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Vol. 27, No. 2
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What's Inside

What's Online

Video
"What Should HR Do?" Disabilities in the workplace
http://ow.ly/JnsfH

Retention
Why employees leave and what you can do about it
http://ow.ly/KbYXg

Hero Line
Tips for leading change in a challenging environment
bit.ly/1BrtGd9

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PROTECTED ACTIVITY

NLRB General Counsel issues guidance on lawful handbook policies

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Nonunion employers often believe they don't have to worry about decisions from the National Labor Relations Board (NLRB). Well, think again! On March 15, 2015, NLRB General Counsel Richard F. Griffin issued a 30-page memo (Memorandum GC 15-04) that provides guidance on handbook policies the NLRB considers unlawful. The memo focuses on employer rules that may violate Section 7 of the National Labor Relations Act (NLRA) by prohibiting protected concerted activity. Section 7 of the NLRA gives employees the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The memo states that even if a rule doesn't explicitly prohibit protected concerted activity, it will still be found unlawful if (1) employees would reasonably construe the rule's language to prohibit protected concerted activity (referred to as having a "chilling effect"), (2) the rule was promulgated in response to union organizing or other protected concerted activity or (3) the rule was actually applied to restrict the exercise of protected concerted rights.

Examples of lawful and unlawful rules

The memorandum is divided into two sections. The first section discusses the legality of work rules frequently before the NLRB, including rules pertaining to confidentiality, professionalism, harassment, trademarks, photography/recording, and media. The discussion contains examples of policies the General Counsel found lawful and unlawful and provides his rationale. The second part offers guidance in the form of "model" policies that the NLRB presumably would find lawful. Here are some of the examples of acceptable and unacceptable policies from the memo.

Confidentiality

- *Unlawful:* Do not discuss customer or employee information outside work, including phone numbers and addresses.
- *Unlawful:* Discuss work matters only with other employees who have a specific business reason to know or have access to such information. Do not discuss work matters in public places.
- *Lawful:* Do not disclose confidential financial data or other nonpublic proprietary company information. Do not share confidential information regarding business partners, vendors, or customers.

Conduct toward employer

- *Unlawful:* Defamatory, libelous, slanderous, or discriminatory comments about the company, its customers and/or competitors, employees, or management will not be tolerated.
- *Unlawful:* Employees may not engage in disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.
- *Lawful:* Each employee is expected to work in a cooperative manner with management/supervisors, coworkers, customers, and vendors.
- *Lawful:* Employees will not be discourteous or disrespectful to a customer or any member of the public in the course and scope of company business.

Employee conduct

- *Unlawful:* Do not send unwanted, offensive, or inappropriate e-mails.
- *Lawful:* Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors is prohibited.

Logos, copyrights, trademarks

- *Unlawful:* Do not use any company logos, trademarks, graphics, or advertising materials on social media.
- *Lawful:* Respect all copyright and other intellectual property laws. For the employer's protection as well as your own, it is critical that you show proper respect for the laws governing copyrights, fair use of copyrighted material owned by others, trademarks, and other intellectual property, including the employer's own copyrights, trademarks, and brands.

Restrictions on leaving work

- *Unlawful:* Walking off the job is prohibited.
- *Lawful:* Walking off a shift, failing to report for a scheduled shift, and leaving early without supervisor permission are grounds for immediate termination.

Employer takeaways

Trying to understand why the General Counsel found some rules unlawful and others lawful is challenging, especially when the policy language is so similar. If you find your policies might be deficient, consult with qualified labor counsel to determine whether they are compliant or need to be revised. Although the memorandum doesn't have the force of law, it provides a strong indication of the likely position the NLRB will take if an unfair labor practice charge challenging your handbook policies is filed.

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LEGISLATIVE ROUNDUP

2015 Florida legislative session: a preview of employment-related bills

by Robert J. Sniffen and Jeff Slanker
Sniffen & Spellman, P.A.

The 2015 legislative session has convened in Tallahassee, and as happens every year, there are a number of pending bills that could affect Florida businesses' employment policies. This article provides an overview of some of the key bills that, if passed by the legislature and signed into law by Governor Rick Scott, could influence the way employers do business in Florida.

