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PROTECTED ACTIVITY

Whistleblower who reports misconduct as part of his job is protected

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

A state court judge in Miami dismissed a whistleblower claim filed by an independent auditor general (IAG) for the city of Miami, ruling that Florida's public-sector whistleblower law doesn't apply to employees whose job requires them to report misconduct and corruption in city government. The IAG appealed the dismissal of his case, and on appeal, the 3rd District Court of Appeals (DCA) found that the whistleblower law does apply to employees like him.

Background on whistleblower law

Florida has two whistleblower laws with different requirements: a private-sector law and a public-sector law. Florida's public-sector whistleblower law was passed to prevent government agencies and their independent contractors from taking retaliatory action against an employee who:

- Reports violations of the law by a public employer (or its independent contractor) that create a danger to the public's health, safety, or welfare; or
- Discloses information about the improper use of a governmental office, a waste of funds, or some other abuse or neglect of duty by a government agency, public officer, or public employee.

The law provides, in part, "This section protects employees and persons who disclose information on their own initiative in a written and signed complaint." The law protects five different categories of employees:

(1) Those who are asked to participate in an investigation, a hearing, or some other inquiry conducted by any agency or federal government entity;

(2) Those who refuse to participate in any adverse action prohibited by the whistleblower law;

(3) Those who initiate a complaint through the whistleblower hotline or the hotline of the Medicaid Fraud Control Unit of the Florida Department of Legal Affairs;

(4) Employees who file any written complaint with their supervisory officials; and

(5) Employees who submit a complaint to the chief inspector general in the Executive Office of the Governor, the employee designated as agency inspector general, or the Florida Commission on Human Relations.

Facts of the recent case

Victor Igwe was hired under a contract to serve as the IAG for the city of

AGENCY ACTION

OSHA issues new guidance on approving whistleblower settlements. The Occupational Safety and Health Administration (OSHA) announced in September 2016 that it has published new guidelines for approving settlements between employers and employees in whistleblower cases. The guidelines make clear that OSHA won't approve a whistleblower settlement agreement that contains provisions that may discourage whistleblowing, such as provisions that require employees to waive the right to receive a monetary award from a government-administered whistleblower award for providing a government agency with information about violations of the law. Also, OSHA won't approve agreements that require the employee to advise the employer before voluntarily communicating with the government or to affirm that the employee isn't a whistleblower.

DOL signs misclassification agreements with two more states. The U.S. Department of Labor (DOL) has announced it has signed agreements with Nebraska and North Carolina as part of its effort to fight misclassification of workers as independent contractors or other nonemployee statuses. The DOL and the states will provide outreach to employers, employees, and other stakeholders; share resources; and enhance enforcement by conducting coordinated investigations and sharing information consistent with applicable law. The latest agreements mean the DOL's Wage and Hour Division (WHD) is working with 34 states and the IRS to combat employee misclassification.

$9.3 million awarded to help employ people with disabilities. The DOL's Office of Disability Employment Policy (ODEP) announced in September a total of $9,286,909 in continued funding for organizations that develop models, provide technical assistance, and share best practices to improve employment opportunities for people with disabilities. ODEP promotes policies and coordinates with employers and all levels of government to increase workplace success for people with disabilities.

OSHA issues final rule on retaliation under Seaman's Protection Act. OSHA has published a final rule that establishes procedures and time frames for handling retaliation complaints under the Seaman's Protection Act. The Act protects seamen from retaliation for engaging in certain protected activity, such as providing information to the government about violations of maritime safety laws or regulations. The final rule also establishes procedures and time frames for hearings before DOL administrative law judges, review of those decisions by the DOL Administrative Review Board, and judicial review of final decisions. ✤

Miami. As part of his job, Igwe disclosed to the city commission and the mayor several instances of alleged misconduct between 2009 and 2011, including a report that the city had violated its financial integrity principles by engaging in improper interfund borrowing and a report that the city had improperly transferred restricted revenue into its general fund. He also issued a report to the city commission and the city's audit advisory committee in which he disclosed that the city attorney had overpaid herself.

