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FLORIDA
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EMPLOYER RIGHTS

Florida appeals court: Union protesters are guilty of trespassing

by Jeffrey D. Slanker
Sniffen & Spellman, P.A.

We've recently highlighted several ways in which nonunion and union employers alike are increasingly subject to the scrutiny of the National Labor Relations Board (NLRB), the federal agency tasked with overseeing private-sector labor relations throughout the country. One way the NLRB has injected itself into nonunion workplaces is by revising the very rules that could lead an employer down the road to a unionized workforce in the first place—the rules that regulate how employees vote to unionize and how union election proceedings are conducted under the National Labor Relations Act (NLRA).

Although its scope is broad, the NLRA doesn't foreclose state laws prohibiting union activity that amounts to trespassing. That's exactly what Florida's 5th District Court of Appeals (DCA) said in a recent decision involving Walmart and the United Food and Commercial Workers union (UFCW).

Facts of the case

Walmart claimed that the UFCW engaged in protests and picketing at its stores that amounted to trespass under Florida law. The protests weren't violent, but they were loud and disruptive to Walmart employees and customers. On one occasion, Walmart was forced to call the police to deal with the protesters.

It's important to remember that the NLRA prohibits employers from taking any action against employees that would infringe on, or even just "chill," their right to engage in union activity. However, the NLRA also prevents unions from interfering with employees' right to decline to join a union or participate in union activities.

Based on the protests at its stores, Walmart filed an unfair labor practice charge with the NLRB alleging that the UFCW interfered with its employees' right to refrain from participating in union activity. Ultimately, Walmart withdrew the unfair labor practice charge and instead filed suit in state court, seeking to bar the UFCW from engaging in the protests because they violated laws against trespass in Florida. The trial court agreed with Walmart, and the UFCW appealed.

Appeals court decision

The UFCW appealed the trial court's ruling that Walmart was entitled to sue for breach of the trespass law and wasn't limited to seeking relief from the NLRB for a violation of the NLRA. In other words, the UFCW relied on the concept of federal preemption, which generally means that because federal law is the supreme law of the land, it overrides any state law that conflicts with it. The UFCW argued that

Walmart was foreclosed from suing for trespass because its only remedy should be with the NLRB. The 5th DCA disagreed and upheld the trial court's ruling.

While the appellate court acknowledged that the NLRA is broad and typically preempts many state laws, it doesn't preempt the action brought by Walmart in this case. Noting that Congress intended the NLRA to be the preeminent law regulating private-sector labor relations, the court held that Walmart's lawsuit wasn't seeking to vindicate rights protected by the NLRA but was purely founded in state law prohibiting trespassing. As a result, the claim was removed from the NLRA's purview over the treatment of labor, whether it's unionized, nonunionized, or not yet unionized.

> **The UFCW argued that Walmart's only remedy should be with the NLRB.**

Indeed, the court held that Walmart's lawsuit didn't require the adjudication of any rights protected under the NLRA, so the Act didn't preempt it. The court noted that Walmart's request that the state court issue an injunction to prohibit the UFCW from trespassing on its property wasn't a claim it could have brought before the NLRB. The UFCW argued that its conduct was protected under the NLRA because the protests were in furtherance of unionizing, but the court found that argument weak since trespassing isn't usually deemed protected under the NLRA.

Indeed, the court noted that Walmart could have brought an unfair labor practice charge under the NLRA, as it originally contemplated. However, the company chose instead to seek to vindicate a completely separate and distinct right under Florida law—the right to be free from trespass. Therefore, the 5th DCA found that the trial court's holding in favor of Walmart was correct and supported by the law. *United Food and Commercial Workers, et al. v. Wal-Mart Stores, Inc.*, Case No. 5D15-1434.

Takeaway

We cannot emphasize enough the importance of remembering that Florida employers of all types, not just those that are unionized, are subject to federal labor law. Companies can avail themselves of the NLRA's protections in some circumstances, but certain state court actions for trespass and nuisance might provide an appropriate weapon against unlawful activities associated with union organizing. Such a strategy isn't always foreclosed just because the NLRA broadly regulates private-sector labor relations. However, this strategy should be deployed carefully given the wide-ranging protection for union activity under the NLRA.

