Florida Association of Special Districts

Labor law and Workforce Changes

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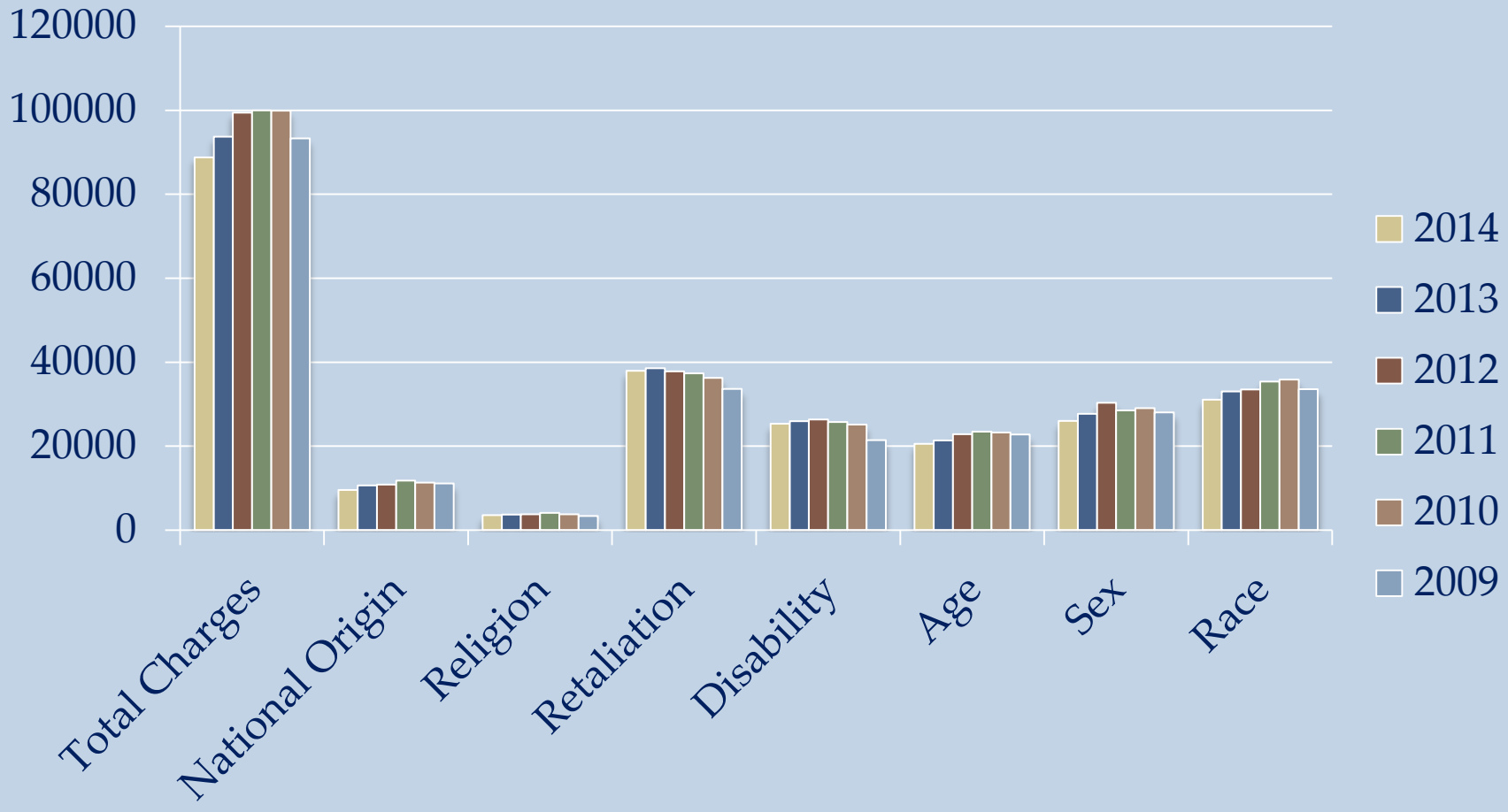
Learning Objectives

- Review Litigation Trends
- Review EEOC Developments
- Discuss FMLA Developments
- Discuss FLSA Proposed Regulations
- Review State Legislative Changes
- Discuss Email and Social Media Issues

