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2005-2006 Survey of Florida Public Employment Law

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2005–2006 SURVEY OF FLORIDA PUBLIC EMPLOYMENT LAW

JOHN SANCHEZ*

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I. INTRODUCTION

This survey article examines a wide range of legal issues involving public employment in Florida during 2005–06. It begins with a discussion of the law governing the hiring stage of public employment. Part II examines the legal issues over: 1) hiring and retaining teachers; 2) privatization and competitive bidding; 3) background checks on employees; 4) nepotism; 5) the hiring of undocumented workers; and 6) ethics and conflicts of interest usually involving public officials.

Part III canvasses the law governing the terms of public employment. For instance, this section weighs emerging developments in the Fair Labor Standards Act governing minimum wage and overtime pay. This section also notes the growing trend among Florida cities and counties to adopt so-called living wage statutes that bring salaries in line with the cost of living. In addition, this section addresses other legal issues including: 1) the off-duty pay for police officers; 2) teachers’ pay; 3) military pay; 4) missed work due to hurricanes; 5) the wage gap between men and women; and 6) living wage laws. Apart from hours and wages, Part III surveys recent developments not only involving health benefits and guns at the workplace, but also workers’ compensation, unemployment compensation, and public pensions. Part IV examines case law governing: 1) discipline; 2) retaliation; 3) whistle-blowing; and 4) the First Amendment. Finally, Part V addresses employment discrimination.

II. HIRING TEACHERS, PRIVATIZATION, BACKGROUND CHECKS, NEPOTISM, ILLEGAL IMMIGRANTS, AND ETHICS

A. *Legal Issues over Hiring and Retaining Teachers*

Under Florida law, public school teachers must earn six continuing-education credits every five years to maintain their teaching licenses.¹ According to the *Miami Herald*, thirty Miami-Dade teachers were faced with

1. Marc Caputo, *Bill Could Shield Teachers*, MIAMI HERALD, Mar. 10, 2006, at 9B.

being fired in 2006 for fraudulently obtaining continuing-education credits.² In response, two Miami legislators proposed a measure aimed at making it “tougher for the state to revoke or suspend an instructor’s license obtained fraudulently.”³ Under the proposed legislation, the state must prove that the teachers knew they were taking part in a fraud.⁴

According to the *Miami Herald*, “[a] study of five school districts found that union seniority rules” commonly require schools to hire unfit teachers.⁵ According to a report cited by the *Miami Herald*, “many teachers transfer because they had done poorly at their previous schools.”⁶ Even so, the teachers with such transfers often had sufficient seniority to be able to transfer to any school with an opening.⁷ The report proposed that teacher hiring decisions be “based on the mutual consent of the teacher and receiving school.”⁸

According to a hearing before the Florida Board of Education, the state will need 30,000 more public school teachers in 2006.⁹ The expected vacancies stem from state law mandating smaller classes.¹⁰ The state board will try to boost teachers’ salaries in its effort to draw more teachers to Florida.¹¹ According to the Monroe County School District Superintendent, the “problem is not finding new qualified teachers. It’s keeping them.”¹² Troops to Teachers, a government program that assists veterans in becoming teachers, recruited 241 former soldiers in Florida between the years of 2001–02 and 2004–05 school years.¹³

2. *Id.*

3. *Id.*

4. *Id.*

5. *Unfit Teachers Forced on Schools, Study Says*, MIAMI HERALD, Nov. 17, 2005, at 10A.

6. *Id.*

7. *Id.*

8. *Id.* (quoting JESSICA LEVIN ET AL., UNINTENDED CONSEQUENCES: THE CASE FOR REFORMING THE STAFFING RULES IN URBAN TEACHERS UNION CONTRACTS (2005), available at <http://www.tntp.org/newreport>).

9. Hannah Sampson, *Challenge Ahead: Hiring Teachers*, MIAMI HERALD, Oct. 19, 2005, at 10B.

10. *Id.*

11. *Id.*

12. Cammy Clark, *Keys Battling to Keep Teachers*, MIAMI HERALD, Aug. 13, 2006, at 6B. “[One hundred seventeen] teachers—about 19 percent of the [county’s] 628 teaching workforce—left the school district” in 2006. *Id.*

13. Peter Bailey et al., *Reveille Call on First Day of School*, MIAMI HERALD, Aug. 15, 2006, at 8A.

B. *Privatization and Competitive Bidding Issues*

Privatization, the conversion of governmental agencies into private entities, continues to be a high-profile issue in Florida.¹⁴ For example, Dania Beach city officials considered privatizing its employment of lifeguards as a cost-saving measure like Hallandale Beach did two years earlier.¹⁵ Under the plan, lifeguards employed by the city would be replaced by those who work for a private company.¹⁶ While use of private lifeguards is common at pools and water parks, critics claim the ocean, with its hazards, requires public lifeguards.¹⁷ In the face of heavy criticism from some residents, local unions, and lifeguards, a Texas company rescinded its plans to supply private lifeguards for Dania Beach.¹⁸ Finally, the city decided to keep public lifeguards on the beach, but outsourced those at pools.¹⁹

Proponents of privatization often tout efficiency and cost-cutting in support of this policy. For example, a private company that began operating Florida's troubled personnel system in 2002 promised to streamline, centralize, and computerize the state's human-resources system.²⁰ In 2006, however, a legislative audit found that the outsourcing contract, Florida's largest, was rife with problems.²¹ Besides hiring a worker who was later imprisoned for identity theft, two whistle-blowers claimed the company illegally sent public employees' private information "to India for processing."²² A state senator has proposed legislation that would give the lawmaking body more control over outsourcing contracts despite objections lodged by then-Governor Jeb Bush.²³

In the education context and at the college level, outsourcing to part-time contract workers means that only 53.8% of teachers nationwide are full-

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

15. Diana Moskovitz, *City May Privatize Lifeguards*, MIAMI HERALD, Sept. 12, 2005, at 1B.

16. *Id.*

17. Diana Moskovitz, *150 Oppose Privatizing Lifeguards*, MIAMI HERALD, Sept. 14, 2005, at 1B.

18. Natalie P. McNeal, *Lifeguard Plan Goes Under*, MIAMI HERALD, Sept. 17, 2005, at 1B.

19. Diana Moskovitz, *City Saves Lifeguards at Beach, Not Pools*, MIAMI HERALD, Sept. 22, 2005, at 3B.

20. Marc Caputo, *Audit Questions Savings on Convergys' Contract*, MIAMI HERALD, Apr. 25, 2006, at 9B.

21. *Id.*

22. *Id.*

23. *Id.*

time faculty, as compared to 77.9% in 1970.²⁴ While outsourcing teaching positions saves money, a growing army of adjunct professors are left earning low wages, receiving no benefits, and having no job security.²⁵ According to the *Miami Herald*, most adjuncts earn between \$1800 and \$2500 per class at public colleges and universities and usually teach lower-level core courses.²⁶ Since part-time teachers are usually in a hurry to leave campus for another assignment elsewhere, there is little time to advise students or to write recommendations needed by students for jobs or graduate school.²⁷ While reliance on adjunct professors is beneficial when the motive is to expose students to teachers with real life experience, such reliance is detrimental when driven solely by the need to plug budget holes.²⁸

Consistent with the practice of public entities, Miami-Dade County contracting rules require competitive bidding.²⁹ However, these rules have been circumvented by the Miami-Dade Solid Waste Department, because it awarded work to a company that outsourced part of the job to former waste department employees, all without soliciting competitive bids.³⁰ A report by the county inspector general found “vague billing records, inadequate documentation, and lack of written authorization before the company initiated work.”³¹ The report recommended ending the no-bid contracting.³²

A May 23, 2005 memo by the Federal Office of Management and Budget makes clear that in assessing which types of jobs are inherently governmental and thus not subject to outsourcing, federal agencies should look at employees performing the functions and decide whether all of the workers are performing inherently governmental work.³³

24. Noah Bierman, *Colleges Turn to Part-Time Teachers as Enrollment Swells, Cash Shrinks*, MIAMI HERALD, Aug. 21, 2005, at 1A.

25. *Id.* at 12A.

