible employees are entitled to twelve weeks of unpaid leave in a twelve-month period: (1) for birth or adoption of a child or placement of a foster child; (2) to care for a spouse, child or parent with a serious health condition;³⁴² or (3) for the employee’s own serious health condition.³⁴³ In the twelve years since the

335. Hope Yen, *Vets Sue over Healthcare*, MIAMI HERALD, July 24, 2007, at 5A.

336. *Id.*

337. Barbara Barrett, *‘Heroes’ Family Benefits Stalled*, MIAMI HERALD, May 7, 2007, at 5A.

338. *Id.*

339. *Id.*

340. *Hawkins v. United States*, 469 F.3d 993, 1001 (Fed. Cir. 2006).

341. *See id.* at 995–97.

342. Mark Zelek, *Department of Labor Seeks Employer Input by Feb. 2*, MIAMI HERALD, Jan. 15, 2007, at 7G. “Only 7 percent of U.S. [employers] have specific policies on caring for elderly family members,” but about 16% of all employees care “for an elderly, ill or disabled family member.” Christina Rexrode, *Next Care Challenge: The Elderly*, ST. PETE. TIMES, Aug. 12, 2007, at 1F.

343. 29 U.S.C. § 2612(a)(1)(D) (2000). The Department of Labor estimates that 94.4 million employees work for FMLA-covered employers, with about 76.1 million workers eligible for FMLA leave. Family and Medical Leave Act Regulations: A Report on the De-

FMLA was enacted, over fifty million workers have taken unpaid leave and employers want clarification on what constitutes a “serious health condition” . . . and the use of unscheduled intermittent leave or sporadic absences.”³⁴⁴ Moreover, employers seek the right to call doctors to confirm employee illnesses.³⁴⁵

While employers aim at weakening the FMLA, employee advocates are working to strengthen and extend its protections. For example, studies showing that the marriages of women who work outside the home are more stable than the marriages of those who do not are cited to support “public-policy arguments for more paid maternal and paternal leave.”³⁴⁶ “In Miami-Dade County, a local version of the [FMLA grants] unpaid time off to workers caring for grandparents.”³⁴⁷

While the FMLA provides for unpaid leave, paid leave has become a new battleground. Already, “[a]t Ernst & Young, new fathers can take up to six weeks paid paternity leave.”³⁴⁸ In 2007, a new law took effect in San Francisco “requiring paid sick leave for all . . . employees,” the “first of its kind in the United States.”³⁴⁹ In 2007, Ohio weighed the decision of whether to join eighteen states that grant maternity leave going beyond the requirements of the FMLA.³⁵⁰ The proposed Ohio law offers employees at a workplace with four or more workers twelve weeks of unpaid leave for infant care, no matter how long they have been on the job.³⁵¹

“Legislation has been proposed nationally and in Florida to [force] employers [to grant] paid sick days,” eight other states are weighing legislation too.³⁵² Under the proposed federal Healthy Families Act,³⁵³ employers with fifteen or more employees must grant workers up to seven paid sick days a year.³⁵⁴

partment of Labor’s Request for Information, 72 Fed. Reg. 35,550, 35,551 (proposed June 28, 2007) (to be codified at 29 C.F.R. pt. 825). In 2005 alone, between 6.1 million and 13 million workers took FMLA leave. *Id.*

344. See Cindy Krischer Goodman, *Sick? Prove It!*, MIAMI HERALD, Feb. 28, 2007, at 1C.

345. *Id.*

346. Greve, *Working Wives*, *supra* note 236.

347. Zelek, *supra* note 342.

348. Cindy Krischer Goodman, *Year of the Man*, MIAMI HERALD, Jan. 17, 2007, at 1C.

349. Nancy S. Paik, *Don’t Let Groundbreaking Sick-Leave Law Become a Headache*, THE RECORDER, Feb. 9, 2007, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1170928964690>.

350. Bob Driehaus, *Ohio Pushes Added Leave for Maternity*, N.Y. TIMES, Aug. 12, 2007, at A15.

351. *Id.*

352. Cindy Krischer Goodman, *Cold Remedy*, MIAMI HERALD, Mar. 21, 2007, at 1C.

353. Healthy Families Act, H.R. 1542, 110th Cong. (2007).

354. *Id.* §§ 4(3)(B)(i)(I), 5(a)(1).

Almost 50% of all full-time, private sector employees receive no paid sick days.³⁵⁵ About 80% of employees in the bottom quarter of wage earners get no paid sick days at all.³⁵⁶ About 145 countries grant paid sick leave, leaving the United States as “the only industrialized [nation] lacking such a [benefit].”³⁵⁷

A 2006 survey found “that personal illness accounts for only 35 percent of unscheduled absences, [with the balance owing] to family issues (24 percent), personal needs (18 percent), stress (12 percent), and entitlement mentality (11 percent).”³⁵⁸

A Florida court ruled that an employer violated the FMLA by failing to explain FMLA benefits and leave rights to an employee when she asked for leave.³⁵⁹ This failure amounts to actionable interference with the worker’s capacity to exercise her right to FMLA leave if she can establish resulting prejudice.³⁶⁰

A hog slaughtering plant in North Carolina protested a company’s decision not to give them Martin Luther King Jr. Day as a paid day off by refusing to work part of the day.³⁶¹

On July 1, 2007, a new Florida law, “[a]n act relating to domestic violence,” took effect.³⁶² The law entitles certain employees up to three working days leave who are either victims of domestic violence themselves, or have a family member who is a victim.³⁶³ The law applies to workplaces with fifty or more employees.³⁶⁴ Individuals requesting leave must have worked for at least three months.³⁶⁵

C. *Guns and Violence in the Workplace*

In March 2007, the Florida Senate Criminal Justice Committee adopted a measure that would bar employers from prohibiting guns, pornog-

355. Bob Herbert, *The Right to Paid Sick Days*, N.Y. TIMES, May 15, 2007, at A29.

356. *Id.*

357. *Id.*

358. *Absenteeism Hits New High*, MIAMI HERALD, Oct. 28, 2006, at 1C.

359. See *Patterson v. Browning’s Pharmacy & Healthcare, Inc.*, 961 So. 2d 982, 986 (Fla. 5th Dist. Ct. App. 2007).

360. *Id.* at 986–87.

361. Estes Thompson, *Hog Slaughterers Protest Work on MLK Day*, MIAMI HERALD, Jan. 16, 2007, at 11B.

362. Act effective July 1, 2007, ch. 2007-107, §§ 1–2, 2007 Fla. Sess. Law Serv. 1034, 1034 (codified at FLA. STAT. § 741.313).

363. *Id.* § 1, 2007 Fla. Sess. Law Serv. at 1035 (codified at FLA. STAT. § 741.313(2)(a) (2007)).

364. *Id.* (codified at FLA. STAT. § 741.313(3) (2007)).

365. *Id.*

raphy, and other legal material from their parking lots.³⁶⁶ Although the bill shields employers if any of the legal materials were enlisted to commit a crime, opponents insist the law infringes on employers' property rights and Florida's "at will" labor laws.³⁶⁷ Advocates of the bill assert that if an employee "is licensed to carry a gun," that right also includes keeping it in his car, no matter where it is parked.³⁶⁸

In April 2007, however, the Florida House Committee killed the NRA-backed measure a day after the gun slaughter of thirty-two people at Virginia Tech.³⁶⁹ Employers cheered the bill's defeat, claiming the law would have exposed them to marked liability and posed a risk to employees.³⁷⁰ In a poll of 600 voters, 62% said they had no knowledge of the "gun at work" law.³⁷¹

In March 2007, a Florida "judge [flushed] a handgun in his courtroom after a man . . . punched a handcuffed defendant accused of molesting his son."³⁷² "Duvall County[']s Public Defender . . . questioned the safety of [permitting] judges to carry guns," even though the practice is currently legal.³⁷³

Violence in the workplace is more likely during downsizing and layoffs, and is often preceded by danger signals ranging from staring, to nasty looks, to verbal threats, to stalking.³⁷⁴ Violence can stem from former employees who are "bitter about their separation," and domestic violence "can . . . spill over into the workplace."³⁷⁵ Prudent workplace security policies should declare "zero tolerance for threatening or violent behavior."³⁷⁶ In the private workplace, federal law makes clear that "in [any] workplace [in which] the risk[s] of violence and serious personal injury are [substantial] enough to be 'recognized hazards,'" the employer must take reasonable steps to counter those risks.³⁷⁷

366. Jim Wyss, *Loaded Debate*, MIAMI HERALD, Mar. 28, 2007, at 1C.

367. *Id.*

368. *Id.*

369. Monica Hatcher, *'Guns at Work' Bill Rejected*, MIAMI HERALD, Apr. 19, 2007, at 1C.

370. *Id.*

371. *62% Percent of Voters Unaware of Gun Bill*, MIAMI HERALD, Apr. 17, 2007, at 3C.

372. *Judge Pulls out Gun in Court*, MIAMI HERALD, Mar. 28, 2007, at 7B.