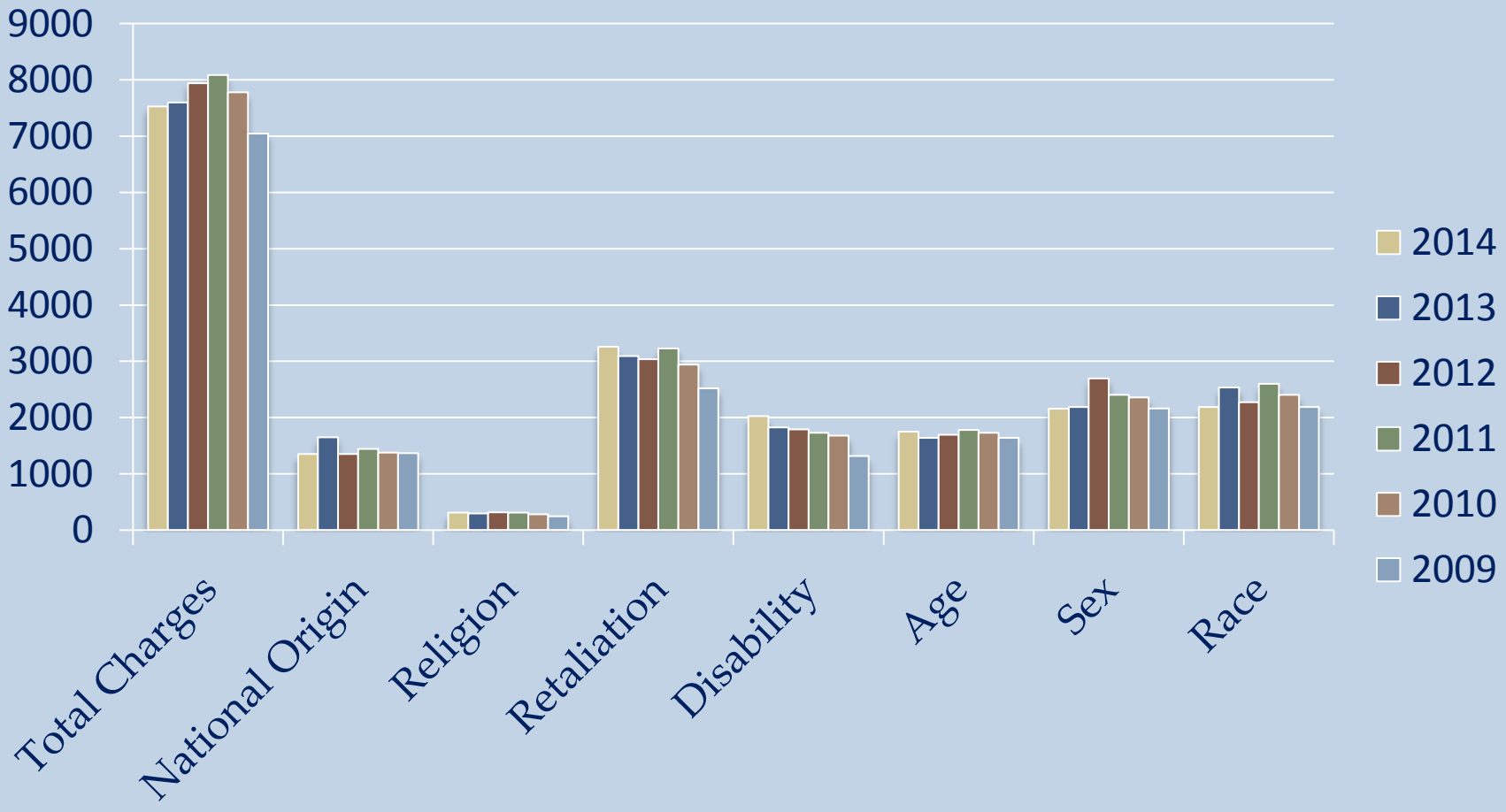
Litigation Trends



EEOC Trends (U.S. Total)