26. *Id.*

27. *Id.*

28. *See id.*

29. Miami-Dade, Fla., Code pt. 1, art. 4, § 4.03(D), available at <http://www.municode.com/resources/gateway.asp?pid=10620&sid=9> (last visited Dec. 26, 2006).

30. Noaki Schwartz, *Inspector General: Solid-Waste Deal Stinks*, MIAMI HERALD, Oct. 5, 2005, at 5B.

31. *Id.*

32. *Id.*

33. Memorandum from David H. Safavian, Office of Mgmt. & Budget, to the Heads of Exec. Dept's & Agencies: 2005 Inventories of Commercial and Inherently Governmental Activities (May 23, 2005), available at <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-12.pdf>.

C. Background Checks on Employees

While 85% of all employers conduct no investigation of prospective employees,³⁴ in Florida, public agencies must undertake a background check of anyone who works or volunteers at parks, playgrounds, child care centers, or other venues where children meet.³⁵ Moreover, a 1996 Florida law requires fingerprinting and extensive background screening of all public school employees.³⁶ While background checks by employers have been challenged on constitutional grounds, such cases are rarely successful.³⁷

Since 2004, all volunteers at Miami-Dade County public schools must submit to background screening by the Federal Bureau of Investigation (FBI) and Florida Department of Law Enforcement.³⁸ Only volunteers who have one-on-one contact with students without teacher supervision must be fingerprinted.³⁹ In Broward County, volunteers are checked against Florida's database for sexual offenders and predators and face a county criminal back-

34. Beatrice Garcia, *Background? Check It Out*, MIAMI HERALD, Oct. 12, 1999, at 1C. "Even expunged cases, however, often turn up in Internet-based criminal record searches conducted with growing frequency by employers." Lee Romney, *Group Pushes to Loosen Limits on Ex-Inmates*, L.A. TIMES, Mar. 3, 2006, at B1.

35. See Peter Bailey & Hannah Sampson, *Schools Increase Scrutiny of Volunteers*, MIAMI HERALD, Aug. 21, 2005, at 1B.

36. See FLA. STAT. § 231.02 (1995), amended by FLA. STAT. § 231.02(2)(b) (Supp. 1996) (stating that "all other personnel currently employed by any district school system . . . shall submit a complete set of fingerprints"); see also Bailey & Sampson, *supra* note 35 (discussing the ramifications of the fingerprinting law).

37. E.g., Fla. Pub. Employees Council 79, *AFSCME v. Dep't of Children & Families*, 745 So. 2d 487 (Fla. 1st Dist. Ct. App. 1999).

38. Bailey & Sampson, *supra* note 35. Comments submitted to the Department of Justice (DOJ) in 2005 recommended that before allowing employers to use FBI databases for employment-related purposes, the DOJ should weigh such issues as the accuracy of the databases and how well errors will be corrected. See, e.g., Letter from Jason B. Morris, President, Background Info. Servs., Inc., to Richard A. Hertling, Deputy Ass't Att'y Gen., Dep't of Justice (Aug. 3, 2005), <http://www.usdoj.gov/olp/pdf/ncicteportjuly25.pdf>; Letter from Gail Simonton, Exec. Dir. & Gen. Counsel, NASCO, to Richard A. Hertling, Deputy Ass't Att'y Gen., Dep't of Justice, (Aug. 5, 2005), <http://www.usdoj.gov/olp/pdf/olpdocketnasco.pdf>; Letter from Michael Sankey, Chief Exec. Officer, BRB Publications, Inc., to Richard A. Hertling, Deputy Ass't Att'y Gen., Dep't of Justice (Aug. 5, 2005), <http://www.usdoj.gov/olp/pdf/hertling.pdf>; Letter from Jennifer Huggins, Staff Att'y, Greater Boston Legal Servs., to Richard A. Hertling, Deputy Ass't Att'y Gen., Dep't of Justice (Aug. 8, 2005), <http://www.usdoj.gov/olp/pdf/commentstoagrecs082005.pdf>. The DOJ solicited the comments through a notice published on June 6, 2005 in the Federal Register. Criminal History Background Checks, 70 Fed. Reg. 32,849 (June 6, 2005).

39. Criminal History Background Checks, 70 Fed. Reg. at 32,849.

ground check.⁴⁰ However, exceptions are made on a case-by-case basis for volunteers who had minor incidents in the past.⁴¹

Unforeseen consequences have emerged since the Jessica Lunsford Act took effect on September 1, 2005, “requiring fingerprinting and background checks for contractors, vendors, sports referees, and others [with business on] school property.”⁴² For example, six National Football League (NFL) Europe teams abandoned Florida high schools they used for preseason training camps on account of the new law.⁴³ Similarly, builders are shying away from school projects because of the new law, raising construction costs in the process.⁴⁴ Reluctant contractors claim some Hispanic workers refuse on cultural grounds to submit to fingerprinting.⁴⁵ In addition, employers must pay the eighty-two dollar fee to fingerprint each worker.⁴⁶ The problem has been compounded by some schools that insist on ruling out people who have committed minor crimes from school premises.⁴⁷ While most employers do not mind the background checks, many find the fingerprinting overly burdensome.⁴⁸

D. *Nepotism: Legal Issues over Hiring Relatives*

Florida prohibits employment discrimination on grounds of marital status,⁴⁹ but also somewhat confusingly has an “anti-nepotism” law.⁵⁰ Sev-

40. Bailey & Sampson, *supra* note 35. San Francisco is the first city in California to prohibit questions about criminal convictions from initial job application forms. Romney, *supra* note 34. A broader Boston ordinance enacted in October 2005 bars “the city from contracting with any private employer who discriminates against applicants with criminal records unrelated to job duties.” *Id.*

41. Bailey & Sampson, *supra* note 35.

42. Rani Gupta, *Predator Law Impacts School Construction*, MIAMI HERALD, Dec. 24, 2005, at 7B.

43. *NFL Europe Must Abandon School Fields*, MIAMI HERALD, Dec. 24, 2005, at 7B.

44. Gupta, *supra* note 42.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. See FLA. STAT. § 760.01(2) (2006).

50. See *id.* §§ 112.3135, 760.10(8)(d); see also Amy Sherman, *Family Hiring Dispute Flares*, MIAMI HERALD, Apr. 26, 2005, at 1B. Nepotism still flourishes “primarily because of the growth of family-owned businesses and companies that view the practice as an opportunity to build loyalty, trust, and responsibility among their work forces.” Hanah Cho, *Nepotism Occurs Despite Negative Perceptions*, MIAMI HERALD, July 16, 2006, at 4E.

eral courts have addressed the question of whether the “marital status” statute undercuts the “anti-nepotism” law.⁵¹

In 2000, the Supreme Court of Florida narrowly interpreted the state’s ban on marital status discrimination by ruling that Florida shall not recognize a marital discrimination claim premised on a company’s response to the action of one’s spouse.⁵² The Court made clear that the common usage of the term “marital status” refers to whether an individual is “married, single, divorced, widowed, or separated;” it does not cover retaliation against an employee for the actions of that employee’s spouse.⁵³

In 2005, the state-funded Early Learning Coalition of Miami-Dade/Monroe allegedly employed or did business with relatives or friends of six coalition staff members.⁵⁴ The Coalition received money from the state “to oversee preschool and school readiness efforts in Miami-Dade and Monroe counties.”⁵⁵ Results of a state inspector general’s investigation are pending.⁵⁶

E. *Strengthening Employer Sanctions over Hiring Undocumented Workers*

Under the Immigration Reform and Control Act of 1986,⁵⁷ it is unlawful for employers to hire undocumented illegal aliens.⁵⁸ The employer owes a duty to verify an alien’s work status by examining documents to see if it “reasonably appears on its face to be genuine.”⁵⁹ At times, employers receive notice from the Social Security Administration that an employee’s social security information does not match data on record.⁶⁰ Until now, employers suffered no penalty if they failed to investigate.⁶¹ But under new rules proposed by the Department of Homeland Security, employers would be required to investigate after notification of discrepancies or face potential

51. See, e.g., *Belton-Kocher v. St. Paul Sch. Dist.*, 610 N.W.2d 374, 377 (Minn. Ct. App. 2000) (noting that anti-nepotism rules violate the state’s prohibition against marital status discrimination absent a compelling and overriding bona fide occupational qualification).

