



Legal and FLSA Updates June 13, 2017

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Legal and FLSA Update

PUBLIC RECORDS

New Requirements

FLSA

Changing Regulations

Medical Marijuana



EMPLOYMENT

Transgender

Sexual orientation

Sexual Harassment

FLSA

Now What?

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New Legislation about
awarding attorney fees
– Chapter 119.12



Court must determine:

1. Whether the agency unlawfully refused to permit a public record to be inspected or copied;
2. Whether the complainant provided **written notice** identifying the public records request to the agency's custodian of public records at least five business days before filing the civil action.

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Public Records Changes

Effective May 23, 2017

Agencies must:
Prominently place
Records Custodian
contact information:



In the administrative building where public records are routinely created, sent, and received

AND

On the agency website if the agency has one.



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Public Records Changes



Is the Request for an Improper Purpose?

- Improper purpose: makes a request to inspect or copy a public record or to participate in a civil action primarily to cause a violation of this chapter or for a frivolous purpose.

Does the requestor just want to catch an untrained employee?

What happens?

- If an improper purpose is found, the court **may not** assess an award of attorneys' fees and costs to the complainant.
- Instead, the court **must award** attorneys' fees and costs to the agency for its defense of a case filed with an improper purpose.

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Public Records Changes

- Records must be provided in a timely manner.
- The five business day safe harbor provision only applies if the agency prominently posts its custodian's contact information in the primary administrative building and on the agency's website.



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Medical Marijuana



Americans With Disabilities Act

- **Section 12114(a) of the ADA**
 - Does not cover applicants or employees currently engaging in the illegal use of drugs when the employer acts on the basis of such use.
- **The ADA defines the illegal use of drugs**
 - as using, possessing or distributing any drug which is unlawful under federal law, not state law.
- **Thus an employee's use of medical marijuana is not protected in the ADA.**
- **While the ADA does not protect current medical marijuana users, the underlying condition may still require independent accommodations in traditional manners that do not violate the law or cause an undue burden.**

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Medical Marijuana

Florida Civil Rights Act



Florida's Civil Rights Act (FCRA)

- makes it illegal to discriminate against applicants or employees with a disability.
- Legislature may provide some guidance on the matter in the language they create to implement the amendment,
- may be up to Florida courts to interpret the FCRA as federal courts have interpreted the ADA.

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Medical Marijuana

FCRA cont'd

- The current amendment states that employers do not have to accommodate onsite medical marijuana use but nothing is mentioned about use out of the workplace.
- In the past, Florida courts have construed the FCRA in conformity with the ADA and its predecessor the Rehabilitation Act.



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Medical Marijuana

Workers Compensation

Employers:

- MAY require a drug test when an employee is in an accident at work. If the employee tests positive for an illegal substance, the decision of whether to pay benefits will be impacted. Because marijuana is still illegal under federal law, courts in other states have upheld terminations when the worker tested positive for marijuana.
- Moreover, if an employee receives an injury that may otherwise qualify for medical marijuana, nothing in the Amendment 2 requires a health insurance provider to purchase medical marijuana for the employee for treatment. See § 29, Article X(7).



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Medical Marijuana



FMLA

- Employees requesting leave under the Family and Medical Leave Act (FMLA) for medical reasons are required to submit forms from their doctor regarding the condition giving rise to the need for the leave and the expected duration of the leave.
- Typically there would not be a need to know what medication an employee is taking when an employee returns to work. However, employers should have policies that require all employees to report to their supervisors when they are taking a medication that may impair their ability to perform the essential functions of their job duties.
- If there is a reasonable cause to suspect impairment employees can be tested for drugs. Moreover, in safety sensitive jobs such as truck and bus drivers employers are allowed to test employees randomly for illegal drug use.



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EMPLOYMENT LAW

**Transgender
Sexual orientation
Sexual Harassment
Retaliation**



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TRANSGENDER



Sex discrimination?

- **GLENN v. BRUMBY, 663 F.3d 1312 11th Cir. 2011**
 - discrimination against a transgender individual because of gender-nonconformity was sex discrimination. (applying gender-nonconformity SEX discrimination in a 42 U.S.C. § 1983 action).
 - “[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype,”
 - because those protections apply to everyone, a transgender individual could not be excluded. A gender non-conformity claim is not “just another way to claim discrimination based on sexual orientation but instead, constitutes a separate, distinct avenue for relief under Title VII.

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TRANSGENDER Disability ADA?