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FMLA RIGHTS

It's unwise to block employee on work restrictions from returning to work

by Tom Harper
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G. Thomas Harper, LLC

A federal district court in Miami has denied an employer's request that it dismiss a lawsuit brought by an employee it refused to reinstate because she wasn't "100% cured" and fully released to return to work with no restrictions after her medical leave. In reaching its decision, the court discussed the two types of medical certifications allowed under the Family and Medical Leave Act (FMLA) regulations and the requirements for each type.

Heavy lifting in software job?

From 2011 until 2014, Sarah Dykstra worked for Florida Foreclosure Attorneys, a large Palm Beach County law firm with more than 50 employees. She eventually became the law firm's IT director, a job in which she was responsible for the firm's software systems and security policies. She earned up to $100,000 a year.

In March 2014, Dykstra suffered a serious back injury. She had several surgeries and was unable to return to work until July 2014. Although her injury occurred in March, the law firm didn't place her on FMLA leave until June 9, 2014. Her 12 weeks of protected leave were set to expire on September 6, 2014.

Dykstra claimed that she contacted the law firm on July 1 and asked if she could return to work by working from home. The law firm denied her request. According to Dykstra, the firm told her that she could come back only if she could work "full-time" in the office.

About a month later, Dykstra again contacted the firm to say that she was "ready, willing and able" to resume her job. She provided certification from her doctor stating that she was medically cleared to return to work "with light[-]duty restrictions." What her doctor meant by that was never clarified. However, the law firm refused to allow her to return to work until she was "100% cured."

Not so fast!

Days before her leave expired, the law firm told Dykstra that she couldn't return to work unless she provided medical certification confirming that she was medically cleared to work without any restrictions. Dykstra claimed that on September 6, the law firm told her that she would be "terminated" if she couldn't return to work in two days "100% cured."

Dykstra claimed that she was able to perform the essential functions of her IT director job even with her light-duty restrictions. Nevertheless, the firm made good on its promise to fire her on September 8, 2014, when she wasn't able to provide her doctor's approval for her unrestricted return to work.

After she was fired, Dykstra sued the law firm and its principal partner for interference and retaliation under the FMLA as well as disability discrimination under the Americans with Disabilities Act (ADA). The law firm responded by asking the court to dismiss her lawsuit because it was within its rights to require her to

ASK ANDY

Is it discrimination if my actions are well-intentioned?

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

Q *I run a retail clothing store. One of my salesclerks is pregnant. Her duties include carrying boxes of clothing weighing approximately 25 pounds and stocking shelves. At times, she stands on a ladder or stepstool. A customer recently expressed concern when she saw my pregnant salesclerk carrying a box. The salesclerk hasn't asked for any accommodation, but I would like to suggest that she consider taking a sedentary office position until she returns from maternity leave. Can I have that conversation with her?*

A Unless your pregnant salesclerk is clearly having a difficult time performing her job duties, it wouldn't be advisable to speak to her about a temporary job change. Even though your concerns may be well-intentioned if you're concerned about the health of your salesclerk and her child, the position espoused by the courts and the Equal Employment Opportunity Commission (EEOC) is clear: Women must be permitted to make their own decisions when it comes to pregnancy-related accommodations.

In *United Auto Workers v. Johnson Controls, Inc.*, the U.S. Supreme Court put an end to the well-intentioned paternalistic approach to accommodations back in 1991 when it struck down the company's "fetal protection policy," which prohibited pregnant women (and women capable of bearing children) from working in jobs that involved exposure to lead. The Court explained, "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role."

Moreover, the EEOC has issued enforcement guidance aimed at eliminating paternalistic and stereotypical views about pregnant employees, including the idea that pregnant employees are unfit for jobs requiring lifting, pulling, pushing, climbing, or standing for long periods. So, unless your pregnant employee asks for an accommodation or a job modification or it's evident that she's having difficulty performing her regular job duties, it's better to remain silent and keep your well-intentioned views to yourself.

The concerned customer's comment doesn't change the analysis, either. In fact, in May, an Arizona bar settled a pregnancy discrimination lawsuit brought by the EEOC after the bar owner terminated a pregnant bartender because of perceived customer concerns. Incredibly, the bar owner was caught on tape expressing the following concerns:

> There's going to be a whole number of people that I would be offending by allowing a pregnant person to be behind the bar. They might look at it as the owner's a f___ing idiot [because] they're letting a girl that's pregnant that could get injured behind the bar [bartend] right now. How irresponsible are those guys?

In a press release, the EEOC summed up the underlying issue: "Women must be allowed to make their own decisions whether to work while pregnant."

