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Developing and Consistently Enforcing a Remote Work Policy Is Key

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Florida Employment Law: Trending Topics



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EMPLOYER CHALLENGES IN A REMOTE WORK ENVIRONMENT

- **The COVID pandemic revealed that remote work is now a viable option across many job categories. However, allowing remote work also presents new challenges and potential legal risks for employers that must be managed.**
- **WHEN AN EMPLOYER ALLOWS REMOTE WORK, DEVELOPING AND STRICTLY AND CONSISTENTLY APPLYING A CUSTOMIZED POLICY IS KEY.**

Developing and Consistently Enforcing a Remote Work Policy Is Key...

- **As employers continue experimenting with and even expanding the ability to work remotely, some employees are becoming more vocal about their preference for this option. Remote work relieved employees of financial and other burdens associated with daily commutes. They do not relish a return to the pre-pandemic grind, and spiking fuel costs are not helping. These circumstances present new challenges:**
- **Can businesses nurture a collaborative culture through emails and Zoom calls?**
- **Can employers supervise, train, mentor and fairly evaluate employees to the same extent in a remote environment?**
- **How do employers address remote work demands when not all jobs are conducive to remote work?**
- **An environment where some *but not all* employees may work remotely raises concerns about a possible new avenue for disparate treatment litigation.**

Employer Challenges in a Remote Work Environment

There is no “one-size-fits-all” solution to the remote work issue. While some employees can easily work from home, those whose work entails hands-on manual tasks or direct interaction with patients, clients or customers cannot.

To satisfy expectations in a tight labor market, many employers are allowing certain categories of employees to continue working remotely, or implementing “flexible” or hybrid policies that require employees to work from the office several days per week.

However, while employers may be eager to make concessions to attract and retain talent in a competitive job market, it is important to resist the urge to offer a remote work option to some similarly situated employees but not others.

Employer Challenges in a Remote Work Environment

Florida is a nationally distinguished landmine for employment litigation. Disparities in how employers address remote work creates risk for those who stray from the bedrock principle that all similarly situated employees be treated the same.

While deviating from this principle may facilitate a great hire, prevent a valued employee from resigning, or just silence a squeaky wheel, an inconsistent approach to allowing remote work can create an array of problems from low employee morale to liability risk. Based on my experience assisting companies with these matters.

What are general guidance points for employers as they navigate these uncharted waters?

Develop a clear remote work policy and apply it consistently.

It is critical that employers establish a remote work policy that makes sense for the business, and apply that policy equally among all similarly situated employees. What does this mean?

The phrase “similarly situated” generally refers to one class of employees being alike in all relevant ways for purposes of a particular decision or issue. In discrimination cases, for example, a plaintiff must typically prove that he or she was treated differently than other similarly situated employees (known as “comparators”) for an unlawful reason—i.e., because of the employee’s race, gender, religion, etc. The comparators must be similarly situated to the plaintiff in all material respects. Similarly situated employees typically share the same job duties and responsibilities, have approximately the same training or experience level, perform similar tasks, and are evaluated based on similar criteria.

If an employer allows only some similarly situated employees to work remotely, it creates risk that employees who are denied this option, and are either members of a protected class or have engaged in some form of protected activity, could cite that refusal as a basis for unlawful discrimination or retaliation. To minimize this risk, employers should take care to ensure that their remote work policy is consistently applied in the same manner to all similarly situated employees.

What about disability-related remote work accommodation requests?

As some employers push for a return to the office, they note an uptick in employee requests to continue working remotely as an accommodation for alleged disabilities.

Employers generally have a duty to reasonably accommodate disabled employees, provided the accommodation does not impose an undue burden on the employer. Because the legal definition of disability is broad, the focus is typically on whether and to what extent a particular accommodation can be reasonably made – in this case, whether allowing remote work is appropriate as an accommodation.

What about disability-related remote work accommodation requests?

Employees are not entitled to any accommodation they desire. With respect to a remote work accommodation request, the question is whether this option is reasonable or will impose a significant operational burden, difficulty or expense for the employer.

This is a highly fact-specific analysis that depends on the nature of the employer's business and the employee's primary job duties and responsibilities. Because disabled employees are not similarly situated to other employees, in some circumstances, it may be appropriate to consider a remote work option as an accommodation for a disabled employee.