- *Blatt v. Cabela's Retail Inc.*, (Case No. 5:14-cv-05822 E.D. PA May 18, 2017) the judge denied a motion to dismiss and held that gender dysphoria *could be* an ADA protected condition, despite the exclusion in Section 12211.
- Court used a narrow interpretation of the ADA to allow plaintiff to state a claim because she alleged that her gender dysphoria substantially limited her ability to interact with others, reproduce and function socially

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ADA cont'd

- Individuals who have gender dysphoria do not necessarily see themselves as disabled;
- Section 12211 of the ADA contains a number of exclusions, including homosexuality and bisexuality; they may not be impairments.
- Also excludes “transvestism, *transsexualism*, pedophilia, exhibitionism, voyeurism, *gender identity disorders not resulting from physical impairments*, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs.” (Emphasis added.)

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Sexual Orientation

- ***EVANS v. GEORGIA REG'L HOSP.*, 850 F.3d 1248 (11th Cir. 2017)**
 - Title VII does not prohibit discrimination on the basis of sexual orientation
 - With Evans, the Eleventh Circuit joined every other federal appeals court that has ruled on the issue – including the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth, and D.C. Circuits – in holding that Title VII does not protect individuals against discrimination based on sexual orientation

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Second Circuit followed suit holding that they were bound to hold that sexual orientation is not covered by Title VII.

But the **Seventh Circuit** said in an *en banc* opinion:

“Title VII of the Civil Rights Act of 1964 **does** prohibit discrimination on the basis of sexual orientation”.

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Since then:

- Second circuit will now hear a case *en banc*

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FMLA

Clarification of when retaliation begins for FMLA retaliation:

Jones v. Gulf Coast Health Care of Delaware, LLC, 2017 WL 1396165 (11th Cir, Apr. 19, 2017)

RETALIATION

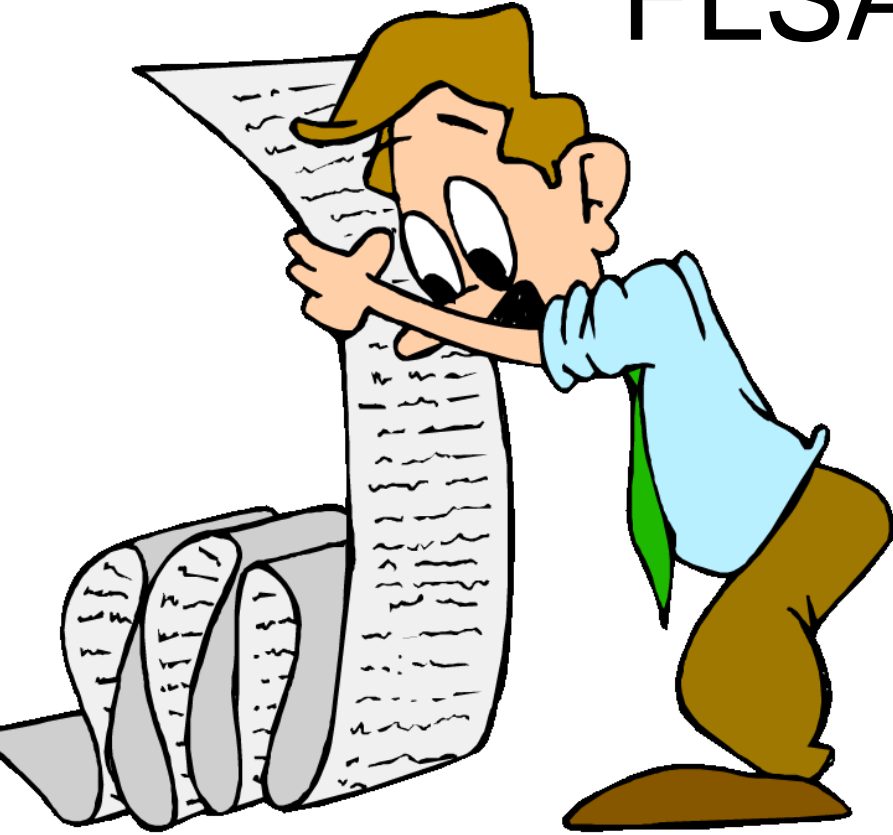
Now follows federal law “because of “ standard

Palm Beach County School

Board v. Wright, 2017 WL 1278072 (Fla 4th DCA April 5, 2017)

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FLSA UPDATES



**New regulations: final brief
to be filed by June 30, 2017
(3rd extension);**

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FLSA UPDATES

June 7, 2017

Rollback of 2015 Informal
DOL Guidance on
misclassifications and
independent contractors.



