Associated Industries of Florida

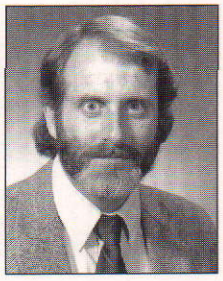
EMPLOYER ADVOCATE

516 NORTH ADAMS STREET • P.O. BOX 784 • TALLAHASSEE, FL 32302 • PHONE (904) 224-7173 • FAX: (904) 224-6532

VOLUME 1 NUMBER 3 MARCH 1992

New taxes or No taxes. The halls of the Capitol are filled with the battle cries of those who want the money and those who will have to pay the money. AIF is taking the position that now is not the time for higher or new taxes. An added tax burden on business will only entrench the recession we're in.

There is no question that current state revenues do not meet expenses. Is it because the tax structure is inadequate or is the money unwisely spent? How that question is answered is crucial to business. That's why we asked both sides to present their arguments.



New Taxes Vs. No Taxes

New Taxes

by Florida Governor Lawton Chiles

Back in 1948, there were no fence laws in Florida. Drivers routinely ran into cattle and were bound by law to pay the owner for damage to his livestock. That may sound outrageous, but such laws were fairly common, given the rural makeup of the state.

A lot has changed since then, but Florida's tax structure hasn't changed much at all.

The present system was designed to lure businesses here to develop a wild and unsettled peninsula – not to meet the needs of the nation's fourth largest state. The challenge before us now is to create a tax system that addresses our needs, keeps pace with our growth, and allows us to improve our quality of life.

Naturally, some folks question the wisdom of undertaking major tax reforms during a recession. The argument has been that industry will suffer and recovery will be slowed. But I challenge any business in Florida – small or major corporation – to show me that any of these taxes will substantially impact their bottom line. Further, economists will tell you that this $1.3 billion tax reform package in a $29 billion budget is not of the size nor the coverage to hinder economic recovery.

Good business people know that even when times are tough, you have to make investments that are sound and offer good returns. Capital improvements and maintenance are essential to survive in the business world.

That's how I look at our budget problems. But instead of thinking only of fixed capital, I think of human capital as well. My concern is humanitarian, but as chief budget officer, it also must be pragmatic. If we don't make the critical investments now, we will face higher costs later.

(See "New Taxes" on page 3)

No Taxes

by Randall G. Holcombe
Professor of Economics, Florida State University

Arguments in favor of increased taxes in Florida fall into two categories. The first is that Florida needs new revenues now to address the current budgetary crisis. The second is that Florida's antiquated tax structure needs to change to keep up with the times. Neither of these arguments holds up when the facts are examined. Florida's existing tax structure will keep up with Florida's income growth for the unforeseeable future. Tax increases are justified only if Florida's citizens want bigger government.

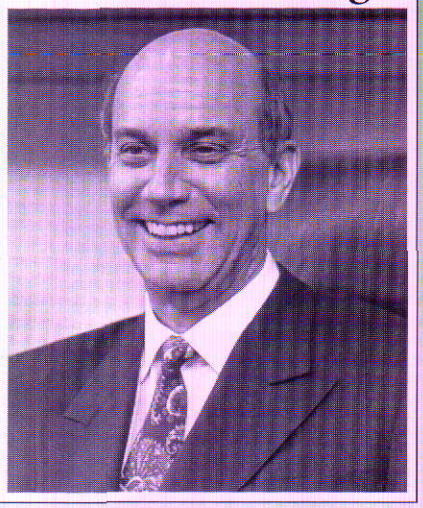
Consider the current budget crisis. As originally passed, the current year's budget was $29.4 billion. The revenue estimates in the budget proved overly optimistic and the budget has been cut by about $1.5 billion, leaving the actual current budget, after cuts, at $27.9 billion. As I am writing, it appears that the Legislature will send a budget for next year of $29.7 billion to the governor. This $29.7 billion represents an increase of more than 6 percent over this year's actual budget. Limiting the state to a 6 percent increase during a recession is what many people are referring to as a crisis.

