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# FLORIDA

## EMPLOYMENT LAW LETTER

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#### Discrimination

You can't discriminate against employees on the basis of such things as race, age, or disability. A whole host of laws cover those bases, including Title VII, the ADA, and the ADEA. At www.HRHero.com, you can find the following resources to help ensure your company isn't illegally discriminating:

- HR Sample Policy—Equal Employment, [www.HRHero.com/lc/policies/203.html](http://www.HRHero.com/lc/policies/203.html)
- HR Sample Policy—Harassment and/or Discrimination, [www.HRHero.com/lc/policies/204.html](http://www.HRHero.com/lc/policies/204.html)

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### CONSTITUTIONAL RIGHTS

## Court allows waiver of right to a jury trial on job application

*In this case, an in-house marketer who is a Seventh-Day Adventist, said she was discriminated against on the basis of her religion. She sued, demanding a jury trial. A judge looked at her employment application, which included language saying that she officially gave up her right to a jury trial in any future lawsuit relating to her employment. A jury trial is a right that Americans are granted under the U.S. Constitution in some circumstances and by the language contained in federal employment laws.*

*Based on this decision, Florida employers can now ask employees to give up their right to a jury trial if the right language is used in the right context. Of course, the decision may be appealed. Let's take a look at the facts of the case and the right language to add to your employment applications to waive employees' right to a jury trial.*

### Background

In January 2008, Brigitte Baker began working for Wyndham Vacation Resorts as an in-house marketer at its Ocean Walk Resort in Daytona Beach. She claimed to have been an exemplary employee and boasted that she even received a prestigious award for being a "top marketer." She may have been a terrific employee, but she wasn't happy with her working conditions.

Baker alleged that when she filled out her employment application, she

made it clear that she couldn't work on Saturdays because of her religious beliefs as a Seventh-Day Adventist. She eventually got tired of being told she would have to work on Saturdays and filed a lawsuit against her employer under Title VII of the Civil Rights Act of 1964. In her lawsuit, she claimed her supervisor harassed and discriminated against her on the basis of her religion. Because she was pregnant by that time, she threw in a claim for pregnancy discrimination for good measure.

Baker alleged that her supervisor forced her to work on Saturdays and threatened her with termination if she refused. She also claimed that on her first day on the job, her supervisor looked at her new hire paperwork and stated that she would never have hired Baker if she had known about her religious beliefs.

When Baker signed her employment application, it included the following language:

Should I become employed, as a condition of my employment, I agree to waive my right to a trial by jury in any action or proceeding involving any claim, whether statutory or at a common law related to or arising out of my employment or the termination of employment, including claims of

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discrimination. I understand that I am waiving my right to a jury trial voluntarily and knowingly and free from duress or coercion. I understand that I have the right to consult with a person of my choosing, including an attorney, before signing this document.

### ***Because winning does matter!***

Everyone knows that litigation is expensive, and unfortunately, more and more businesses, even small ones, are increasingly exposed to the high cost of litigation. Some of you may know from experience that taking a

**Taking a case all the way to trial and then losing can be expensive.**

case all the way to trial and then losing can be expensive. It's somewhat intuitive that employers are easy to demonize, and juries tend to sympathize with

employees. A jury trial waiver may be valid, but its validity depends on the context in which it was signed by the job applicant.

In this type of fight, the employer will want to show the court that the document truly was signed voluntarily and knowingly and without duress or coercion. The employee will want to portray the situation as one in which she was rushed, told that the document was unimportant, or threatened with not being hired if she didn't sign the waiver. Indeed, that's exactly how it played out in this case.

### ***Completely different stories***

Ocean Walk argued that the waiver clause was placed in an obvious spot immediately above the signature line on the application and its terms were very easy to understand. The company also pointed out that the language informed Baker of her right to speak with an attorney before she signed the document. Ocean Walk's HR representative said that every applicant was required to complete an application package that included the waiver language before beginning work. The HR representative also said that she personally reviewed each application package for completeness before any new hire began working.

Baker had an entirely different story to tell. According to her, a few weeks after she started working, her supervisor, Rebecca Hanrahan, pulled her aside and gave her a blank employment application to complete. Baker claimed Hanrahan "forced and begged" her to fill out the application because Hanrahan made a mistake in not giving it to her before she was hired. She alleged that Hanrahan stood over her the entire time, telling her to skip certain sections, the document was unimportant, and she just needed to sign it. In the end, however, the

court thought Baker was lying and Hanrahan and the HR rep were telling the truth. Baker will still get a bench trial on her claims. *Brigette Baker v. Wyndham Worldwide*, 2012 U.S. Dist. LEXIS 125987 (M.D. Fla., August 17, 2012).

### ***What you need to know***

This decision means that Florida employers can include on their employment applications a waiver of the right to a jury trial. The waiver should be valid as long as it's entered into in a knowing and voluntary manner. There are several factors courts look at to decide whether a waiver was knowing and voluntary:

- (1) **The conspicuousness of the waiver provision.** Was it in bold or all caps, or was it in fine print? Was it near the signature line, placed at the top of the document, or tucked into the middle of the sixth paragraph on page 3?
- (2) **The parties' relative bargaining power.** The court didn't discuss this factor in its opinion, but this is the kind of situation in which a court might find that an applicant's waiver wasn't voluntary because she had no choice but to sign the application and waiver if she wanted to be hired.
- (3) **The sophistication of the party challenging the waiver.** This factor would play out in a similar manner to the parties' relative bargaining power.
- (4) **Whether the terms of the agreement or waiver were negotiable.** In many situations (e.g., signing a basic employment agreement), contracts are offered as "take-it-or-leave-it" agreements.