In addition to those reports, Igwe was subpoenaed by the Securities and Exchange Commission (SEC) and the FBI, which were investigating the city's conduct. He complied with the SEC's subpoena and testified during its investigation. When the city decided to not renew his contract, he sued, claiming the city had retaliated against him by declining to retain him as IAG based on his adverse written reports and his cooperation with the SEC's investigation.

The city argued to the trial court in Miami that the words "on their own initiative" in the whistleblower law mean that any disclosures about wrongdoing must be *voluntarily* offered, and disclosures made while performing the duties of your job aren't voluntary. The city contended that Igwe's disclosures weren't protected by the law because he was required to make such disclosures in the course of doing his job as IAG. Surprisingly, there are cases outside Florida that have followed this interpretation of the law. The trial judge bought the city's argument and dismissed Igwe's case.

The trial judge found that Igwe's disclosures weren't voluntary because his reports of misconduct included "things that the job obligated him to report," and his cooperation with outside agencies like the SEC and the FBI was a part of his job duties. Igwe appealed the court's decision, and in October 2016, a panel of three judges from the 3rd DCA disagreed with the city's interpretation of the law and reversed the lower court's decision.

Appeals court's reasoning

In reaching its decision, the appeals court first noted that the federal court decisions the trial judge relied on have been overruled by changes in the federal whistleblower law. After a federal court found that the federal law didn't apply if the disclosure was part of the employee's job, Congress changed the law to state that an employee isn't excluded from whistleblower protection simply because he made a disclosure about wrongdoing during the normal course of his duties. Thus, the appeals court found the trial judge erred in relying on a case that had been neutralized by Congress.

Reviewing the reasoning of the lower court, the 3rd DCA found that Igwe's disclosures to the city commission were covered because he fit within the fourth category of employees covered by Florida's public-sector whistleblower law. The fourth category covers "employees who file any written complaint to their supervisory officials." Further, his disclosures to the SEC were covered under the first category: participation in an investigation, a hearing, or some other inquiry conducted by any agency or federal government entity.

The appeals court didn't buy the city's reasoning that disclosures made by an employee performing his job duties aren't voluntary and that Igwe's disclosures weren't protected because he was required to make them to do his job as IAG. Instead, the appeals court found that excluding someone from the protection of the law because reporting misconduct is part of his job responsibilities is inconsistent with the law's purpose. The law is intended to prevent employers from taking retaliatory action against "any person" who discloses improper conduct by a governmental agency, a public officer, or a public employee. The court accepted the common and normal meaning of "any person."

The appeals court also reasoned that laws like the whistleblower law must be "liberally construed in favor of granting access to protection from retaliatory actions." The court rejected a narrow reading of the law and concluded that employees whose job it is to report on waste and corruption in government are protected under Florida's public-sector whistleblower law. *Victor Igwe v. City of Miami,* Case No. 3D15-1307 (Fla. 3DCA, October 13, 2016).

ASK ANDY

Paying nonexempt employees by the day or the job

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

Q *Are employers required to pay nonexempt employees by the hour? My company employs people to set up meeting facilities for large conferences, and I would like to pay them by the job so they have an incentive to work quickly. When I pay them by the hour, they tend to take their time, knowing that overtime is paid at 1½ times their hourly rate. Each job typically takes between six and nine hours, and I would like to pay them a set rate of $85 per job. Is that permissible?*

A Yes. Neither the Fair Labor Standards Act (FLSA) nor Florida law requires employers to pay nonexempt employees by the hour. You may pay nonexempt employees by the job or by the day. For example, you may choose to pay your conference setup staff $85 per job, and the cumulative day-rate payments for the workweek would represent straight-time compensation for all the hours they worked during the workweek. But there are a few important points to keep in mind.

You need to make sure that an employee is earning at least the minimum wage, which is currently $8.05 an hour in Florida and will increase to $8.10 on January 1, 2017. A day or job rate of $85 is sufficient to cover 10.56 hours of work at $8.05 per hour and 10.49 hours of work at $8.10 per hour.

If you decide to pay by the day or the job, you must pay an employee the full amount (in this example, $85) even if he finishes the job very quickly. So don't get upset if you have to pay the full $85 for a few hours of work. That's why many employers don't like paying by the day or the job and would rather pay by the hour. And you must still keep accurate records of hours worked.

