The New Louisiana Employment Statutes: What Hath the Legislature Wrought

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Louisiana, as with many southern states, was slow to enact employment discrimination legislation. While Congress had provided protection against racial, sexual, religious discrimination in 1964,1 age discrimination in 1967,2 and disability discrimination in 1973,3 our state’s first enactment in this area was to provide protection against age discrimination4 in 1978.5 Thereafter, the legislature seemed in a “rush” to catch up with the rest of the country, enacting statutes:

• prohibiting discrimination against the handicapped in 1980,6
• protecting those with the sickle cell trait in 1982,7
• prohibiting employment discrimination based upon race, religion, color, sex or national origin in 1983,8
• providing protection for pregnant employees9 and for affirmative action programs in 1987,10
• creating a “Louisiana Commission on Human Rights” empowered to enforce new laws prohibiting discrimination in employment and public accommodation on the basis of race, creed, color, religion, sex, age, disability and national origin,11 and
• protecting those who smoke “off the job,” in 1991.12

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5. Louisiana did have some interesting statutes on the books before the 1970’s however. In 1938, the legislature enacted Louisiana Revised Statutes 23:961 prohibiting employers from interfering in their employees’ exercising political rights, which followed up on Louisiana Revised Statutes 23:962 (prohibition of employer control over employee’s political opinions) which was enacted in 1868.
The 1983 general employment discrimination law was criticized quite frequently for not providing members of protected groups with an adequate state means to address their complaints.\textsuperscript{13} The legislature attempted to address this concern in 1988 by creating the Human Rights Commission, but neglected to revise and/or repeal the other statutory provisions. This situation created mass confusion for the parties and the courts in determining which statutes applied to a particular situation and resolving the conflicts between the various provisions.\textsuperscript{14} Moreover, the legislature has never, to this day, provided adequate funding for the Human Rights Commission.\textsuperscript{15}

In 1997, the legislature took one more swipe, albeit a much larger one, to alleviate these past concerns. Representatives Garey Forster, James Donelon and Senator Ellington sponsored and stewarded the “Louisiana Employment Discrimination Law” through the legislature.\textsuperscript{16} Massive in scope, the new law purports to eliminate confusion by wiping out nearly all previous employment discrimination statutes in place of new Chapter 3-A of Title 23, consisting of fifty-four (54) sections. As with any new piece of legislation, however, the law creates as many new questions as it answers. Unfortunately, as will be discussed below, the new law is disappointing in several areas. Rather than creating a cohesive, logical framework to insure equal opportunity in Louisiana’s laws, the bill merely “cut and paste” old provisions into one long chapter. For example, instead of creating one central definition of “employer” for coverage under all of the laws, specifically with respect to the number of employees required for coverage, the new law merely re-states the old provisions for coverage under the listed types of discrimination. The law also leaves unresolved the question of what to do

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\item[15.] When the Commission was created, then Governor Buddy Roemer appointed members, but never provided any funds. After the 1991 election, Governor Edwin Edwards transferred $100,000.00 in “seed” money to the Commission from his contingency funds. Using these funds the Commission was able to employ a “bare bones” staff sufficient to convince the national Equal Employment Opportunity Commission that it could serve as a “deferral agency” under Section 706 of Title VII. See Memorandum of Understanding Between the Equal Employment Opportunity Commission and the Louisiana Commission on Human Rights. However, given the consistent failure of the legislature to provide funding, and the Commission’s inability to receive private donations sufficient to allow it to employ an adequate staff, it is fair to say that it has had no meaningful impact upon the employment discrimination landscape other than to increase to 300 days the time in which an individual can file a charge under federal law to preserve his or her rights. See 42 U.S.C. § 2000e-5(g) (1996). For instance, unlike the situation present in federal law, a party seeking to bring an action in state court has no obligation to file a charge with the Commission. See Coutcher v. Louisiana Lottery Corp., 710 So. 2d 259 (La. App. 1st Cir. 1997). The new law retains this anomaly with federal law.
\item[16.] 1997 La. Acts No. 1409.
\end{enumerate}
with our national embarrassment—the unfunded, unstaffed and apparently unloved Louisiana Commission on Human Rights.

The legislature also enacted a few more bills in the 1997 session which will impact the Louisiana workplace. First, the legislature dealt a blow to the "at will" rule, codified in Civil Code Article 2747, by enacting new protection for "whistleblowers" in the workplace. In addition, the Louisiana Legislature passed a law prohibiting municipalities from enacting a minimum wage. This was done to avoid problems such as calculating the wages of an employee who performs his duties in more than one parish where he might be subject to different wages. Other bills passed concerned a separated employee's right to vacation pay and the an employer's new right to seek reimbursement of the costs of medical testing of a new employee who resigns within ninety (90) days.