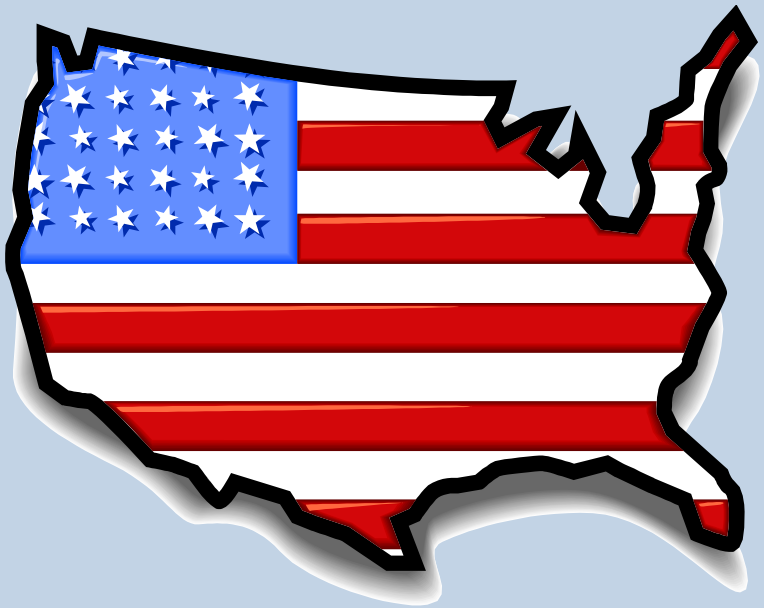


EEOC Trends (Florida Only)