52. *Donato v. Am. Tel. & Tel. Co.*, 767 So. 2d 1146, 1155 (Fla. 2000).

53. *Id.*

54. Carol Marbin Miller, *Nepotism Probe Target Points to Agency Successes*, MIAMI HERALD, Oct. 15, 2005, at 6B.

55. *Id.*

56. *Id.*

57. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C. (2000 & Supp. III 2004)).

58. 8 U.S.C. § 1324a(a)(1) (2000).

59. *Id.* § 1324a(b)(1)(A).

60. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281 (proposed June 14, 2006) (to be codified at 8 C.F.R. pt. 274a).

61. See *id.* at 34,281–82.

penalties.⁶² Employers who attempted to clear up discrepancies would be protected from court action.⁶³ A second regulation allows employers to maintain employment records in electronic form, saving employers who have thousands of employees or a high turnover the cost and storage space that paper records require.⁶⁴

President Bush hoped to make “an overhaul of the nation’s immigration laws” his signature domestic initiative of 2006.⁶⁵ However, differences among President Bush, the House, and the Senate, meant that the long odds for passage of the Bill in 2006 grew even longer.⁶⁶ The House Bill would make it a felony to live in the United States illegally and rejects any chance for undocumented aliens to win legal status.⁶⁷ The Senate Bill seeks to strengthen border control, while at the same time giving illegal immigrants a chance to become citizens after paying a fine.⁶⁸ President Bush’s approach calls for stronger enforcement, while providing avenues to legalize the illegal work force and to carve a potential path to citizenship.⁶⁹

The Eleventh Circuit Court of Appeals, in *Williams v. Mohawk Industries Inc.*,⁷⁰ ruled that claims by employees that their employer hired illegal workers as part of a conspiracy to hold down wages and lower workers’ compensation claims were valid under the Racketeer Influenced and Corrupt Organizations (RICO) Act and state law.⁷¹

While there are twenty-one million immigrants and only seven million unemployed Americans, “the majority of immigrants [have not] ‘taken’ jobs; they must be doing jobs that would not have existed had the immigrants not been here.”⁷² However, economists disagree over whether immigrants hurt

62. *Id.* at 34,282–83. On March 1, 2003, the Immigration and Naturalization Service was renamed the Bureau of Citizenship and Immigration Services and moved from the Justice Department to the Department of Homeland Security. Homeland Security Act of 2002, 68 Fed. Reg. 9824, 9824 (Feb. 28, 2003) (codified at 28 C.F.R. pt. 200).

63. Safe Harbor Procedures, 71 Fed. Reg. at 34,283.

64. 8 U.S.C. § 1324a(b)(3) (2005).

65. Adam Nagourney et al., *Bush’s Immigration Plan Stalled as House G.O.P. Grew Anxious*, N.Y. TIMES, June 25, 2006, at A1.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. 411 F.3d 1252 (11th Cir. 2005).

71. *Id.* at 1257.

72. Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES MAG., July 9, 2006, at 36, 38.

the economic prospects of the Americans they compete with, but the consensus of most is that, overall, immigration is good for the country.⁷³

Some Florida cities have proposed their own controversial laws on undocumented immigrants.⁷⁴ For example, Palm Bay in Brevard County and Avon Park in Highlands County are weighing fines for businesses that hire workers without legal residency status.⁷⁵ These measures would also bar city contracts from businesses employing undocumented immigrants.⁷⁶ Critics claim that such ordinances will violate civil rights laws and may be preempted by federal immigration law.⁷⁷ Avon Park had to reconsider its position, because such a ban might have blocked the construction of a Wal-Mart.⁷⁸ Under such ban, Wal-Mart would be in violation for hiring illegal immigrants.⁷⁹ As a result, Avon Park's proposed immigration ordinance failed on July 24, 2006, by a 3-2 vote by the City Council.⁸⁰

F. *Ethics and Conflicts of Interest*

Many states have enacted so-called "codes of governmental ethics" that set standards of conduct not only for public employees, but also for persons such as lobbyists who interact with government officials and employees.⁸¹ Florida requires that violations of its code of ethics be proven by clear and convincing evidence of wrongdoing.⁸² Under a new law enacted in 2005, Florida legislators may no longer take gifts or meals from lobbyists.⁸³ However, according to the *Miami Herald*, many state lawmakers continue to raise money for their political organizations from corporations and lobbyists that have an interest in what the legislature undertakes.⁸⁴ Despite a 2004 rule change that forced all legislators to register any political committees with whom they have an affiliation, some observers speculate that these political organizations amount to a huge loophole for lawmakers to dodge the new

73. *Id.*

74. *Cities Propose Laws on Migrants*, MIAMI HERALD, July 10, 2006, at 5B.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Aid Ban Imperils Wal-Mart*, MIAMI HERALD, July 14, 2006, at 8B.

79. *See id.*

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

81. Erika Bolstad, *County Weighs Lobbyist Rules*, MIAMI HERALD, Jan. 7, 2006, at 1B.

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

83. *See* FLA. STAT. § 112.3148(7)(j) (2006).

84. Gary Fineout, *Cash Flows Despite New Ban on Gifts*, MIAMI HERALD, Dec. 19, 2005, at 1B.

gift ban.⁸⁵ In 2006, a group of lobbyists asked a Leon County judge to enjoin one of the nation's toughest restrictions on gifts from lobbyists to legislators.⁸⁶ Florida's ban, effective January 1, 2006, angered many lobbyists who were also obliged to reveal how much they get paid.⁸⁷ The lobbyists have challenged the new law as "deeply flawed across the board procedurally and it also violates First Amendment and equal protection rights guaranteed by the [United States] Constitution."⁸⁸

On a local level, Broward County commissioners are considering whether to enact their own "ethics rules that [would] bar them from accepting any gifts or meals from lobbyists," mirroring restrictions passed by legislators statewide.⁸⁹ "Currently, county commissioners can accept gifts worth less than \$100 from lobbyists without reporting them" to the Florida Commission on Ethics.⁹⁰ Since 2001, lobbyists that conduct business with the Broward County Commission are required to register and reveal yearly any fees for securing a contract for a client.⁹¹

Joining the ethics bandwagon in 2005, Florida's Attorney General called for the elimination of the revolving door at "state-run entities where former employees [leave and form] companies only to return seeking contracts from their former employer."⁹² Currently, state "law requires state employees to wait two years before doing business with their former agency."⁹³ Under the new law, violations would be investigated by the Florida Commission on Ethics, with restitution and fines up to \$10,000.⁹⁴ Soon after, Citizens Property Insurance (Citizens) executives told the Florida House Committee it was about to impose ethics rules along the lines of those proposed by Florida's Attorney General.⁹⁵ In 2005, conflict of interest

85. *Id.*

86. Gary Fineout, *Lobbyists Appeal Gift Ban Before Judge*, MIAMI HERALD, Feb. 17, 2006, at 8B.

87. *Id.*

88. *Id.*

89. Bolstad, *supra* note 81.

90. *Id.*

91. *Id.*

92. Mary Ellen Klas, *Crist: Tighten Rules on State-Run Firms*, MIAMI HERALD, Oct. 18, 2005, at 8B.

93. *Id.*

94. *Id.*

95. Mary Ellen Klas, *Citizens Ponders Ethics Rules*, MIAMI HERALD, Oct. 19, 2005, at 3C.

claims emerged when former Citizens executives hatched a plan to form a private insurance firm that would seek business from Citizens.⁹⁶

The Florida Legislature is considering a measure that will outlaw the ethically-dubious practice of “double dipping” whereby state legislators receive a salary as a state legislator and draw pay from another job that is state-funded.⁹⁷ The bill, for example, will prohibit state lawmakers from working for public schools, a city, or a county.⁹⁸ In addition, the bill makes it a conflict of interest for a lobbyist to serve on the Florida Commission on Ethics.⁹⁹ However, if enacted, the law will not apply to any current lawmakers or take effect until January 2016.¹⁰⁰

The ban on the practice of “double dipping” is similar, but not identical, to laws that regulate the practice of dual office holding.¹⁰¹ On occasion, the ban on dual office holding is lifted where the second office is merely conceived as an added duty of the first office.¹⁰² For example, a Florida court ruled that a city commissioner was not barred outright from holding office as a pension trustee if pension administration is a regular duty shared with the office of commissioner.¹⁰³

Beyond the statutory concept of dual office holding is the common law doctrine of incompatibility of office.¹⁰⁴ Incompatibility of office is deemed to arise where one office falls under the control of the other, thereby enabling the office holder to favor one position over the other.¹⁰⁵ Faced with this conflict, the office holder is forced to yield one of the positions if holding both might disserve the public interest.¹⁰⁶ The potential for conflict rather than actual conflict triggers the ban.¹⁰⁷ Under Florida’s Constitution, neither serving as notary public nor holding a commission with the National Guard of state militia triggers divestiture.¹⁰⁸

96. *Id.*

97. Gary Fineout, ‘Double Dipping’ by Legislators Is Under Attack, *MIAMI HERALD*, Mar. 15, 2006, at 7B [hereinafter Fineout, *Double Dipping*].

