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FLORIDA
EMPLOYMENT LAW LETTER

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OVERTIME

Strip club's $1.2 million settlement shows dangers of FLSA violations

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

A Key West strip club was sued by its dancers in the U.S. District Court for the Southern District of Florida. The parties proposed a $1.2 million settlement. The settlement highlights the dangers of violations of the Fair Labor Standards Act (FLSA), a federal wage and hour law. This article explains a little about the case, the FLSA, and upcoming changes to the Act's regulations and provides guidance on how to plan for the changes.

Bare claims

The dancers alleged that they were employees, not independent contractors, because the strip club set their schedules, told them what they could wear, and instructed them how to perform. The dancers did not receive wages or a salary; instead, they worked for tips. The dancers claimed they were entitled to damages for the club's alleged failure to pay minimum wage and overtime.

The club settled the matter for $1.2 million, with $295,000 paying for the dancers' attorneys' fees. The settlement details, which must be approved by a federal district court, reveal that missteps under the FLSA can be quite costly. Indeed, the owner of the club agreed to a seven-figure settlement.

The law

The FLSA requires employers to pay minimum wage and overtime to workers who are not exempt from the Act's provisions. There are various exemptions to the overtime requirements, some of which are based on the salary paid to an employee and the types of duties an employee performs. The FLSA does not mandate overtime or minimum wage for independent contractors. Nevertheless, the law does apply to most employees.

Again, the dancers' settlement highlights the enormous costs FLSA violations can carry. An employee is entitled to recover attorneys' fees in an FLSA claim. Further, potential exposure is particularly troubling since FLSA collective actions are prevalent because many employees are often misclassified. In the lawsuit filed against the strip club, the dancers were incorrectly classified as independent contractors. In other cases, employees may be misclassified as exempt from the FLSA in some way, shape, or form. Indeed, collective actions alleging an employer failed to properly apply an overtime exemption can carry huge risks.

Overtime changes

Employers should note that the FLSA's regulations are undergoing a major overhaul. The U.S. Department of

Labor (DOL) is finalizing rules that would significantly change the Act's overtime exemptions. Currently, the frequently used exemptions for white-collar employees who perform executive, administrative, or professional functions require that employees (1) perform certain job duties and (2) be paid at least $23,660 annually. The DOL's proposed rules would drastically change that amount, raising the salary threshold to $50,440. The rules also provide that the threshold will be adjusted annually.

The DOL recently sent the rules to the Office of Management and Budget for review. That is the final step that must be completed before a rule can be finalized, meaning the final overtime rules may be published by summer.

Takeaway

Employers should be proactive and ensure they are properly classifying workers. Make sure that employees and independent contractors are properly designated and that employees are properly classified as exempt or nonexempt. Be especially cautious of the impact the DOL's revised overtime rules will have on your business. The drastic change will require employers to pay overtime to many more employees under the FLSA. Identify how your company will be affected by the new overtime rules, and make strategic staffing and salary adjustments to ensure compliance with the law. Lazy or unaware employers might find themselves facing a seven-figure settlement or judgment.

Robert J. Sniffen is the founder and managing partner of the Tallahassee firm of Sniffen & Spellman, P.A. He can be reached at 850-205-1996 or rsniffen@sniffenlaw.com. Jeff Slanker is an attorney with Sniffen & Spellman, P.A., in Tallahassee. He can be reached at 850-205-1996 or jslanker@sniffenlaw.com. ✤

DISCRIMINATION

Religious freedom or LGBT bias? Employers caught in fallout from state bills

Lawmakers in various states have been tackling questions about how religious freedom and LGBT rights intersect, leaving employers wondering how new state initiatives might affect their workplaces. In recent months, several states have enacted or debated religious freedom bills that have sparked cries of discrimination and calls for boycotts. Other states have considered bills not specifically addressing the exercise of religion but requiring individuals to use public bathrooms and locker rooms for the gender listed on their birth certificates.

Recent state actions have come under fire as allowing discrimination against the LGBT community. But advocates of the bills say state laws are necessary to properly protect people with sincerely held religious beliefs and moral convictions related to LGBT issues.

Employer concerns

Although recent bills refer to public accommodations and sincerely held religious beliefs or moral convictions, they also can affect employers. In some cases, the measures address terminating the employment of or denying employment to individuals who don't conform to a faith-based organization's beliefs. Some also would prevent local governments from passing ordinances that go further than state laws in creating protected classes related to LGBT status.