373. *Id.*

374. Eilene Zimmerman, *Danger Signals at Work, and How to Handle Them*, N.Y. TIMES, Apr. 15, 2007, at 18.

375. *Id.*

376. *Id.*

377. OSHA Interpretation Letter from Richard E. Fairfax, Director, Directorate of Enforcement Programs, to Morgan Melekos (Sept. 13, 2006), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504.

According to a survey of workplace violence conducted by the Bureau of Labor Statistics, over 70% of U.S. workplaces lack a policy addressing workplace violence, and about 80% offer no training for preventing it.³⁷⁸ The survey also found that 5.3% of all employers faced an incident of workplace violence in the previous year.³⁷⁹

D. *Workers' Compensation*

In 2003, Florida's workers' compensation law was substantially overhauled, resulting in fewer injured workers' claims, largely owing it to "less fraud and abuse."³⁸⁰ In late 2006, state regulators approved a reduction in workers' compensation insurance rates, averaging 16% statewide.³⁸¹ Florida's Chief Financial Officer ordered a 50% reduction in the 2008 Workers' Compensation Administration Trust Fund assessment rate, which is projected to save Florida employers \$19 million.³⁸²

Thanks to sagging sales tax collections, the Broward County School District cut "\$61 million from its budget" in 2007, including \$2 million on workers' compensation claims.³⁸³ Many employers saw annual workers' compensation claims drop 80% after introducing wellness programs aimed at preventing illnesses.³⁸⁴

In 2006–07, Florida case law addressed a wide range of workers' compensation issues, including: 1) employee versus independent contractor status;³⁸⁵ 2) the exclusivity of workers' compensation as claimants' sole recourse;³⁸⁶ 3) heart and lung acts creating rebuttable presumptions that some

378. Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Survey of Workplace Violence Prevention 2005 (Oct. 27, 2006), *available at* <http://www.bls.gov/iif/oshwc/osnr0026.pdf>.

379. *Id.*

380. *Drop in Workers' Comp Rates Approved*, MIAMI HERALD, Nov. 1, 2006, at 3C.

381. *See id.*

382. *Assessment Rate Cut 50 Percent*, MIAMI HERALD, July 9, 2007, at 5G.

383. Shah, *School Cuts*, *supra* note 209.

384. Emily Fredrix, *Road Hazards*, *supra* note 304 (explaining that as a result of the introduction of wellness programs aimed at preventing illness, one company in Michigan saw an 80% drop in workers' compensation claims).

385. *Compare* Orange County Sch. Bd. v. Powers, 959 So. 2d 370, 371 (Fla. 1st Dist. Ct. App. 2007) (explaining that student teachers are not employees covered by workers' compensation), *with* Fla. Dep't of Fin. Servs. v. MJ Versaggi Trust, 952 So. 2d 583, 586 (Fla. 2d Dist. Ct. App. 2007) (explaining that construction workers who do not meet the definition of an independent contractor are considered employees and covered by workers' compensation); *see also* Blue Stone Real Estate v. Ward, 962 So. 2d 945, 947 (Fla. 1st Dist. Ct. App. 2007).

386. FLA. STAT. § 440.11(1)(b) (2007) (providing for tort claims against "an employer [who] commits an intentional tort that causes" an employee's injury or death); *see generally* Bakerman v. Bombay Co., 961 So. 2d 259, 265 (Fla. 2007) (finding an exception to workers'

illnesses are job-related for police and firefighters;³⁸⁷ 4) medical benefits;³⁸⁸ 5) pre-existing conditions;³⁸⁹ 6) the dual purpose exception to the going and coming rule;³⁹⁰ 7) offsets;³⁹¹ and 8) remedies.³⁹²

E. *Unemployment Compensation*

According to a 2007 “study, unemployment benefits [in the United States] replace, on average, [only] 14 percent of workers’ lost earnings.”³⁹³ At the federal level, in 2006, the Department of Labor issued a final rule requiring state agencies doling out unemployment compensation to protect confidential information as a condition for securing federal grants to operate their departments.³⁹⁴ On January 16, 2007, the Department of Labor published a final rule that codifies a federal requirement that states may only

compensation immunity where an employer’s acts were substantially certain to result in injury or death).

387. *See* *Orange County Fire Rescue v. Jones*, 959 So. 2d 785, 789 (Fla. 1st Dist. Ct. App. 2007) (finding “hepatitis C is no longer recognized as an occupational disease for firefighters”); *City of Tarpon Springs v. Vaporis*, 953 So. 2d 597, 599 (Fla. 1st Dist. Ct. App. 2007) (noting that the “presumption merely [shifts] the burden of proof” to an employer to prove that a heart attack was not suffered in the line of duty).

388. *James W. Windham Builders, Inc. v. Overloop*, 951 So. 2d 40, 43 (Fla. 1st Dist. Ct. App. 2007) (finding a written prescription is needed before attendant care may be provided). *See generally* *One Beacon Ins. v. Agency for Healthcare Admin.*, 958 So. 2d 1127, 1129 (Fla. 1st Dist. Ct. App. 2007) (addressing reimbursement of an ambulatory surgical center charge). In Florida, medical coverage for a workers’ compensation injury lasts for the life of the injured employee. *See* FLA. STAT. § 440.15(3)(c) (2007). The employer, however, is entitled to select the doctors who treat the employee, and the employer is entitled to receive the injured employee’s workers’ compensation medical records. *See id.* §§ 440.13(4)(b), 440.15(1)(e)1.

389. *Pearson v. Paradise Ford*, 951 So. 2d 12, 17 (Fla. 1st Dist. Ct. App. 2007).

390. *Wilcox v. AG Mart Produce*, 942 So. 2d 959, 962–63 (Fla. 1st Dist. Ct. App. 2006) (stating that although an employee was injured while driving his company car home from work, he is not entitled to workers’ compensation under the dual purpose exception to the going and coming rule because the employer received no benefit from keeping its car at the employee’s house at night).

391. *Fla. Marine Patrol v. Clifton*, 959 So. 2d 1262, 1264 (Fla. 1st Dist. Ct. App. 2007); *O’Connor v. Hillsborough County Sec. Servs.*, 954 So. 2d 649, 650 (Fla. 1st Dist. Ct. App. 2007).

392. *Chavez v. Bonnie Tile Corp.*, 959 So. 2d 1268, 1269 (Fla. 1st Dist. Ct. App. 2007). *See generally* *Minerd v. Walgreens & Kemper Nat’l Ins. Cos.*, 962 So. 2d 955, 956 (Fla. 1st Dist. Ct. App. 2007) (calculating reasonable attorney’s fees).

393. Editorial, *The Less-Than-Generous State*, N.Y. TIMES, Aug. 16, 2007, at A24.

394. *See* Federal-State Unemployment Compensation Program (UC), 71 Fed. Reg. 56,830, 56,830 (Sept. 27, 2006) (to be codified at 20 C.F.R. pt. 603).

award unemployment compensation to claimants “who are able [to work] and available . . . for work.”³⁹⁵

At the end of 2006, “Florida’s overall non-farm [unemployment] rate, seasonally adjusted, was 3.3 percent,” with “Broward County’s jobless rate . . . the lowest in South Florida at 2.7 percent,” while Miami-Dade County’s unemployment rate was 3.5%.³⁹⁶ While Florida added 145,200 jobs in January 2007, which is a 1.8% growth, “the state’s rate of employment growth has slowed” markedly compared to the past few years.³⁹⁷ By June 2007, Florida’s jobless rate was 3.4%, still far lower than the national average and “the lowest of the 10 most populous states.”³⁹⁸ While experts insist Florida is not “headed for a recession,” earlier forecasts of how much the state’s economy would contract were too sanguine.³⁹⁹ By July 2007, however, Florida’s jobless rate rose to its “highest [level] in two years.”⁴⁰⁰ The state’s unemployment rate in July registered 3.9%, quite a hike “over the June [to] July 2006 rate of 3.3 percent,” but Florida still ranks “below the national rate of 4.6 percent.”⁴⁰¹

Claimants are not eligible for jobless benefits if they were “discharged for misconduct connected with work.”⁴⁰² A Florida court ruled in 2007 that a claimant’s refusal to allow his employer to inspect the contents of his briefcase amounted to misconduct, especially since the former employee admitted that he possessed company property in his briefcase.⁴⁰³

395. Unemployment Compensation—Eligibility, 72 Fed. Reg. 1890, 1890 (Jan. 16, 2007) (to be codified at 20 C.F.R. pt. 604).

396. Niala Boodhoo, *Florida’s Jobless Rate Maintains Status Quo*, MIAMI HERALD, Jan. 20, 2007, at 1C.

397. Niala Boodhoo, *Job Growth Slow but Steady*, MIAMI HERALD, Mar. 9, 2007, at 3C.

398. David Royse, *Report: Fla. Slowdown to Linger*, MIAMI HERALD, July 13, 2007, at 1C.

399. *Id.*

400. Niala Boodhoo, *Jobless Rate Rises as Construction Slows*, MIAMI HERALD, Aug. 18, 2007, at 1A.

401. *Id.*

402. *Leedham v. State Unemployment Appeals Comm’n*, 950 So. 2d 475, 476 (Fla. 4th Dist. Ct. App. 2007).

403. *Id.* at 477.