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* Compare Fineout, *Double Dipping*, *supra* note 97, with *City of Orlando v. State Dep’t of Ins.*, 528 So. 2d 468, 469 (Fla. 1st Dist. Ct. App. 1988).

102. See *City of Orlando*, 528 So. 2d at 469.

103. *Id.*

104. *Gryzik v. State*, 380 So. 2d 1102, 1104 (Fla. 1st Dist. Ct. App. 1980).

105. *Id.*

106. *Id.*

107. *Id.*

108. See FLA. CONST. art. II, § 5(a).

III. TERMS OF EMPLOYMENT

A. Hours and Wages

1. Fair Labor Standards Act Issues

The national minimum wage has been frozen at \$5.15 an hour since September 1997, “marking the second longest [term] that the [country] has had a stagnant minimum wage since” the enactment of the Fair Labor Standards Act (FLSA) in 1938.¹⁰⁹ States are free to raise the minimum wage within their own borders.¹¹⁰ “In 2004, Florida voters [overwhelmingly] approved a constitutional amendment that set the state minimum wage at \$6.15 an hour and . . . [scheduled] annual adjustments for inflation.”¹¹¹ On January 1, 2006, the Florida Legislature adjusted the minimum wage to \$6.40 an hour.¹¹² According to the Miami Herald, about “400,000 of Florida’s 8.5 million workers earn . . . minimum wage.”¹¹³ In the past year, the Department of Labor issued several opinion letters dealing with calculating overtime pay:

- One letter offered aid in assessing overtime when an employee performs both exempt and nonexempt tasks.¹¹⁴ As a rule, employers owe overtime for all hours worked if the primary duty is nonexempt work.¹¹⁵
- One letter made clear that changes to the law governing the executive exemption from overtime pay rules, affected by the 2004 revisions in the FLSA regulations, are clarifications and not substantive changes.¹¹⁶

109. Rick Klein, *Democrats to Woo Voters with Wage Increase Issue*, BOSTON GLOBE, Dec. 28, 2005, at 3A. See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-213 (2000).

110. See Klein, *supra* note 109.

111. *Id.*

112. *Id.*

113. *Id.*

114. Advisory Letter from Alfred B. Robinson, Jr., Deputy Admin., U.S. Dep’t of Labor, FLSA2005-14 (Mar. 17, 2005).

115. See *id.*

116. Advisory Letter from Alfred B. Robinson, Jr., Deputy Admin., U.S. Dep’t of Labor, FLSA2005-19 (Aug. 2, 2005).

- One letter clarified that a graduate degree requirement for social workers satisfies the learned professional exemption from overtime, while a general college degree for caseworkers did not.¹¹⁷
- One letter explained that although an employer is typically required to pay the average aggregate wage when a firefighter works two jobs at different pay levels, employers who can show that the pay scheme is not aimed at selling workers short or evading the FLSA may pay for overtime based on two distinct wages.¹¹⁸

In 2005, the United States Supreme Court ruled that, under FLSA, time spent walking between the area where workers put on and take off (don and doff) protective gear, that is “integral and indispensable”¹¹⁹ to the “principal [activity]”¹²⁰ plus time spent waiting to doff, is compensable.¹²¹ By contrast, time devoted to waiting to put on the first article of gear, that signals the beginning of a non-stop workday, is excluded from the scope of the FLSA under section 4(a)(2) of the Portal-to-Portal Act.¹²²

A Tampa federal court ruled, in *Bogacki v. Buccaneers Ltd. Partnership*,¹²³ that a worker who files a retaliation claim under the FLSA may recover emotional distress damages alongside lost wages, liquidated damages, costs, and attorneys’ fees.¹²⁴

2. Off-Duty Pay for Police Officers

The Miami-Dade Police Benevolent Association (PBA) conducts an off-duty work program aimed at providing police officers as added security for private businesses.¹²⁵ However, according to a report by the Inspector General, the head of the PBA received over \$100,000, since 2003, for patrolling the union office.¹²⁶ According to the report, this is “a ‘flagrant abuse’ of

117. Advisory Letter from Alfred B. Robinson, Jr., Deputy Admin., U.S. Dep’t of Labor, FLSA2005-50 (Nov. 4, 2005).

118. Advisory Letter from Alfred B. Robinson, Jr., Deputy Admin., U.S. Dep’t of Labor, FLSA2005-1NA (Feb. 14, 2005).

119. *IBP, Inc. v. Alvarez*, No. 03-1238, slip op. at 7 (U.S. Nov. 8, 2005) (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956)).

120. *Id.* (quoting *Steiner*, 350 U.S. at 256).

121. *Id.*

122. *Id.* at 19.

123. 370 F. Supp. 2d 1201 (M.D. Fla. 2005).

124. *Id.* at 1201, 1206.

125. Scott Hiaasen, *Union Boss’ Off-Duty Pay Under Fire*, MIAMI HERALD, May 31, 2006, at 1A.

126. *Id.*

an off-duty work program,” which was designed to be “self-sustaining, with businesses, not taxpayers, bearing all the costs.”¹²⁷

3. Teachers’ Pay

About 900 Florida International University (FIU) faculty had been working without a labor contract since 2003.¹²⁸ However, in 2006, FIU’s faculty signed a three-year landmark contract that will aid the fast-growing public school in recruiting better faculty.¹²⁹ The contract, which guarantees each faculty member a minimum pay hike and the right to arbitrate grievances before an internal panel, is the first contract for the FIU faculty since Florida eliminated its Board of Regents.¹³⁰

In 2006, hundreds of South Florida teachers mounted a silent protest by wearing blue shirts in part to express their anger over a state plan to tie teacher salaries to student test scores.¹³¹ In 2005, Miami-Dade public school teachers agreed to a one-year contract that included almost \$53 million in salary increases.¹³² Under the new contract, a school teacher’s starting salary would increase from \$33,275 to \$34,200.¹³³ As a result of the new contract, the average salary of Miami-Dade teachers would rise to \$48,307, about \$8,000 more than the state average and almost \$3,000 above the national average salary for all teachers.¹³⁴

South Florida’s high cost of housing has often deterred new teachers from working in the area.¹³⁵ A starting salary of \$35,000 makes it very difficult for new teachers to afford to buy even a one-bedroom condo.¹³⁶ To address this problem, the Broward School Board entertained proposals by a real estate developer to reserve 50 apartment units in a redevelopment area for

127. *Id.*

128. Noah Bierman, *FIU Faculty Approves New 3-Year Contract*, MIAMI HERALD, Feb. 16, 2006, at 1B.

129. *Id.*

130. *Id.*

131. Mary Ellen Klas, *Teachers Dress in Blue to Protest*, MIAMI HERALD, Apr. 26, 2006, at 8B.

132. Matthew I. Pinzur, *Early Deal Hikes Dade Teachers’ Pay*, MIAMI HERALD, July 30, 2005 at 1B.

133. *Id.*

134. *Id.*

135. Steve Harrison, *Homing in on a Headache*, MIAMI HERALD, Aug. 24, 2005, at 3B.

136. *Id.*

teachers by selling the units to the teachers below market value.¹³⁷ Under the plan, “the School Board [would offer] teachers a \$20,000 loan, refundable if they teach for five years.”¹³⁸ Moreover, the School Board is weighing whether to lobby the state legislature to grant an additional homestead exemption for teachers.¹³⁹ “[T]he Miami-Dade County School Board recently approved a program” to provide discounts to teachers for public transit as an employee benefit.¹⁴⁰