Taking a longer view, some people argue that Florida's tax structure is inadequate for keeping up with Florida's growth. The facts suggest otherwise. During the 1980's, Florida's taxes grew 7 percent faster than Florida's income. In 1980, Florida raised $712 per person in taxes, after adjusting for inflation. By 1989, Florida raised $983 per person. This is a 38 percent increase in tax revenues per person during the 1980's, adjusted for inflation. Florida's taxes have more than kept up with Florida's growth.

The 1980's did see rate increases to produce these revenue

(See "No Taxes" on page 2)

President's Message



by Jon L. Shebel

Inside and Outside the Capitol

Remember playing chicken in your younger years? The game is alive and going strong in Tallahassee. Now that the Regular Session has come to an end, the governor and Legislature are locked in a classic standoff over taxes.

The Republican legislators have taken an adamant anti-tax stance. The Democrats are more amenable to the idea, but they don't want to give the Republicans any ammunition in the upcoming elections. Polls show that those of us who make up the general public don't want taxes. If the Democrats follow their leader, they may not find friendly faces at the polls come November. Governor Chiles, however, is unrelenting in his quest for more state revenues. A Special Session will keep both sides on a collision course until one side goes chicken.

Adding spice to the conflict were the teachers unions. Their ads attacking the anti-tax Legislature ruffled more than a few feathers. On the other side, AIF, Florida Retail Federation, and National Federation of Independent Business (NFIB), joined forces in opposition to new taxes. NFIB produced a low-key television ad urging patience in the place of new revenues. Florida's businesses and workers continue to suffer from the decline in the state's economy. No one wants to see necessary services cut, but a recession is the worst time to add to the tax burden.

Taxes were not the only item on the legislative stage this year. Haggling over reapportionment and election year politics were a major attraction in the capitol, but some work did get done. In a short while, Associated Industries will publish ***The Summary of Legislation***, a full report on what the Legislature did. We'll let you know as soon as it's available. Meanwhile, you can still order a subscription to ***Legislative Letter***, AIF's weekly briefing on key business issues. ***Legislative Letter*** is a free service to AIF members. If you'd like to subscribe, call Jane Hennessy or Jacque Horkan at the Association offices, (904) 224-7173. We'll send you the back issues and put you on the mailing list for further reports during the Special Session.

One key item of interest to small business operators — passage of the Small Group Health Insurance Reform Act. This bill gives employers with 3 to 25 employees, more affordable options for purchasing group health plans. Too many small businesses have had to forfeit health insurance benefits for their employees because of the cost. The Small Group Health Insurance Reform Act will give them a break. If you would like a summary of the provisions of this Act, call Melissa Reese at the Association offices, (904) 224-7173.

It's hard to find fault with a law like the Small Group Health Insurance Reform Act. Other laws, however, don't pass that test, no matter how admirable the intent. Even the most honest and responsible business managers can get trapped in the net of complex laws concerning sexual harassment, negligent employment claims, and the definition of the employer/worker relationship. Violations of these laws carry hefty penalties, even if the violations may be inadvertent. In this issue of ***Employer Advocate***, we've asked some experts for advice on how to stay out of trouble when it comes to workplace regulations. Hopefully, these articles will help clarify matters for you.

On a final note, we recently received the sad news of the death of E.T. "Andy" Lay. Mr. Lay worked for the Association in the early years, from 1925 to 1939. He was responsible for starting some of the publications that we prepare to this day. About four years ago, when Mr. Lay visited AIF's headquarters, we had the honor of meeting a gracious and intelligent man. All of us at Associated Industries share in his family's sorrow.

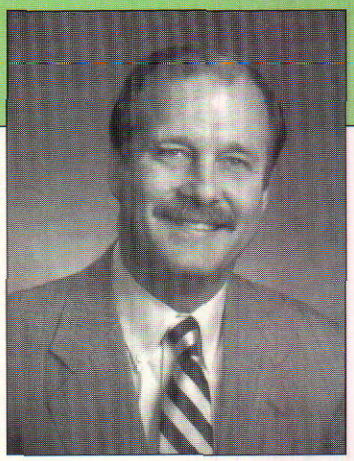
As always, we'd like to hear from you. Comments, questions, suggestions, even complaints are welcome.