Employers also have to balance the beliefs of employees who have differing views on the need for state laws on the issues. In addition, employers have expressed concern over how state laws might affect their diversity and inclusion efforts. Plus, economic development officials have expressed alarm that some employers have said they won't locate in states with such laws.

History

State lawmakers began drafting the current spate of bills after the U.S. Supreme Court's *Obergefell v. Hodges* ruling in June 2015, which effectively legalized same-sex marriage nationwide. Those who opposed same-sex marriage on religious grounds wanted laws protecting them if they decided not to provide wedding and other services to gay couples. Proponents of gay marriage, however, maintained that withholding services goes against the rights ensured by the Supreme Court ruling.

But the stage for state religious freedom bills may have been set well before the *Obergefell* ruling. A federal law, the U.S. Religious Freedom Restoration Act (RFRA), passed Congress in 1993 with near-unanimous support and was signed by President Bill Clinton. The purpose of the law was to keep the federal government from "substantially burdening" people in the exercise of their religion.

The federal RFRA was prompted in part by laws seen as infringing on Native American religious practices. It set a standard that the federal government couldn't take action substantially burdening a person's religious practice without a "compelling interest," and it stipulated that when such an interest exists, the government should pursue its interest in the "least restrictive" way.

A Supreme Court ruling later narrowed the scope of the federal law, but its provisions remain in effect for federal actions. After the Court ruling limiting the law, many states enacted their own versions of the RFRA, but they weren't generally cited in the gay rights context until recently.

Recent legislative action

Several states have passed or are considering measures aimed at LGBT issues.

Mississippi. Governor Phil Bryant signed a religious freedom bill into law on April 5 that provides businesses, religious organizations, and individuals with legal protection for refusing to provide services to LGBT people.

Concerning employment, it prohibits the state from taking action against a religious organization that makes an employment-related decision affecting individuals whose conduct or religious beliefs are inconsistent with those of the organization.

The law also includes a provision prohibiting the state from taking action against anyone for establishing "sex-specific standards or policies concerning employee or student dress or grooming, or concerning access to restrooms, spas, baths, showers, dressing rooms, locker rooms, or other intimate facilities or settings, based upon or in a manner consistent with a sincerely held religious belief or moral conviction."

ASK ANDY

Employment agreements and at-will employees can go together

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

Q *Can we offer an employment agreement to an at-will employee and still maintain the at-will nature of the employment relationship?*

A Florida is an at-will state. That means that unless an employer and employee agree otherwise, either party may terminate the employment relationship at any time for any lawful reason with or without cause or notice.

Employment agreements that provide for a definite term of employment (e.g., three years) create exceptions to the at-will rule. Such agreements often mean that the employer cannot terminate the employment relationship during the term without incurring a financial obligation to the employee (for example, paying the employee's base salary through the end of the term) unless it has "cause." Conversely, while an employer cannot force an employee to remain employed until the end of the contractual term, an employee who leaves before the end of the term without "good reason" typically forgoes a severance payment or other benefit.

While employment agreements are frequently used to establish the period (or term) of employment, that is not always the case. An employment agreement can be used for other purposes, such as explaining the employee's job duties, setting forth the compensation and bonus structure, describing benefits, protecting confidential information and trade secrets, establishing nonsolicitation and noncompetition restrictions, and detailing mandatory arbitration policies. Those issues can be addressed in an employment agreement while maintaining the at-will nature of the employment relationship. Of course, it is prudent to include an at-will statement in the agreement to make the issue crystal clear.

Also, it's not uncommon for employment agreements in at-will relationships to contain "cause" and "no-cause" termination provisions tied to severance payments. For example, even in an at-will relationship, some employers agree to make severance payments to employees who are terminated "without cause" or who resign "with good reason" (often in exchange for a release). Other employers tie "cause" and "no-cause" termination provisions to restrictive covenants. In that case, the nonsolicitation or noncompetition provisions apply only in the event of a termination "with cause" or a resignation "without good reason." If the concepts of "cause" or "good reason" are incorporated into an employment agreement for any reason, be certain to clearly define the terms so you don't leave their interpretation up to a judge, jury, or arbitrator.