4. Military Pay

Under federal law, employers are only required to keep the same or similar job and pay and benefit packages for any workers called to active duty.¹⁴¹ A bill introduced in the Florida Legislature in 2005 will assist state National Guard and Reserve soldiers who lose wages when they are called up for active duty.¹⁴²

The Broward County Sheriff’s Office exceeds federal standards, maintaining jobs for reservists by paying them “half of the difference between what the military pays them and what [the employer] ordinarily pays them.”¹⁴³ State-wide, “Florida has more than \$1.8 million available in matching grants” for any employer who supplements pay to workers “called to active federal military duty.”¹⁴⁴

In *Coffman v. Chugach Support Services*,¹⁴⁵ the Eleventh Circuit Court of Appeals ruled that under the Uniformed Services Employment and Reemployment Rights Act (USERRA),¹⁴⁶ an employer is not a successor in interest to another employer absent a merger or transfer of assets between the two entities.¹⁴⁷

137. *Id.*

138. *Id.*

139. *Id.*

140. Niala Boodhoo, *Housing Aid is a Recruitment Tool*, MIAMI HERALD, Aug. 13, 2006, at 20A.

141. See 38 U.S.C. §§ 4312(a), 4316(a) (2000) (commonly referred to as Uniformed Services Employment and Reemployment Rights Act of 1994).

142. See Phil Long, *State Eyes Cash Relief for Guard*, MIAMI HERALD, Feb. 14, 2005, at 1B.

143. Dalia Naamani-Goldman, *Military Praises Employers*, MIAMI HERALD, Apr. 29, 2005, at 5B.

144. *State Offers Grants for Military Pay*, MIAMI HERALD, Jan. 14, 2006, at 3C.

145. 411 F.3d 1231 (11th Cir. 2005).

146. See 38 U.S.C. §§ 4301-4333. This Federal Act codifies veterans’ reemployment rights. *Id.*

147. *Coffman v. Chugach Support Servs.*, 411 F.3d 1231, 1237-38 (11th Cir. 2005).

The final rules issued by the Department of Labor on December 19, 2005 state that employees returning from military service are entitled to unbroken pension participation, vesting, and accrual of benefits.¹⁴⁸ The final rules apply to state and local governments as well as private employers.¹⁴⁹ Returning service members must receive the same seniority, status, and pay as they would have earned had they not left for military service.¹⁵⁰ Additionally, disability incurred during military service does not foreclose reinstatement at the same seniority, status, and pay.¹⁵¹ Employers owe a duty to reasonably accommodate a returning service member's disability.¹⁵²

5. Missed Work Pay Due to Hurricanes

As a general rule, hourly employees are not paid for hours they do not work.¹⁵³ Only salaried employees, who are exempt from overtime, are entitled to be paid for time missed in the wake of a hurricane.¹⁵⁴ Hourly workers need not be paid even if the workplace closes due to power failure or hurricane damage.¹⁵⁵ Such employees may be eligible for unemployment or disaster assistance.¹⁵⁶ Disaster Unemployment Assistance (DUA) is only available for workers "left jobless as a direct result of a declared disaster."¹⁵⁷ However, "DUA cannot supplement regular unemployment compensation."¹⁵⁸

6. The Wage Gap Between Men and Women

Men, on average, earn more money than women.¹⁵⁹ "[A] woman earns only 77 percent as much as her male counterpart with the same job descrip-

148. See Uniformed Services Employment and Reemployment Rights Act of 1994, 70 Fed. Reg. 75,246, 75,309-10 (Dec. 19, 2005) (codified as amended at 20 C.F.R. pt. 1002) [hereinafter USERRA].

149. *Id.* at 75,291.

150. See *id.* at 75,275.

151. See *id.* at 75,277.

152. *Id.*

153. Jim Wyss, *Will You Get Paid for Missed Work?* MIAMI HERALD, Nov. 1, 2005, at 1C.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 5C.

158. Wyss, *supra* note 153, at 5C.

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

tion and experience.”¹⁶⁰ African-American women earn even less, while Hispanic women earn the least of all.¹⁶¹ The wage gap has not narrowed in ten years.¹⁶² Over a lifetime, the wage gap can make an enormous difference in retirement savings, among other things.¹⁶³ April 25th has been declared National Pay Equity Day and it serves to draw attention to the inequity of the wage gap.¹⁶⁴

7. Living Wage Laws

In 2005, full-time workers earning minimum wage netted \$12,300 annually, about “40 percent below the federal poverty level for a family of four.”¹⁶⁵ To remedy the plight of the public-sector working poor, Miami-Dade County enacted a living wage ordinance in 1999.¹⁶⁶ Miami Beach followed in 2001 and Broward County in 2002.¹⁶⁷ A study of Miami-Dade County’s living wage ordinance found that after earning an extra \$5,720 a year, workers were better able to reduce debt, save more, and live better.¹⁶⁸ “The ordinance covers all county employees and service contractors, Public Health Trust workers, and ground service providers at Miami International Airport.”¹⁶⁹ In 2006, the Miami City Commission “unanimously gave tentative approval to a living wage ordinance for city workers and employees of [city contractors].”¹⁷⁰ If approved, covered “workers would be guaranteed an hourly wage of \$10.58, if they receive health insurance coverage,” or \$11.83 an hour if health insurance is not offered.¹⁷¹

160. Cindy Krischer Goodman, *Seeing Red*, MIAMI HERALD, Apr. 26, 2006, at 1C.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Arthur Rosenberg, *Public-Sector Workers Deserve a Fair Day’s Pay*, MIAMI HERALD, Sept. 30, 2005, at 25A.

166. *Id.*

167. *Id.*

168. Niala Boodhoo, *County’s Living Wage Success with Workers*, MIAMI HERALD, Feb. 16, 2006, at 3C.

169. *Id.*

170. Michael Vasquez, *Tentative Approval for Living Wage Rule*, MIAMI HERALD, Mar. 24, 2006, at 3B.

171. *Id.*

B. Health Benefits

According to a recent study, 41% of working-age Americans with mid-level incomes lack full-time health insurance, up from 28% in 2001.¹⁷² To make matters worse, more employers are eliminating coverage or offering health benefits that are too expensive for many workers to afford.¹⁷³

In 2006, Florida International University became the first Florida university—public or private—“to offer six months’ paid leave to either parent” in order to care for a newborn child.¹⁷⁴

Alongside workplace smoking bans, more and more public and private employers are forcing “employees who use tobacco to pay higher health [insurance] premiums.”¹⁷⁵ In light of the fact that smokers cost employers around 25% more than nonsmokers when it comes to healthcare, some companies “charge smokers higher premiums, [ranging] from . . . \$20 to \$50 a month.”¹⁷⁶ For a number of reasons, public employers are increasingly hiring only non-smokers: not only individuals who do not smoke at work but also individuals who do not smoke at all. In this regard, the Supreme Court of Florida has ruled that there is no privacy violation for a city to require job applicants to sign affidavits vowing they had not used tobacco for a year.¹⁷⁷

More and more, public and private employers provide dependent health benefits to “spousal equivalents” of its employees.¹⁷⁸ For example, in 2006,

172. *More Mid-Income Uninsured*, MIAMI HERALD, Apr. 26, 2006, at 7A. On January 1, 2007, the first-of-its-kind legislation takes effect in Maryland requiring private employers with more than 10,000 employees to spend at least 8% of payroll on health care benefits. Fair Share Health Care Fund Act of 2006, S.B. 790, 2006 Md. Laws ch. 3 (to be codified at MD. CODE ANN., LAB. & EMPL. § 8.5-104).

173. *More Mid-Income Uninsured*, *supra* note 172.

