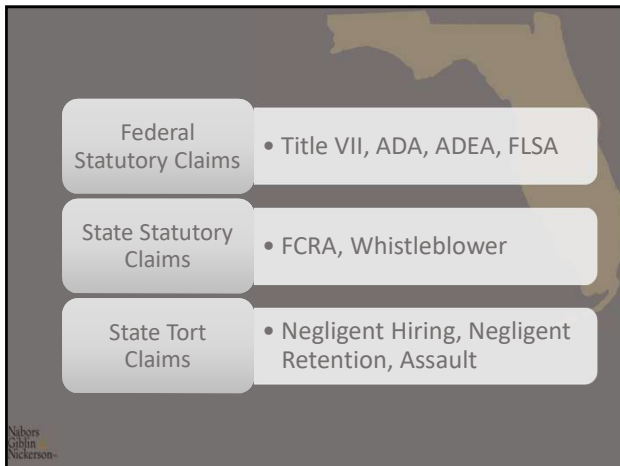
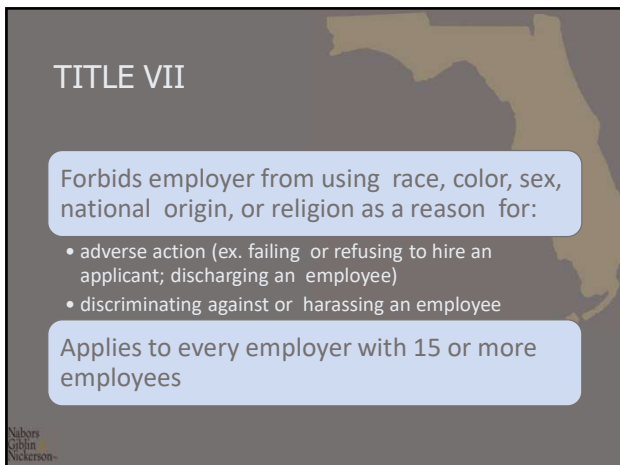




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3

TITLE VII

Discrimination

- An “adverse employment action”
- Motivated by protected characteristic.

↓

Harassment

- A type of discrimination.
- Not limited to sexual harassment. Based on any protected characteristic.



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TITLE VII



Race: ALL races are protected

Sex: Gender and sexual orientation

Pregnancy: Prohibits discrimination based on pregnancy and abortions

National Origin: Any ancestry or origin

Religion: More extensive protection; requires accommodation

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TITLE VII

RACE

- Title VII prohibits discrimination on the basis of race against all persons.
- Title VII does not define “race.”
- Associational discrimination is also prohibited.
 - Ex: Discrimination based on Plaintiff having multiracial child or interracial marriage.
- No Bona Fide Occupational Qualification defense to race discrimination claim.

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TITLE VII

NATIONAL ORIGIN

- National origin includes membership in a national group, common ancestry, heritage or background, ethnic characteristics, or the geographical place of birth
- Need not be recognized “nation”
 - Based upon unique historical, political and/or social circumstances of a given region.
 - Ex: Cajun, Serbian

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TITLE VII

NATIONAL ORIGIN

- Employer rules requiring employees to speak only English at all times are presumptively unlawful.
- Permissible if policy is job related and consistent with business necessity subject to these factors:
 1. Whether the restrictive policy effectively serves business needs;
 2. Whether the restrictive language is narrowly tailored; and
 3. Whether the employer provided adequate notice of language restrictive policies.

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TITLE VII

SEX

- Generally, protected class of “sex” involves condition of being male or female.
- Price Waterhouse: Title VII discrimination includes discrimination based on sexual stereotypes.

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Bostock v. Clayton County, 140 S. Ct. 1731 (2020)

- 3 consolidated cases involving Title VII: does it cover discrimination based on sexual orientation or transgender status?
- In all 3, ER fired a long-time EE shortly after the EE revealed homosexual or transgender orientation.
- For the last 50+ years, virtually all courts have said that Title VII does not cover those characteristics.
- Recently, a couple of circuits held that such discrimination violated Title VII's prohibition on discrimination based on sex



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Bostock v. Clayton County, 140 S. Ct. 1731 (2020)

Suppose an ER had two EEs who both were attracted to men and suppose further that one EE was male and one was female.