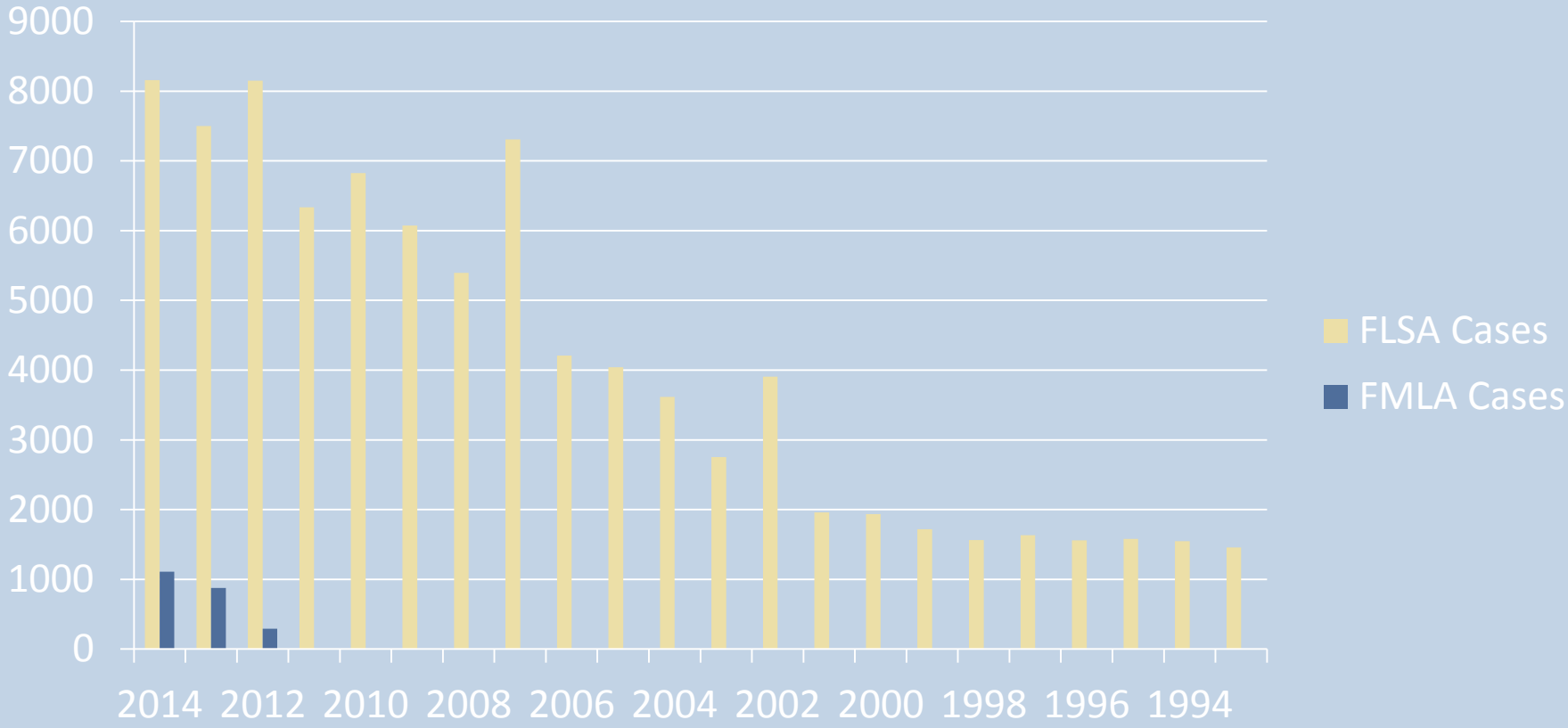


EEOC Trends Quiz

- Which state had the most EEOC Charges filed in 2014?
  - California
  - Florida
  - Texas
  - Georgia



FLSA and FMLA Trends



EEOC Developments



Coverage of LGBT-Related Discrimination

- EEOC's Strategic Enforcement Plan adopted December 2012 to include "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply" as a top enforcement priority
- EEOC filed two suits in September of 2014



Recent ADA/Disability-Related Cases

- Aloof/abrasive police sergeant continued to have interpersonal problems after performance review noting that he was arrogant and “inspired fear” in his subordinates.
- Subordinate filed grievance against him and internal investigation ensued, with sergeant on suspension.
- While on suspension, clinical psychologist concluded sergeant suffered from adult ADHD.
- Sergeant then requested reasonable accommodation to reinstate him to his position on active duty.



Recent ADA/Disability-Related Cases

- Investigation concluded he was "tyrannical, unapproachable, non-communicative, belittling, demeaning, threatening, intimidating, arrogant and vindictive."
- City terminated sergeant because he did not possess adequate emotional intelligence to successfully work in team environment, much less lead a team of police officers.
- Sergeant filed suit under ADA alleging he was terminated because of his disability.
- Jury awarded him $75,000 in damages. Judge awarded additional $232,143 in back pay, $330,807 in front pay and $139,712 in attorneys' fees.



Recent ADA/Disability-Related Cases

- City appealed to 9th Circuit.
- Appeals court REVERSED verdict against City.
- Court stated "[m]ere trouble getting along with co-workers is not sufficient to show a substantial limitation." To prove substantial limitation in ability to interact with others, employee must show his "relations with others were characterized on regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal or failure to communicate when necessary. Court referred to cases where plaintiffs were "essentially homebound", "barely functional" and had a "total inability to communicate at times".



Recent ADA/Disability-Related Cases



- 10th Circuit Court of Appeal held that university's inflexible 6-month leave policy was lawful under the Rehabilitation Act.
- University did not provide employee undergoing cancer treatment with more than 6 months leave, even after employee's request for reasonable accommodation.
- University arranged for her to receive LTD benefits, which employee claimed terminated her employment.

Recent ADA/Disability-Related Cases



- Court held that even though good teacher, employee incapable of working in any capacity for more than 6 months is not capable of performing essential functions of job.
- EEOC has generally opposed inflexible leave caps and continues to do so.
- Other jurisdictions have struck down inflexible leave caps.
- 10th Circuit ruling does not automatically allow Florida employers to have an inflexible leave cap.

FMLA Developments



New FMLA Regulations

- DOL revised definition of “spouse” under FMLA
- Based upon *US v. Windsor* where US Supreme Court found Section 3 of DOMA unconstitutional
- New regulation moves from “state of residence” rule to one based on where marriage was entered into (“place of celebration”)
- Expressly references inclusion of same-sex marriages (including foreign marriages)



New FMLA Regulations

- DOL definition of spouse for purposes of FMLA:
- Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one state. This definition includes an individual in a same-sex or common law marriage that either (1) was entered into in a State that recognizes such marriages or, (2) if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.