F. *Public Pensions*

1. National Developments

Generally, nationwide public employee pensions are more secure than private sector employee pensions.⁴⁰⁴ Increasingly, however, more and more public employers are chipping away at those pension promises.⁴⁰⁵ Thanks to unexpectedly spiraling obligations to retirees, public employers have raised the eligibility requirements for retirement; some have declared bankruptcy to shed some of the nation's \$1.4 trillion public pension debt.⁴⁰⁶

In the 1990s, many local governments started tapping their public pension funds to help pay for retiree health care of former public employees.⁴⁰⁷ But with "double-digit increases in health care costs," some are regretting it.⁴⁰⁸

At the federal level, "[t]he Governmental Accounting Standards Board [(GASB)] . . . sets the rules for state and local governments."⁴⁰⁹ In 2006, the GASB proposed rules that would require public pension funds to report their financial position, much like private corporations.⁴¹⁰

Until recently, public pensions of federal lawmakers could be forfeited only if the office holder "commit[ed] crimes such as treason or espionage."⁴¹¹ In 2007, however, a House bill weighed extending forfeiture for other "felonies related to the performance of official duties."⁴¹²

2. Florida Developments

In 2007, "Florida became the first state" to enact a law banning state pension fund investing "in any companies doing business with Iran's energy

404. Mary Williams Walsh, *Once Safe, Public Pensions Are Now Facing Cuts*, N.Y. TIMES, Nov. 6, 2006, at A19.

405. *Id.*

406. *Id.*

407. Mary Williams Walsh, *Paying Health Care from Pensions Proves Costly*, N.Y. TIMES, Dec. 19, 2006, at A1.

408. *Id.*

409. Mary Williams Walsh, *Estimates for Pensions to Tighten*, N.Y. TIMES, Dec. 29, 2006, at C1.

410. *Id.*

411. Jim Abrams, *House Votes to Strip Convicted Members' Pensions*, MIAMI HERALD, Jan. 24, 2007, at 6A.

412. *Id.*

sector and Sudan.”⁴¹³ Together, Florida’s pension fund and the investment fund for state employees amount to \$130 billion.⁴¹⁴

In Florida, public employees “can forfeit [their] taxpayer-funded pension benefits” if they “are found guilty or plead no contest” to “conduct that represents a violation of public trust.”⁴¹⁵ Three Hollywood police officers arrested in an FBI sting in 2007 faced losing their public pensions if they accepted a plea deal or plead no contest to the charges.⁴¹⁶

As belt tightening grips Florida’s cities and counties thanks to shrinking tax revenues and property tax reform, lavish public pension benefits have come under scrutiny. For example, some criticize Davie, Florida’s generous system, whereby firefighters are entitled to a 95% pension of their final salary after thirty years.⁴¹⁷ By contrast, Fort Lauderdale police officers receive only 60% after twenty years of service.⁴¹⁸

The Broward County School District’s 10,300 substitute and part-time teachers’ pensions, unlike their full-time counterparts, receive no matching funds from the school district.⁴¹⁹ Criticized as the “privatization” of Social Security, the practice is being challenged in federal court by disgruntled substitutes and part-timers whose pensions are invested in low-interest accounts instead of a state matching program.⁴²⁰

In 2007, a Florida court denied a beneficiary retroactive retirement benefits, since nine years earlier she had “failed to timely respond to three” notices of her right “to monthly retirement benefit[s] following her husband’s death.”⁴²¹ Under Florida’s Deferred Retirement Option Program (DROP), longtime school administrators are entitled to retirement benefits at the same time they earn their regular salary for five years before they retire.⁴²² One popular Broward County school principal, however, faced

413. *Sudan Off-Limits for Florida Pension Fund*, MIAMI HERALD, June 9, 2007, at 3C.

414. Breanne Gilpatrick, *State Investments Bill Would Drop Firms Active in Iran, Sudan*, MIAMI HERALD, May 3, 2007, at 8B.

415. Wanda J. DeMarzo et al., *Pensions at Stake in Police Scandal*, MIAMI HERALD, Mar. 23, 2007, at 1B.

416. *Id.*

417. Fred Grimm, *Firefighter Pensions: It’s Another World*, MIAMI HERALD, June 24, 2007, at 3B.

418. *Id.*

419. Nirvi Shah, *Substitute Teacher Sues*, MIAMI HERALD, Oct. 3, 2006, at 3B.

420. *Id.* Under a 1991 federal tax law, some public employers may “contribute to government retirement programs—instead of to Social Security—on behalf of their employees.” *Id.*

421. *Hoffman v. Fla. Dep’t of Mgmt. Servs.*, 964 So. 2d 163, 164, 167 (Fla. 1st Dist. Ct. App. 2007).

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

forced retirement at age fifty-seven or losing eleven months of retirement pay for unwisely enrolling in the DROP program.⁴²³

G. *Working Conditions*

Recent surveys reveal that both employers and employees are over-worked.⁴²⁴ One study of small business owners found that 20% said they carried “their phones or documents on . . . bathroom breaks.”⁴²⁵ About 50% “checked voice mail or e-mail or used a cell phone during family time, while driving or while on vacation.”⁴²⁶ 40% said they worked eighty-hour weeks.⁴²⁷ 40% “had no plans to take a vacation in the next six months.”⁴²⁸ When work spills over into personal lives, “private lives . . . are not as private anymore.”⁴²⁹ Increasingly, workers face “24/7 client demands, [short] deadlines, and [volatile] work flows;” therefore, it is no wonder that “45 percent of high-earning [employees] are too tired [at the end of an overlong workday] to say anything to their spouses or partners.”⁴³⁰ Abusive employers are also contributing to employee “exhaustion, job tension, nervousness, depress[ion], and mistrust.”⁴³¹ Poor morale lowers productivity too.⁴³²

In response, more and more workplaces are experimenting with ways of achieving a reasonable work-life balance.⁴³³ For example, some workers facing child-care emergencies bring a child to work or work from home.⁴³⁴ Some opt to work for a temporary agency, working full-time some weeks but “turning down jobs when family demands” emerge.⁴³⁵ It is no surprise that

423. *Id.*

424. See generally Jane Bussey, *Work Life Overtakes Leisure*, MIAMI HERALD, Jan. 9, 2007, at 1C [hereinafter Bussey, *Work Life*]. But a 2007 study found that “[t]he average worker wastes 1.7 hours a day [surfing the Web], socializing with co-workers, and conducting personal business.” *Average Time Slacking: 1.7 Hours in a Workday*, MIAMI HERALD, Aug. 27, 2007, at 9G.

425. Bussey, *Work Life*, *supra* note 424.

426. *Id.*

427. *Id.*

428. *Id.*

429. Cindy Krischer Goodman, *Should We Ever Get Involved?*, MIAMI HERALD, Feb. 21, 2007, at 1C.

430. Cindy Krischer Goodman, *Struggling to Escape ‘The Dead Zone’*, MIAMI HERALD, Mar. 28, 2007, at 1C [hereinafter Goodman, *Struggling to Escape*].

431. Brent Kallestad, *Got a Bad Boss? You’re Not Alone*, MIAMI HERALD, Jan. 2, 2007, at 5B.

432. *Id.*

433. Cindy Krischer Goodman, *The Art of the Exit*, MIAMI HERALD, Oct. 11, 2006, at 1C.

434. Cindy Krischer Goodman, *Bring Kids Get Fired*, MIAMI HERALD, Apr. 25, 2007, at 1C [hereinafter Goodman, *Bring Kids*].

435. Cindy Krischer Goodman, *Lovin’ Tempin’*, MIAMI HERALD, Sept. 27, 2006, at 1C.

temp agencies are projected to “grow faster than any other industry” in the next ten years, producing 1.6 million jobs.⁴³⁶ Today, temp jobs are held by 2.9 million people.⁴³⁷ Telecommuting—working at home—offers flexibility, eliminates commuting time, lowers absenteeism, and improves recruitment and retention.⁴³⁸

Innovative solutions to child-care responsibilities are emerging. For example, some hospitals offer “sick-child day-care center[s].”⁴³⁹ Bringing children to work, however, is sometimes not an option—either owing to employer inflexibility or hazardous workplaces.⁴⁴⁰

Flexible schedules are yet another popular option for achieving a reasonable balance between the demands of work and family. While flexible schedules are options for two-thirds of working parents earning over \$71,000 a year, it is offered to less than one-third earning under \$28,000 a year.⁴⁴¹ A voluntary overtime system would be welcomed by many working parents as well.

Workers enlist a host of strategies for reducing job-related stress: some use the commute to decompress; others relax after work with a drink or two; some turn to physical activity; and some “negotiate a time out” at home where family members leave the tired worker alone and undisturbed until dinner.⁴⁴²

H. Health and Safety

“[I]n 2005, 406 people lost their lives on the job” in Florida while “246,300 were injured or became ill [thanks to] unsafe [working] conditions.”⁴⁴³ Florida has less than fifty Occupational Safety and Health Administration (OSHA) inspectors covering the whole state.⁴⁴⁴

Nationwide, 5734 workers died at work, “and 4.2 million were injured” in 2005.⁴⁴⁵ According to the Centers for Diseases Control and Prevention, workplaces today are about “40,000 lives a year safer than they were in the

436. *Id.*

437. *See id.*

438. See Mark Cheskin & Kristen Foslid, *So You're Thinking About Offering Telecommuting? Think Carefully*, MIAMI HERALD, Mar. 12, 2007, at 9G.