To be clear, there absolutely are situations when an employer has an obligation to accommodate a pregnant employee. Certain pregnancy-related conditions will constitute disabilities under the Americans with Disabilities Act (ADA) and require reasonable accommodation, and certain pregnancy-related issues will trigger protected leave under the Family and Medical Leave Act (FMLA). But putting those issues aside, you should refrain from imposing your well-intentioned beliefs (or your customers' similarly well-intentioned beliefs) on your pregnant employee. It's her choice.

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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. ✤

be completely healed before returning to work. However, the court disagreed.

Can an employer refuse to reinstate someone after leave?

Can an employer refuse to reinstate an employee who isn't fully released to perform all of her job duties? The answer is "yes," but only if the employer uses the right tools available to employers under the FMLA regulations.

To help employers prevent fraud and abuse of federally mandated FMLA leave, the U.S. Department of Labor (DOL) has created two different fitness-for-duty (FFD) certifications. However, to rely on either type of FFD certification as a condition for job restoration, an employer must inform the employee in its "Notice Designating the Employee's Leave as FMLA-Qualifying" (DOL Form WH 382) that the certification will be required before she returns to work.

In the first type of FFD certification an employer may require, the healthcare provider must certify that the employee is "able to resume work." The second type of FFD certification specifically addresses the employee's ability to perform the essential functions of her job before she returns to work. To use the second type of certification, an employer must provide the employee a list of the essential functions of her job at the time it designates her leave as FMLA-qualifying. In addition, the designation notice itself must state that the healthcare provider's certification must address the employee's ability to perform the essential functions listed.

A case of two forms

In this case, it wasn't apparent to the court which certification form the law firm used. Clearly, the firm would've pointed out that it used the FFD certification addressing Dykstra's ability to perform her job functions if it had used that form.

Because both sides referred to Dykstra returning the medical certification, the court assumed that the firm's request for medical certification was valid. However, the court extended that assumption only to the first type of FFD certification, which merely states that the employee is "able to resume work." There was no evidence that the law firm satisfied the prerequisites for requesting the second type of FFD certification, in which Dykstra's healthcare provider would've specifically addressed her ability to perform the essential functions of her job.

The court explained, "The question . . . is thus whether an employee who provides [an FFD] certification that she is able to return to work 'with light[-]duty restrictions' may [make a claim] under the FMLA when the lower[-]threshold 'able to resume work' certification is requested. [We hold] that the provision of such [an FFD] certification *does not foreclose an employee's FMLA claim"* (emphasis added).

In this case, Dykstra met the requirements of her FFD certification when she was released to return to work by her healthcare provider. Looking to other court decisions, the district court found that when she submitted the return-to-work certification from her doctor, the law firm's duty to reinstate her was triggered. The certification allowing her to return to work with light-duty restrictions satisfied her requirement to comply with the regulatory obligation to provide a medical return-to-work certification.

However, the court went on to explain:

> This does not mean that the FMLA requires an employer who fails to properly request an "ability to perform essential functions" certification (or any [FFD] certification at all) to retain an employee who is unable to perform the functions of the position. Even if an employer fails to request an "ability to perform essential functions" certification, the employer may still require a medical examination [from] the employee to ensure that she is able to perform the essential functions of her position. And, without delaying the employee's reinstatement, [the] employer may contact the healthcare provider for further clarification of the [FFD] certification.

According to the court, Dykstra's light-duty restrictions may ultimately allow the law firm to deny her reinstatement. But that determination would be based on a different requirement in the FMLA regulations. After an employee returns from FMLA leave, the ADA allows her employer to require (and pay for) a medical examination that is job-related and consistent with business necessity. If a healthcare provider finds that Dykstra can't perform the essential functions of her IT director position, she wouldn't be entitled to reinstatement. *Sandra Dykstra v. Florida Foreclosure Attorneys, PLLC and Rick Felberbaum,* Case No. 15-81275-CIV-MARRA (S.D. Florida, April 26, 2016).

Bottom line

The FMLA regs allow you to require that an employee's medical certification specifically address her ability to perform the essential functions of her job. But to do that, you must provide a list of the employee's essential job functions at the time you give her the FMLA designation notice, if not before. Also, you have to state on the designation notice that the medical certification must address the employee's ability to perform her essential job functions. If you satisfy those requirements, the employee's healthcare provider must certify that she can perform the identified essential functions of her job.