If the ER were to fire the male EE but permit the female EE to stay employed, then the ER discriminated against the male EE for traits or actions that tolerated in the female EE.

By intentionally singling out the male EE based in part on his sex, the ER violated Title VII.

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Bostock v. Clayton County, 140 S. Ct. 1731 (2020)

“Because the text of the statute was unambiguous, the majority held that the logical command of those terms had to be given effect, even if the legislators who passed the law might not have realized what its consequences would be.”

“Those who adopted the Civil Rights Act might not have anticipated that their work would lead to this particular result....But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.”

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TITLE VII

Discrimination can be established under 3 theories:

Disparate Treatment	Disparate Impact	Pattern & Practice Discrimination
---------------------	------------------	-----------------------------------

↓

Disparate Treatment and Pattern & Practice require **proof of discriminatory intent**; Disparate Impact does not.

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TITLE VII



To prove intentional discrimination under burden-shifting framework of McDonnell-Douglas, EE must show:

- She belongs to a protected class;
- She was subjected to an adverse employment action;
- She was qualified to perform the job; and
- "similarly situated" EEs outside the class treated more favorably

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TITLE VII



- Similarly Situated EEs must be "in all material respects."
- This standard is generally met when the "comparator":
 1. Engaged in the same basic conduct (or misconduct);
 2. Was subject to the same employment policy;
 3. Was under the jurisdiction of the same supervisor; and
 4. Shared the plaintiff's employment or disciplinary history.

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TITLE VII

HARASSMENT

- Conduct that is **unwelcome**; not solicited or invited
- Based on a **protected characteristic**
- Severe and pervasive enough to **alter the conditions of employment**; reasonable person standard
- ER liability analysis depends on **harasser's status**

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TITLE VII

ER liability for harassment based on the bad actor:

- ER is automatically liable for the harassment of a **Supervisor**
- ER is liable for harassment of a **Coworker** when knew or should have known

UNLESS

- No tangible employment action AND
- Affirmative defense
 1. ER used reasonable care to prevent harassment (policy) AND
 2. EE unreasonably failed to take advantage of preventative/corrective opportunity

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Allen v. Ambu-Stat, LLC, 799 Fed. Appx. 703 (11th Cir. 2020)

"Sufficiently pervasive" standard for hostile work environment claims is high in the 11th Circuit.



Employee brought sexual harassment and retaliation claims.

- Employee claims she was subjected to sexually suggestive comments from her employer and that the employer had his son slap the employee on her buttocks.
- Employee complained about the inappropriate comments but did so in response to the employer's wife accusing her of having an affair.



11th Circuit determined that the employer's conduct did not constitute as sexual harassment because it was not "sufficiently pervasive" and the employee did not "oppose" the conduct for the retaliation claim.

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Allen v. Ambu-Stat, LLC, 799 Fed. Appx. 703 (11th Cir. 2020)

- ▶ ER's conduct was not "sufficiently pervasive" because, while "boorish" and inappropriate, was sporadic and appears to have occurred in a joking context of "friends outside of work."
- ▶ EE's complaints didn't constitute "opposition" for retaliation purposes because
 - ▶ the employee must have actively opposed the conduct, merely discussing an event is not enough;
 - ▶ complaints made by the employee were to "apologize and mend fences" and not to oppose; and
 - ▶ merely mentioning the words "sexual harassment" does not invoke statutory protection. The 11th Circuit focused on why the complaints were made and whose behavior comments focused on.