439. Goodman, *Bring Kids*, *supra* note 434.

440. *Id.*

441. *Id.*

442. Goodman, *Struggling to Escape*, *supra* note 430.

443. Fred Frost, Letter to the Editor, *Support Job Safety*, MIAMI HERALD, May 6, 2007, at 4L.

444. *Id.*

445. *Id.*

1930s.”⁴⁴⁶ Among several factors credited for safer workplaces is the marked “increase in the number of . . . women, whose accident rate is [only one] tenth that of men.”⁴⁴⁷ The four leading causes of job-related deaths include: 1) highway deaths; 2) falls; 3) a category known as “struck by object;” and 4) homicide.⁴⁴⁸ Roughly 75% of workplace killings stem from robberies.⁴⁴⁹ Workplace homicides decreased to 564 in 2005 compared to 1080 in 1994.⁴⁵⁰

Since 2001, OSHA enforcement of workplace safety weakened as OSHA’s Secretary moved “aggressively away from regulations in favor of corporations’ pledges to police themselves.”⁴⁵¹ In addition, Congress repealed an ergonomics regulation for employees.⁴⁵² The Bush Administration successfully rolled back what it deemed onerous OSHA rules that put unneeded “costs on businesses and consumers.”⁴⁵³ Since 2001, OSHA issued fewer significant standards in its history.⁴⁵⁴

I. *Public Unions*

In agency shops, public employees must pay union dues whether or not they join the union. Thirty years ago, the United States Supreme Court ruled that states must constitutionally recognize the agency shop for public employment so long as union dues go toward collective bargaining, contract administration, and grievance adjustment.⁴⁵⁵ At the same time, the ruling recognized that public employees’ freedom of association is unduly burdened when the union forces them to contribute to the support of an ideological cause they oppose.⁴⁵⁶ What remained unresolved until 2007 was whether the employee must take the initiative and specifically object to having a portion of the fees used for political causes she opposes, or whether the union must obtain the objecting employee’s consent before diverting fees for that purpose.⁴⁵⁷

446. Greve, *Workplaces*, *supra* note 66.

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. Editorial, *Crippling Government from Within*, N.Y. TIMES, Apr. 27, 2007, at A26.

452. *Id.*

453. Stephen Labaton, *OSHA Leaves Worker Safety Largely in Hands of Industry*, N.Y. TIMES, Apr. 25, 2007, at A1.

454. *See id.*

455. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977).

456. *Id.* at 241.

457. Mark Sherman, *Use of Union Dues at Issue*, MIAMI HERALD, Sept. 27, 2006, at 7A.

In *Davenport v. Washington Education Association*,⁴⁵⁸ the United States Supreme Court addressed the State of Washington's "opt-in" law shifting the burden to the union to obtain objecting employees' consent,⁴⁵⁹ in contrast to the traditional "opt-out" alternative already approved of in *Abood v. Detroit Board of Education*⁴⁶⁰ where the employee bears the burden of taking the initiative.⁴⁶¹ In vacating the Supreme Court of Washington's ruling, striking down the "opt-in" provision as an unconstitutional burden on a union's rights of free speech and association, the United States Supreme Court said states are free to adopt either the "opt-in" or "opt-out" approach without violating the First Amendment.⁴⁶²

Other federal level developments affecting public unions nationwide include a ruling by the District of Columbia Circuit Court interpreting a provision in federal law ensuring that Homeland Security "employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them."⁴⁶³ In *National Treasury Employees Union v. Chertoff*,⁴⁶⁴ the District of Columbia Circuit ruled that the Department of Homeland Security illegally restricted collective bargaining rights of its employees.⁴⁶⁵

In 2007, President Bush and his Senate allies threatened to oppose an anti-terror bill if Congress approved it containing a provision entitling federal airport screeners to unionize.⁴⁶⁶ Nevertheless, on March 13, 2007, the United States Senate enacted a measure extending collective bargaining rights to Transportation Security Administration airport screeners.⁴⁶⁷

A Florida court in 2007 upheld the constitutionality of a law⁴⁶⁸ that prohibits public employee unions, "their members, agents, or representatives, or . . . persons acting on their behalf . . . from soliciting public employees during working hours."⁴⁶⁹

458. 127 S. Ct. 2372 (2007).

459. *Id.* at 2379.

460. 431 U.S. 209 (1977).

461. Linda Greenhouse, *Rights of Unions and Non-Members Vie at Court*, N.Y. TIMES, Jan. 11, 2007, at A24.

462. *Davenport*, 127 S. Ct. at 2382.

463. 5 U.S.C. § 9701(b)(4) (2000 & Supp. II 2002).

464. 452 F.3d 839 (D.C. Cir. 2006).

465. *Id.* at 867.

466. Laurie Kellman, *Terrorism Bill Draws Veto Threat Bush, Senators Reject Union for Screeners*, SUN-SENTINEL, Feb. 28, 2007, at 3A.

467. Improving America's Security Act of 2007, S.4, 110th Cong. (2007) (enacted).

468. *Menegat v. City of Apopka*, 954 So. 2d 681, 683 (Fla. 5th Dist. Ct. App. 2007).

469. FLA. STAT. § 447.509 (2007).

IV. DISCIPLINE, RETALIATION, FIRST AMENDMENT, AND HATCH ACT REMEDIES

A. *Discipline*

At the federal level, the Congressional Research Service urged that at-will employees, who are quarantined after exposure to dangerous viruses be protected under the doctrine of wrongful discharge on the grounds that the employer violates public policy by undermining acts that are “beneficial to the public welfare.”⁴⁷⁰

In 2007, the Florida House passed a bill prohibiting “the bullying of students and employees at school, on school buses, at school events, and online.”⁴⁷¹ “The Senate version of the [anti-harassment] bill is stalled in that chamber.”⁴⁷²

Discipline cases involving public school teachers fall more or less into two categories: misconduct committed at school and off-duty misconduct. A 2007 analysis of thousands of Florida teacher investigations revealed that over 50% of the “750 teachers punished since 1997 for sexual misconduct or physical and verbal assaults on students . . . [continued] to keep their license[s] to teach.”⁴⁷³ “While principals and superintendents can” dismiss errant teachers if they have notice of prior misconduct allegations, the state licensing board decides if the teacher should still be certified to teach in other Florida schools.⁴⁷⁴

Beginning in 2008, state education officials will unveil the website, MyFloridaTeacher.com, enabling parents to learn whether complaints have been lodged against teachers, the county where the misconduct occurred, and the ultimate resolution of any disciplinary action.⁴⁷⁵

Disciplinary action recently taken pursuant to complaints against teachers over misconduct committed at school include: a) “indefinite suspension [of a middle school arts teacher] after he showed students a documentary

470. *CRS Says Wrongful Discharge Claims Could Protect At-Will Quarantined Workers*, U.S. LAW WK., Aug. 22, 2006, at 2103.

471. *House Passes Bill to Ban Harassment at Schools*, MIAMI HERALD, Apr. 25, 2007, at 9B.

472. *Id.*

473. Editorial, *Teachers Instruct Despite Infractions*, MIAMI HERALD, Mar. 19, 2007, at 6B.

474. *Id.*

475. Nirvi Shah, *Website Shows How Teachers Disciplined*, MIAMI HERALD, Mar. 3, 2007, at 5B.

[portraying] images of aborted fetuses;⁴⁷⁶ b) resignation of a second-grade teacher who admitted hitting students with a belt or ruler or shaking or grabbing them to control their behavior;⁴⁷⁷ c) suspension of a high school teacher, in part, for using his “school-issued laptop to [view] sexually explicit websites;”⁴⁷⁸ and d) potential dismissal of a teacher for lifting a student by his head.⁴⁷⁹

Disciplinary action recently taken against teachers for off-duty misconduct include: a) potential dismissal of a teacher after he was arrested for fondling an eleven-year-old boy while on vacation in Hawaii;⁴⁸⁰ b) potential discipline of a high school culinary arts teacher after he was charged with possession of marijuana and drug paraphernalia;⁴⁸¹ c) a history teacher quit after students saw pictures of her posing for the U.S. National Bikini Team on a website;⁴⁸² and d) a part-time high school music teacher was threatened with dismissal if he refused to pull out of a community theater production of *The Full Monty*, where he bared his bottom.⁴⁸³

Turning to the judiciary, a judge ordered a court stenographer—and all her equipment—sent to jail until she completes an overdue transcript of a child rape case.⁴⁸⁴ Judges themselves faced disciplinary action on several grounds including being arrested for smoking marijuana in a public park and for making insensitive comments in court about minority groups.⁴⁸⁵ A Miami City Commissioner was removed from office after engaging “in a drunken fight with police at [an airport].”⁴⁸⁶ In 2007, three police officers “re-

476. Nirvi Shah, *Teacher in Bind for Controversial Project*, MIAMI HERALD, Oct. 27, 2006, at 9B.

477. *Teacher Who Hit Students Resigns*, MIAMI HERALD, Feb. 6, 2007, at 2B (stating that while corporal punishment is permitted by Florida law, Broward County had banned it).