Employment screening

House Bill (HB) 977 and **Senate Bill (SB) 214** would prohibit an employer from inquiring into or considering a job applicant's criminal background on an initial employment application unless it is required by law to review and assess the information at that point in time. The bills come on the heels of the Equal Employment Opportunity Commission's (EEOC) increased focus on employers' use of criminal background checks in the hiring process, evidenced by the agency's recent strategic enforcement initiatives.

Many local government entities, including some in Florida, have already implemented similar prohibitions on criminal background checks, but the new proposals would extend the protection to employees statewide.

Protected classes, FLCRA amendment

SB 156 is similar to bills introduced in years past that would amend the Florida Civil Rights Act (FLCRA) to add sexual orientation and gender identity to the list of classes protected from discrimination in employment. SB 156 would also alter the nature of the FLCRA to allow someone to file suit for employment discrimination based on his employer's perception that he is a member of a protected class. That means that if an employer takes an adverse employment action against an employee it perceives to be a member of a protected class (e.g., African American), he might have a viable claim under the amended FLCRA even if he doesn't belong to that particular protected class. **HB 33** is the corresponding bill in the Florida House of Representatives.

HB 433 also seeks to expand the scope of the FLCRA by allowing unpaid interns to file suit against employers for employment discrimination. The bill would amend the definition of "employee" under the Act to include unpaid interns. **SB 1396** is the bill's corollary in the senate.

Spouses of military servicemembers

SB 1358 would provide certain protections for spouses of military servicemembers employed by Florida state agencies. The bill would prohibit the employing agency from mandating that an employee who is married to a servicemember work extended hours during her spouse's active military deployment under certain circumstances. The bill would also prohibit the employer from penalizing the employee for failing or refusing to work extended hours during her spouse's active military deployment. It would also require the employer to grant the employee's requests for unpaid leave under certain circumstances. **HB 1009** is the corresponding bill in the house of representatives.

Workplace bullying

HB 297 would create the Safe Work Environment Act to protect employees from workplace bullying. It would make subjecting employees to an "abusive work

ASK ANDY

Moonlighting during FMLA leave

by Andy Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Q *I have an employee out on Family and Medical Leave Act (FMLA) leave for 10 weeks to care for her spouse, who has a serious health condition. During her leave, she was seen working for another company in a local retail store. I believe that if she can work for that store, she can also return to work for me. I view this as fraud. Is there anything I can do?*

A Your question raises a "moonlighting" issue—whether an employee on FMLA leave may work for another employer during her leave. While many employers may, from an emotional standpoint, regard moonlighting during leave as a form of FMLA abuse, the FMLA does not prohibit moonlighting in all circumstances. In fact, the regulations expressly state that if an employer has a uniformly applied policy governing outside or supplemental employment, it may continue to apply the policy to an employee on FMLA leave. Conversely, an employer that doesn't have such a uniformly applied policy "may not deny benefits to which an employee is entitled" under the FMLA unless the leave was "fraudulently obtained."

So, what does that really mean? In a nutshell, you must treat all employees (those on FMLA leave and those not on FMLA leave) similarly when it comes to moonlighting. If you maintain a (preferably written) policy prohibiting outside work in all circumstances or during all periods of approved leave of any type and if you enforce the policy uniformly, you may apply your "no-moonlighting" policy to an employee on FMLA leave. However, if you don't have a uniformly applied no-moonlighting policy, you may not restrict an employee's right to work for another employer during FMLA leave unless you can establish that the FMLA leave was fraudulently obtained. With respect to your question, that could mean proving the employee's spouse doesn't in fact have a serious health condition.

If you believe that your employee is violating a uniformly applied no-moonlighting policy during her FMLA leave, then it would be prudent to contact her to confirm your understanding of the facts and inform (or remind) her of the policy before taking any action that may affect her FMLA rights. Perhaps your understanding of the facts was mistaken, or perhaps the employee wasn't aware of the policy (and she will agree to comply with it going forward). Or perhaps the employee is moonlighting during hours that she didn't work for your company and therefore isn't abusing her FMLA leave or violating your no-moonlighting policy.

If, after conducting a complete investigation, you determine that the employee violated your uniformly applied no-moonlighting policy or obtained FMLA leave fraudulently, you may be able to take disciplinary action, provided, of course, that discipline is uniformly applied to employees, regardless of whether they're on FMLA leave. Taking disciplinary action against an employee on FMLA leave is risky, so consult with your attorney in advance.