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TITLE VII

HARASSMENT

- The EEOC Harassment Guidance – Jan. 10, 2017
- 5 Core Principles to prevent and address harassment:
 - Committed and engaged leadership;
 - Consistent and demonstrated accountability;
 - Strong and comprehensive harassment policies;
 - Trusted and accessible complaint procedures; and
 - Regular, interactive training tailored to the audience and the organization

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TITLE VII

RETALIATION

- ER cannot take action against an employee because
 1. She filed a Title VII charge
 2. She participated in an investigation
 3. She opposed actions illegal under Title IV
- 11th Cir: When the conduct complained of is not an EE practice under Title VII (or can be reasonably seen as such), the complaint is not protected.

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Monaghan v. Worldpay US, Inc., 955 F.3d 855 (11th Cir. 2020)

- ▶ In Monaghan, the 11th Circuit reset its Title VII retaliation claim standard.
- ▶ 11th Circuit decided that the correct standard is SCOTUS's in Burlington Northern: retaliation is material if it "well might have dissuade[d] a reasonable worker from making or supporting a charge of discrimination."
- ▶ Rejected the district court's application of the Gowski v. Peake standard: retaliation only occurs if ER's actions were "sufficiently severe or pervasive to alter the terms and conditions of employment."

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TITLE VII

- Pregnancy Discrimination Act (part of Title VII)
- ▶ Protects the right of pregnant employees to be treated the same as non-pregnant employees.
 - ▶ No duty to accommodate pregnant women if they do not already accommodate other disabled employees.
 - ▶ Employer's refusal to accommodate could constitute unlawful discrimination if such accommodations are routinely granted to non-Pregnant employees
 - ▶ Young v. United Parcel Services Inc., 575 U.S. 206 (2015).

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Hicks, 870 F.3d 1253 (11th Cir. 2017)

- ▶ Female police officer sued city under Title VII/ Pregnancy Discrimination Act and FMLA alleging constructive discharge after returning to work from birth of her child
- ▶ Supervisor told Hicks multiple times she would get 6 weeks FMLA, not 12
- ▶ Evaluated as exceeding expectations before leave, written up on return
- ▶ Overheard coworker saying "that b****" and claiming she would find a way to write her up. Another officer overheard Richardson say "that stupid c*** thinks she gets 12 weeks."

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Hicks, 870 F.3d 1253 (11th Cir. 2017)

- ▶ Hicks involuntarily transferred from narcotics to patrol 8 days after return and lost her vehicle, weekends off, received pay cut, and would be required to wear ballistics vest all day.
- ▶ Hicks requested desk job with a doctor's letter indicating the vest could lead to infection and inability to breastfeed.
- ▶ Chief did not believe breastfeeding warranted alternative duty and told her to skip the vest or wear a larger vest that did not offer protection. Hicks resigned.
- ▶ Hicks showed others similarly situated were given alternative duty and won—breastfeeding is covered activity.

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TITLE VII

RELIGION

- ▶ Religion is defined as "all aspects of religious observance and practice, as well as belief." Religion includes any sincerely held religious belief, whether or not "mainstream."
- ▶ Unlike other protected classifications under Title VII, religion carries with it a duty to accommodate.
- ▶ Unless undue hardship: any act that requires an employer to bear greater than a de minimis cost in accommodating an employee's beliefs.

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TITLE VII



REMEDIES

- Back pay
- Front pay
- Restored benefits
- Reinstatement
- Attorney's fees and costs
- Equitable relief
- Punitive damages (NOT for Public ERs)
- Jury Trial

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TITLE VII



STATUTE OF LIMITATIONS

- Employee must file charge with EEOC within 300 days
- Employee must obtain a right-to-sue
- Employee has 90 days to file suit after receiving notice

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LILLY LEDBETTER FAIR PAY ACT OF 2009



Signed by President Obama in January 2009.



Holds that actionable discrimination may occur each time an employee is affected by a discriminatory compensation decision

i.e., each time wages, benefits or compensation is paid.
300 days from the date of the paycheck to file a charge.

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EQUAL PAY ACT OF 1963

- Requires only that workers doing "equal work" be paid "equal wages."
- Applies ONLY to GENDER
- No employer shall discriminate:
 - On the basis of sex;
 - Within an establishment;
 - For work performed under similar working conditions; and
 - That requires equal skill, effort and responsibility.