Remote Work -- The bottom line:

If employers will allow remote work, to minimize the risk of disparate treatment claims they should develop and disseminate customized remote work policies around their business models. Employers should thereafter consistently and strictly enforce the policy across all similarly situated employee categories.

Florida Governor Ron DeSantis signs “Individual Freedom Act”

What Is Florida’s Individual Freedom Act (IFA)?

- The IFA prohibits employers from implementing alleged discriminatory practices in their diversity training programs, effective July 1, 2022.
- The IFA amends the Florida Civil Rights Act, Fla. Stat. 760.01, et seq., to expand the definition of discrimination, and subjects employers to liability for incorporating what the Governor describes as “woke indoctrination” concepts into mandatory workplace training.

Became Effective July 1, 2022

Fla. Stat. § 760.10: Unlawful employment practices

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(2) It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status or to classify or refer for employment any individual on the basis of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

. . .

The IFA expands the definition of “Discrimination” under the Florida Civil Rights Act

- The IFA amends § 760.10, Fla. Stat., to prohibit public employers and private employers with 15 or more employees from requiring any individual—as a condition of employment, membership, certification, licensing, credentialing, or passing an examination—to participate in training, instruction, or any other required activity that espouses, promotes, advances, inculcates, or compels the individual to believe any of the **8 discriminatory concepts** outlined in the statute.

The IFA expands the definition of “Discrimination” under the Florida Civil Rights Act

§ 760.10(8)(a) Subjecting any individual, as a condition of employment, membership, certification, licensing, credentialing, or passing an examination, to training, instruction, or any other required activity that espouses, promotes, advances, inculcates, or compels such individual to believe any of the following concepts **constitutes discrimination** based on race, color, sex, or national origin under this section:

1. **Members of one race, color, sex, or national origin are morally superior to members of another race, color, sex, or national origin.**

The IFA expands the definition of “Discrimination” under the Florida Civil Rights Act

1. Members of one race, color, sex, or national origin are **morally superior** to members of another race, color, sex, or national origin.

The IFA expands the definition of “Discrimination” under the Florida Civil Rights Act

2. An individual, **by virtue of his or her race, color, sex, or national origin**, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.

The IFA expands the definition of “Discrimination” under the Florida Civil Rights Act

3. An individual's moral character or status as either privileged or oppressed is **necessarily determined by his or her race, color, sex, or national origin.**

The IFA expands the definition of “Discrimination” under the Florida Civil Rights Act

4. **Members of one race, color, sex, or national origin** cannot and should not attempt to treat others without respect to race, color, sex, or national origin.

The IFA expands the definition of “Discrimination” under the Florida Civil Rights Act

5. An individual, **by virtue of his or her race, color, sex, or national origin**, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, sex, or national origin.

The IFA expands the definition of “Discrimination” under the Florida Civil Rights Act

6. An individual, **by virtue of his or her race, color, sex, or national origin**, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.

The IFA expands the definition of “Discrimination” under the Florida Civil Rights Act

7. An individual, **by virtue of his or her race, color, sex, or national origin**, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the individual played no part, committed in the past by other members of the same race, color, sex, or national origin.

The IFA expands the definition of “Discrimination” under the Florida Civil Rights Act

8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a **particular race, color, sex, or national origin** to oppress members of another race, color, sex, or national origin.

These concepts may still be included if they are addressed in an objective manner and without endorsement.

Enforcement and Liability

- If the Florida Attorney General has cause to believe that an employer has engaged in discrimination that violates the IFA and raises an issue of great public interest, the Florida Attorney General is authorized to file a civil action against the employer for injunctive relief, damages, and civil penalties of up to \$10,000 per violation.

Enforcement and Liability, continued

- Additionally, individual employees who believe their employer has violated the Individual Freedom Act may file a charge with the Florida Commission on Human Relations, and thereafter pursue their own administrative or civil actions. Remedies available to employees include injunctive relief, compensatory damages, back pay, and punitive damages up to \$100,000.
- Employees must file within 365 days of the alleged violation.

Takeaway for Employers

- All employers with Florida employees should carefully review their diversity and inclusion training materials and practices to evaluate their potential exposure to liability under the IFA, and consult with counsel where appropriate.
- Employers should be careful in making any discipline or termination decisions based on an employee's objection to or refusal to participate in diversity training that could implicate the IFA.
- Although a lawsuit has been filed in the Northern District of Florida challenging the law, the IFA still went into effect July 1, 2022.