Be aware that paying by the day or the job does *not* relieve you of your overtime obligations because you're still dealing with nonexempt employees. If an employee works more than 40 hours in a workweek, you must pay him overtime at a half-time rate in addition to the established day or job rate. To calculate the additional overtime due, you must divide the total compensation earned by the employee during the workweek (e.g., the daily or job rate multiplied by the number of days or jobs worked) by the total number of hours worked during the workweek. Then divide that number by two to arrive at the half-time rate, and multiply the half-time rate by the number of overtime hours worked during the workweek.

The day or job rate covers compensation for all straight time an employee worked, so that calculation establishes the additional half time he is owed. (The "time" plus the "half time" equals "time and a half.") The calculation will differ if the employee receives compensation other than the daily or job rate, such as commissions or incentive payments.

If you decide to establish a day- or job-rate compensation plan for your nonexempt employees, it's advisable to put the plan in writing and include an example that clearly describes how overtime will be calculated. Consult with your employment law attorney when you draft the document.

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

Bottom line

This decision broadens the whistleblower protections for employees who work for public entities. Because employees who serve as watchdogs to prevent waste and unethical actions are now clearly covered by the whistleblower law, public-sector employers will need documented performance reasons for disciplining and terminating them.

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

COMPENSATION

Florida's minimum wage will rise in 2017

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

Florida's minimum wage will be going up on January 1, 2017. The current hourly minimum wage of $8.05 will increase five cents to $8.10. The calculation is based on the percentage increase in the federal Consumer Price Index for Urban Wage Earners and Clerical Workers in the South Region for the 12-month period prior to September 1, 2016.

Tipped employees. Restaurant and hotel employers that take a tip credit may still take a credit of up to $3.02 per hour against the new minimum wage. That means tipped employees must receive direct wages of at least $5.08 per hour starting January 1.

Federal and Florida minimum wage posters. In addition, on or before January 1, 2017, Florida employers will need to replace their current Florida minimum wage poster with a new poster reflecting the new minimum wage. That's in addition to the federal-law requirement to post a notice of the federal minimum wage.

Florida's minimum wage poster may be downloaded in English, Spanish, and Creole from the Florida Department of Economic Opportunity's website at www.floridajobs.org. The federal poster can be downloaded from the U.S. Department of Labor's (DOL) website at www.dol.gov/whd/regs/compliance/posters/flsa.htm. (Note that the DOL published a new federal minimum wage poster that was effective August 1, 2016. Employers should have already posted it.) You can also satisfy your federal and Florida posting requirements by purchasing an "all in one poster," which is commercially available from various companies.

Lisa Berg is an employment lawyer and shareholder in the Miami office of Stearns Weaver Miller. You may reach her at lberg@stearnsweaver.com or 305-789-3543. ✤

AGE DISCRIMINATION

11th Circuit: Nonemployees can't bring disparate impact claims under the ADEA

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

The U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers) recently held that disparate impact claims cannot be filed by job applicants, or anyone else who is not an employee, under the Age Discrimination in Employment Act (ADEA). The ADEA is a federal law prohibiting discrimination against employees who are older than 40. The decision, which has implications for employers throughout the 11th Circuit, narrows the avenue of attack for certain individuals who allege they were discriminated against on the basis of their age.

Background of the case

Richard Villarreal was 49 years old when he applied for a territory manager job with R.J. Reynolds Corporation. R.J. Reynolds employed another company, Pinstripe, to screen applications under guidelines provided by R.J. Reynolds. At the time, the guidelines stated that the target candidate for the territory manager position was someone only a few years out of college who adjusted easily to changes and hadn't been in sales for a number of years.

In accordance with those parameters, Pinstripe screened out Villarreal's application, and he didn't hear back from R.J. Reynolds. After being contacted by a lawyer who indicated that he might have an age discrimination claim, Villarreal filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). He subsequently filed a lawsuit against R.J. Reynolds and Pinstripe alleging disparate impact under the ADEA. In particular, he argued that Pinstripe's use of the parameters set by R.J. Reynolds to screen job applicants had an adverse impact on applicants over 40, even if the use or institution of the parameters wasn't motivated by age-based animus.