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EQUAL PAY ACT OF 1963

EXCEPTIONS

Unequal pay is allowed when the unequal pay has been set pursuant to:

- A seniority system;
- A merit system;
- A system which measures earning by quantity or quality;
- Any other differential based on a factor other than sex.

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EQUAL PAY ACT OF 1963

Who can be held liable?

- Any employer that permits an employee to work, OR
- Any person acting directly or indirectly in the interest of such an employer.

Managers may be held individually liable.

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EQUAL PAY ACT OF 1963

REMEDIES

 Difference in compensation

 Liquidated damages Allows victim to recover an additional amount equal to the amount of the loss

 Attorneys' fees and costs

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EQUAL PAY ACT

STATUTE OF LIMITATIONS



Actions must be commenced within **2 Years** after cause of action accrued, or



For willful violations, victims have **3 Years** to file suit.



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AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

Only applies to AGE

Protected class = 40 years old or older

Job actions prohibited are the exact same as Title VII, including harassment



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ADEA

ADEA does NOT:

- Permit a person to establish discrimination by showing that age was a motivating factor. The ADEA requires the person to show her age was the "but-for" cause of an adverse decision.
- Apply to job applicants attempting to bring a claim of disparate impact.
 - Even though the 11th and 7th Circuits have held the foregoing, not all courts agree.
 - See e.g., Northern District of California & Southern District of Texas





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ADEA
EXCEPTIONS

BFOQ, reasonably necessary to the normal operation of the business;

Differentiation is based on a reasonable factor other than age;

The terms of a bona fide seniority system apply; OR

A disparate impact arises from application of equal terms of a bona fide employee benefit plan to employees of different ages.

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ADEA

Who can Be Held Liable?

- State or local gov't
- Individual managers generally NOT liable

Remedies

- Same as Title VII
- EXCEPT if the employer's violation is willful, liquidated damages may be awarded in the amount of lost compensation

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ADEA
STATUTE OF LIMTIATIONS



Like Title VII, must file a charge within 300 days with EEOC;



BUT, unlike Title VII, no need to wait for receipt of a right-to-sue letter. May file suit 60 days after a charge has been filed.

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Babb v. Wilkie, Sec’y of Veterans Affairs, 140 S.Ct. 1168 (2020)

- ▶ A clinical pharmacist, employed at a VA hospital, brought Title VII and ADEA claims.
- ▶ The pharmacist contended that the ADEA’s normal “but-for” causation standard was inappropriate under the federal-sector provision of the ADEA.
- ▶ What is the appropriate causation standard under the ADEA’s federal-sector provision?

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Babb v. Wilkie, Sec’y of Veterans Affairs, 140 S.Ct. 1168 (2020)

- ▶ Justice Alito, writing for the majority, held that the plain meaning of the federal-sector provision of the ADEA demanded that personnel actions be untainted by any consideration of age and that age need not be a “but-for” cause of an employment decision for a violation of the ADEA.
- ▶ The statute’s syntax only requires that age be a factor in an employment decision for there to be a violation.
- ▶ But, the “but-for” causation standard is still important in determining the appropriate remedy.
- ▶ To obtain reinstatement, damages, or other relief related to the result of an employment decision, a plaintiff must still satisfy the “but-for” causation standard.
- ▶ If age played a lesser role in the decision, then other remedies apply.

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Babb v. Wilkie, Sec’y of Veterans Affairs, 140 S.Ct. 1168 (2020)

- ▶ Justice Thomas dissented.
- ▶ He worried that Justice Alito’s “any consideration” standard has the potential to disrupt the settled expectations of federal employers and employees and open up the floodgates for age-discrimination claims.
- ▶ He also concluded that the language of the ADEA’s federal-sector provision was ambiguous.
- ▶ Because it was ambiguous, the ADEA’s default “but-for” causation standard should apply.