When an employee requests FMLA leave, use the DOL's forms, attach a job description, and state that the

medical certification must address the employee's ability to perform the essential functions of her job. Make that your standard practice every time you approve a request for FMLA leave.

You may contact the author at tom@employmentlawflorida.com. ✤

WORKERS' COMP REFORM

Florida Supreme Court finds workers' comp attorneys' fees schedule unconstitutional

by Tom Harper
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On April 28, 2016, the Florida Supreme Court issued its decision in a case in which it was asked to determine the constitutionality of the mandatory attorneys' fees schedule for workers' compensation cases. Section 440.34, which was added to Florida's workers' comp law in 2009, eliminated the requirement that a successful workers' comp claimant be awarded reasonable attorneys' fees. That provision was a major part of the 2009 workers' comp reform aimed at reducing escalating workers' comp costs for Florida employers. It also resulted in many attorneys giving up their workers' comp practice.

Injury was a pain in the neck

During the course of his employment at Next Door Company, Marvin Castellanos, a 47-year-old press brake operator in Miami, suffered an injury that resulted in cuts on his head and neck. Next Door's workers' comp carrier denied Castellanos' requests for certain additional treatment. However, he prevailed on his workers' comp claim after his attorney successfully refuted a number of defenses raised by the employer and its insurance carrier.

The judge of compensation claims (JCC) determined that an award of fees was "reasonable and necessary" for the attorney's work in litigating this complex case. Because the law passed in 2009 limits a claimant's ability to recover attorneys' fees to a sliding scale based on the amount of workers' comp benefits he obtained, the fees awarded to Castellanos' attorney amounted to only $1.53 per hour for 107.2 hours of work.

Castellanos had no ability to challenge the reasonableness of the $1.53 hourly rate, and both the JCC and the court of appeals were prevented by the language in the workers' comp law from assessing whether the attorneys' fees award was reasonable. As the Florida Supreme Court noted, "Instead, the [2009 law] presumes that the ultimate fee will always be reasonable to compensate the attorney, without providing any mechanism for refutation."

Court objects to lopsided results of fee schedule

In its decision, the supreme court ruled that a claimant's right to obtain reasonable attorneys' fees has been a critical feature of the Florida workers' comp law since 1941. The court ruled that the mandatory fee schedule in Section 440.34, which creates an irrebuttable presumption that precludes any consideration of whether the fee award is reasonable to compensate the attorney, is unconstitutional under both the Florida and the U.S. Constitutions because it's a violation of due process under the law.

After reviewing the history of attorneys' fees under the workers' comp law, the court concluded that the 2009 revision "eliminated any consideration of reasonableness and removed any discretion from the [JCC], or the judiciary on review, to alter the fee award in cases where the sliding scale based on benefits obtained results in either a clearly inadequate or a clearly excessive fee."

The workers' comp law requires the mandatory reporting of all attorneys' fees to the Office of JCCs. The court noted that those reports show that claimants' attorneys have consistently received a lower percentage of their total fees than defense attorneys, and the gap has increased over the past decade. The percentage of fees received by claimants' attorneys, in relation to the percentage received by employers' and insurance carriers' lawyers, declined from 49 percent to 36 percent over the 10 years between 2003 and 2013.

The court concluded by stating:

> While [the employer's or the insurance carrier's] attorney is adequately compensated for the hours reasonably expended to unsuccessfully defend the claim, . . . the claimant's attorney's fee may be reduced to an absurdly low amount, such as the $1.53 hourly rate awarded to the attorney for Castellanos. In effect, the elimination of any requirement that the fee be "reasonable" completely eviscerates the purpose of the [attorneys'] fee provision and fails to provide any penalty to the [employer or the insurance carrier] for wrongfully denying or delaying benefits in contravention [of] the stated purpose of the statutory scheme.

Castellanos v. Next Door Company, et al., Case No. SC13-2082.

Takeaway

There are at least 18 cases on appeal that will be settled by the supreme court's decision in this case. Unless the Florida Legislature takes some action to address the issue, the law will revert to the pre-2009 law, which means that workers' comp claimants will be entitled to a "reasonable" award of attorneys' fees. Expect a gradual

and steady increase in workers' comp activity as more lawyers begin returning to this area of practice.

You may contact the author at tom@employmentlawflorida.com. ✤

FMLA

DOL releases new FMLA poster and employer guide

Employers take note: The U.S. Department of Labor (DOL) has released a new Family and Medical Leave Act (FMLA) poster for use by employers covered by the FMLA. The new poster, dated April 2016, is reformatted and contains additional information on servicemember caregiver leave, intermittent leave, and use of accrued paid leave as well as new information on requesting FMLA leave.