No Taxes *(continued from page 1)*

by Randall G. Holcombe, Professor of Economics, Florida State University

increases, and some critics say that without rate increases, the sales tax cannot keep up with the state's growth. In 1985, the state rate was 5 percent and took 2.68 percent of Florida's income. By 1989, the rate was 6 percent and took 3.44 percent of the state's income. A rate increase of 20 percent produced an increase of 28 percent in the fraction of income paid in sales tax, so sales tax revenues as a percent of income rose faster than sales tax rates. Over a longer period of time, the state rate had doubled from 3 percent to 6 percent since the 1960's, but sales tax revenues as a percent of income have also approximately doubled. Florida's current tax structure is well-designed to keep up with the state's income growth.

Florida's taxes have risen faster than Florida's income in the past, and this year's crisis budget, without new taxes, would still increase government spending by 6 percent in the midst of a recession. Yes, we are facing a crisis in Florida, but the crisis is on the spending side of the budget. Taxes have risen faster than income, but spending has risen faster than taxes. Tax increases are justified only if Floridians want to turn over a bigger share of their incomes to the government.



The Value of Independence

by Scott Johnson, Florida Association of Insurance Agents

Insurance is a major expense for any business. As property values rise, as employees demand more and better health care, as more and more lawyers find more ways to get more money for more clients, both your business and your personal insurance premiums will rise. But buying your insurance from an independent insurance agent can help.

Yes, you could buy your insurance from employees of insurance companies like Allstate or Liberty Mutual. You could buy it from captive agents (like those of State Farm) who may not be employees, but represent only one company and have all the restrictions of employees. Or you could even purchase your insurance through the mail or over the telephone.

However . . . when you deal with an independent insurance agent you are dealing with a local business person who is self-employed and who represents several different insurance companies. If nothing else, you will always be getting more for your money with local business people who can do business with you in return. Also, because they can choose from more companies, independent agents can mix and match programs and prices to suit your business' pocketbook. An independent insurance agent must be more knowledgeable overall and better trained to handle your insurance needs. You see, representing more than one company means having options. And having options creates the need for your agent to understand your business more and his product better to make the right match. Someone with only one product to sell doesn't need to know your needs. Your needs don't make any difference if the price and product can't change to fit them.

You probably run into independent insurance agents all the time. You see them at church and at football games, out coaching Little League, selling tickets to raffles, for charity suppers, volunteering at any number of events that make a community tick. Doing business with a local independent agent helps insure that dollars earned in the community are spent in the community; not siphoned off to the economy of some other city in some other state. Sure, there are times when you might save a few more dollars by going direct mail, or buying your insurance over the telephone. But ... when it can be done and when it can be kept within reason, you will always be better off buying your insurance from an independent agent who serves the insurance company last, your community second, and you first.

New Taxes *by Florida Governor Lawton Chiles* *(continued from page 1)*

For example:

- ***If we spend $100 less per student for education than last year, then we can expect businesses to look outside Florida for qualified workers.***
- ***If more low-birth weight babies are born in Florida, they will require long-term medical care costing three times as much as preventive care.***
- ***If our elderly end up in nursing homes rather than receiving care in their own homes, it costs us tenfold.***
- ***If we don't fund new prison beds and leave our judicial system overcrowded, business insurance rates will rise with the crime rates.***

The reform package we've submitted to the Florida Legislature is an attempt to update our seriously flawed method of financing government. It represents an effort to work within the framework of Florida's Constitution and get everyone to pay their share.

Presently 1.2 million businesses operate in Florida, but some are carrying an unfair burden. Of the 325,000 "C" corporations that filed corporate income tax returns only 85,000 actually paid a cent. Of the ones who paid, just 848 of them accounted for 70 percent of total collections.

Is it fair for 92 percent of Florida's businesses to get a free ride? Do they receive fewer benefits from the state? Certainly not. The problem rests in Florida's thousands of loopholes that allow a few businesses to pull the load for everyone.

Our plan is to spread this burden among all corporations. For the "C" and "S" corporations who now pay no corporate income tax, we propose to levy a minimum annual assessment of $200.

We are also looking to end sales tax exemptions on a variety of goods and services to further insulate us from revenue shortfalls. More diversity will mean more stability in a weak economy.