Also keep in mind that some states (but not Florida) prohibit employers from regulating employees' lawful off-duty conduct. Such a state law may prevent the implementation of a no-moonlighting policy. Consult with your attorney before implementing any policy against moonlighting.

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Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

environment" unlawful, and employees would not have to establish that their protected class was the motivation for creating the abusive environment. **SB 892** is the corresponding bill in the Florida Senate.

Day laborers

HB 325 and **SB 456** would modify the manner in which day laborers must be paid and revise the procedures for labor pools to compensate day laborers. The bills provide for certain notice requirements and establish guidelines for payment by debit card. The proposals also authorize the electronic delivery of wage statements to day laborers upon their request.

Human trafficking

SB 534 would require the Florida Department of Transportation and certain other employers, including strip clubs, primary airports, passenger or light rail stations, bus stations, truck stops, emergency rooms at general acute care hospitals, urgent care centers, privately operated job recruitment centers, massage parlors, public K-12 schools, and public libraries, to display human trafficking public awareness signs. The Florida Attorney General's Office would enforce the requirement. The bill provides guidelines for the development of the notice. Failure to display the notice would carry civil penalties. The house companion bill, **HB 369,** has been revised in committee to make posting the notice permissive, instead of mandatory, for any business in Florida.

The Safe Work Environment Act would make subjecting employees to an "abusive work environment" unlawful.

Employers should take note

The bills covered in this article are just some of the proposals that might change the employment landscape and companies' business obligations in Florida. Take note of these recently proposed bills, and assess whether they might affect the way you do business. Then monitor the status of the bills as the legislative session progresses, and ensure your company complies with any changes that are signed into law.

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RACE DISCRIMINATION

Allowing only 'light-skinned' employees to interact with patient was race discrimination

by Tom Harper
Law and Mediation Offices of G. Thomas Harper, LLC

A federal judge in Tampa has ruled in favor of an African-American licensed practical nurse (LPN) who was removed by a hospital from caring for a patient because of her race. At first blush, that may sound like the obviously correct result to you, but let's look at the hospital's side of the story.

Patient's request

In August 2013, a patient (whom the court referred to as "Patient X") was admitted to the hospital's emergency room (ER) for injuries allegedly sustained when an African-American man attacked her and threw her to the ground while taking her purse. The patient, an older woman of Hispanic origin, sustained fractures to her pelvis and arm. The hospital claimed that both the patient and her daughter requested that no African Americans or "dark-skinned" people treat or serve her because of what had happened to her.

Two days after being admitted to the ER, Patient X was transferred to an acute rehab unit in the hospital. As a result of the request by the patient and her family, the hospital directed that she should not be treated by African Americans or other dark-skinned people. A sign placed on her door stated that hospital staff were to "report to [the nurses'] station before entering room."

All African Americans and some dark-skinned employees of a different ethnicity who reported to the nurses' station were told not to deliver food to the room or provide any hospital services to Patient X. Instead, a white employee was assigned to provide the needed service or treatment. The directive applied to all hospital personnel, including dietary aides, nurses, and physical therapy staff.

In September, Syrenthia Dysart, an experienced LPN who was assigned to the acute rehab unit, overlooked the note on the door, went into Patient X's room, and began performing an assessment on her. The patient made no objection to her presence. However, while Dysart was assessing the patient, Mary Terlecki, the white charge nurse, entered the room and said she needed to speak with her.

Terlecki informed Dysart that Richard McGuire, a white man, would be replacing her as the patient's nurse for the shift. She explained to Dysart that the patient had been admitted to the hospital because she had been mugged by an African-American man and sustained severe injuries; therefore, dark-skinned hospital staff were being excluded from caring for her.

Dysart was upset about being removed from caring for Patient X. She immediately left the acute rehab unit, called the supervisor on duty, and informed her of the situation. The supervisor offered her work in another section of the unit, but Dysart wasn't satisfied. She later went to HR, but the decision to restrict the patient's care to nonblack and light-skinned personnel was upheld.