478. *Two Teachers Accused of Misconduct Suspended*, MIAMI HERALD, July 25, 2007, at 3B.

479. Nirvi Shah, *Board to Rule on Firing Two Teachers*, MIAMI HERALD, Aug. 2, 2007, at 3B.

480. *Id.*

481. *Cops: Teacher Received Marijuana in the Mail*, MIAMI HERALD, July 26, 2007, at 3B.

482. Christina DeNardo, *Former Teacher Poses for Playboy*, MIAMI HERALD, Feb. 13, 2007, at 6B.

483. *Teacher Sticks by 'Full Monty'*, MIAMI HERALD, Mar. 14, 2007, at 8B.

484. Scott Andron, *Tardy Transcriber Is Jailed*, MIAMI HERALD, Mar. 11, 2007, at 3B.

485. Nikki Waller & Kathleen McGrory, *Longtime Judge Charged with Smoking Marijuana*, MIAMI HERALD, Mar. 20, 2007, at 1A.

486. Editorial, *No-Contest Plea Isn't an Acquittal*, MIAMI HERALD, June 6, 2007, at 16A.

signed after an investigation [found] they had sex with prostitutes and some [traded] drugs for [sex].”⁴⁸⁷

B. Retaliation

1. Federal Whistleblower Statutes

The Whistleblower Protection Enhancement Act, passed by the House of Representatives in 2007, would extend protection against official retaliation to the FBI, to intelligence agencies, “[a]nd non-government workers employed by federal contractors.”⁴⁸⁸ In addition, the measure extends anti-retaliation rights to employees who complain “about the politicization of science by patronage appointees and to airport security workers.”⁴⁸⁹

Under the Federal False Claims Act (FCA), public employees who report government fraud are protected against retaliation, and may also recover “a percentage of the funds recovered.”⁴⁹⁰ An amendment to the FCA, effective January 2007, requires public employers to instruct their workers on how to detect health care fraud and how to be whistleblowers once they expose it.⁴⁹¹ It is estimated that there is one billion dollars a year of Medicaid fraud in South Florida alone.⁴⁹² A former accountant at a Miami public hospital claimed she was discharged after blowing “the whistle on a financial scandal.”⁴⁹³

Under the FCA, a person bringing a cause of action must be an original source of the information.⁴⁹⁴ In 2007, the United States Supreme Court ruled, in *Rockwell International Corp. v. United States*,⁴⁹⁵ that “[a]n ‘original

487. *Three Officers Resign over Illicit Sex Charges*, MIAMI HERALD, July 27, 2007, at 10B.

488. Editorial, *Protecting Those Who Speak Out*, N.Y. TIMES, Feb. 16, 2007, at A22.

489. *Id.*

490. John Dorschner, *Hospital Workers Learning How to Be Whistle-Blowers*, MIAMI HERALD, Dec. 29, 2006, at 1C [hereinafter Dorschner, *Hospital*].

491. HCA, Florida False Claims Statutes Policy (October 2006), <http://www.nfrmc.com/CPM/HCAFFalseClaimsAct.pdf>. In 2003, the United States Supreme Court ruled that counties may be subject to suit under the FCA. See *Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003).

492. Dorschner, *Hospital*, *supra* note 490.

493. Tere Figueros Negrete, *Fired Whistle-Blower Wants Job Back*, MIAMI HERALD, July 14, 2007, at 5B.

494. 31 U.S.C. § 3730(e)(4)(A) (2000).

495. 127 S. Ct 1397 (2007). The laid-off engineer’s FCA claim failed because he lacked the “direct” and “independent knowledge” of the alleged violations to qualify as an “original source” eligible to bring the *qui tam* suit. *Id.* at 1409.

source' is [defined as] 'an individual who has direct and independent knowledge of the information on which allegations are based.'"⁴⁹⁶

2. Florida Whistleblower Statute

Three retaliation cases were decided in 2007 under the Florida Private Sector Whistleblower Act (FPSWA).⁴⁹⁷ One retaliation claim was granted because the plaintiff offered evidence that the defendant was given an opportunity to remedy the misconduct.⁴⁹⁸ In addition, the plaintiff offered evidence that he complained to his employer on numerous occasions about the misconduct and, thus, his employer was aware of the misconduct before filing suit.⁴⁹⁹ Another circuit court ruled that it lacked jurisdiction to hear whistleblower claims against an archdiocese given the First Amendment's bar against secular court review of religious policy and administration.⁵⁰⁰ A third Florida circuit court dismissed a whistleblower's claim because the FPSWA excludes employees of independent contractors from its definition of "employee."⁵⁰¹

C. First Amendment and Hatch Act Issues

1. Public Employee Speech

In 2006, in *Garcetti v. Ceballos*,⁵⁰² the United States Supreme Court ruled that public employees, who made statements as part of their official duties, "are not speaking as citizens for First Amendment purposes," and so may face employer discipline stemming from work-related communications.⁵⁰³ In the wake of *Garcetti*, the Seventh Circuit Court of Appeals has ruled that a public school district in Indiana did not violate the First Amendment by dismissing an at-will school teacher for expressing her view on military operations in Iraq because current events were part of the teacher's as-

496. *Id.* at 1403 (citing 31 U.S.C. § 3730(e)(4)(B)).

497. *See Morin v. Fla. Power & Light Co.*, 963 So. 2d 258, 261 (Fla. 3d Dist. Ct. App. 2007); *El Toro Exterminator of Fla., Inc. v. Cernada*, 953 So. 2d 616, 617 (Fla. 3d Dist. Ct. App. 2007); *Archdiocese of Miami, Inc. v. Miñagorri*, 954 So. 2d 640, 641 (Fla. 3d Dist. Ct. App. 2007).

498. *Cernada*, 953 So. 2d at 618.

499. *Id.*

500. *Miñagorri*, 954 So. 2d at 642-43.

501. *See Morin*, 963 So. 2d at 261.

502. 126 S. Ct. 1951 (2006).

503. *See id.* at 1960.

signed duties.⁵⁰⁴ Another Seventh Circuit case explained the impact *Garcetti* has on the First Amendment test for weighing public employee speech.⁵⁰⁵ Before *Garcetti*, courts first looked at the “‘content, form, and context’ of the employee’s speech to determine whether the employee spoke as a citizen on a matter of public concern.”⁵⁰⁶ “After *Garcetti*, however, the threshold inquiry is whether the employee was speaking as a citizen; only then [should courts] inquire into the content of the speech.”⁵⁰⁷

Two Eleventh Circuit Court of Appeals cases addressed public speech in 2006. In *Battle v. Board of Regents of Georgia*,⁵⁰⁸ the court ruled that a financial aid counselor at a state university, whose contract was not renewed after she reported her supervisor’s student loan fraud to superiors, was speaking as an employee fulfilling official duties.⁵⁰⁹ Thus, her First Amendment retaliation claim must fail under the ruling in *Garcetti*.

In *City of San Diego v. Roe*,⁵¹⁰ the United States Supreme Court ruled that the First Amendment did not bar the discharge of a police officer who sold videotapes of “himself stripping off a police uniform and masturbating.”⁵¹¹ Such “speech,” the Court concluded, did not involve “a matter of public concern.”⁵¹² Relying on *Roe*, the Eleventh Circuit Court of Appeals upheld the dismissal of two Florida deputy sheriffs for selling sexually explicit photographs and videos over the Internet.⁵¹³

2. Freedom of Association

Many police departments have written policies prohibiting all department employees from associating with anyone convicted of a felony.⁵¹⁴ In fact, a twenty-one-year veteran Miami police officer was warned, “[l]eave your husband or lose your job,” in light of her husband’s felony conviction.⁵¹⁵ Such policies have been challenged on freedom of association

504. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007).

505. *Spiegla v. Hull*, 481 F.3d 961, 965 (7th Cir. 2007).

506. *Id.*

507. *Id.*

508. 468 F.3d 755 (11th Cir. 2006).

509. *Id.* at 761.

510. 543 U.S. 77 (2004) (per curiam).

511. *Id.* at 78, 84.

512. *Id.* at 84.

513. *Thaeter v. Palm Beach County Sheriff’s Office*, 449 F.3d 1342, 1356–57 (11th Cir. 2006).