The majority of this paper will analyze the provisions of the new discrimination law, showing on a section-by-section basis, the changes made to existing law. In the second section, I will discuss the old issues resolved and left open by the new law, as well as the new issues presented. Finally, in the third section, I will propose some technical changes to the law which would aid both potential claimants and defendants in efficiently resolving disputes. I will also briefly discuss the other actions of the legislature affecting the Louisiana workplace.

I. THE LOUISIANA EMPLOYMENT DISCRIMINATION LAW

The authors of the new law obviously intended to clarify the organization of Louisiana's employment discrimination statutes. Essentially, the enacted bill is divided into five sections. Section 1 creates a new "Employment Discrimination Law" consisting of six (6) parts: general provisions, age, disability, race (including color, religion, sex and national origin), pregnancy, and sickle cell trait. Section 2 contains amendments to the Civil Rights Act for Handicapped Persons, such that it conforms to the new law. Similarly, Section 3 amends the Commission on Human Rights Act. Section 4 lists the deleted statutes and Section 5 provides the effective date.

A. Section 1


Part I contains general provisions, including the new grandiose title, i.e. "Louisiana Employment Discrimination Law." Section 302 contains defini-
tions for general application of the terms "employee," "employment agency," and "labor organization." Unfortunately, under the new law, an employee is merely defined as an individual employed by an employer—and for that definition, the lawyer will have to look for a different definition for every theory of discrimination.

2. Age Discrimination

Section 311 describes the application of the age discrimination prohibition. An "employer" is "an employer who employs twenty or more employees within this state for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." In addition, an employer also means "a person, association, legal or commercial entity, or the state, its agencies, boards, commissions, or political subdivisions receiving services from an employee and, in return, giving compensation of any kind to an employee." This definition is equivalent to the old definition of employer under prior law, but it leaves out the coverage of "... any agent of such person, the state of Louisiana, or any political subdivision thereof, but the term shall not include the United States or a corporation wholly owned by the United States" and adds the requirement that services be received and compensation be paid. As is discussed more below, this change will apparently resolve, once and for all, whether there can be individual liability for age discrimination under Louisiana law. New to the definition is an exclusion, for domestic servants and for relatives, previously found only in the Louisiana Commission on Human Rights Act. Finally, coverage of the age discrimination prohibition is limited by the new law to persons over forty years of age. The old law followed the former federal limitation applying the ADEA to those between forty and seventy years of age.

Section 312 contains the basic prohibitions of age discrimination, and the exceptions. There is no change from the prior law. The new law also makes

22. The definition of "employment agency" follows prior law at former Louisiana Revised Statutes 23:971(2).
26. The authors apparently tackled on the "receiving services ... giving compensation" prong of the definition from former Louisiana Revised Statutes 23:1006.
no changes to the notice posting requirements. Significant changes are found in Section 313, however, which authorizes suits to redress violations of the age discrimination prohibitions in state district courts only and also specifies that relief includes back pay, reinstatement, reasonable attorneys fees and court costs. Prior law authorized such suits in "any court of competent jurisdiction for legal or equitable relief." As will be discussed below, it appears that the legislature has done away with the front pay remedy. Finally, the new law also does not appear to exempt its effect from state minimum age or mandatory retirement laws.

3. Disability Discrimination

This section of the new law is based upon the old "Civil Rights Act for Handicapped Persons" enacted by the legislature in 1980. Section 321 of the Law defines application of the disability discrimination proscription to employers with fifteen or more employees within Louisiana for each working day in each or twenty or more calendar weeks in the current or preceding calendar year. Employers are also limited to private entities and state agencies who "receive services from an employee and, in return, [give] compensation of any kind to an employee." Prior law stated that an employer included any person "who has fifteen or more employees or a person who, as contractor or subcontractor, is furnishing material or performing work for the state local or governmental entity or agency or political entity of the state and includes an agent of such a person." Again, the legislature appears to be ending the possibility of individual liability under the disability discrimination laws. Finally, as in the case of age discrimination, there is also a new exclusion for domestic servants and for relatives. Section 322 contains a laundry list of statutory definitions. For the terms "adaptive devices," "disabled person," "discrimination," "impairment," "major life activities," "otherwise qualified disabled person," and "reasonable accommodation," there is no change from the prior law. New definitions are provided