New FMLA Regulations

- Effective March 27, 2015
- provides eligible employees the opportunity to take FMLA leave to care for their lawfully wed same-sex spouse, regardless of where they live, when
  - caring for their same-sex spouse with a serious health condition,
  - taking qualifying exigency leave due to their same-sex spouse's covered military service, or
  - taking military caregiver leave for their same-sex spouse



New FMLA Regulations



- Includes husband or wife in a common law marriage as long as the common law marriage was validly entered into in a state that permits the formation of common law marriages
- an eligible employee in a legal same-sex or common law marriage can take FMLA leave to care for his or her stepchild regardless of whether the employee stands in loco parentis to the stepchild
- when an eligible employee's parent has a same-sex spouse, the employee would be able to take FMLA leave to care for his or her stepparent (the employee's parent's same-sex spouse), regardless of whether the stepparent ever stood in loco parentis to the employee

New FMLA Regulations



- Employers may require employees who take leave to care for a family member to provide reasonable documentation for purposes of confirming a family relationship. An employee may satisfy such a requirement either by providing documentation such as a marriage license or a court document, or by providing a simple statement asserting that the requisite family relationship exists. It is the employee's choice whether to provide a simple statement or another type of document. Employers may not use a request for confirmation of a family relationship in a manner that interferes with an employee's exercise or attempt to exercise his or her FMLA rights.

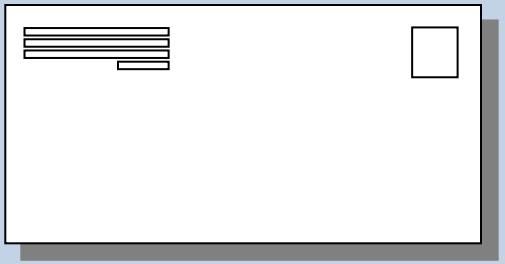
New FMLA Regulations



- Civil unions are not considered marriages under the FMLA.
- Employees in same-sex or opposite-sex civil unions are not guaranteed the right to take FMLA spousal leave
- Employees in same-sex or opposite-sex civil unions do not have protections under the Act, including protection from retaliation.

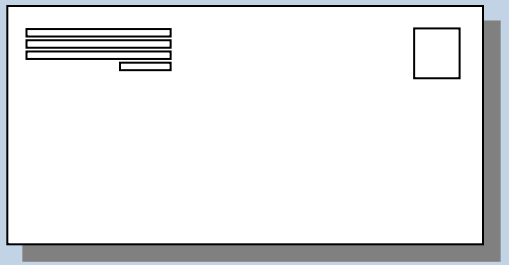
Lupyan v. Corinthian Colleges, Inc., 761 F.3d 314 (3rd Cir. 2014)

- Instructor suffered from depression and supervisor suggested she take a personal leave.
- She originally requested 17 days, but when her supervisor suggested she apply for STD, she scheduled appointment with physician and received the DOL Certification of Health Care Provider for a mental health condition.
- HR determined she was eligible for FMLA leave instead of personal leave.



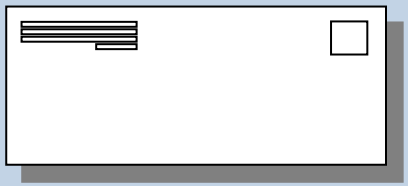
Lupyan v. Corinthian Colleges, Inc., 761 F.3d 314 (3rd Cir. 2014)

- On 12/19/2007, administration met with Lupyan and instructed her to initial the "Family Medical Leave" box on her request form. Administration changed return date to 4/1/2008 based on physician certification.
- Lupyan's FMLA rights were never discussed during this meeting (undisputed by parties).
- College mailed her letter advising the designation of FMLA later that day, explaining her rights under FMLA.



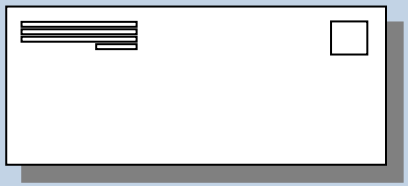
Lupyan v. Corinthian Colleges, Inc., 761 F.3d 314 (3rd Cir. 2014)

- Lupyan denies ever receiving the letter and denies having knowledge that she was on FMLA leave until she attempted to return to work.
- On 3/13/08, Lupyan advised she was cleared to return to work with certain restrictions. The Company advised she needed no restrictions. Shortly thereafter, she provided a full release to duty.
- On 4/9/08, company terminated her due to low student enrollment and because she did not return to work within the 12 weeks of FMLA.
- She sued for FMLA interference and retaliation.