174. Noah Bierman, *FIU Faculty Approves New 3-Year Contract*, MIAMI HERALD, Feb. 16, 2006, at 1B.

175. Lisa Cornwell, *Smokers Feel the Heat from Employers*, MIAMI HERALD, Feb. 17, 2006, at 3C. Two states, Alabama and Kentucky, have passed on to state employees the cost for smokers by raising health insurance premiums for smokers. Ariel Hart, *National Briefing South: Alabama: Trying to Limit Health Spending for State Workers*, N.Y. TIMES, Nov. 17, 2004, at 26A.

176. Cornwell, *supra* note 175.

177. *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1029 (Fla. 1995). In the private sector, a Michigan insurance benefits administrator “began testing its 200 employees for smoking in” 2005. Jeremy W. Peters, *Company’s Smoking Ban Means Off-Hours, Too*, N.Y. TIMES, Feb. 8, 2005, at 5C. Employees face random testing and if they flunk, they are dismissed. *Id.*

178. *See* Bierman, *supra* note 174.

Florida International University “join[ed] the University of Florida in extending healthcare benefits to same-sex domestic partners.”¹⁷⁹

Seven years after “Broward County became one of the first local governments in Florida to extend domestic partner benefits to employees,” “only a few cities in Broward have followed [suit]”¹⁸⁰ Like Broward County, “Hollywood, Miramar, Oakland Park, and Wilton Manors [offer] domestic partner benefits” to employees.¹⁸¹ In 2005, the Miami Beach City Commission approved a measure that “required city contractors to [offer] the same benefits for domestic partners as they do for spouses.”¹⁸² The ordinance is unique in Florida.¹⁸³

Medical insurance costs for United States workers and retirees amounted to \$13,382 in 2006 for a family of four, up 9.6% from 2005.¹⁸⁴ Moreover, 14% of employers in one survey “expect to eliminate retiree health benefits for current workers.”¹⁸⁵ About 160 million workers, retirees, and their families are covered by health insurance purchased by employers.¹⁸⁶

Kidcare is Florida’s subsidized health insurance program for children.¹⁸⁷ A child is eligible for coverage only if both parents work.¹⁸⁸ In the past, enrollment periods were limited, but Governor Jeb Bush signed a law that entitles parents to enroll their children in Kidcare at any time.¹⁸⁹

C. *Guns at the Workplace*

In 2006, the National Rifle Association supported a measure that would punish “Florida employers with prison time and lawsuits if they [forbade their workers] from keeping [firearms] in their cars in workplace parking

179. *Id.* The Supreme Court of Alaska ruled in 2005 that “it was unconstitutional to bar benefits to the same-sex partners of public employees.” *National Briefing Northwest: Alaska: Ruling on Same-Sex Partners*, N.Y. TIMES, Oct. 29, 2005, at 16A.

180. Amy Sherman, *Partner Benefits Again an Issue*, MIAMI HERALD, Mar. 13, 2006, at 1B.

181. *Id.*

182. *Gay-Benefits Package Passes*, MIAMI HERALD, Oct. 20, 2005, at 3B.

183. *Id.* Broward County gives preference to contractors who extend domestic partnership benefits, but does not require them. *Id.*

184. *Business Briefs: Medical Costs Are Up*, MIAMI HERALD, July 6, 2006, at 1C.

185. *Id.*

186. *Id.*

187. Deborah Circelli, *Enrollment Now Open for State KidCare Program*, DAYTONA NEWS-J, June 11, 2005, at 03C.

188. *See id.*

189. *Id.*

lots.”¹⁹⁰ In response, Florida employers claim the law intrudes on their private property rights.¹⁹¹ The bill would not apply to schools where guns are banned by law.¹⁹² Under the bill, employers would be relieved of liability in the event an employee committed a crime with a gun left in their car.¹⁹³ “Shootings accounted for three-quarters of the 551 workplace homicides in the United States” in 2004.¹⁹⁴

D. *Workers’ Compensation*

“In 2000, Florida had the highest workers’ compensation rates [nation-wide].”¹⁹⁵ In 2003, Florida’s workers’ compensation insurance underwent reform and insurance rates declined 14%.¹⁹⁶ In 2005, Florida’s Chief Financial Officer, who was running for Governor, proposed “a [twenty-two] percent cut in workers’ comp[ensation] insurance rates.”¹⁹⁷

E. *Unemployment Compensation*

In 2005, Florida’s unemployment rate was at an all-time low of 3.8%.¹⁹⁸ With the Federal Reserve raising interest rates eighteen times in an effort to forestall inflation, overall spending is reduced, employers hire fewer workers, and unemployment rises. Commentators disagree about whether inflation or rising unemployment poses the greater concern.¹⁹⁹

190. Marc Caputo, *NRA Bill Would OK Guns in Cars at Work*, MIAMI HERALD, Feb. 8, 2006, at A1.

191. *Id.*

192. *Id.*

193. *Anti-Gun Businesses Soon May Be Under Fire*, MIAMI HERALD, Oct. 3, 2005, at 7B.

194. *Id.* (citing Bureau of Labor Statistics, U.S. Dep’t of Labor, Changes to the Current Employment Statistics Survey, <http://www.bls.gov/ces/cesww.htm> (last visited Dec. 26, 2006)); see also PAUL BABIAK & ROBERT HARE, *SNAKES IN SUITS: WHEN PSYCHOPATHS GO TO WORK* 17–18 (2006).

195. Stephanie Horvath, *State CFO Calls for Deeper Cuts in Comp Rates*, MIAMI HERALD, Oct. 5, 2005, at 4C.

196. *Id.*

197. *Id.*

198. Roberto Santiago, *Florida Workers Have Scant Job Protection*, MIAMI HERALD, Sept. 5, 2005, at 5B.

199. Compare Mark Weisbrot, *Rate Hikes Help Bankers, Not Average Americans*, MIAMI HERALD, July 7, 2006, at 21A, with Mark J. Perry, *Economy Going Just Fine*, MIAMI HERALD, July 7, 2006, at 21A.

F. *Public Pensions*

In 2006, of the nearly \$240 million the City of Miami plans to collect in taxes, about \$80 million will go to fund its “generous—and occasionally scandal-plagued—pension funds.”²⁰⁰ Apparently, the fund suffered years of neglect during the 1990s, when the City of Miami narrowly avoided bankruptcy and relied on stock market gains to shore up retirement benefits.²⁰¹ The troubled fund faces not only public resentment over budget-crippling payments, but also charges of faulty management. For example, a city auditor found that twenty-five public employees were deemed permanently disabled without medical evidence of their injuries.²⁰²

IV. DISCIPLINE, RETALIATIONS, AND DISCRIMINATION

A. *Discipline*

A Martin County deputy sheriff was dismissed for using the video camera in his patrol car to zoom in on and record bikini-clad girls while on duty.²⁰³ The deputy is challenging his dismissal and nothing is final until a panel conducts a hearing and votes on whether the discipline is warranted.²⁰⁴

A Lauderhill firefighter-paramedic was dismissed for not reporting to duty during a hurricane, and his firing was subsequently upheld in 2005.²⁰⁵ The firefighter refused to work, stating that he had been drinking wine; however, department policy bars on-call employees from drinking alcohol once a hurricane watch goes into effect.²⁰⁶

B. *Retaliation, Whistle-Blowing, and the First Amendment*

In 2006, the United States Supreme Court handed down two major decisions involving retaliatory discharge: one concerning Title VII,²⁰⁷ and an-

200. Jack Dolan & Michael Vasquez, *Swelling Pension Costs Put Big Dent in Miami's Budget*, MIAMI HERALD, Sept. 22, 2005, at 6B.