35. See former Louisiana Revised Statutes 23:975, which stated that "[n]othing in this Part shall repeal, invalidate, or preempt any minimum age of employment or mandatory retirement age provided in any other statute or ordinance nor prohibit any age limitations permitted by federal law, rule, or regulation for enrollment in any apprenticeship program."
41. Compare La. R.S. 23:322(1), (3), (4), (6), (7), (8), (9) (1998) with former La. R.S. 46:2253 (17), (1), (11), (2), (3), (4)(a), (19) (1982). Of course, the word "handicapped" has been dropped
for "direct threat" and "essential functions." "Essential function" under the new law are defined as "the fundamental job duties of the employment position the disabled person holds or desires. . . . [Such functions do] not include the marginal functions of the position." The latter differs markedly from the definition in the federal Americans with Disabilities Act of 1990, which specifies that "consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." Under the new state law, the employer is thus left without its federal "safe harbor" and the courts (and juries) are given more freedom to decide what are the "essential functions" of the job in question.

Section 323 outlines the types of discrimination prohibited. With the exception of the former law’s application to educational facilities, real estate transactions and state funded programs, the list of prohibited practices is identical to that found in the Civil Rights for Handicapped Persons statute. In addition, the new law does not exempt employees of religious or fraternal entities, even when religion might be a bona fide occupational qualification for employment, as did the former law. As will be discussed below, however, there were certain inconsistencies in the old law’s provisions which have made their way into the new law.

Section 324 is a new provision setting out defenses to an allegation of disability discrimination. Apparently adopted verbatim from the ADA, this provision first allows an employer to show that a selection criteria having a disparate impact upon disabled individuals may be justified by business necessity, if such necessity cannot be achieved by any available reasonable accommodation. Second, an employer may defend its decision not to hire or retain a disabled individual on the basis that his or her employment constitutes a "direct threat" to himself or others. As will be discussed below, the legislature’s
failure to include certain defenses and exemptions contained in the ADA, as well as the former Louisiana Commission on Human Rights Act, might have the unintended consequence of greatly expanding the new law's coverage and effect.

Court actions to remedy violations of the disability discrimination provisions, and the remedies available, are set out in Section 325. Small, but critical, changes have been made to the prior law. First, the Civil Rights Act for Handicapped Persons Act was one of the few previous pieces of civil rights legislation which explicitly set forth a prescriptive period for the filing of an action—one year from the alleged discriminatory act. As will be discussed below, the new provision is silent as to the appropriate prescriptive period—the authors apparently content to allow the courts to continue to decide which prescriptive period is applicable. Second, the old law provided remedies including “all remedies available under the law . . . including, but not limited to, compensatory damages, attorneys' fees, costs, and any other relief deemed appropriate.” The new law authorizes remedies of “compensatory damages, back pay, benefits, reinstatement, reasonable attorney fees and court costs.” Again, it appears that the authors have removed the “front pay” remedy. Finally, as will be discussed below, two unique provisions from the old law are retained—that requiring a plaintiff to give thirty days' notice to the potential defendant that a court action will be filed and a provision authorizing the trial judge to award attorneys' fees and court costs, at his discretion, to a prevailing defendant.

4. Discrimination Based on Race, Color, Religion, Sex or National Origin

Part 4 of the new Discrimination Law is based on a combination of the 1983 Civil Rights Act and the 1989 Commission on Human Rights Act. Its prohibitions against discrimination based upon race, color, religion, sex, or national origin apply to employers with over fifteen employees and who provide compensation and receive services. Unlike other forms of discrimination, the legislature has apparently chosen to exempt religious institutions from this

54. See 42 U.S.C. §§ 12113 (c) & (d), 12114, 12210, 12211 (1995).
60. La. R.S. 23:325(C), (B) (1998).
63. La. R.S. 23:331(A), (B) (1998). The Commission on Human Rights Act applied to "any person employing eight or more persons within the state, or any person acting as an agent of an employer directly or indirectly." Former La. R.S. 51:2232(4) (1997).
section’s proscriptions.64 Finally, the exemption for domestic servants and relatives is also provided for in this part.65

Section 332 proscribes certain forms of “intentional” discrimination.66 The traditional employer prohibitions against disparate treatment and disparate impact discrimination track the language of Title VII.67 A similar provision is applicable to the actions of employment agencies.68 Labor organizations are also prohibited from discriminating in their internal and external operations.69 Discrimination in apprenticeship programs and in employment advertising is also prohibited.70 As in the prior law, discrimination by insurers against insurance agents is also prohibited.71 The protection from actions taken pursuant to an affirmative action plan is also retained in the new law.72 Finally, the last provision of Section 332 preserves the “bona fide occupational qualification” defense for race, sex and national origin, exempts religious institutions, sets forth the defenses to a charge of compensation discrimination and permits the use of “professionally developed ability” tests.73