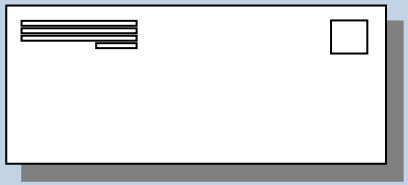
Lupyan v. Corinthian Colleges, Inc., 761 F.3d 314 (3rd Cir. 2014)

- Company moved for summary judgment, which included affidavits from company employees who testified the FMLA Letter was properly mailed to Lupyan.
- Trial court relied on evidentiary presumption that arises under the "mailbox rule" and found that Lupyan received the letter.
- Trial court ruled in favor of company.
- Appellate court held that whether Lupyan received letter was a fact issue precluding summary judgment—requiring case to go to trial.



Lupyan v. Corinthian Colleges, Inc., 761 F.3d 314 (3rd Cir. 2014)

- Practical Pointer:
  - Incur the cost of confirming receipt of FMLA correspondence by, for example, overnight delivery service, certified mail/return receipt requested, or courier.



FLSA Developments

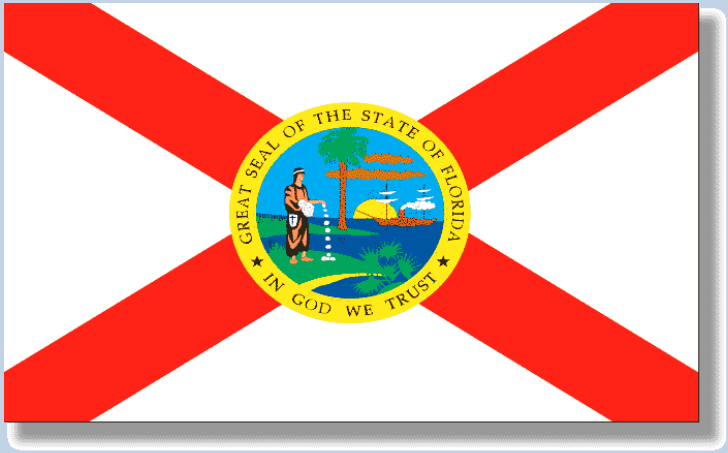


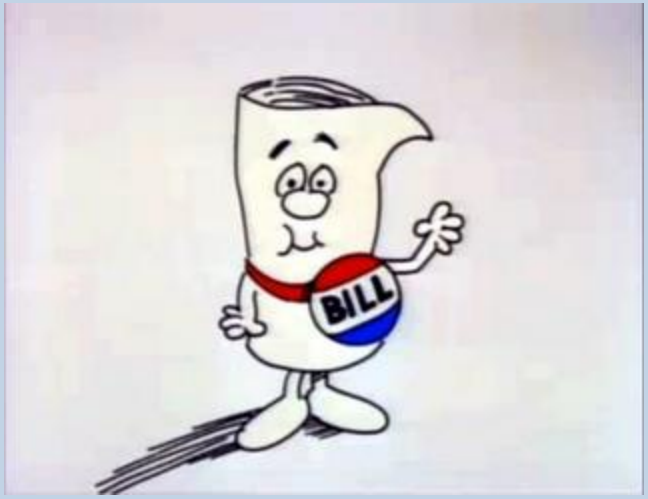
FLSA Proposed Regulations

- Fair Labor Standards Act – March 13, 2014 White House Memorandum/Fact Sheet
- "White-collar" regulations – define scope of exemptions;
- Directs DOL to propose revisions and to:
  - "[C]onsider how the regulations could be revised to update existing protections consistent with the intent of the Act;
  - address the changing nature of the workplace; and
  - simplify the regulations to make them easier for both workers and businesses to understand and apply.