Under the ADEA, an employer may not treat substantially younger employees better than employees who are older than 40. Under some employment discrimination statutes, employers can be held liable for maintaining a policy that appears neutral on its face but nevertheless adversely affects individuals who are members of a protected class (e.g., based on their race, sex, or color).

The trial court dismissed Villarreal's lawsuit, holding that the ADEA doesn't permit disparate impact claims for job applicants. The 11th Circuit ultimately upheld that ruling. The court of appeals examined the

language of the ADEA and found that the law does permit disparate impact claims, but it doesn't permit job applicants to file them, only employees. *Villarreal v. R.J. Reynolds Tobacco Co., Pinstripe, Inc.*, 2016 WL 5800001.

Employer takeaway

This ruling is a positive development for employers operating in states governed by the 11th Circuit. The case is a good reminder that liability under labor and employment laws, and particularly antidiscrimination laws, can occur even when an employer has no intention of engaging in discrimination.

Jeffrey D. Slanker is an attorney at Sniffen and Spellman, P.A., in Tallahassee. He represents employers and management in labor and employment matters. He can be reached at 850-205-1996 or jslanker@sniffenlaw.com. ✤

WAGE AND HOUR LAW

Time to prepare for new EEO-1 reporting requirements

It's official: The change to employer reporting requirements the Equal Employment Opportunity Commission (EEOC) previously announced is now final, meaning many private employers and federal contractors will have to include summary compensation and hours-worked data in their annual Employer Information Report (EEO-1).

The change also affects the reporting deadline, which is being moved from September 30 to March 31. The next EEO-1 report will be due March 31, 2018. The date change allows for the EEO-1 cycle to align with the W-2 reporting cycle since covered employers get the compensation and hours-worked data from employee W-2 data.

The change is part of an effort to address wage gaps between male and female workers. In its September 29 announcement of approval of the new EEO-1 report, the EEOC said requiring the additional data will improve investigations of possible pay discrimination.

Who is covered

The EEO-1 is coordinated by the EEOC and the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP), with the OFCCP collecting data from federal contractors and subcontractors.

Private employers with at least 100 employees, including federal contractors and subcontractors with 100 or more employees, will report summary pay data. They are not to report individual pay or any personally identifiable information.

The EEOC reports that federal contractors and subcontractors with 50 to 99 employees will not report summary pay data but will continue to report employees by job category as well as by sex, ethnicity, and race as they do now. Private employers with 99 or fewer employees and federal contractors and subcontractors with 49 or fewer employees won't be required to complete the EEO-1 report, as is current practice.

Employer concerns

Employers have spoken out against the new requirements, claiming they will be burdensome and costly and that the newly required information may lead to misperceptions. Here are some of their concerns:

- Taking information from W-2 forms likely will lead to misperceptions because the information won't take into account several factors related to pay. The variables associated with take-home pay mean the information on W-2 forms isn't standard.
- The new form will leave employers open to additional liability risks since the new information given to the EEOC may be taken out of context because an employee's annual salary is affected by more than just hours worked. The W-2 data don't reflect those other factors, such as seniority and education.
- Confidentiality also is a concern even though employers must report only aggregate data. Many employers will object to competitors getting their pay information from EEO-1 filings.

What to do

The law firm of Fortney & Scott, LLC, in Washington, D.C., has posted an alert explaining the new EEO-1 form. The firm, which edits *Federal Employment Law Insider,* has the following suggestions for employers:

- Assemble a team right away to assess the organization's ability to report the required data. The team should include representatives from legal, HR, compensation, timekeeping, payroll, and other affected areas.

WORKPLACE TRENDS

Research links after-hours e-mail to emotional exhaustion. A study presented in August 2016 links the practice of employees working on after-hours e-mail to emotional exhaustion that hinders work-family balance. The study, authored by researchers at Lehigh University, Virginia Tech, and Colorado State University, looked at the role of organizational expectations regarding off-hour e-mailing and found it negatively affects employees' emotional states, leading to burnout and diminished work-family balance, according to an article on the study from Lehigh University. The article says the study is the first to identify e-mail-related expectations as a job stressor along with already established factors such as high workload, interpersonal conflicts, physical environment, or time pressure. The researchers found it's not the amount of time spent on work e-mails but the expectation that drives the resulting sense of exhaustion.