According to the DOL, the previous version of the FMLA poster (dated February 2013) can still be used to fulfill the posting requirement.

Poster requirements

Every employer covered by the FMLA is required to post a general notice explaining the Act's provisions and providing information regarding the procedures for filing complaints of FMLA violations to the DOL's Wage and Hour Division (WHD). The general notice must be posted in conspicuous places where employees are employed and where it can be readily seen by employees and applicants. The poster text must be large enough so that it can be easily read and must be fully legible.

The DOL's *Notice to Employees of Rights Under FMLA* (found at www.dol.gov/whd/regs/compliance/posters/fmla.htm) satisfies the general notice requirement. Covered employers must post this general notice even if no employees are eligible for FMLA leave. The penalty for willful violations of the general notice posting requirement is a civil fine of $110 for each separate offense.

Distribution. FMLA regulations state that if an FMLA-covered employer has any eligible employees, it must also provide the general notice to all employees by including it in the employee handbook or other written guidance concerning employee benefits or leave rights. If the employer doesn't have such a handbook or other written guidance, the regulations require it to distribute a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically.

Language requirements. The final FMLA rules require that if an employer's workforce is composed of a significant portion of workers who aren't literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.

New FMLA employer guide

In addition to the new FMLA poster release, the DOL published a new "Employer's Guide to the Family and Medical Leave Act" (found at www.dol.gov/whd/fmla/employerguide.htm). According to the DOL, the guide is designed to provide essential information about the FMLA, including information about employers' obligations under the law and the options available to employers in administering leave. The guide is organized to correspond to the order of events from an employee's leave request to restoration of the employee to the same or an equivalent job at the end of her FMLA leave. It also includes a topical index.

The DOL says it created the 76-page guide in an effort to increase public awareness of the FMLA and the various DOL resources and services available to the public. The guide provides information on FMLA administration and compliance issues, including:

- Covered employers and their notice requirements;
- When an employee needs FMLA leave, including notice and eligibility;
- Qualifying reasons for leave;
- The certification process;
- Military family leave;
- Intermittent leave;
- What happens during FMLA leave, including scheduling, leave calculation, benefits, and job restoration;
- Record-keeping requirements; and
- Interaction with other federal and state leave laws.

In addition to compliance materials that closely follow the language of the FMLA and regulations, the DOL has interspersed lesser-known facts about the law throughout the guide, highlighted in orange, with the question "DID YOU KNOW?"

For example, the guide states:

> DID YOU KNOW? If the employee does not meet the eligibility requirements, an employer may not designate the leave as FMLA even if the leave would otherwise qualify for FMLA protection. If the employee is not eligible for FMLA leave, the employer may grant the employee leave under the employer's policy. Once the employee becomes eligible and the leave is FMLA-qualifying, any of the remaining leave period taken for an FMLA-qualifying reason becomes FMLA-protected leave.

The guide also contains links to DOL forms, related sections of the FMLA regulations, and a useful "road map" to the FMLA. ✤

CONSTITUTIONAL RIGHTS

Employee's political free speech is protected, even if he didn't say anything

Is an employee protected by his constitutional right to free speech even if he didn't actually engage in any protected speech or activity? Yes, says a recent decision by the U.S. Supreme Court.

According to the Court, when a public employer demotes an employee out of a desire to prevent him from engaging in protected political activity, the employee is entitled to challenge the demotion under the First Amendment to the U.S. Constitution—even if the employer's actions are based on a mistaken belief about his behavior.

When a (yard) sign isn't a sign

Jeffrey Heffernan, a detective working for the chief of police in Paterson, New Jersey, had agreed to pick up and deliver a campaign yard sign for his mother. The yard sign promoted the candidate running against the current mayor. Unfortunately for Heffernan, the current mayor had appointed both the chief of police and Heffernan's supervisor. Heffernan picked up the yard sign as a favor to his bedridden mother and wasn't involved in the campaign in any way.

Police officers observed Heffernan holding the yard sign and speaking to campaign staff at the sign distribution point. Word got back to the police chief, and Heffernan was demoted from detective to patrol officer as punishment for "overt involvement" in the campaign for the current mayor's rival. Heffernan sued, claiming that he had been demoted based on the mistaken belief that he had engaged in conduct that constituted protected speech and that he had been deprived of his constitutional right.