Legal Challenges: *Falls v. DeSantis*, Case No. 4:22-cv-00166-MW-MJF, (N.D. Fla. April 22, 2022)

- Plaintiffs:
 - 3 teachers, 1 student, and 1 DEI consultant sued for a preliminary injunction
- Chief Judge Mark Walker (2012 President Obama appointee)
- Dr. Tammy L. Hodo: the plaintiff challenging the employment provisions of the IFA
- Judge Walker: Dr. Hodo does not have standing
- Dr. Hodo's standing theories:
 - (1) Standing on behalf of potential future clients
 - (2) Standing on behalf of her own injury

Case 4:22-cv-00166-MW-MJF Document 1 Filed 04/22/22 Page 1 of 31

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DONALD FALLS, JILL HARPER,
Dr. ROBERT CASSANELLO, STEPHANIE
NICOLE JAMIESON, as next of friend of RMJ,
Dr. TAMMY L. HODO,

Plaintiffs,

vs.

Case No.:

RON DESANTIS, in his official
capacity as Governor of Florida; RICHARD CORCORAN,
in his official capacity as Commissioner of the
Florida State Board of Education; TOM GRADY,
BEN GIBSON, MONESIA BROWN, MARVA
JOHNSON, RYAN PETTY, JOE YORK,
in their official capacities as members of the
Florida State Board of Education; BRIAN LAMB,
TIMOTHY M. CERIO, AUBREY EDGE, PATRICIA FROST,
EDWARD HADDOCK, H. WAYNE HUIZENGA, JR.,
NATASSIA JANVIER, KEN JONES,
DARLENE LUCCIO JORDAN, ALAN LEVINE,
CHARLES H. LYDECKER, STEVEN M. SCOTT,
WILLIAM SELF, ERIC SILAGY, KENT STERMON,
in their official capacities as members of the Florida Board of
Governors of the State University System; and ASHLEY MOODY,
in her official capacity as Florida's Attorney General,

Defendants.

VERIFIED COMPLAINT

Plaintiffs bring this action seeking declaratory and injunctive relief,

attorney's fees, and costs against Defendants and allege:

***Falls v. DeSantis*, Case No. 4:22-cv-00166-MW-MJF, (N.D. Fla. April 22, 2022), continued**

- Judge Walker rejected both theories:
 - (1) No standing on behalf of potential third parties and their potential injuries
 - (2) No standing on her own behalf because she only pled hypothetical injuries; no allegations that she actually lost clients, that any clients said they would no longer hire her, or that any clients even expressed concern about hiring her in the future
- No injunction. Dr. Hodo's claim dismissed without prejudice.

Case 4:22-cv-00166-MW-MJF Document 1 Filed 04/22/22 Page 1 of 31

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IFA Hypothetical

- A black female loan officer at a large bank is required to attend a 2-day annual employee retreat. There is a DEI training session. The bank brings in a DEI consultant in to teach on CRT concepts like white privilege, microaggressions, implicit bias, and equity.
- Additionally, the bank introduces a new version of their employee handbook, which includes an updated mission statement. The mission statement goes beyond addressing the provision of banking products and services and includes language highlighting the importance of contributing to society and promoting principles of equity and inclusion.

IFA Hypothetical, continued

- The employee attends the DEI session but is offended. She complains to HR and explains she does not want to sign the new mission statement.
- She is not required to sign the statement.
- Later that year, the employee receives a written performance review that is allegedly retaliatory. She also complains that she was not given a bonus or a raise, which she believes she was entitled to, and that she has been ostracized from meetings, initiatives, and given the least desirable assignments.
- *What exposure does the bank have pursuant to the statute?*

IFA Hypothetical, continued

- The employee may file a charge with the Florida Commission on Human Relations and then pursue her own administrative or civil action.
- She may seek injunctive relief, compensatory damages, back pay, and punitive damages up to \$100,000.
- **It's just not worth it.**

Other States with CRT Restrictions

- Arkansas
- Idaho
- Iowa
- New Hampshire
- Oklahoma
- Tennessee

Other States with Pending CRT Restrictions

- Alabama
- Georgia
- Kentucky
- Louisiana
- Michigan
- Missouri
- Montana
- Ohio
- Pennsylvania
- Rhode Island
- South Carolina
- Texas
- Utah
- Washington
- West Virginia
- Wisconsin