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ADA

Prohibits employers with 15 or more employees from discriminating against qualified individuals with disabilities or perceived disabilities.

NOTE: Title II of the ADA (public services) covers all employers regardless of size.

Same actions as prohibited by Title VII: hiring, firing, failure to promote, harassment...

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ADA

- ▶ An individual with a disability:
 - ▶ has an impairment that substantially limits a **major life activity**;
 - ▶ has a record of such an impairment; OR
 - ▶ is regarded as having such an impairment.
- ▶ "Qualified" individual means:
 - ▶ A person who, with or without reasonable accommodation, can perform the essential functions of the job in question.

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ADA

ACCOMMODATIONS

- The burden of identifying an accommodation rests with the **EE**.
- EE also carries ultimate burden of persuasion that accommodation is reasonable.
- **ER** has burden to show that accommodation would cause "undue hardship."

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ADA

Reasonable Accommodation **may** include:

- “making existing facilities used by employees readily accessible to and usable by individuals with disabilities;” and
- “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.”

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ADA

Courts have held reasonable accommodation **does not necessarily** include:

- Job reassignment without competition.
 - “The ADA only requires an employer to allow a disabled person to compete equally with the rest of the world for a vacant position.”
- Telecommuting – Regular attendance generally qualifies as an essential job function.
- Extensive leave where substantial leave has already been granted.

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ADA

- ▶ On August 8, 2017, the EEOC and UPS settled an 8-year-long lawsuit for \$1.7 million.
- ▶ Allegation: UPS violated the ADA by maintaining an inflexible maximum leave policy that automatically terminated employees when they reached 12 months of leave.
- ▶ In addition to monetary and injunctive relief, the settlement also required UPS to implement a new ADA policy.
- ▶ August 8, 2017 EEOC Press Release:

“Having a multiple-month leave policy alone does not guarantee compliance with the ADA. Such a policy must also include the flexibility to work with employees with disabilities who may simply require a reasonable accommodation to return to work. UPS has now made changes which will allow more people to keep their jobs.”

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ADA



WHO CAN BE HELD LIABLE?

All employers with 15 or more employees
Title II--Discrimination in the administration of public services--all employers may be held liable



REMEDIES

Same as Title VII



STATUTE OF LIMITATIONS

Same as Title VII

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FLSA

Sets minimum wage and overtime for employees



Creates categories of employees exempt from overtime

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FLSA

EXEMPTIONS

- Effective January 1, 2020 –
- Qualifying salary level for exemption is currently not less than \$684 per week / \$35,568 per year.
- Highly compensated employee exemption threshold is raised to
- \$107,432.

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FLSA

SALARY BASED EXEMPTIONS (WHITE COLLAR)	NON-SALARY BASED EXEMPTIONS
1. Executive	1. Outside Sales
2. Administrative	2. Commissioned Sales
3. Professional	3. Motor Carrier Exemption
	4. Miscellaneous

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FLSA

Working Time

- 1. Waiting Time
- 2. Pre and Post Activities
- 3. On-call Time
- 4. Lunch Breaks
- 5. Sleeping Time
- 6. Travel Time
- 7. Meetings and Training



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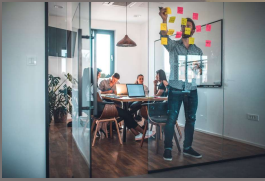
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FLSA

- Who Can be Sued?
- "Employer" includes any person who acts in the interest of an employer to any employees of the employer.
- THUS, like the Equal Pay Act, individual managers can be held liable.



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FLSA

Remedies:

- Unpaid wages
- Unpaid overtime
- Liquidated damages
- Attorney's fees and costs

Statute of Limitations:

- Like the Equal Pay Act; 2 years; Extended to 3 for willful



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FMLA

Entitles eligible employees for up to 12 work weeks of leave during any 12-month period for:

- Birth of a child
- Placement of a child with the employee for adoption or foster care;
- Employee's serious health condition; or
- Care of the employee's spouse, son, daughter, or parent, if the spouse, son, daughter, or parent has a serious health condition.