In a nutshell, employment agreements are used for many reasons, even in at-will settings. However, drafting an employment agreement can be a legal land mine, so make sure you consult legal counsel to assist with the task.

Andy Rodman is a shareholder and director in the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like him to address, e-mail arodman@stearnsweaver.com or call 305-789-3255. 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. ✤

North Carolina. On March 23, Governor Pat McCrory signed a law aimed at an ordinance the city of Charlotte passed that banned discrimination against LGBT people in the provision of public accommodations and allowed transgender people to use the bathroom of their choice.

The intent of the state law was to overturn Charlotte's ordinance, but it reaches further. Among the state law's provisions are some that directly affect employers:

- Its provisions prevent local governments from imposing requirements related to employee compensation, meaning local governments can't enact "living wage" or paid leave ordinances.
- It prohibits local governments from passing ordinances prohibiting employment discrimination such as laws against discrimination based on sexual orientation.
- It amends the North Carolina Equal Employment Practices Act (NCEEPA) so that no common-law claims for wrongful discharge in violation of public policy can be based on the NCEEPA.

On April 12, in response to criticism over the new law, Governor McCrory signed an Executive Order "to protect privacy and equality." According to McCrory, the order "expands the state's employment policy for state employees to cover sexual orientation and gender identity" and "seeks legislation to reinstate the right to sue in state court for discrimination."

Georgia. On March 28, Governor Nathan Deal vetoed a bill that would have allowed faith-based organizations to deny access to their facilities if doing so would violate an organization's sincerely held religious beliefs. It would have allowed those organizations to deny same-sex couples the use of their facilities for various events. Faith-based organizations also would have been able to deny social, educational, or other charitable services to individuals if doing so would violate the organization's beliefs.

Recent state actions have come under fire as allowing discrimination against the LGBT community.

The bill also would have allowed a faith-based organization to terminate employment or deny employment to individuals with beliefs not conforming to the organization's beliefs.

South Carolina. On April 5, a bill was introduced in the state legislature to prevent local governments from enacting laws to allow transgender people to use the public bathroom of their choice. It also would require local school boards to require students to use school bathrooms based on their gender at birth. Because of controversy surrounding the bill, however, it will not be voted on this year.

Tennessee. Lawmakers were debating a proposal in March and April that would require students to use the school bathroom for the gender listed on their birth certificate. The measure prompted criticism from economic development officials and others that passing such a law could jeopardize business and federal Title IX funding for schools and universities. On April 18, the bill's sponsor decided to delay action on the bill until next year, saying she wants to further study the issue. ✤

FMLA LEAVE

Pay up: Tampa jury awards $81,400 to supervisor fired while on FMLA leave

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

On February 22, 2016, a six-person jury in a Tampa federal court awarded $40,700 in back wages to an employee who was fired while she was on Family and Medical Leave Act (FMLA) leave. On April 14, the court awarded an equal amount in liquidated damages. The case addressed several issues of interest to Florida employers, including the type of notice an employee must provide to qualify for FMLA leave and whether an employer can terminate an employee when her doctor says she will not be able to return to work in 12 weeks.

A first misstep

Regena White began working as an accounts payable/accounts receivable supervisor for Beltram Edge Tool Supply, Inc., in 2003. She supervised two to four specialists in the accounts receivable and accounts payable department. In addition to performing normal office duties, White had to walk around the three buildings Beltram occupies to work out commission and billing problems with salespeople. Beltram used an

out-of-date employee handbook that did not mention the FMLA, and the company did not post the required FMLA notices.

In April 2010, White tore the ACL in her left knee. Her doctor said she might need surgery, but she opted for physical therapy and returned to work. (FMLA leave was not offered or mentioned by Beltram.) In November 2010, White began suffering from several other medical conditions, including migraine headaches, anxiety attacks, shortness of breath, and an irregular heartbeat. She missed some work, but Beltram did not offer her FMLA leave. Her health issues continued, and she missed a lot of work in January 2011. She frequently called her supervisor to tell him about her medical problems. She was referred to a cardiologist for tests on her heart.

A second misstep

White's doctor released her to return to work on January 31, 2011. However, on January 26, before she returned to work, she had an accident at home while descending the stairs. Her left knee "gave out" while she was walking down the stairs, and she fell. Her knee became swollen, and she experienced great pain and could not walk or put any pressure on her knee. Her doctor referred her to an orthopedic specialist to find out what happened.