The above factors don't all have to be met; they just provide the court with questions to ask when it's trying to answer the ultimate inquiry: whether the waiver is "unconscionable, contrary to public policy, or simply unfair."

### ***Takeaways***

The court upheld the waiver in this case because it was in a section titled "APPLICANT PLEASE READ AND SIGN." It was in bold type. It was located directly above the line for the employee's signature. It was very clearly worded, and it informed applicants that they could consult with an attorney before signing it. What the court seemed to brush aside, however, was the reality of the situation—if an applicant wanted a job, did she really have a choice but to sign the application? How many applicants who refused to sign the application were hired?

In other words, the court didn't address the inherent nature of employment applications. We think that if courts change their position on this issue in the future, it might be because they have reconsidered the

implications of the last three waiver factors in the list above. A court could recognize that in many cases, prospective employees have less bargaining power and are less sophisticated than employers, and applicants usually are asked to sign employment agreements that aren't negotiable.

If you decide to add a jury trial waiver to your pre-employment documents, make sure you get applicants to sign it *before* they start work. Make the words pop off the page by using boldface type or capital letters, and give the section a clear heading. Put it at the top of the agreement or right next to the signature line. Don't put any pressure on applicants to sign the waiver, give them a few days to see an attorney if they choose to, and allow them to be thorough in reviewing their options. ❖

## WORKPLACE ISSUES

### Know the rules of engagement when employees talk politics at work

*Did you know that when coworkers discuss politics, more than one in five report that a "heated discussion or fight" ensues?*

*That was one finding from a CareerBuilder survey conducted late last year by the polling organization Harris Interactive. The nationwide survey of more than 7,000 full-time private-sector workers also found 36 percent of respondents reported talking politics at work. Even more—43 percent—believe they will talk with fellow employees about the upcoming presidential election. Men are more likely to talk politics than women, and older employees are more likely to do so than younger ones.*

*So regardless of what you would prefer your employees do, there's a good chance politics will creep into workplace conversations. Managers will want to maintain productivity in the workplace, promote civility, and be aware of applicable laws, particularly those dealing with giving workers time off to vote.*

### Know state, local rules

Private-sector employers generally have more leeway to limit talk of politics at work than public-sector employers. (Generally speaking, public-sector employees have rights under the First Amendment to the U.S. Constitution to speak as citizens on matters of public concern unless the speech causes workplace disruption.) It's crucial, however, to know the laws on political talk for the states in which you operate as well as any measures

local government has enacted. In addition, be aware that the National Labor Relations Act (NLRA) protects concerted activities by employees to improve their working conditions. Some political talk may be considered or may inspire protected concerted activity.

Once you understand and have met any state and local requirements on political speech at work, there is room for you to act. It may be possible to create a policy that forbids all political talk, but it may not be a good idea to do so because it will be difficult to enforce. You may want to craft policies that are specific to certain types of employees, such as those who deal with the public. Political talk could turn off would-be customers, and that's not good for business. Another possibility is to target inappropriate, disruptive behavior in general. Make sure you enforce these policies with an even hand and document any disciplinary measures.

### Promote civility, productivity

You also may want to reeducate workers on your organization's civility and antiharassment policies. Anti-discrimination laws don't cover political affiliation, but they do prohibit discrimination based on race, religion, and national origin, among other reasons. Workplace political discussions may veer into those areas, and heated words can lead to a hostile work environment for employees in a protected class. So remind all employees to respect one another, and tell them your organization won't tolerate threatening, discriminatory, or disruptive behavior.

You also can make sure employees aren't wasting time on politics when they should be working. If politics—or other nonwork topics—interfere with business or distract others, you can tell the talkers that they're not meeting job requirements or production goals. Again, it's key to enforce productivity rules fairly and document any disciplinary actions.

### Keep it real, and keep the peace

Here are some smart communications pointers for talking politics in the office:

- ✓ Let coworkers speak without interruption.
- ✓ Have a good reason for speaking out on a political issue; don't just make small talk.
- ✓ Don't get emotional. If you can't do that, don't discuss the topic at all.
- ✓ Know how to calmly bow out of political talk. (Say something like, "My granny told me never to discuss politics at work," with a smile.) Follow your personal principles on how much you want to share.
- ✓ Don't lose your temper.
- ✓ Don't be confrontational just for the sake of being confrontational.
- ✓ Don't talk politics with argumentative coworkers.

## ***Time off to vote***

Many states have laws allowing employees to take a reasonable amount of paid time off to vote on Election Day. The states you operate in may set specific time entitlements, so check with counsel on the rules. Also, state laws often prohibit employers from requiring employees to vote a certain way, saying things that are calculated to coerce employees into voting a certain way, or even requiring employees to vote at all. Other state laws say employers can't require employees to donate to campaigns.

➔ *To learn more about managing workplace politics and balancing your employees' desire to express their opinions with your organization's need for productivity and a healthy work environment, download the free HRHero white paper "Politics in the workplace: an employer's election-year guide" at [www.HRHero.com/whitepapers/index.cgi?pc=wppiw&](http://www.HRHero.com/whitepapers/index.cgi?pc=wppiw&). ♣*

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