Study shows positive potential to 401(k) participation. Data from the Employee Benefit Research Institute (EBRI) and the Investment Company Institute (ICI) show that the average 401(k) plan account balance of workers who participated consistently in one 401(k) plan increased significantly over the four-year period ending at year-end 2014. The study examined the accounts of about 8.8 million "consistent participants"—those who remained active in the same 401(k) plan for the four-year period. It found that average account balances increased during the period for consistent participants in all age categories. "Looking at average balances for all 401(k) accounts does not reflect the system's full potential for workers building their retirement resources," said Sarah Holden, ICI's senior director of retirement and investor research.

Study shows more workers open to leaving current employer. A survey from talent, retirement, and health solutions provider Aon Hewitt finds that 52 percent of employees are open to leaving their current employers for new opportunities. Of those, 44 percent are actively looking for new roles. "Encouraged by low unemployment rates and frustrated with lackluster wage increases, many U.S. workers are looking for new and better jobs," Ray Baumruk, employee research leader at Aon Hewitt, said. The Workforce Mindset study, which surveyed more than 2,000 U.S. employees, set out to explore the different characteristics that make an employee's experience unique and different. The top five workplace differentiators are (1) provides above-average pay, (2) provides above-average benefits, (3) is a fun place to work, (4) has a flexible work environment, and (5) is a strong fit with my values. ✤

- Review the payroll and HRIS systems to determine any changes required to collect the required data.
- If payroll is maintained on a separate system, consult with the company's IT representatives on any necessary updates.
- Employers using outside vendors to generate W-2 forms that don't maintain the information internally should review their contracts and determine how to import the W-2 data into the system used to prepare the new EEO-1 report.
- Decide whether to use the default entries of 40 hours (full-time) and 20 hours (part-time) for exempt employees or whether to provide exempt employees' actual hours.
- Ensure that reasonable steps are taken to protect the confidentiality of data once it's in the agencies' hands.

About the new report

The EEOC has provided a Q&A document as well as a fact sheet for small businesses explaining the new reporting requirements. In the documents, the EEOC explains that the 10 EEO-1 job categories have not changed. Those categories are:

1. Executive/senior level officials and managers;
2. First-level/midlevel officials and managers;
3. Professionals;
4. Technicians;
5. Sales workers;
6. Administrative support workers;
7. Craft workers;
8. Operatives;
9. Laborers and helpers; and
10. Service workers.

The new EEO-1 report requires employers to report the number of employees they have in each of 12 pay bands. The bands are:

1. $19,239 and under;
2. $19,240 through $24,439;
3. $24,440 through $30,679;
4. $30,680 through $38,999;
5. $39,000 through $49,919;
6. $49,920 through $62,919;
7. $62,920 through $80,079;
8. $80,080 through $101,919;
9. $101,920 through $128,959;
10. $128,960 through $163,799;
11. $163,800 through $207,999; and
12. $208,000 and over. ✤

SICK LEAVE

DOL finalizes paid sick leave rule for contractors

The U.S. Department of Labor (DOL) has issued final regulations requiring federal contractors to provide employees with up to seven paid sick days each year. The DOL says it expects the rule to provide sick leave to 1.15 million employees, and its reach may be even broader if employers attempt to alleviate their administrative burden by offering paid sick days to all employees, rather than exclusively to those working on government contracts.

Background

The regulations implement an Executive Order (EO 13706) that President Barack Obama issued last year. It requires that federal contractors and subcontractors provide employees with up to seven days (56 hours) of paid sick time per year, accrued at the rate of one hour for every 30 hours worked. The order affects contracts solicited (or entered into outside the solicitation process) after January 1, 2017.

President Obama directed the DOL to issue implementing regulations by September 30, 2016. In a 127-page notice appearing in that day's *Federal Register*, the DOL published the rules along with a discussion of comments received about its proposed rules issued earlier this year.

Coverage

The DOL said that one of the major things it did was define the exact type of contracts that bring an employer under the Executive Order's coverage and those that don't, such as grants.