Finally, we want to work with the business community and find ways to become less dependent on increased consumption during good times. Recent events have shown us that relying almost entirely on sales tax is a risky way to pay for government. The state's responsibility to protect and provide for its citizens does not diminish during hard times – in fact, it becomes more important. The level of service we are bound to provide must be constant, even though our means of doing so may not.

Real tax reform is the only solution to the problems we face today – many of which are a result of our past failure to invest. Our future depends on whether we've learned from these mistakes. If we commit to reform and pay our short-term costs now, we can avoid the higher long-term costs tomorrow. That's the best deal for businesses. That's the best deal for everyone.

A Wealth of Difference

On December 20, 1822, Ralph Waldo Emerson wrote in his journal, "To different minds, the same world is a heaven and a hell." He must have been going through an IRS audit.

The IRS is always on the lookout for tax revenues. In this day of deficit and recession, they may be looking a little harder. The withholding system makes the job of tax collection easier for the government. Employers are required to withhold FICA and income taxes from an employee's paycheck. On the other hand, there is no withholding requirement for workers classified as independent contractors. They are responsible for reporting income and remitting their share of taxes. But the government has found that workers not subject to withholding do not always report their income. Therefore, during an audit, the IRS will pay special attention to those workers a business treats as independent contractors.

Reclassification by the IRS of an independent contractor to employee status translates to harsh repercussions for the employer. Sole proprietors and partnerships have ***personal liability*** for any withholding and FICA taxes not paid by the reclassified independent contractor. If the employer is a corporation, any responsible corporate officer assumes ***personal liability*** for willful failure to withhold the employee's share of FICA and income taxes. Then comes the potential for penalties and interest. Obviously, it behooves you to make the right decision about a worker's status.

The issue of independent contractor vs. employee does not follow a straight line. There is no statutory definition of when an employer/employee relationship exists. Nevertheless, you are not entirely at the mercy of the merciless IRS. The question of independent contractor status turns on the facts of the particular working relationship. Generally, the IRS looks at the degree of control which a business owner exercises over a worker. The IRS weighs 20 factors to determine the nature of the relationship. *(see Worker Status Checklist)*

The more of these factors that suggest independent contractor status the stronger the argument. Section 530 of the Revenue Act of 1978 offers the strongest safety net for a company to continue treating workers as independent contractors. That section states that the IRS cannot raise the issue on audit if a business has never treated an individual as an employee, has filed all tax returns consistent with that position, and has a "reasonable basis" for treating the worker as an independent contractor. "Reasonable basis" may be established by:

- ***A case or ruling provided to the specific taxpayer.***
- ***A previous IRS audit in which there was no assessment for reclassification of workers.***
- ***A long-standing industry practice.***

The issue of worker classification spills over into workers' compensation. Under the law, employers are liable for benefits to employees but not to independent contractors. If a claim for benefits is filed by an independent contractor, the courts will decide whether the carrier is responsible for benefits based on the particular facts of the case. Just as with the IRS, you can call a worker anything you like, but the court's determination will rest on the nature of the relationship, not the name.

Under no circumstances should you take responsibility for any of the independent contractor's fringe benefits, such as health insurance, sick leave, or vacation pay. If you engage the services of an independent contractor, execute a contract specifying the terms of the work to be performed. The agreement may be written or oral, but a written document offers you greater protection, in more ways than one.

A contract alone is not sufficient, though. Both the IRS and the workers' compensation system give primary emphasis to the amount of control retained by the company over the individual and the work product. If you are treating any workers as independent contractors, you may want to compare the arrangement with the ***Worker Status Checklist.*** That will help you shore up any soft spots in your classification of a worker as an independent contractor. If you determine that a worker should be treated as an employee, the sooner you make the adjustment, the lighter the consequences.

If you and the IRS are of like mind concerning the status of your independent contractors, the world is a much nicer place. If you are of different minds with the IRS . . . well, just ask Ralph Waldo Emerson what it's like.

Worker Status Checklist

Independent Contractor Vs. Employee

The IRS has set general guidelines for determining whether a worker is an independent contractor or an employee. At issue is the amount of control the company has over the individual. Employer control in any of these items suggests employee status. If the worker retains control, it indicates independent contractor status.