514. Andrea Robinson, *Police Under Fire over Ban on Social Contact with Felons*, MIAMI HERALD, May 17, 2007, at 1A.

515. *Id.*

grounds, as well as on equal protection grounds, given that such policies disproportionately affect black female officers owing to the huge number of inmates who are black males.⁵¹⁶ The *Miami Herald* condemned this policy as “morally wrong, socially discriminatory and very likely unconstitutional.”⁵¹⁷

A Florida court ruled in 2007 that a county corrections officer was illegally dismissed on the ground that she lived with her boyfriend who was a convicted felon on parole.⁵¹⁸ Absent a written policy, the court concluded, the public employee was denied adequate notice that simply living with a convicted felon was cause for discharge.⁵¹⁹

3. Hatch Act

The Federal Hatch Act regulates the partisan political activities of federal employees.⁵²⁰ In 2007, the Justice Department and Congress opened investigations into whether senior justice department officials improperly filled career jobs based on applicants’ political affiliation.⁵²¹ “Politicization of civil service positions could violate [the Hatch Act]. . . .”⁵²² The inquiry centers on whether the replacement of nine U.S. attorneys in 2006 stemmed from Republican efforts to file more vote-fraud cases against Democrats in close elections.⁵²³ The Bush Administration countered “that six [of the] U.S. attorneys were [terminated] on performance-related” grounds.⁵²⁴ “Legal experts [agree] that the Hatch Act [allows] White House officials to talk about upcoming [pending] elections and political strategy generally, but [the Act] would prohibit any official from taking [action to sway] an election.”⁵²⁵

516. *Id.*

517. Editorial, *A ‘Scarlet Letter’ Approach to Policing*, MIAMI HERALD, May 18, 2007, at 18A.

518. *Williams v. Miami-Dade County*, 32 Fla. L. Weekly D1764, D1765 (3d Dist. Ct. App. July 25, 2007).

519. *Id.*

520. 5 U.S.C. § 7324 (2000). Florida law provides for criminal penalties for public officials who campaign while working at their government jobs. *Commissioner’s Apology Accepted*, MIAMI HERALD, Aug. 22, 2007, at 3C.

521. Margaret Talev & Greg Gordon, *Probe Will Cover More than Firings*, MIAMI HERALD, May 31, 2007, at 3A.

522. *Id.*

523. *Id.*

524. Dan Eggen, *Deputy Attorney General Defends Prosecutor Firings*, WASH. POST, Feb. 7, 2007, at 3A.

525. Stephen Labaton & Edmund L. Andrews, *White House Calls Political Briefings Legal*, N.Y. TIMES, Apr. 27, 2007, at A25.

In a nutshell, the Hatch Act “bar[s] consideration of political affiliation in hiring of [federal employees] for non-political, career jobs.”⁵²⁶

D. Remedies

Under the Arbitration Fairness Act of 2007 introduced in Congress, mandatory arbitration clauses that force individuals to seek relief through arbitration instead of litigation would be rendered unenforceable.⁵²⁷ While primarily aimed at clauses in consumer contracts, it would also ban mandatory arbitration clauses in employment agreements governed by the Federal Arbitration Act.⁵²⁸

In 2007, a Florida court ruled that a county is liable for attorney’s fees owed by a county commissioner who successfully defends himself against criminal charges where the case stems from performance of official duties.⁵²⁹

Another Florida court in 2007 reversed the issuance of a temporary injunction to enforce a non-competition clause in an employment contract because it was issued without notice and did not allege that irreparable harm would result before defendant could be heard.⁵³⁰

V. EMPLOYMENT DISCRIMINATION

A. Generally

A 2007 report found substantial growth in the filing of employment class actions alleging job discrimination, wage inequities, and post-employment benefits.⁵³¹

In 2006, the United States Supreme Court ruled that the fifteen-employee requirement for assessing whether an employer is covered by Title VII is not a jurisdictional matter that can be raised as a defense at any point

526. Greg Gordon & Margaret Talev, *Political Hirings Alleged*, MIAMI HERALD, May 7, 2007, at 3A.

527. Angela Tablac, *Bill Would Nullify Contract Clauses*, MIAMI HERALD, July 25, 2007, at 1C.

528. *Id.*

529. *See* Leon County, Fla. v. Dobson, 957 So. 2d 12, 13–14 (Fla. 1st Dist. Ct. App. 2007) (per curiam).

530. *See* Lewis v. Sunbelt Rentals, Inc., 949 So. 2d 1114, 1115 (Fla. 2d Dist. Ct. App. 2007).

531. *See* Press Release, Seyfarth Shaw Attorneys LLP, Third Annual Workplace Class Action Report from Seyfarth Shaw of 2006 Collective Action Litigation Defines Trends for 2007 (Jan. 22, 2007), <http://www.seyfarth.com> (follow “News & Press Releases” hyperlink; then search “Press Releases” for “Third Annual”; then follow hyperlink).

of litigation.⁵³² Instead, the fifteen employee threshold is a substantive element of plaintiff's claim.⁵³³

In 2007, the United States Supreme Court ruled that it did not have jurisdiction to review the appeal from the office of a United States Senator seeking review of a District of Columbia Circuit Court ruling denying it immunity under the speech or debate clause from suit by a former worker alleging employment discrimination.⁵³⁴

In 2006, a federal district court ruled that the Florida Civil Rights Act extends to Florida residents working outside the state.⁵³⁵

In 2006, a federal district court applied eight factors to distinguish between an employee and an independent contractor for purposes of Title VII coverage.⁵³⁶

B. Race

In 2007, a law professor studied "a government survey of 2,084 legal immigrants [in the] United States . . . and found that those with the lightest skin earned [on] average 8 percent to 15 percent more than [comparable] immigrants with [far] darker skin."⁵³⁷

In 2007, the Equal Employment Opportunity Commission (EEOC) filed a class-action lawsuit against Walgreens Company, alleging the company "engaged in a 'pattern and practice of race discrimination' in promotion and store assignments, [especially] against [African-American] managers, pharmacists, and management trainees."⁵³⁸

C. National Origin

The Eleventh Circuit Court of Appeals ruled that national origin discrimination, by its nature, does not invariably implicate race discrimination, thereby rendering such claims cognizable under 42 U.S.C. § 1981.⁵³⁹

532. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006).

533. *Id.* at 515.

534. *Office of Sen. Mark Dayton v. Hanson*, 127 S. Ct. 2018, 2020 (2007).

535. *Parry v. Outback Steakhouse of Fla., Inc.*, No. 8:06-CV-00804-T-17TBM, 2006 WL 3313352, at *4 (M.D. Fla. Oct. 11, 2006).

536. *Dahl v. Ameri-Life Health Servs. of Sara-Bay, LLC*, No. 8:05-CV-66-T-17TBM, 2006 WL 2884962, at *3-4 (M.D. Fla. Oct. 10, 2006).

537. Travis Loller, *Study: Darker Immigrants Make Less Money*, MIAMI HERALD, Jan. 28, 2007, at 5A.

538. Niala Boodhoo, *Walgreens Sued for Race Bias*, MIAMI HERALD, Mar. 8, 2007, at 1C.

539. *See Tippie v. Spacelabs Med., Inc.*, No. 05-14384, 2006 WL 1130809, at *4 (11th Cir. Apr. 27, 2006).

According to federal regulations, a blanket ban on non-English speech at the workplace may “create an atmosphere of inferiority, isolation and intimidation . . . which could result in a discriminatory working environment.”⁵⁴⁰ In 2007, the Mayor of Nashville, Tennessee, vetoed an ordinance “that would have made [e]nglish the official language of” the city, warning it was unconstitutional, unnecessary, and mean-spirited.⁵⁴¹

D. *Affirmative Action*

A 2007 study “found that more diverse companies also have more customers, a [bigger] share of their markets and greater profitability.”⁵⁴² Of course, “it may also be [the case that firms] that are successful to begin with” make more of an effort to recruit and retain minorities.⁵⁴³ Not only do minorities bring new perspectives to the workplace, but they also cause their white co-workers “to think in new ways.”⁵⁴⁴

In 2000, Congress enacted the Women’s Procurement Program aimed at growing the participation of women-owned small business concerns in the federal procurement marketplace.⁵⁴⁵ A 2007 Rand Corporation study found, however, that women-owned small businesses remain underrepresented among companies doing business with the federal government.⁵⁴⁶ Under a 1999 federal law, every federal agency is urged to award at least “3 percent of their contracts to businesses owned by service-disabled veterans.”⁵⁴⁷

Even after Florida abolished affirmative action in 1999, “the state’s spending on contracts with businesses owned by minority group members and women ha[d] . . . tripled” by the end of 2006.⁵⁴⁸ In 1999, Governor Jeb Bush ended affirmative action programs and replaced it with his “One Florida initiative” which merely urges state agencies to promote minority business spending.⁵⁴⁹ While the Department of Corrections increased its female

540. 29 C.F.R. § 1606.7(a) (2006).

541. *Tennessee Mayor Vetoes English-Only Law*, MIAMI HERALD, Feb. 13, 2007, at 3A.

542. Shankar Vedantam, *Diversity Makes a Difference, Studies Find*, MIAMI HERALD, Jan. 16, 2007, at 11B.

543. *Id.*

544. *Id.*

545. 15 U.S.C. § 637(m) (2000).

546. ELAINE REARDON ET AL., *THE UTILIZATION OF WOMEN-OWNED SMALL BUSINESSES IN FEDERAL CONTRACTING 10* (2007), available at http://www.rand.org/pubs/technical_reports/2007/RAND_TR442.sum.pdf.

547. David Goldstein, *Disabled Veterans Not Getting Fair Share of U.S. Contracts*, MIAMI HERALD, July 2, 2007, at 3A.

548. *Minorities Getting More State Business*, MIAMI HERALD, Nov. 14, 2006, at 10B.