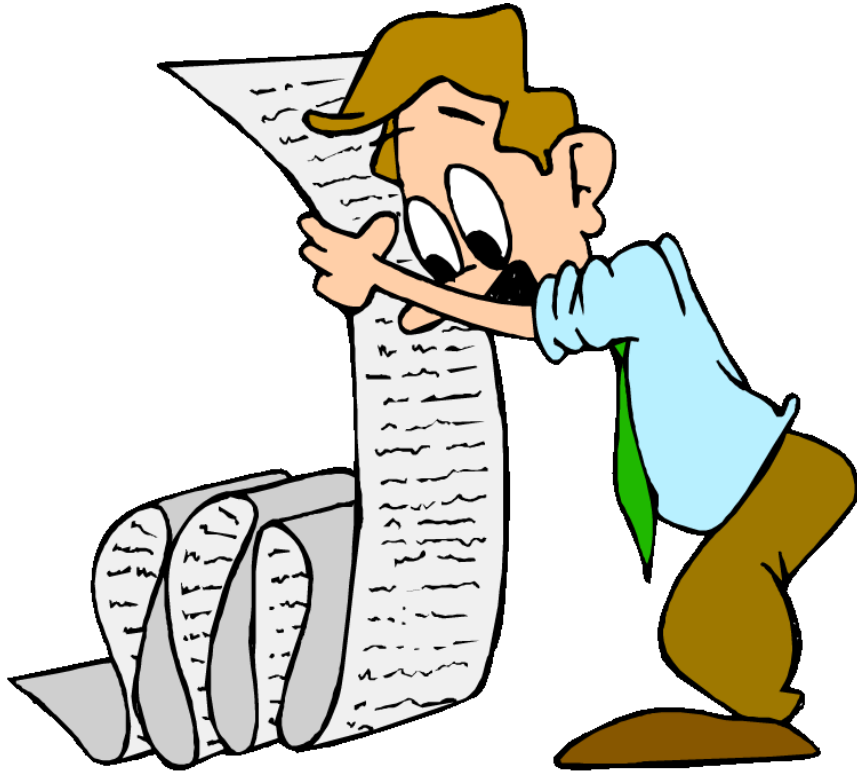
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June 7, 2017

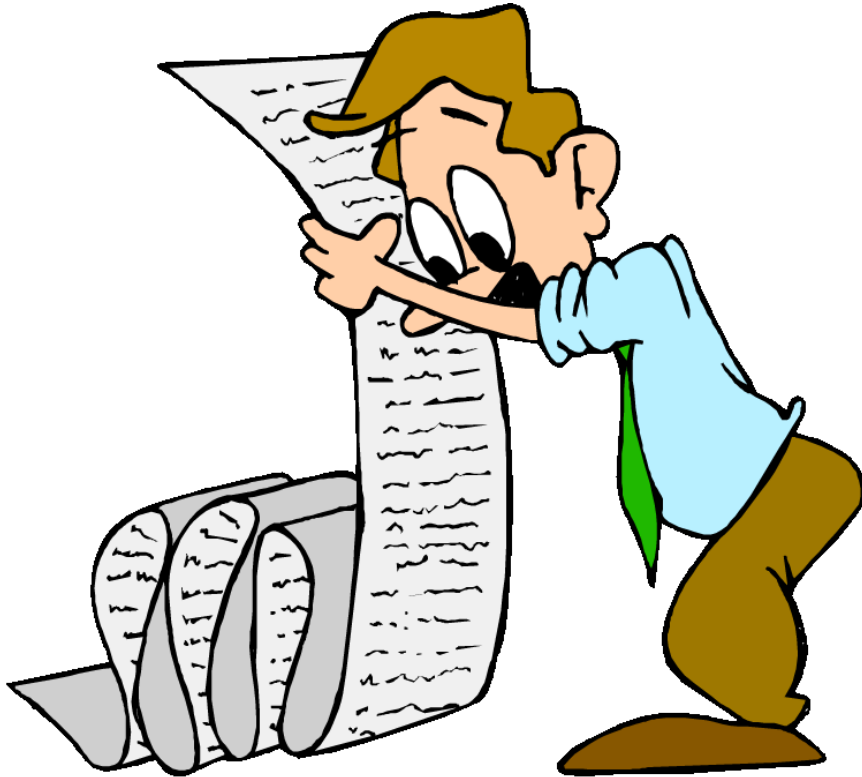
Rollback of 2015 Informal
DOL Guidance on

- misclassifications and independent contractors
- Joint employer liability.



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Reminders and miscellaneous

1. Consistency
2. Metrics
3. Measuring performance
4. Early intervention
5. Protect your culture

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Disclaimer

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Thank you!

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