1. ***Instruction:*** An employee abides by the employer's rules as to when, where, and how to work. An independent contractor doesn't.
2. ***Training:*** Independent contractors receive no training from the purchasers of their services.
3. ***Integration:*** A fancy term meaning that if a worker's tasks are necessary to the company's continued existence and success, the worker is an employee.
4. ***Services Rendered Personally:*** An employee is a worker who is personally responsible for the work assigned to him or her. An employer supervises what an employee does as well as how it is done. An independent contractor promises that the work will get done, while maintaining control over who will do it and how it will get done.
5. ***Hiring Assistants:*** An independent contractor hires, supervises, and pays assistants under a contract that requires the contractor to be responsible for the results.
6. ***Continuing Relationship:*** An employee has a continuing relationship with an employer. This can include frequent but irregular intervals.
7. ***Set Hours of Work:*** An independent contractor is the master of his or her own time.
8. ***Full-time Required:*** An employee is a worker who is required to devote time to the business, with an implicit or explicit restriction from engaging in other gainful work. An independent contractor retains the right to choose when and for whom work will be performed.
9. ***Work Done on Premises:*** Work performed on an employer's premises suggests control over the worker, especially if the work could be done elsewhere. An important factor here is whether the employer controls if the work is done on or off the premises.
10. ***Order or Sequence Set:*** An employer sets priorities for the order or sequence of work performed by an employee. An independent contractor controls the order or sequence of work performed.
11. ***Oral or Written Reports:*** If the person for whom a service is performed requires regular reports, an employee relationship is suggested.
12. ***Method of Payment:*** An employee is usually paid by the hour, week, or month. A contractor is paid by the job.
13. ***Payment of Business Expenses:*** A worker who receives reimbursement for business and travelling expenses is an employee.
14. ***Tools & Materials:*** An independent contractor supplies his or her own significant tools, materials, or other equipment.
15. ***Significant Investment:*** An independent contractor has a significant investment in the facilities used in performing services for someone else. An employee is dependent on the investment in facilities by the person for whom services are performed.
16. ***Profit/Loss:*** An independent contractor is a person who enjoys a profit or risks a loss as a result of his or her services.
17. ***Working for More than One Firm:*** An independent contractor can perform services for two or more firms/persons at one time.
18. ***Availability to General Public:*** An independent contractor's services are available to the general public.
19. ***Right to Fire:*** An employer has the right to discharge an employee. An independent contractor cannot be fired as long as he or she produces results that meet the specifications of the contract.
20. ***Right to Quit:*** An employee can quit a job at any time without incurring liability. An independent contractor is bound by the terms of a contract.

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Safety Comes First

Associated Industries of Florida Property & Casualty Trust

Associated Industries of Florida Property & Casualty Trust (AIFPCT) pursues the objective of building a strong and reliable workers' compensation fund for its participants. We take two paths to achieve this objective: strong underwriting principles and active loss control programs.

Underwriting involves taking a risk on accepting a participating company. Loss control depends on reducing the risk of the occurrence of accidents.

AIFPCT initiated SafetyFirst Productions to support our loss control programs. The Trust's safety personnel identify on-going safety problems faced by our insured companies. The Association's in-house video production unit develops training tapes to assist companies in correcting the problems.

These productions are available at no charge to AIFPCT participants. Companies that belong to AIF, but do not carry workers' compensation insurance through the AIFPCT, can purchase the tapes at a discounted membership price of $59.00. Non-AIF members can purchase the tapes for $89.00. If you would like to order one of the SafetyFirst productions, please call the AIFPCT Loss Control Division at 1-800-866-1234.

SafetyFirst Productions

The Floor Show: *The highest percentage of injuries in hotels and restaurants can be traced to slips and falls resulting from improper floor care. This 14-minute videotape teaches employees the correct floor care procedures in an entertaining and informative manner.*

The Moment of Decision: *The mistakes a forklift operator makes are usually dangerous and costly, in human and monetary terms. This 8-minute videotape reviews safe operating procedures for lift trucks.*

Both tapes available in English and Spanish

A SafetyFirst Production of:

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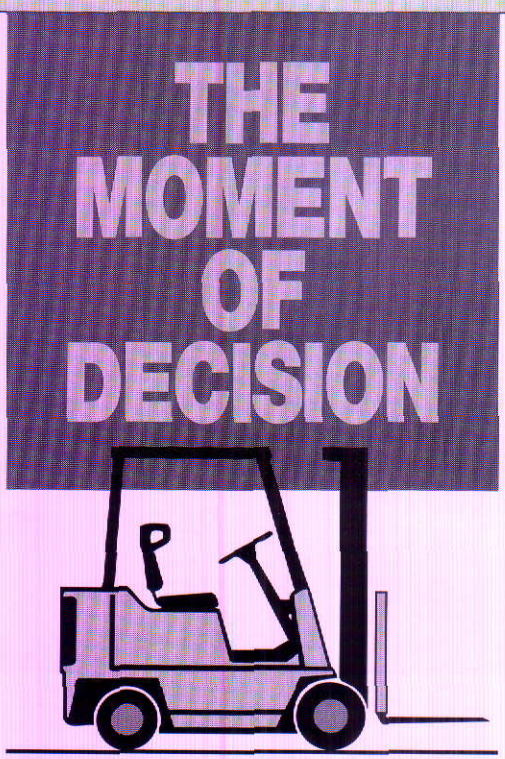

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SEXUAL HARASSMENT in the Workplace

by Lynda Quillen, Assistant Attorney General

Recent events have heightened awareness and increased concern about sexual harassment in the workplace. Employers need to know, more than ever before, what actions of their supervisors and staff may constitute sexual harassment and how they can protect themselves from suit. As defined by the courts and the Equal Employment Opportunity Commission, sexual harassment is an unwelcome sexual advance, a request for a sexual favor, or any other verbal or physical conduct of a sexual nature when:

- *Submission to the conduct is either explicitly or implicitly a term or condition of employment.*
- *Submission to or rejection of such conduct is the basis for an employment decision.*
- *The conduct unreasonably interferes with job performance or creates an intimidating, hostile, or offensive working environment.*

It is clear from this definition that sexual harassment means more than unwanted and uninvited touching and more than the "quid pro quo" form of harassment where job benefits are given or withheld based upon submission to a request for sexual favors.

And, indeed, it is the "hostile working environment" theory of sexual harassment that has most recently been the subject of public discussion and court review. Courts have held that, under such circumstances, the posting of sexually offensive posters, graffiti, and pinups may create a hostile environment. The use of sexual and obscene innuendoes, stories, and jokes, when pervasive, may also constitute sexual harassment. Further, non-sexual behavior, such as when an employee is verbally abused, shunned, or otherwise treated differently because of the employee's sex, may satisfy the legal definition of a hostile work environment. The standard by which such conduct is judged is generally that of the "reasonable person." Some courts, however, have fashioned a new standard — that of the "reasonable woman," in cases involving sexual harassment of women in the workplace, finding that men and women perceive and react differently to sexual harassment.

When managerial staff and supervisors are involved in the harassment, employers may be liable for their actions, regardless of knowledge of those actions. Generally, employers without knowledge will not be liable for the actions of other staff unless the harassment was so pervasive or severe that the employer should have known of the harassment or, having learned of the harassment, failed to take sufficient remedial measures.

Employers can and should take steps to limit potential liability and provide employees with a workplace free from sexual harassment. Not only is this behavior in the workplace unlawful, but it diminishes the dignity of employees, interferes with productivity, causes a loss of self respect, brings about absenteeism, and often causes employees who can afford it to quit. Employers who insist upon mutual respect in the workplace will not only be doing that which is right but will also have a more productive workplace. Minimally, management should:

- *Adopt, publish, and post a policy statement which clearly indicates that sexual harassment is prohibited and will not be tolerated.*
- *Define the prohibited conduct and explain that retaliation against employees who complain of sexual harassment is also prohibited.*
- *Establish penalties for violation of the policy which should include termination for a first offense if sufficiently severe.*
- *Provide procedures for reporting incidents of sexual harassment and retaliation. The procedure should include an alternative for reporting such conduct if the person designated to receive reports is the alleged harasser. The procedure should contain the name, address, and telephone number of the person(s) designated to receive reports.*
- *Thoroughly investigate all complaints.*
- *Take swift and sure action when a report of sexual harassment is substantiated.*
- *Educate and train all employees about sexual harassment, affirm management's commitment to eradicating sexual harassment, the penalty for violating the policies, and the procedure for reporting incidents of sexual harassment or retaliation. Education and training should be periodically repeated and new employees should be informed of the policy when hired.*