Dysart also met with the chief nursing officer, Andrea Clyne, who said that she would investigate the matter. Clyne consulted with the hospital's CEO and other management personnel and reported back to Dysart that management was in agreement on the subject. In acknowledgment of the upsetting nature of its decision, the hospital offered Dysart paid vacation.

Patient 'freaked'

The undisputed evidence before the court established that upon seeing a dark-skinned person, Patient X "freak[ed] out" on several occasions, shaking, crying, stating that she didn't want a black therapist, and even becoming incontinent. Her seemingly irrational aversion to people of color was so strong that in one instance she had a negative reaction when she saw a putting green outlined in black leaning against a wall in the hospital's gym.

Of course, the hospital has a written antidiscrimination policy applicable to its employees, but it didn't view its actions as inconsistent with the policy. Instead, it believed that its actions were justified by the trauma Patient X had suffered as well as her treatment request. Patient care trumps job assignments, right? Wrong! The court analyzed the situation differently.

Patient care was hospital's justification

Dysart's lawyer bypassed the Equal Employment Opportunity Commission (EEOC) and filed suit under Section 1981, the Civil War era Civil Rights Act. Section 1981 applies to claims for intentional race discrimination in "the making, performance, modification, and termination of [employment] contracts" and in "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Dysart presented the facts to the court and asked it to rule that the hospital was guilty of intentional discrimination based on her race. The court obliged.

U.S. District Judge Mary Scriven found that Dysart provided direct evidence that race was a factor in the hospital's employment decisions. Few cases involve direct evidence that race was the reason for an employer's actions, but, according to the judge, this case did. Judge Scriven reasoned:

> While the court acknowledges the difficult posture the patient's circumstances presented, these factors are wholly irrelevant, at least for purposes of liability for racial discrimination. The Hospital, in essence, is attempting to assert a "legitimate, discriminatory reason" for its actions: Patient X's health and recovery. However, while a legitimate, *non*-discriminatory reason would be a defense in a *circumstantial evidence case,* there is no legitimate, discriminatory reason defense recognized by law even in that context[,] and certainly it would not be recognized in an intentional discrimination, race-matching case such as this one.

Under a court's analysis of an intentional discrimination claim, "an employee who adduces direct evidence of disparate treatment on the basis of race makes out a *prima facie* [minimally sufficient] case of intentional discrimination. The burden of persuasion then shifts from the employee to the employer, who must rebut the direct evidence of discrimination by affirmatively proving that it would have made the same decision even if it had not taken race into account." The hospital couldn't meet that burden.

Judge Scriven found the hospital's actions constituted its policy, albeit an unwritten one. According to the judge, an unwritten client-requested race-matching policy is no less invidious and illegal than an overt policy of discrimination. Judge Scriven concluded, "Suffice it to say that the law is unwavering and cases legion that expressly prohibit unwritten discrimination: it is abundantly clear that Title VII [of the Civil Rights Act of 1964] tolerates no racial discrimination, subtle or otherwise."

The court also dismissed the notion that the business necessity defense or a bona fide occupational qualification (BFOQ) defense applied. Summarizing the BFOQ defense, the court explained that an employer may intentionally discriminate "on the basis of . . . religion, sex, or national origin where religion, sex or national origin is a

[BFOQ] reasonably necessary to the normal operation of the business." However, the court noted that the defense is an extremely narrow exception, and because Section 1981 prohibits discrimination solely on the basis of race, the BFOQ defense wasn't available to the hospital.

Similarly, when a facially (or apparently) neutral practice is challenged for its disparate impact, an employer may argue that its practice was grounded in a legitimate job-related purpose. However, because the liability was based on intentional discrimination, the business necessity defense also wasn't available to the hospital.

But no harm occurred!

Dysart wasn't fired, demoted, or financially harmed by her reassignment. Could she still make a case for discrimination? After all, an employee claiming discrimination must show that she suffered an adverse employment action. The court dismissed that argument by describing how Dysart was "removed from a patient's room because of her race."

Dysart testified that she was offended by the hospital's "no blacks allowed" sign. She was told that she was reassigned because she is an African American. She was replaced by a white male nurse and sent to work in a different area of the hospital. Her complaint "was rebuffed by management," and she was sent home on paid leave. The policy was still in place when she returned to work, and it remained in place until the patient was discharged from the hospital.