The DOL also spelled out which employees are covered. According to the agency, the requirements are almost identical to the coverage of another Executive Order setting a minimum wage for contractors' employees. The only difference, it said, is that this new rule also covers employees who qualify for an exemption from the Fair Labor Standards Act's (FLSA) minimum wage and overtime provisions and certain contracts with the U.S. Postal Service (USPS).

The rule also details compliance requirements when a contractor is dealing with special circumstances, such as the existence of a collective bargaining agreement or a multiemployer plan.

Accrual requirements

The order allows workers to carry accrued leave over from one year to the next and requires that accruals be reinstated for employees rehired by a covered contractor within 12 months of a job separation. Employers do not, however, have to pay employees for unused sick time at the end of their employment. (But if they do, employees aren't entitled to any reinstated accruals if they are rehired.)

UNION ACTIVITY

Union applauds settlement of Arizona immigration lawsuit. The United Food and Commercial Workers International union (UFCW) is praising the settlement of a lawsuit challenging Arizona's S.B. 1070, which required Arizona police to determine the immigration status of people arrested or detained if there was reasonable suspicion athat they weren't in the United States legally. "This settlement reinforces the fact that law enforcement all across the United States must be blind to race or national origin," UFCW Secretary-Treasurer Esther Lopez said in September after the settlement was announced. A statement from the union said that the settlement of the lawsuit means the criminal provisions of S.B. 1070 have been gutted, and law enforcement in Arizona can't detain or arrest someone based on suspected immigration status alone.

Unions at odds over pipeline. A September 2016 court ruling on the Dakota Access Pipeline, an oil pipeline that is to run from North Dakota to Illinois, is attracting both supporters and opponents among labor unions. The International Brotherhood of Teamsters, the Laborers' International Union of North America, the International Union of Operating Engineers, and the Plumbers and Pipefitters Union have members working to build the pipeline. A September U.S. district court ruling allowed for continued construction of the pipeline, which is nearly half completed, according to a statement from the Teamsters. Another union organization, the Communications Workers of America Committee on Human Rights, opposes the pipeline project and supports the Standing Rock Sioux Tribe in South and North Dakota, which claims the pipeline endangers their community, land, and water supply.

Union, airport launch emergency response partnership. The Service Employees International Union-United Service Workers West (SEIU-USWW) has announced a partnership with Los Angeles International Airport (LAX) to train frontline airport service workers to respond to emergency situations. The union, Los Angeles World Airports, which oversees LAX, and other partners will develop a training program for passenger service workers in areas such as observation skills and maintaining situational awareness, stakeholder communications, emergency/critical incident response and evacuation, and differentiating among emergency personnel by identifying among different types of "first responders." The new training program is in line with an emergency response management method the Federal Emergency Management Agency (FEMA) advocates called the "Whole Community Approach," according to the SEIU-USWW statement. ✤

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Of particular note is the rule's cap on sick-time rollovers. The Executive Order requires that employers provide workers with one hour of paid sick time for every 30 hours worked, up to 56 hours each year, with the ability to roll hours over. In its final rule, the DOL says that employers only have to permit workers to roll over 56 hours at the end of each year.

The DOL also made clear that the new rule doesn't create any new timekeeping requirements for employers. If a contractor isn't already required to track an employee's hours under another law (such as for an exempt employee under the FLSA), employers may estimate a worker's hours. Employers do, however, have to inform employees in writing of the amount of leave they have available at the end of each pay period or month, whichever interval is shorter.

And if an employer prefers not to track accruals at all, it may instead award an employee 56 hours of paid sick leave at the beginning of each accrual year.

Leave use

The Executive Order says that employees must be allowed to use the leave for their own illness, to care for a family member, or in the event of domestic violence, sexual assault, or stalking.

Employees must give seven days' notice if the need for leave is foreseeable, and approval of the leave request can't be contingent on an employee finding someone to cover his shift. Employees must be able to request paid time off (PTO) verbally or in writing, but contractors must put any denials in writing.

The Executive Order permits an employee to use accrued leave in increments as small as one hour, except when her work makes it physically impossible to leave or return during a shift. And the time off can run concurrently with Family and Medical Leave Act (FMLA) leave or other sick leaves required by state laws. Additionally, employers may require certification if the leave lasts three consecutive days, with a few limitations. ✤

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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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