In summary, sexual harassment is against the law. While there are no criminal penalties for this "unlawful employment practice," civil penalties are available and the Civil Rights Act of 1991, signed into law by President Bush on November 21 of that year, significantly expanded those remedies. Under the Civil Rights Act of 1964, commonly referred to as Title VII, successful litigants were entitled to an award of backpay, to reinstatement, to an injunction, and other such relief. Now, employees also may receive compensatory damages for other types of injuries, including pain and suffering, emotional distress, and humiliation. Employees may also be entitled to punitive damages; that is damages designed to punish the employer and to set an example for others, and to a jury trial. The Act continues to provide for attorney's fees and costs and now permits the payment of expert witness fees without limitation. Currently, Florida law is virtually identical to the "old" Title VII, however, legislation is under consideration which would conform, in substance, what is now known as the Florida Human Rights Act of 1977 to federal law.

The purpose of the Federal and Florida Civil Rights Acts is to protect personal dignity and to assure that individuals may reach their full productive capabilities. Such can occur only in a workplace where discrimination and harassment do not exist. This should be the goal of all managers and employers, if for no other reason than it is against the law.

Negligent Employment Claims

Personnel Policies to Minimize Exposure

by John-Edward Alley, Alley and Alley, Chartered

In the November issue of ***Employer Advocate*** we pointed out that negligent employment and retention claims are becoming increasingly popular with plaintiffs' attorneys. Therefore, it is very important for you, as an employer, to fulfill your duty to hire and retain only safe and competent employees. In this issue, we will address some personnel policies and practical considerations for you to keep in mind in an effort to reduce your exposure to these claims.

1. *Develop an effective employment application form based on negligent employment concerns. Require the listing of previous employers for at least the past seven years and an explanation regarding any periods of unemployment. Require the listing of each supervisor at each place of employment. Then carefully review the applicant's employment application, specifically looking for gaps in the applicant's employment record and other unusual entries or omissions.*
2. *Obtain the applicant's authorization to gather information from all former employers, educational institutions, and personal references as well as an agreement to indemnify you and all prior employers.*
3. *Contact each prior employer, each supervisor, and each personal reference listed on the application. Document all information received from the references. If an individual or former employer is reluctant to give information, at least document that you have contacted the individual and attempted to get the necessary background information regarding the applicant.*
4. *Ask all former employers and personal references whether there is any reason to doubt the applicant's competency, trustworthiness, reliability, etc., and maintain a record of their responses.*
5. *Check the driver license and driving record of any applicant, who, if hired, will be required to drive in the course of his/her employment.*
6. *Determine whether or not it is necessary to conduct a criminal record search, based on the job that is to be filled, the information provided by the applicant on the application form, and information learned through the applicant's previous employers, personal references, and the initial interview. You should keep in mind that the EEOC scrutinizes pre-employment inquiries regarding arrests and even convictions.*
7. *Conduct reference checks on employees referred by employment agencies and on temporary employees and consider requiring a hold harmless agreement from the referral agency.*
8. *Do not offer any applicant employment until the pre-employment screening process has been completed.*
9. *Whenever discharge is being considered for an employee, and thoughts turn to giving the employee "one more chance," evaluate the situation the way a jury might in a negligent employment (retention) case.*
10. *Recognize that if you are aware of complaints of sexual harassment against an employee but do not take any corrective measures, you may be subject to suit by the harassed employee under Title VII, the tort of negligent retention, and perhaps other state tort theories.*
11. *Realize that by retaining an employee whose performance evaluations suggest the employee is unfit/incompetent for the job held, you may be setting yourself up for a negligent employment (retention) claim.*
12. *While the most fertile area for claims arising under the theory of negligent employment is based upon the conduct of the employer in the hiring process, keep in mind that these same policies and practical considerations should be considered when transferring or promoting current employees to new positions. For example, you should re-evaluate and perhaps re-check references to ascertain an employee's fitness/competence for a new job if the job will require greater contact with the public.*

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