201. *Id.*

202. *Id.*

203. Jill Taylor, *Deputy is Fired for Using Video Camera to Ogle Girls*, MIAMI HERALD, Feb. 8, 2006, at 7B.

204. *Id.*

205. Evan S. Benn, *Fired Firefighter Loses Appeal*, MIAMI HERALD, Sept. 24, 2005, at 2B.

206. *Id.*

207. *Burlington N. & Santa Fe Ry. Co. v. White*, No. 05-259, slip op. at 1 (U.S. June 22, 2006).

other implicating the First Amendment.²⁰⁸ In the latter, *Garcetti v. Ceballos*,²⁰⁹ a supervising deputy district attorney claimed that he was retaliated against for writing a memo in the course of his employment that pointed out inaccuracies in an affidavit police used to secure a search warrant.²¹⁰ The United States Supreme Court ruled that public employees who utter statements in the course of their official duties are not speaking as citizens for First Amendment purposes and, consequently, are not constitutionally immune from employer discipline stemming from their communications.²¹¹ Writing on behalf of five justices, Justice Kennedy made clear that the dispositive factor was not that Ceballos expressed his views inside his office rather than publicly, but that the employer is properly entitled to exercise control over what it has commissioned or created.²¹² In dissent, Justice Souter wrote:

that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.²¹³

In the other retaliatory discharge ruling, the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*²¹⁴ markedly strengthened legal protection against retaliation for employees who protest discrimination or harassment on the job.²¹⁵ Title VII, the basic federal law banning discrimination in employment, also “prohibits employers from retaliating against [employees] who complain about discrimination.”²¹⁶ According to Justice Breyer’s unanimous opinion, retaliation does not need to result in dismissal because any “materially adverse employment action that

208. *Garcetti v. Ceballos*, No. 04-473, slip op. at 1 (U.S. May 30, 2006).

209. *Id.* “[T]he decision raise[s] questions about the extent to which whistle-blowers who make their complaints public might now face greater danger of retaliation.” Linda Greenhouse, *Some Whistle-Blowers Lose Free-Speech Protection*, N.Y. TIMES, May 31, 2006, at A14.

210. *Garcetti*, No. 04-473, slip op. at 1–2.

211. *See id.* at 10.

212. *See id.* at 10–11.

213. *Id.* at 1 (Souter, J., dissenting).

214. No. 05-259, slip. op. at 1 (U.S. June 22, 2006).

215. *Id.* at 3; see Linda Greenhouse, *Supreme Court Gives Employees Broader Protection Against Retaliation in Workplace*, N.Y. TIMES, June 23, 2006, at A24 [hereinafter Greenhouse, *Supreme Court*].

216. Greenhouse, *Supreme Court*, *supra* note 215.

‘might have dissuaded a reasonable worker’²¹⁷ from protesting discrimination qualifies as prohibited retaliation under Title VII.²¹⁸

According to the *New York Times*, around “20,000 retaliation cases were filed with the Equal Employment Opportunity Commission in 2004.”²¹⁹ This new ruling by the United States Supreme Court is likely to substantially increase the number of retaliation cases.²²⁰

In 2005, the United States Supreme Court ruled that the six-year statute of limitations for *qui tam* suits under the False Claims Act (FCA) does not govern whistle-blower retaliation suits.²²¹ Instead, FCA retaliation claims are governed by the more “analogous state statute of limitations.”²²²

On September 29, 2005, the United States House Committee on Government Reform approved a measure that would strengthen whistle-blower protections for federal employees, including the right to jury trials.²²³

At the state level, a former marine biologist sued the State of Florida under Florida’s Whistle-Blower’s Act,²²⁴ alleging that his protests over a plan to broaden the highway into the Florida Keys cost him his job.²²⁵ In 2005, the Hallandale Beach Civil Service Board recommended that a fire-fighter-paramedic finally be promoted and awarded back pay after he was continually passed over for promotion, because the “decisions he made while on the Civil Service Board” were controversial.²²⁶

C. Employment Claims

From 2004 to 2005, the backlog of discrimination claims filed with the Equal Employment Opportunity Commission (EEOC) increased 12%, amounting to 33,562 claims last year.²²⁷ Since 2001, “[t]he EEOC has lost 20% of its staff since 2001, when a hiring freeze was instituted, and it now

217. *Id.* (quoting *Burlington N. & Santa Fe Ry. Co.*, No. 05-259, slip op. at 13).

218. *Id.*

219. *Id.* This number has “doubled” since 1992. *Id.*

220. Greenhouse, *Supreme Court*, *supra* note 215.

221. *See* *Graham County Soil & Water Conservation Dist. v. United States*, No. 04-169, slip op. at 1 (U.S. June 20, 2005).

222. *Id.* at 12.

223. *See* FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT, H.R. REP. NO. 109-544, pt. 1, at 6 (2006).

224. FLA. STAT. §§ 112.3187-.31895 (2006).

225. Luisa Yanez, *Biologist Who Lost Job Fights Firing in a Lawsuit*, MIAMI HERALD, Aug. 4, 2005, at 3B.

226. Diana Moskovitz, *Board Rules Fireman Unfairly Passed Over*, MIAMI HERALD, Oct. 20, 2005, at 5B.

227. Marni Goldberg, *Job-Discrimination Claims Pile up with Budget Cuts*, L.A. TIMES, June 17, 2006, at A6.

faces budget reductions, with the Bush administration proposing to cut the agency’s budget by \$4 million next year.”²²⁸ For over forty years, “the EEOC has investigated workplace discrimination based on sex, race, age, national origin, religion, and disability.”²²⁹ To make matters worse, a controversial reorganization plan recommends a national call center staffed by non-professionals, instead of trained specialists, to answer public questions.²³⁰

According to a 2005 EEOC Advisory Letter, it is unlawful to compel answers to internet job questionnaires that inquire about “race, color, religion, sex, national origin, age, and disability.”²³¹ In the 2005 fiscal year, the EEOC helped secure roughly “\$378 million in total monetary benefits” for job discrimination victims, “down from . . . \$415.4 million in fiscal [year] 2004.”²³²

In Florida, employers are not allowed to terminate or discriminate against employees on the basis “of age, race, religion, sex, national origin, or pregnancy.”²³³ In addition, the Family and Medical Leave Act of 1993²³⁴ prohibits terminating an employee for taking a leave in certain circumstances.²³⁵ One provision of an anti-bullying bill, currently making its way through the Florida Legislature, prohibits “‘bullying and harassment’ of . . . school employees in Florida’s public schools.”²³⁶

V. EMPLOYMENT DISCRIMINATION

A. Generally

Title VII covers employers with “fifteen or more employees.”²³⁷ In 2006, the United States Supreme Court, in *Arbaugh v. Y & H Corp.*,²³⁸ ruled that the fifteen-employee requirement is not similar to a jurisdictional issue, which can be raised at any time, but instead is merely a defense to the dis-

228. *Id.*

229. *Id.*

230. *Id.*

231. Advisory Letter from Peggy R. Mastroianni, Assoc. Legal Counsel, Equal Employment Opportunity Comm’n, Internet Hiring (Oct. 27, 2005), http://www.eeoc.gov/foia/letters/2005/internet_hiring.html.

232. *EEOC’s Benefits Dropped Slightly in 2005, Charge Filings Continued Three-Year Decline*, 74 U.S.L. WK. 2376, Jan. 3, 2006.

233. Santiago, *supra* note 198.

234. 29 C.F.R. §§ 825.100-.800 (2006).

235. *Id.* § 825.112(a)(1)-(4).

236. *Fix Anti-Bullying Bill*, MIAMI HERALD, Apr. 25, 2006, at 28A.

237. 42 U.S.C. § 2000e(b) (2000).

238. No. 04-944 (U.S. Feb. 22, 2006).

crimination claim.²³⁹ This defense can be waived by failure to raise it in a timely fashion.²⁴⁰

B. *Race and National Origin*

Both federal and state laws ban employment discrimination based on a person's race.²⁴¹ During the past year, the rulings in this area had the effect of binding Florida employers.²⁴² Under the Florida Civil Rights Act of 1992 (FCRA),²⁴³ employers are prohibited from discriminating in the workplace on grounds of race, among other categories.²⁴⁴ The Sovereign Immunity Tort Law (SITL)²⁴⁵ allows persons to sue state agencies, counties, and subdivisions of state government.²⁴⁶ The provision, however, limits recovery.²⁴⁷ In *Gallagher v. Manatee County*,²⁴⁸ a Florida appellate court ruled that a \$100,000 cap in the SITL applies to all damages that an employee can recover under the FCRA.²⁴⁹

Hostile work environments may be based on race as well as on sex.²⁵⁰ In *Webb v. Worldwide Flight Service, Inc.*,²⁵¹ the Eleventh Circuit Court of Appeals upheld a judgment of \$100,000 in compensatory damages and \$100,000 in punitive damages, under the FCRA, to a victim of racial comments that created a hostile work environment.²⁵² In 2005, "[a] Fort Lauderdale police officer was suspended without pay . . . for [uttering] racist remarks to a teenager and [then] lying about it [in the course of] an investigation."²⁵³ Additionally, "[s]even lawyers' groups representing minorities and women [proposed that] Broward County judges . . . undergo training to be

239. *See id.* at 2, 12.