Those facts were enough for the court to find that an adverse employment action had occurred, and a jury should decide Dysart's damages. *Syrenthia Dysart v. Palms of Pasadena Hospital, LP,* Case No. No. 8:13-cv-2499-T35EAJ. (M.D. FL., March 2, 2015).

Bottom line

The court noted that the hospital's lawyer was available but wasn't consulted when Clyne investigated Dysart's complaint. The facts of this case may seem to justify the hospital's decision to place the patient's concerns first, but the outcome illustrates the danger of making race-based decisions. A court's analysis of a case that involves direct evidence of discrimination is different from its analysis of most claims based on circumstantial evidence.

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FAMILY AND MEDICAL LEAVE

New DOL rule will simplify FMLA administration for multistate employers

The U.S. Department of Labor (DOL) has issued final regulations that will settle a confusing area of Family and Medical Leave Act (FMLA) administration for multistate employers. The regulations, effective March 27, adopt the "place of celebration" rule instead of the "place of residence" rule when establishing a spousal relationship for purposes of federal medical and military leaves.

Under the new rule, employers must look to the law of the place in which an employee's marriage was entered into, as opposed to the law of the state in which the employee resides. This change allows all legally married couples—whether opposite-sex, same-sex, or married under common law—to have consistent federal family leave rights regardless of where they live. The rule also encompasses marriages performed overseas, so long as the union would be recognized as valid in at least one U.S. state.

Why was the rule needed?

In 2013, the U.S. Supreme Court struck down the provision of the Defense of Marriage Act (DOMA) that defined marriage as being solely between one man and one woman for purposes of federal law. The decision changed the application of every federal law that relied on the DOMA definition of "spouse." As a result, same-sex couples married in states and countries where such unions are legally recognized became eligible for equal benefits under over 1,000 federal laws and regulations.

Because same-sex marriage still isn't legally recognized in all states, soon after the Court's decision, federal agencies such as the IRS and U.S. Citizenship and Immigration Services (USCIS) released clarifying statements that they would observe same-sex marriages based on the "place of celebration." In other words, if a same-sex couple married in a state where the union is legal, then that couple would continue to be eligible for related federal benefits regardless of the law of the other states in the nation.

However, uncertainty still remained for administration of the Family and Medical Leave Act, whose regulations defined a covered "spouse" as "a husband or wife as defined or recognized under state law for purposes of marriage *in the state where the employee resides*."

Eliminating employer headaches

The place-of-residence rule created FMLA administration difficulties for multistate employers as well as those with telecommuting or remote workers. For example, an employer's obligation to provide spousal leave under the FMLA could differ not only from the law of the business' primary state of operation but even among

individual workers if those employees resided in states with different marriage laws.

In addition, if employees relocated during their employment, their entitlement to spousal leave could change based on the changing state of residence—even if they had entered into a legally binding marriage far in advance of the move.

Further, though some employers (or some states) could address these leave discrepancies by adopting internal policies (or local laws) extending supplemental spousal leave to FMLA-ineligible spouses, the leave couldn't run concurrently with federal FMLA leave, which created record-keeping and administrative headaches and left some workers entitled to "double-dip" into the family and military leave coffers.

The new regulations will eliminate this confusion because an employee who enters into a legal marriage will retain spousal leave rights regardless of the state of residence. Additionally, now that these employees will be entitled to federal FMLA leave, spousal leave under any related state laws or internal policies *will* run concurrently with federal FMLA leave, reducing the overall entitlement to the standard 12 weeks of leave under the Act. Similarly, if both spouses work for the same employer, they are now subject to the FMLA rule that limits spouses to a *combined total* of 12 weeks of family leave for a birth, the adoption of a child or placement of a child in foster care, or to care for a parent with a serious health condition.

An employee who enters into a legal marriage will retain spousal leave rights regardless of the state of residence.

What do employers need to do now?

Employers that haven't already done so should review employee handbooks and policy documents related to FMLA leave to ensure their application clearly includes all recognized spouses, including same-sex and common-law marriages as recognized in the place where they were originally celebrated.

Affected documentation may include policies, forms, and other employee communications related to:

- Leave to care for a spouse with a serious health condition;
- Qualifying exigency leave due to a covered spouse's military service;
- Military caregiver leave for a covered spouse;
- Leave to care for a stepchild (child of a covered spouse); and
- Leave to care for a stepparent (covered spouse of the employee's parent).