On January 28, Beltram's vice president of operations, Xio Polewalski, e-mailed White Form WH-380E (Certification of Serious Health Condition) to take to her doctor. Beltram did not provide White Form WH-381 (required notice of FMLA rights) or Form WH-382 (designation notice). She was told to return the medical certification form by February 12. White's orthopedic surgeon told her she needed reconstructive surgery on her left knee to repair her ACL and meniscus. Surgery was scheduled for late February, but her doctor took medical leave. White was sent to a different doctor, and the surgery was delayed.

Medical certification

On February 11, White told Polewalski that she could not return the medical certification by the deadline because of the change in doctors. According to White, Polewalski responded, "Just get it in as soon as possible." Polewalski asked White to provide doctor's notes for her absences since late December 2010. White provided two doctor's notes, but one of the notes said she could return to work on January 31. The note was written before White reinjured her left knee, but Beltram did not know that.

When White did not return the medical certification form by February 16, Beltram decided to fire her. On February 17, one of White's subordinates informed her that Beltram announced that she had been fired because she did not return the paperwork. The news worried White, who went to a lot of trouble to fax the medical certification form to the company twice on February 16. Beltram denied receiving the form. When the company received the form, it stated White needed surgery and rehab and would be unable to work from January 28 until April 28 (nearly 13 weeks).

Beltram sent White a letter explaining why she had been fired. The letter said one of the doctor's notes indicated that she was able to return to work without restrictions on January 31 but she never returned. Additionally, the letter stated that she "failed to return, within the 15 calendar days granted by law, the FMLA form that was e-mailed to [her] on January 28, 2011." White had knee surgery on March 7. In January 2013, she filed suit in state court in Hillsborough County.

Court dismisses case

Beltram had the case moved to federal court. After discovery (the exchange of evidence), the company asked the federal court to dismiss White's claims. District Judge James S. Moody, Jr., found that White (1) did not suffer from a serious health condition, (2) did not give her employer proper notice of her need to take FMLA leave, and (3) requested more than 12 weeks of leave. Therefore, Judge Moody ruled that her job was not protected and dismissed her case.

White appeals

White appealed Judge Moody's decision to the U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers). The appeals court disagreed with Judge Moody, finding that White presented evidence that she had a serious health condition. You may think that should have been obvious to Beltram, but the district court considered only what the company said it knew when it decided to fire White. However, the appeals court said the district court should have considered all available evidence. The appeals court explained:

> We know of no authority . . . suggesting that, to determine whether an employee had a "serious health condition," a court must limit itself to considering only evidence received by the employer before the employee was fired. And we see no reason why that should be the case. The fact question—did the employee suffer from a serious health condition—is one that, like any other question on summary judgment [dismissal without a trial], should be answered using all available evidence.
>
> It may at first seem unfair to the employer, as Beltram argues, to make the serious-health-condition determination using evidence that the employer did not see until after it made the termination decision. But . . . other provisions in the FMLA protect employers from being sandbagged by employees who try to create

AGENCY ACTION

Over 10,000 severe injuries reported in first year of new requirement. The Occupational Safety and Health Administration (OSHA) reported in March 2016 that 10,388 severe work-related injuries were reported in the first year of the agency's new reporting requirement. Since January 1, 2015, employers have been required to report any severe work-related injury—defined as a hospitalization, amputation, or loss of an eye—within 24 hours. The requirement that an employer report a workplace fatality within eight hours remains in force. In the first full year of the program, employers reported 10,388 severe injuries, including 7,636 hospitalizations and 2,644 amputations. OSHA said that it responded to the reports by working with the employers to identify and eliminate hazards rather than conducting a worksite inspection.

EEOC issues new fact sheet for small businesses. The Equal Employment Opportunity Commission (EEOC) in March issued a new fact sheet designed to help owners of small businesses better understand their responsibilities under federal antidiscrimination laws. The "Preventing Discrimination Is Good Business" fact sheet provides an overview of the legal obligations of small businesses. It also provides information about other EEOC resources available for small businesses. The fact sheet is posted on the EEOC's website at www.eeoc.gov/eeoc/publications/index.cfm#smallbusiness.