FINAL REGULATIONS DUE TO BE ISSUED VERY SOON

State Legislation





State HR-Related Legislation

- Florida Information Protection Act of 2014, Fla. Stat. Section 501.171
  - Effective July 1, 2014
  - Requires entities (including governmental entities) to take “reasonable measures to protect and secure data in electronic form containing personal information”
  - Requires notice to individual whose information was accessed without “unreasonable delay”, but no later than 30 days after determination of breach
  - Requires notice to credit reporting agencies where more than 1,000 individuals impacted at single time
  - Requires notice to Fla. Dept. of Legal Affairs re: any breach impacting 500 or more individuals in the State – w/in 30 days



State HR-Related Legislation

- Florida Information Protection Act of 2014, Fla. Stat. Section 501.171
  - Civil penalties not to exceed $500,000 as follows:
    - In the amount of $1,000 for each day up to the first 30 days following violation and, thereafter, $50,000 for each subsequent 30-day period or portion thereof for up to 180 days.
    - If the violation continues for more than 180 days, in an amount not to exceed $500,000.
  - The civil penalties for failure to notify provided in this paragraph apply per breach and not per individual affected by the breach
  - No private cause of action.



State HR-Related Legislation

- HB 297/SB 892 – Safe Work Environment Act (anti-bullying); provides that abusive work environment is unlawful; prohibits retaliation; provides for liability for individual employees in certain circumstances; provides for private right of action (similar version was introduced in 2013).

DIED IN COMMITTEE



State HR-Related Legislation

- HB 33/SB 156: Florida Competitive Workforce Act
  - Amends Fla. Stat. to include sexual orientation and gender identity or expression as protected categories
  - Amends Fla. Stat. to include "perception of" protected category
  - Proposed effective date July 1, 2015

DIED IN COMMITTEE

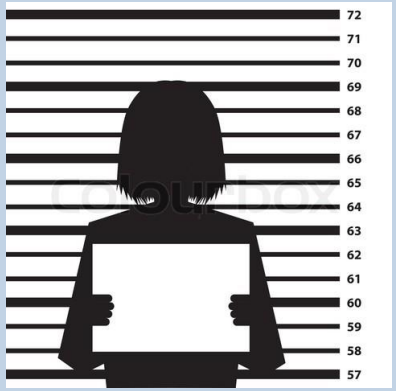


State HR-Related Legislation

- HB 977/SB 214: Discrimination in Employment Screening
  - Creates Fla. Stat. 760.105 to prohibit employers from inquiring into or considering applicant's criminal history on initial employment application unless required to do so by law
  - May inquire or consider only after applicant's qualifications have been screened and employer determined that applicant meets minimum position requirements
  - Proposed effective date July 1, 2015

DIED IN COMMITTEE





State HR-Related Legislation

- HB 625/SB 982: Florida Civil Rights Act
  - Amends to include pregnancy, childbirth or related medical conditions as protected category
  - As of March 19, 2015—in Judiciary Committee
  - Becomes effective July 1, 2015



State HR-Related Legislation

- Fla. Stat. 48.031 "Service of Process Generally" – amended
  - Employers must authorize process servers access to a private area in the workplace to serve an employee
  - Now punishable by fine up to $1,000 (non-criminal)



State HR-Related Legislation

- SB 126 (last year as HB 527/SB 198) – prohibits employers from requesting or requiring access to social media accounts of employees or applicants; authorizes civil action – failed in 2014;

DIED IN COMMITTEE





E-mail and Social Media Issues

- Can I (and should I) look at an *applicant's* Facebook or social media? (20-30%);
  - EEOC concerns
  - Privacy concerns
  - Develop policies – firewall; do later in the process
- Can I (and should I) look at an *employee's* Facebook or social media account?
  - National Labor Relations Act concerns
  - Electronic Stored Communications Act concerns







E-mail and Social Media Issues



- Can employees use company email to discuss workplace issues, including union organization?
  - NLRB ruled that workers can use email system for union organization
  - NLRB stated that “employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.”
  - This decision overturned a 2007 NLRB ruling that workers did not have the right to use work email systems to communicate with one another about pay and workplace conditions.

Questions



Disclaimer

Please note that this presentation is intended as a general overview of various issues and should not be construed as legal advice or a legal opinion relating to a particular set of facts or circumstances. Further, laws, rules, and regulations are continually changing. As a result, you should consult with your legal counsel before taking any action relating to a particular situation.