The district court and the U.S. 3rd Circuit Court of Appeals ruled for the employer, holding that Heffernan hadn't been deprived of any constitutionally protected right because he hadn't engaged in any First Amendment conduct. According to the 3rd Circuit, Heffernan's claim would be actionable only if his demotion was caused by his actual—rather than perceived—exercise of his free-speech rights.

Supreme Court says . . .

In a 6-2 decision reversing the lower courts' decisions, the U.S. Supreme Court held that when an employer demotes an employee out of a desire to prevent him from engaging in protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment—even if the employer's actions are based on a mistaken belief about his behavior.

The Court focused on the employer's motive and the facts as the employer reasonably understood them in determining whether it had violated Heffernan's First Amendment rights. The Court noted that the police department demoted Heffernan

AGENCY ACTION

Silica dust rule finalized. The Occupational Safety and Health Administration (OSHA) in March 2016 announced a final rule aimed at improving protections for workers exposed to respirable silica dust. The agency says the rule will curb lung cancer, silicosis, chronic obstructive pulmonary disease, and kidney disease by limiting workers' exposure to respirable crystalline silica. The final rule is written as two standards, one for construction and one for general industry and maritime. Employers covered by the construction standard have until June 23, 2017, to comply with most requirements. Employers covered by the general industry and maritime standard have until June 23, 2018, to comply with most requirements.

USCIS announces H-1B visa caps reached. U.S. Citizenship and Immigration Services (USCIS) announced on April 7 that it had reached the congressionally mandated H-1B visa cap for fiscal year 2017. The cap in the general category is 65,000 visas. April 7 was the day the filing period ended. The agency also said on April 7 it had received more than the limit of 20,000 H-1B petitions filed under the U.S. advanced degree exemption. USCIS will continue to accept and process petitions filed to extend the amount of time a current H-1B worker may remain in the United States, change the terms of employment for current H-1B workers, allow current H-1B workers to change employers, and allow current H-1B workers to work concurrently in a second H-1B position.

DOL announces 2015 safest year for mining. The U.S. Department of Labor's (DOL) Mine Safety and Health Administration has released preliminary data showing that 2015 was the safest year in mining history, both in terms of number of deaths and injury and fatal injury rates. Rates are calculated based on hours of miners' exposure, a relative measure taking into account recent employment changes in the mining market. In 2015, 28 miners died in mining accidents, down from 45 in 2014. The fatal injury rate, expressed as reported injuries per 200,000 hours worked, was the lowest in mining history for all mining at 0.0096, down from 0.0144 in 2014 and 0.0110 in 2011 and 2012. The all-injury rate—reported by mine operators—also dropped to a new low in 2015 at 2.28.

OSHA updates eye, face protection standards. OSHA in March published a final rule that updates requirements for personal protective equipment for workers in general industry, shipyards, longshoring, marine terminals, and construction. OSHA says the final rule reflects current national consensus standards and ensures that workers can use up-to-date eye and face protection. The final rule became effective April 25. ✤

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on the mistaken belief that he had engaged in protected speech—the result of which was to discourage other employees from engaging in protected speech or association. This harm, the Court noted, was the same whether or not the employer's action rested on a factual mistake.

The Court assumed that Heffernan was demoted based on the belief that he was supporting the current mayor's rival in the mayoral election. However, there was some evidence that he may have been demoted based on a neutral office policy prohibiting all police officers from any overt involvement in any political campaign. As a result, the Court sent the case back to the lower court to decide whether the police department may have acted under the neutral policy and whether such a policy, if it existed, complied with constitutional standards. *Heffernan v. City of Paterson*, No. 14-1280 (2016).

Private-sector employers are entitled to prohibit employees from engaging in political activity during work hours.

What it all means

It's important to note that the employer in this case is a *public* employer—the city of Paterson, New Jersey. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press." This limitation applies to government actions (not private actions or private employers). Through the Fourteenth Amendment, state and local governments are also prohibited from infringing on these rights by law or by imposing rules (such as employment policies) that infringe on the right to the exercise of religion, free speech, and press.

Other than laws regulating political contributions, there are no federal laws that regulate a *private* employee's political activity. Of course, employees have the right to maintain and express points of view on political issues. However, private-sector employers have the right to regulate and control employee work time. As a result, they are entitled to prohibit employees from engaging in political activity during work hours. ✤

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