Grants to help young offenders gain job skills. The U.S. Department of Labor (DOL) has announced a $30 million grant competition to help expand employment opportunities for young people involved in the criminal justice system. The DOL will award approximately seven grants of up to $4.5 million. Grant recipients may be either rural or urban organizations. The "Reentry Demonstration Projects for Young Adults" grants allow organizations the flexibility to design programs for adults ages 18 to 24 that apply evidence-based interventions, such as mentoring, career pathways, registered apprenticeships, family reunification, and other promising practices with a focus on providing occupational training and credentials, the DOL said in announcing the grants in March.

Funds to support migrant, seasonal farmworkers announced. The DOL in March announced $81 million in available funding through the National Farmworker Jobs Program to provide additional employment, training, and housing assistance to migrant and seasonal farmworkers and their families. The DOL said the National Farmworker Jobs Program is designed to help participants retain and stabilize their current jobs and acquire new skills and better living arrangements to start careers that provide higher wages and stable, year-round employment. ✤

interference claims after the fact and based on information not known at the time of termination.

The district court also found that White's need for leave was foreseeable and that she had not given Beltram the required 30-day notice. To reach that conclusion, the district court relied on the fact that White was told months before she took leave that knee surgery was "an option." The lower court noted her surgeon's deposition statement that her knee surgery was "elective." Those facts led the lower court to conclude that White's surgery and leave were foreseeable and triggered the FMLA's 30-day notice requirement.

However, the appeals court again saw things differently. The appeals court found that the district court did not view the evidence in the light most favorable to White, which was its duty at this point in the lawsuit. The lower court did not point to White's fall and reinjury of her knee on January 26, 2011. In addition, the lower court did not consider the surgeon's full answer when he stated that White's surgery was "elective." A few minutes later in his deposition, the surgeon explained what he meant by "elective":

Beltram jumped the gun and concluded that White would not be able to return to work in 12 weeks.

> It's elective in that it doesn't have to be done right away in the middle of the night. That's an orthopedic emergency. It's a relatively urgent procedure because if . . . something isn't done[,] the knee is going to keep buckling out and giving out, but it's not a true emergency where you're going to lose your leg if it isn't done right away.

The appeals court found that White's surgery was "relatively urgent," not a "planned medical treatment." Since the surgery was not foreseeable, White was not required to give Beltram 30 days' notice.

Finally, the district court found that even if White had a serious health condition and provided adequate notice to her employer, she was not entitled to be reinstated to her job because she requested more than 12 weeks of leave. The district court pointed to the doctor's note stating she would be unable to return for 13 weeks. According to the lower court, that meant she was not entitled to job restoration. Since White was not entitled to be reinstated to her job, Beltram did not interfere with her FMLA rights by firing her.

The district court's decision raised a question Florida employers are often presented with: If a doctor estimates that an employee will not be able to return to work in 12 weeks, can the employer terminate the employee? The appeals court said "no." The FMLA medical certification form asks the doctor for the *probable duration* of the condition necessitating leave. In this case, Beltram fired White before giving her a chance to see when she would be able to return to work. During the lawsuit, White obtained the doctor's opinion that she had an excellent recovery

from surgery and that she would have been able to return in eight weeks, not 13.

Again, the court was required to look at things from White's point of view. Beltram jumped the gun and concluded that she would not be able to return to work in 12 weeks. The appeals court stated, "These competing pieces of evidence create a dispute as to whether Ms. White could have returned to work within 12 weeks. The district court erred by resolving this dispute in favor of Beltram."

The appeals court reversed the lower court's ruling on those important issues, and the case was sent back to the district court. The case was tried in Tampa in late February. The jury returned a $40,700 verdict in favor of White. The verdict was less than what she asked for, but it is still a significant amount.

Posttrial motions in this case are still pending. In April, the district court awarded White $40,700 in liquidated damages. The FMLA does not provide for compensatory damages, but the law allows liquidated damages to be awarded to successful employees. White's lawyers have also asked the court to award attorneys' fees and costs. Her lawyers have asked for about $140,000 in legal fees, and the court will review their work and decide how much to award in attorneys' fees and court costs. Beltram has filed a motion to set aside the jury's verdict. *White v. Beltram Edge Tool Supply, Inc.*, Case No. 8:13-cv-478-T-30MAP, M.D. FL (April 14, 2016).