549. *Id.*

and minority contractor spending by 75%, the legislature registered a 70.7% decline.⁵⁵⁰

A 2007 lawsuit filed against Broward County alleges that its affirmative action program is unconstitutional because it forces contractors “to hire subcontractors based on race, ethnicity or sex—not quality.”⁵⁵¹ An earlier suit forced Miami-Dade County to abolish its minority set-aside program on equal protection grounds.⁵⁵² Recent United States Supreme Court rulings have rendered minority set-aside programs highly suspect.⁵⁵³

E. Gender

A study found “that teen [sexual harassment] cases [rose] from two percent of all sexual harassment cases in 2001 to about eight percent in 2004.”⁵⁵⁴ In 2007, the United States Supreme Court ruled, in *Ledbetter v. Goodyear Tire & Rubber Co.*,⁵⁵⁵ five to four against a woman who failed to file her sex-based pay discrimination “lawsuit within the 180-day statute of limitations from when her first paycheck showed” the existence of the wage disparity.⁵⁵⁶ “Employee-oriented organizations called [the decision] a severe weakening of civil rights.”⁵⁵⁷

In 2007, a federal jury found that the Florida Department of Corrections condoned the “sexual harassment of its female nurses by male inmates.”⁵⁵⁸ The nurses alleged “they were harassed on daily rounds [while] examining inmates and [dispensing] medicine to sick prisoners.”⁵⁵⁹ In 2007, the Eleventh Circuit upheld the dismissal of sexual harassment and retaliation claims since the victim failed to cooperate with her employer’s proposed remedy.⁵⁶⁰

Acting to shield themselves from sexual harassment lawsuits, some employers are urging senior executives to sign “love contracts” whereby co-workers disclose romantic relationships.⁵⁶¹ By openly declaring their ro-

550. *Id.*

551. Amy Sherman, *Lawsuit: White Males Cheated*, MIAMI HERALD, Mar. 29, 2007, at 1B.

552. *Id.*

553. *See id.*

554. G. Thomas Harper, *Teen Complaints Up*, FLA. EMPLOYMENT LAW LETTER, June 2007, at 3.

555. 127 S. Ct. 2162 (2007).

556. Stafford, *supra* note 215.

557. *Id.*

558. *12 Prison Nurses Win Jury Award*, MIAMI HERALD, Jan. 28, 2007, at 6B.

559. *Id.*

560. *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1301 (11th Cir. 2007).

561. Molly Selvin, *In Love in the Office? Sign on the Dotted Line*, MIAMI HERALD, Feb. 14, 2007, at 3C.

mance to be “voluntary” and “consensual,” these contracts should render employers immune from liability—should the relationship go sour.⁵⁶² By one estimate, “43 percent of [United States employees] admit to having dated a co-worker.”⁵⁶³

In 2007, the city manager of Largo, Florida was fired after disclosing he was undergoing a sex change operation.⁵⁶⁴ Largo city commissioners defended their position by “saying they doubted his integrity and ability to lead the city and its 1200 employees.”⁵⁶⁵ Although the fired city manager can appeal, his contract makes it clear that he can be dismissed without cause.⁵⁶⁶ While transsexuals are generally unprotected under federal civil rights laws,⁵⁶⁷ a few recent cases give limited protection under Title VII.⁵⁶⁸ Legislation proposed at the federal level, the Employment Non-Discrimination Act of 2007, would ban “employment discrimination on [grounds] of sexual orientation or gender identity.”⁵⁶⁹ In 2007, an attempt was made to add legal protections for transgender people in Broward County.⁵⁷⁰ Some gay rights activists oppose the timing of the ordinance, fearing that “adding ‘gender identity and expression’ . . . will jeopardize [protection for all gay men and women] already on the books.”⁵⁷¹

F. Age

Despite the ban on mandatory retirement under the federal Age Discrimination in Employment Act (ADEA),⁵⁷² the average retirement age in

562. *Id.*

563. *Id.*

564. Tere Figueras Negrete, *Fired Transgender Vies for Sarasota Job*, MIAMI HERALD, May 15, 2007, at 8B.

565. Tere Figueras Negrete, *Town Rocked by Sex-Change Case*, MIAMI HERALD, Mar. 4, 2007, at 1A.

566. Phil Davis, *Firing Begins over Sex Change*, MIAMI HERALD, Mar. 1, 2007, at 8B.

567. *See, e.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984).

568. *See, e.g.*, *Schroer v. Billington*, 424 F. Supp. 2d 203, 205 (D.D.C. 2006) (holding that a transsexual rejected for a job failed to state a Title VII claim that she was discriminated against for not conforming to gender stereotypes, but she may claim she was denied employment because of her sex).

569. *Id.*

570. Beth Reinhard, *GLBT Rights Activist Pulls Back on the ‘T’*, MIAMI HERALD, Aug. 4, 2007, at 1B.

571. *Id.*

572. 29 U.S.C. § 623 (2000).

2007 is sixty-two.⁵⁷³ “[O]nly 27 percent of Americans retire at age 65 or later, according to the Employee Benefit Research Institute.”⁵⁷⁴

In *General Dynamics Land Systems, Inc. v. Cline*,⁵⁷⁵ the United States Supreme Court ruled that the ADEA does not bar employers from favoring older workers over relatively younger ones who are also protected by the Act.⁵⁷⁶ In response, on August 4, 2006, the EEOC proposed regulations making clear that the ADEA does not bar employers from favoring older workers over younger ones⁵⁷⁷—also over age forty.⁵⁷⁸ In addition, the EEOC revised a portion of 29 C.F.R. § 1625.4(a) that barred job advertisements favoring older persons to make it clear that it is permissible to encourage older applicants to apply.⁵⁷⁹

A 1990 amendment to the ADEA, the Older Workers Benefit Protection Act (OWBPA), spelled out some of the ground rules for employers framing early retirement programs.⁵⁸⁰ In 2006, the Eleventh Circuit Court of Appeals ruled that the OWBPA only requires employers to give discharged workers detailed information about layoffs in their own department—not nationwide.⁵⁸¹ In 2007, the Federal Aviation Administration disclosed “that it will review its rule forcing airline pilots to retire at age sixty,” after the “International Civil Aviation Organization [rose] the age to [sixty-five].”⁵⁸² Any rule change, however, would be prospective only, leaving pilots already retired, but under sixty-five, out of luck.⁵⁸³

G. Disability

The Americans with Disabilities Act (ADA) generally prohibits employment discrimination against the disabled, not only at the hiring and dismissal stages, but also involving promotions, transfers, compensation, train-

573. Damon Darlin, *Retirement Contrarian Speaks Out*, N.Y. TIMES, May 12, 2007, at B1.

574. *Id.*

575. 540 U.S. 581 (2004).

576. *Id.* at 600.

577. Coverage Under the Age Discrimination in Employment Act, 71 Fed. Reg. 46,177, 46,177–78 (Aug. 11, 2006).

578. 29 U.S.C. § 631(a) (2000).

579. 29 C.F.R. § 1625.4(a) (2006).

580. 29 U.S.C. § 623(f).

581. *Burlison v. McDonald’s Corp.*, 455 F.3d 1242, 1248 (11th Cir. 2006).

582. Matthew L. Wald, *F.A.A. Review Is Expected on Pilots’ Age at Retirement*, N.Y. TIMES, Jan. 30, 2007, at C10; see also Julie Johnsson, *U.S. Pilots in Age Limbo*, CHI. TRIB., Sept. 30, 2007, at 1.

583. Wald, *supra* note 582.

ing, and virtually every other term and condition of employment.⁵⁸⁴ In 1800 out of 2000 ADA complaints, the Justice Department, between the years 2001 and 2006, forced public and private employers to comply with the Act by enlisting mediation and ruling out penalties.⁵⁸⁵

In 2007, a United States House of Representatives committee approved a measure aimed at preventing “discrimination by employers and insurers against people based on genetic information.”⁵⁸⁶

Under the ADA, employers owe a duty to reasonably accommodate the disabled.⁵⁸⁷ In 2006, the Eleventh Circuit Court of Appeals ruled that retraining a disabled employee is not a reasonable accommodation under the ADA.⁵⁸⁸ “With 21 million American diabetics, . . . [employers] are struggling . . . with confusion [over] whether diabetes is a legitimate disability and with concern [over] whether it is [unduly costly], hazardous and disruptive to accommodate the illness.”⁵⁸⁹

Disability claims may also be litigated under Florida’s civil rights laws. A 2007 Florida case concluded that the Florida Civil Rights Act “does not require proof that a plaintiff’s HIV [positive] condition amounts to a . . . disability.”⁵⁹⁰ The law bans bias “based upon even the ‘perceived results’ of an HIV test, [no matter] the physical condition of the employee.”⁵⁹¹ Under Florida and federal laws, anyone with a history of epilepsy is prohibited from driving certain commercial vehicles.⁵⁹² Under the law, commercial truck “drivers must undergo a physical every two years to [confirm] they do not have any medical conditions that could [impair] their driving.”⁵⁹³

584. 42 U.S.C. § 12112(a) (2000). A law review article found that plaintiffs claiming mental or psychiatric impairments under the ADA are less successful than plaintiffs alleging bias based on physical disabilities. Jeffrey Swanson et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94, 95 (2006).