240. *See id.* at 2.

241. *See* 42 U.S.C. § 2000e-2(a)(1)-(2) (2000); FLA. STAT. § 760.10(1)(a)-(b) (2006).

242. *See, e.g., Webb v. Worldwide Flight Serv., Inc.*, 407 F.3d 1192 (11th Cir. 2005).

243. FLA. STAT. § 760.01-.11 (2006).

244. *Id.* § 760.10(1)(a).

245. *Id.* § 768.28.

246. *Id.* § 768.28(1).

247. *Id.* § 768.28(5).

248. 927 So. 2d 914 (Fla. 2d Dist. Ct. App. 2006).

249. *See id.* at 916, 919.

250. *Compare id.* at 914 (ruling against workplace gender-based discrimination), *with Webb v. Worldwide Flight Serv., Inc.*, 407 F.3d 1192 (11th Cir. 2005) (ruling against workplace racial discrimination).

251. 407 F.3d at 1192.

252. *Id.* at 1193.

253. Darran Simon, *Police Officer Is Suspended for Alleged Racist Remark*, MIAMI HERALD, July 29, 2005, at 3B.

more sensitive toward black and Hispanic defendants.”²⁵⁴ Further, in Orlando, an elementary school teacher resigned over a letter she wrote.²⁵⁵ The letter was published in a Spanish-language daily newspaper “disparaging Hispanics and other minorities.”²⁵⁶ Also, the Davie Town Council decided not to terminate a planning board member charged with circulating a cartoon that some on the council considered racist.²⁵⁷ Moreover, the Eleventh Circuit ruled that a district court properly reduced a national origin bias award of back pay and compensatory damages from \$700,000 to \$1²⁵⁸ because the claimant failed to produce any evidence of his actual earnings while employed.²⁵⁹

C. *Gender and Same-Sex Discrimination*

Over the past two years, various examples of gender discrimination in both state and federal settings have arisen. In 2005, the United States Department of Labor’s Bureau of Labor Statistics stopped collecting data on the number of women employees in the workplace for its monthly payroll employment survey.²⁶⁰ Further, in 2005, the Eleventh Circuit Court of Appeals ruled that an employee, who sues for sex discrimination in pay, under an annual salary review system, could recover on her disparate pay gap claim only as far back as the last salary decision that affected her pay, within Title VII’s 180-day filing period.²⁶¹ Also, in 2006, the EEOC sued a Miami-based company for pregnancy discrimination, alleging that the employer illegally dismissed a worker after she mentioned she would need a cesarean.²⁶² According to the EEOC, pregnancy discrimination claims in Florida “have almost doubled since 1992.”²⁶³

In the same-sex discrimination arena, “most urban police departments [nationwide] are actively recruiting gays and lesbians[;] . . . in South Florida,

254. Beth Reinhard, *Judges Urged to Act Nicer*, MIAMI HERALD, Mar. 14, 2006, at 1B.

255. *Teacher Quits Over Anti-Latino Remarks*, MIAMI HERALD, Aug. 31, 2005, at 7B.

256. *Id.*

257. Nikki Waller, *Cartoon Sender to Stay on Planning Board*, MIAMI HERALD, July 7, 2006, at 6B.

258. *Akouri v. Fla. Dep’t of Transp.*, 408 F.3d 1338, 1348–49 (11th Cir. 2005).

259. *Id.* at 1342.

260. U.S. Dep’t of Labor, *Changes to the Current Employment Statistics Survey*, <http://www.bls.gov/ces/cesww.htm> (last visited Dec. 26, 2006).

261. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1189 (11th Cir. 2005).

262. *EEOC Sues Firm for Discrimination*, MIAMI HERALD, July 7, 2006, at 3C.

263. *Id.*

most gay police officers remain in the closet.”²⁶⁴ “[O]nly three [South Florida police departments]—Miami Beach, Key West, and Fort Lauderdale—have liaisons to the gay community.”²⁶⁵ While gay police officers are no longer bullied or abused by co-workers in South Florida, most continue to stay in the closet for fear of harassment.²⁶⁶ “[In] Florida, gay workers . . . have no specific protection against being [dismissed] on the basis of their sexual orientations.”²⁶⁷ Florida Law Enforcement Gays and Lesbians (LEGAL) is an organization that has about eighty members.²⁶⁸

D. *Age Discrimination*

In 2005, the United States Supreme Court settled a difference of opinion amongst the circuits by ruling that a disparate impact analysis is an available framework under the Age Discrimination in Employment Act (ADEA).²⁶⁹ Employers, however, may still prevail by raising the potent defense of “reasonable [factors] other than age” under the ADEA.²⁷⁰

E. *Disability Discrimination*

In 2006, the United States Supreme Court ruled that Title II of the Americans with Disabilities Act (ADA) “validly abrogate[d] [the] state[s]’ sovereign immunity” in lawsuits for money damages, from prisoner suits that raise constitutional violations.²⁷¹ This ruling has potential implications for public employers in Florida because the Eleventh Circuit Court of Appeals ruled in 1998 that public employers may also face liability under Title II of the ADA.²⁷²

Although the ADA prohibits disability-related questions before an applicant is hired, an EEOC advisory letter carves out an exception when an employer seeks to hire individuals with disabilities “as part of an affirmative

264. Wanda J. DeMarzo & Steve Rothaus, *Despite Some Progress, Many Gay Officers Still in Closet*, MIAMI HERALD, Jan. 28, 2006, at 23A.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005).

270. *Id.* at 242–43.

271. *United States v. Georgia*, No. 04-1203, slip op. at 7 (U.S. Jan. 10, 2006).

272. *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 825 (11th Cir. 1998).

action program.”²⁷³ According to a 2005 EEOC advisory letter, pregnancy-related disabilities are treated the same as other disabilities when relating to fringe benefits.²⁷⁴

The circuit courts are split over whether employees regarded as disabled are entitled to the same reasonable accommodation as employees who are actually disabled.²⁷⁵ The Eleventh Circuit Court of Appeals follows the minority view that employees regarded as disabled are entitled to the same reasonable accommodation as employees who are actually disabled.²⁷⁶

The Eleventh Circuit Court of Appeals ruled in 2005 that although the “don’t-look-back” rule bars a trial court from revisiting whether a “prima facie case [exists] after all the evidence is [introduced],”²⁷⁷ the issue of the employee’s disability can be reconsidered even after the case is submitted to the jury.²⁷⁸

VI. CONCLUSION

The period of 2005–06 produced a wide array of public employment legal issues. Every stage of employment, from hiring, to the terms of employment, to employment discrimination, to discipline and discharge, creates issues at the federal, state, and local levels. In contrast to private sector employment, which by and large escapes public scrutiny, public sector employment captures widespread media attention. Besides case law and legislative enactments, news stories afford a wealth of insight and detail to this corner of the law.

273. Advisory Letter from Christopher J. Kuczynski, Ass’t Legal Counsel, Equal Employment Opportunity Comm’n, ADA: Disability-Related Inquiries and Medical Examinations–Pre-Offer, (Nov. 8, 2005), http://www.eeoc.gov/foia/letters/2005/ada_inquiries_examinations_preoffer.html.

274. Advisory Letter from Peggy R. Mastroianni, Assoc. Legal Counsel, Equal Employment Opportunity Comm’n, ADA and Title VII–Disability Retirement Benefits (July 29, 2005), http://www.eeoc.gov/foia/letters/2005/ada_titlevii_disability_retirement_benefits.html.

275. *D’Angelo v. Conagra Foods, Inc.*, 422 F.3d 1220, 1235 (11th Cir. 2005).

276. *Id.*

277. *Collado v. United Parcel Serv., Co.*, 419 F.3d 1143, 1151–52 (11th Cir. 2005).

278. *See id.* at 1153–54.