As a final note, keep in mind that the regulations do specifically extend only to *spouses*. In other words, employees who enter into domestic partnerships or civil unions still aren't entitled to FMLA leave because those partners don't qualify as "spouses" under the federal regulations. (State laws may, however, extend comparable leave to domestic partners and members of civil unions.) ✤

ARBITRATION

'Sign here or go home—you have 5 minutes'

by Andy Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Employers present employees with all sorts of documents for their signature: new-hire paperwork, performance evaluations, handbook acknowledgments, and disciplinary write-ups, among other things. Sometimes, an employee may refuse to sign a certain document or claim that he was forced to sign it under duress. In one recent case, an employer successfully defeated an employee's duress argument despite facts that may strike some as coercive.

Employee given ultimatum

On December 18, 2012, Diamond K Resources hired Robert Taylor to work as a truck driver. Taylor didn't fill out any paperwork on the day he was hired. When he arrived at a jobsite in Florida three days later, however, a supervisor presented him with an employment application for AMS, a Texas-based employee leasing company through which he would be employed. The supervisor told Taylor and other drivers that if they didn't fill out the application, backdate it to December 19, and return it within five minutes, they would be fired and should "go home."

Taylor completed and signed the application on the hood of a truck that was sitting under a parking lot light. He didn't read the document because he didn't have his reading glasses with him. A short time later, he was injured on the job and filed a workers' compensation claim. After he was fired, he sued Diamond K and AMS in the Circuit Court for St. Lucie County, alleging workers' comp retaliation under Florida law.

Demand for arbitration

It turns out that the employment application Taylor signed on the hood of the truck contained a provision requiring arbitration of all disputes in Dallas, Texas, where AMS maintains its home base. Consequently, AMS filed a motion with the circuit court seeking to compel arbitration.

Taylor opposed the motion, arguing that (1) the arbitration clause violated public policy by requiring an

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4-22 HR Records Spring Cleaning: What to Keep, Toss, and Tidy Up

4-23 Travel, Training, and On-Call Pay in California: HR's Compliance Roadmap for Avoiding Legal Potholes

4-28 FMLA/CFRA Certifications: How to Properly Designate Absences and Stop Leave Abuse

4-28 Benchmarking & Slotting Jobs: How to Seamlessly Mesh the Two to Optimize Your Compensation Program ✤

hourly wage worker to travel from Florida to Texas to arbitrate his retaliation claim and (2) the arbitration clause was unconscionable and procured under duress. The circuit court denied AMS's motion to compel arbitration, and the company appealed to Florida's 4th District Court of Appeal.

The court of appeal resolved the issue under the Federal Arbitration Act (FAA), which applies to transactions involving interstate commerce. The court held that the Florida Arbitration Code (the state counterpart to the FAA) didn't apply to the dispute because the arbitration agreement set Texas as the forum for arbitration.

Applying the FAA, the court of appeal reversed the circuit court's decision and ordered the parties to arbitrate Taylor's retaliation claim. The court held that the designated location for the arbitration withstood scrutiny under the FAA. It also rejected Taylor's duress argument, noting that "the only evidence of a 'threat' in this case was the threat that [his] services were not needed if he did not sign the employment contract."

According to the court of appeal, a sign-here-or-leave ultimatum "is insufficient to constitute duress." In support of that proposition, the court noted that Taylor didn't testify that the supervisor's coercive conduct induced him to sign the document or that he would have demanded removal of the arbitration provision but for the sign-here-or-leave ultimatum. *AMS Staff Leasing, Inc. v. Robert F. Taylor* (Fla. 4th DCA) (March 4, 2015).

Takeaway

Despite the employer's victory in this case, the takeaway for employers should *not* be "Now I can require employees to sign documents on demand." Rather, the prudent course of action is to give employees a reasonable opportunity to review documents before signing them and to review legal documents (such as arbitration and noncompete agreements) with counsel of their own choosing. If AMS and Diamond K had provided Taylor a reasonable period of time to review the employment application (with the embedded arbitration provision) before he signed it, perhaps they would have been able to avoid a lengthy and expensive court battle.

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