585. Joshua Freed, *Most ADA Violators Escape Penalties*, MIAMI HERALD, Oct. 6, 2006, at 6A.

586. *House OK’s Genetics Law*, MIAMI HERALD, Feb. 15, 2007, at 1C.

587. 42 U.S.C. § 12112(b) (2000).

588. *Warren v. Volusia County, Fla.*, No. 05-16411, 2006 WL 1818938, at *3 (11th Cir. July 5, 2006).

589. N.R. Kleinfield, *Diabetics in the Workplace Confront a Tangle of Laws*, N.Y. TIMES, Dec. 26, 2006, at A1.

590. *Byrd v. BT Foods, Inc.*, 948 So. 2d 921, 927 (Fla. 4th Dist. Ct. App. 2007).

591. *Id.* at 927–28.

592. *Kathleen McGrory & Breanne Gilpatrick, Trucker Drove Despite Epilepsy*, MIAMI HERALD, Nov. 29, 2006, at 1B.

593. *Id.*

H. Religion

The two governing sources of law for analyzing religious issues arising in the workplace are the religious clauses of the First Amendment, which apply only in the public sector, and Title VII, which protects both public and private employees against religious discrimination. At least one court has noted the similar nature of protection afforded by the First Amendment and Title VII: “the [F]irst [A]mendment protects at least as much religious activity as Title VII does.”⁵⁹⁴

Employers intent upon creating “faith-friendly” workplaces must strike a delicate balance between seeming to favor “one religion over another,” and treating all faiths, even atheists, even-handedly.⁵⁹⁵ It is one thing for an employer to tolerate “well-known faiths such as Judaism, Christianity or Islam, but” the law dictates equal tolerance for Santeria, Wicca, and other marginal religions.⁵⁹⁶

Under Title VII and the First Amendment, employers owe a duty to reasonably accommodate the religious beliefs and practices of their employees.⁵⁹⁷ For example, in 2007, a Florida park ranger resigned from his job after his employer denied his request for “Sundays off to go to church.”⁵⁹⁸ Ultimately, facing a lawsuit, the county offered the park ranger “his job back and back pay.”⁵⁹⁹ Similarly, when Muslim cashiers working for Target “refuse[d] to ring up pork products [on] religious [grounds]” the store accommodated these Muslim cashiers by transferring them “to other jobs at the stores.”⁶⁰⁰ What is left unclear, however, is whether wages would be identical at the new jobs.⁶⁰¹ What the case illustrates is the employer’s legal duty to strike a balance between “the religious rights of its employees with customer demands for service.”⁶⁰²

“Legal cases involving workers claiming religious discrimination on the job have [increased], especially since the Sept. 11, 2001 terrorist attacks” and

594. *Brown v. Polk County, Iowa*, 61 F.3d 650, 654 (8th Cir. 1995).

595. Niala Boodhoo, *Having Faith*, MIAMI HERALD, Feb. 15, 2007, at 1C [hereinafter Boodhoo, *Having Faith*].

596. *Id.*

597. 42 U.S.C. § 2000e(j) (2000).

598. Jane Musgrave, *Religious Ranger Gets His Job Back*, MIAMI HERALD, Aug. 15, 2007, at 6B.

599. *Id.*

600. Chris Serres & Matt McKinney, *Target Stores Reassign Muslim Cashiers Who Avoid Pork*, MIAMI HERALD, Mar. 19, 2007, at 3A.

601. *See id.*

602. *Id.*

many of these claims involve Muslim employees.⁶⁰³ For example, three-quarters of the taxi drivers serving the Minneapolis-St. Paul Airport are Muslims and recently many of them refuse, on religious grounds, to carry passengers carrying alcohol.⁶⁰⁴ “[E]ven blind people with guide dogs have been” turned away by the religious cabbies in light of Islamic law “that the saliva of dogs is unclean.”⁶⁰⁵ In response, the city proposes “a 30-day suspension for a first offense” and a two year license revocation for repeat offenders.⁶⁰⁶ Similarly, in 2005, Christian pharmacists “refus[ed] to fill prescriptions for the ‘morning after’ anti-contraception pill” on religious grounds.⁶⁰⁷

After a Muslim Congressman announced that he planned to carry the Koran in one hand and the Bible in the other when he took his oath of office, another Congressman warned that “more Muslims will follow” if Congress failed to adopt strict immigration laws.⁶⁰⁸

The constitutionality of state-paid legislative chaplains was largely upheld by the United States Supreme Court in 1983 in *Marsh v. Chambers*.⁶⁰⁹ The Court relied on evidence that the First Amendment framers embraced the practice of government chaplains—indeed, the First Congress had installed chaplains in both houses.⁶¹⁰ In 2007, “[t]he Army National Guard [had] 310 chaplain vacancies.”⁶¹¹ One explanation for the shortage is the fact that “chaplains [are not] covered by a federal law protecting [veterans’] jobs while they are deployed.”⁶¹² One legally questionable practice, however, is that the National Guard makes exceptions to the age range for chaplains, such as for Roman Catholic priests.⁶¹³

Quite apart from state-paid chaplains is the emerging trend of private corporations nationwide “bringing chaplains into the workplace.”⁶¹⁴ Because these chaplains work for the employers, critics charge, they do nothing to

603. Boodhoo, *Having Faith*, *supra* note 595.

604. Leonard Pitts Jr., *Muslim Cabbies’ Spirited Refusal Is Intolerable*, MIAMI HERALD, Jan. 22, 2007, at 1B.

605. *Id.*

606. *Id.*

607. *Id.*

608. Rob Hotakainen, *Lawmaker’s Letter Irks Muslim Group*, MIAMI HERALD, Dec. 21, 2006, at 12A.

609. 463 U.S. 783, 794 (1983).

610. *Id.* at 787–88.

611. Nafessa Syeed, *Guard Deals with Chaplain Shortage*, MIAMI HERALD, Feb. 18, 2007, at 6A.

612. *Id.* (citing 31 U.S.C. § 3730(e)(4)(B) (2000)).

613. *Id.*

614. Neela Banerjee, *At Bosses’ Invitation, Chaplains Come into Workplace and onto Payroll*, N.Y. TIMES, Dec. 4, 2006, at A14.

challenge labor law violations, even when they are blatant.⁶¹⁵ Even if company chaplains steer clear of evangelizing, they run the risk of looking like the boss favors a particular religion.⁶¹⁶ “[D]iscussions between chaplains and employees are confidential, unless the [employee poses] an imminent [threat] to himself or others.”⁶¹⁷

Another emerging trend that may bode well for employers but is problematic for employees is the hands-off approach toward “religious organizations—especially religious schools—to manage their affairs with [minimal] interference from the government and their own employees.”⁶¹⁸ Under the so-called ministerial exception, judges rarely hear a case calling into question church “doctrines, governance, discipline or hiring preferences of any religious faith.”⁶¹⁹ What is new and troubling, however, is that some judges are expanding the ministerial exception sanctioned by Title VII to refuse to intervene “when religious groups have [fired] lesbians, unwed mothers and adulterous couples” because they run counter to their employers’ religious beliefs.⁶²⁰

A former Broward Community College (BCC) instructor convinced a federal judge in 2007 that the instructor’s Catholic faith played a substantial role in his being passed over for full-time jobs and that the college “favored evangelical Protestants in hiring, promotion and class assignments.”⁶²¹ A *Miami Herald* editorial took BCC to task for refusing to say it has begun “hiring based on academic, not religious, credentials.”⁶²² As a taxpayer-funded public college, the editorial intoned, “[t]he public has the right to know.”⁶²³

I. Remedies

In 2006, the EEOC recovered “\$274 million in monetary” benefits for victims of employment discrimination.⁶²⁴

615. *Id.*

616. *Id.*

617. *Id.*

618. See Diana B. Henriques, *Where Faith Abides, Employees Have Few Rights*, N.Y. TIMES, Oct. 9, 2006, at A1.

619. *Id.*

620. *Id.*

621. Natalie P. McNeal, *BCC May Pay for Bias in Favor of Evangelicals*, MIAMI HERALD, July 17, 2007, at 1B.

622. *Clean House in Religion Department*, MIAMI HERALD, Aug. 2, 2007, at 14A.

623. *Id.*

624. Press Release, EEOC, *Job Bias Charges Edged up in 2006*, EEOC Reports (Feb. 1, 2007), available at <http://www.eeoc.gov/press/2-1-07.html>.

In 2007, the United States Supreme Court ruled, in *Sole v. Wyner*,⁶²⁵ that a plaintiff who secures a preliminary injunction that is dissolved when the merits of the case are finally decided against her is not a “prevailing party” entitled to receive attorneys’ fees under 42 U.S.C. § 1988(b).⁶²⁶

In calculating reasonable attorneys’ fees under Florida’s Civil Rights Act, a Florida court ruled that it is an error to apply a multiplier to enhance a lodestar fee in an anti-retaliation case.⁶²⁷

625. 127 S. Ct. 2188 (2007).

626. *Id.* at 2196.

627. *Haines City HMA, Inc. v. Carter*, 948 So. 2d 904, 908 (Fla. 2d Dist. Ct. App. 2007).