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FMLA

Who Can Be Sued?

- "Employer" includes any person who acts in the interest of an employer to any of the employees of such employer. (Same as FLSA).
- According to the 11th Cir., public official sued in his or her individual capacity is not an "employer" under the FMLA, thus there is no subject matter jurisdiction over the claim.

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FMLA



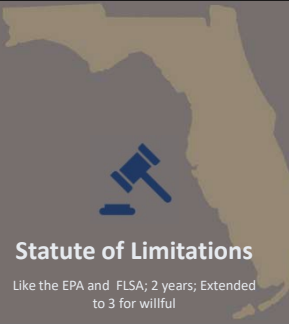
Remedies

Lost wages, salary, benefits or other compensation
Prejudgment interest
Liquidated damages equal to the sum of lost wages/salary/benefits ; and
Fees and costs



Statute of Limitations

Like the EPA and FLSA; 2 years; Extended to 3 for willful



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NAT'L DEF. AUTHORIZATION ACT

- Went into effect January 28, 2008, amends the FMLA to provide 2 new leave entitlements.
- Eligible EEs of covered employers to care for covered servicemembers (26 WORKWEEKS)
- Any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty.
- Short notice deployment; military events; childcare and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and agreed upon activities



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FLORIDA WHISTLEBLOWER ACT

- Covers EEs who disclose or threaten to disclose to a governmental agency a violation or suspected violation of misfeasance, malfeasance, waste, or neglect of duties. (Fla. Stat. § 112.3187)
- The complaint must be in writing. Does not protect those who disclose information known to be false.



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PUBLIC EMPLOYEE LABOR RELATIONS ACT

Protects rights of public employees to take concerted action in furtherance of mutual aims and protects the right to form, join and assist employee organizations.

PERC oversees disputes concerning the representation of public employees by labor unions and allegations of unfair labor practices.

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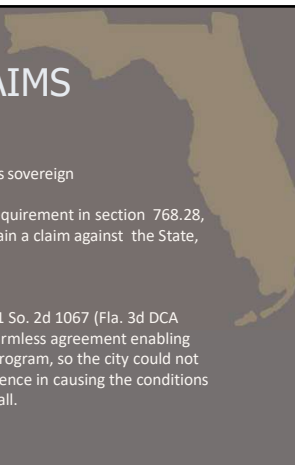


STATE TORT CLAIMS

- ▶ DEFAMATION
- ▶ NEGLIGENT RETENTION
- ▶ NEGLIGENT HIRING
- ▶ BATTERY

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STATE TORT CLAIMS

Sovereign Immunity

- ▶ § 768.28 F.S. - § 768.28, F.S. waives sovereign immunity in state tort actions.
- ▶ Strict compliance with the notice requirement in section 768.28, Florida Statute is required to maintain a claim against the State, its Agencies or Subdivisions.

Contractual Waiver/Hold Harmless

- ▶ *Gonzalez v. City of Coral Gables*, 871 So. 2d 1067 (Fla. 3d DCA 2004). The mother signed a hold harmless agreement enabling the daughter to participate in the program, so the city could not be held liable for any alleged negligence in causing the conditions that led to the daughter's slip and fall.

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SAMPLE QUESTIONS

Public Sector Liability

1. Beautiful City operates a Fire Rescue Explorer Program for children ages 14-16. In order to participate in the program, the child's parent is required to sign a hold harmless agreement in favor of the City for any negligence of the City. If a child is injured and the parent sues the City, how should the City be advised regarding the hold harmless agreement?

a. The agreement is void as against public policy.

b. The agreement is enforceable as an explorer program is a commonplace child-oriented community or school-supported activity for which a parent may waive their child's litigation rights.

c. The agreement is void as against sovereign immunity.

d. The agreement is enforceable as an explorer program is otherwise immune from these types of claims.

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SAMPLE QUESTIONS

Public Sector Liability

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Answer: B

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