Takeaway

This case provides many lessons. First, get the FMLA forms provided by the U.S. Department of Labor (DOL) and use them. Second, update your employee handbook, and post all required notices (e.g., notice of employees' FMLA rights). Third, this case requires employers to consider what happens after they decide to fire an employee. That is a new requirement for Florida employers. If you fire an employee who is on FMLA leave, it appears that you must continue to reach out to the employee to make sure you know all the facts about her condition and ability to return to work.

Tom Harper is board-certified in labor relations and employment law by the Florida Bar. He is a circuit civil mediator with more than 30 years' experience in employment law issues. If you have a question or issue you would like Tom to address, contact him at tom@employmentlawflorida.com or 904-396-3000. Your identity will not be disclosed in any response. Articles in Florida Employment Law Letter are not intended to provide legal advice since answers to personnel-related inquiries are fact-dependent and often vary state by state. Consult employment counsel before making personnel decisions. ✤

AGE DISCRIMINATION

The aging workforce and how employers can avoid age discrimination claims

Older workers continue to make up a significant portion of the U.S. workforce as many Baby Boomers opt to continue working past the traditional retirement age. According to the U.S. Bureau of Labor Statistics (BLS), workers age 55 and over will make up more than 25 percent of the U.S. workforce by the year 2022. That could mean a potential increase in age discrimination lawsuits filed under the federal Age Discrimination in Employment Act (ADEA) and comparable state age discrimination laws.

EEOC pursuing age claims

The ADEA covers employers with 20 or more employees and prohibits age discrimination against individuals who are 40 years of age or older. It also prohibits workplace harassment based on age. The Equal Employment Opportunity Commission (EEOC) has been active in filing lawsuits against employers that violate the ADEA.

In the past six months alone, the EEOC has negotiated nearly $900,000 in settlements of lawsuits it filed against employers under the ADEA. In one case, an employer allegedly inquired during an e-mail interview whether the job applicant fell within its ideal age range of 45 to 52 years old. The applicant, who was older than 52, wasn't hired after he disclosed his age. In another case, a 52-year-old employee was terminated because the company's owner allegedly said he wanted "younger and peppier" employees.

In a case that's pending against a restaurant chain, the EEOC claims the employer discriminated by refusing to hire older workers for front-of-house jobs as hosts, bartenders, and servers. The employer reportedly claims its hiring requirements are lawful even if they had an

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adverse impact on older workers because the requirements are job-related and consistent with business necessity.

What are the requirements? Servers must line dance during shifts, wear jeans and T-shirts, and work evenings and weekends. The implication is that people over age 40 aren't able to satisfy the requirements.

In each of these lawsuits, it seems the employer was stereotyping older workers as being insufficiently "peppy" or somehow less than "ideal" for the job in question. Assumptions that older workers are less competent or less energetic can lead to a charge of age discrimination if an employer makes employment decisions based on those stereotypes.

Ensure you are in ADEA compliance

As the number of older workers in the workforce continues to increase, employers that want to avoid age discrimination claims need to be vigilant about their policies and practices—for hiring, firing, promotion, pay, and all other terms and conditions of employment. Here are some suggestions to ensure compliance with the ADEA:

- In all employment decisions, stay focused on an individual's talent, skills, and experience.
- Remove from job application forms questions about an applicant's birthdate and eliminate references to age-related dates like high-school or college graduation.
- Provide training on age discrimination laws to all employees involved in the hiring process, and make sure hiring criteria don't exclude older workers—either directly or indirectly.
- Make sure supervisory employees have training on all aspects of age discrimination, including the dangers of stereotypes.
- Provide harassment prevention training for all employees.
- Encourage employees to report age harassment, make sure supervisors know how to respond to complaints (i.e., report to HR), conduct prompt investigations, and take appropriate action when the investigation is complete.
- Employers considering a layoff or downsizing should have in place objective criteria on which to base layoff decisions. The criteria should be applied consistently, and employers should consider training for decision makers on how to apply the criteria. ✤

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Editorial inquiries should be directed to G. Thomas Harper at The Law and Mediation Offices of G. Thomas Harper, LLC, 1912 Hamilton Street, Suite 205, Post Office Box 2757, Jacksonville, FL 32203-2757, 904-396-3000. Go to www.EmploymentLawFlorida.com for more information.

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