As in the case of the other types of discrimination causes of action discussed above, the legislature has again narrowed the damages available to plaintiffs. Under Section 333A, plaintiffs may seek as remedies “compensatory damages, back pay, benefits, reinstatement, reasonable attorneys’ fees and court costs.”74 Previously, a plaintiff joining causes of action under the Civil Rights Act of 1983 and the Commission on Human Rights Act could also seek “general or special” compensatory damages, “actual damages” and injunctive relief.75 Clearly, “front pay” is to be disallowed. The legislature also retained the provision of the

64. La. R.S. 23:331(B) (1998). This provision was formerly in the Commission on Human Rights Act at Louisiana Revised Statutes 51:2242(B).
73. La. R.S. 23:333(D) (1998). Subsections (3) and (4) were apparently derived from Section 703(h) of Title VII, at 42 U.S.C. § 2000e-2(h) (1994).
1983 law allowing judges to award attorneys' fees and costs to prevailing defendants, when "frivolous claims" are brought.\(^6\)

In an unrelated act, the legislature amended former Section 23:1006 to include a new subsection (D).\(^7\) Now, predesignated as 23:333(C), the new provision protects potential state plaintiffs from prescription while their case is pending before the Equal Employment Opportunity Commission or the Louisiana Commission on Human Rights—for up to eighteen months.\(^8\) Query: does this mean that actions for racial, sexual and religious discrimination are governed by an eighteen month prescriptive period or by the one year prescriptive period that courts have previously applied to Louisiana civil rights actions?\(^9\)

5. **Pregnancy, Childbirth and Related Medical Conditions**

Louisiana's Pregnancy Discrimination Law,\(^8\) which created a four-month floor on the amount of leave state employers are required to give employees for pregnancy, was retained, on a word-for-word basis, in the new law.\(^8\) The definition of "employer" under the law has been slightly changed by limiting it to those who "receive services" and "give compensation," again apparently to clarify that there can be no individual liability under the Act.\(^8\) As will be discussed below, the legislature missed an opportunity here to clarify some inconsistencies within this law and to consider how this law should co-exist with the federal Family and Medical Leave Act of 1992.\(^8\)

6. **Sickle Cell Trait**

As in the case of pregnancy discrimination, the new law adopts, almost word for word, the previous law with respect to discrimination based upon sickle cell trait.\(^8\) The prohibition is again limited to employers with twenty or more employees, but again such employers must "receive services . . . and give compensation," thus again preventing individual liability of supervisory or co-
employees. Furthermore, the intent to deny any "front pay" relief can be intimated from the changes in remedies from "legal or equitable relief" to "compensatory damages, back pay, benefits, reinstatement, reasonable attorneys' fees and court costs."

B. Section 2—Revisions to Civil Rights Act for Handicapped Persons

At Section 2 of the Act, the legislature amended the provisions of the Civil Rights Act for Handicapped Persons to remove all references to employment. Essentially, the law now only applies to educational facilities, real estate transactions and state funded programs.

C. Section 3—Revisions to Commission on Human Rights Act

The Commission on Human Rights Act is similarly effected by the new Employment Discrimination Law. As will be discussed below, the Commission itself was left intact—as unsupported as ever. The new law deletes many references to employment discrimination, as it did with the Handicapped statute. However, the new law specifically inserts a new provision in the law stating that the Commission shall have enforcement powers, including claim adjudication, over age, disability, race, sex, religious, pregnancy and sickle cell trait discrimination.

The power for Parishes and Municipalities to create their own ordinances and agencies is preserved at Section 51:2236.

88. The changes are as follows: Section 46:2252 is amended to strike the word "employment" from its second paragraph. Section 46:2253(2) is amended by striking the words "at the discretion of the employer." Section 46:2253(4)(a) is deleted. "Employment" is deleted from the title of Section 46:2254. "In Employment" is deleted from Section 46:2254(A).
89. For example, somewhat nonsensically, the word "employment" is stripped from the first few words stating the purpose of the Commission on Human Rights Act in Section 51:2231(A):
   It is the purpose and intent of the Legislature by this enactment to provide for execution within Louisiana of the policies embodied in the Federal Civil Rights Act of 1964, 1968 and 1972 and the Age Discrimination in Employment Act of 1967, as amended, and to assure that Louisiana has appropriate legislation prohibiting discrimination in employment public accommodations sufficient to justify the deferral of cases by the federal Equal Employment Opportunity Commission. . . .
   but left the word in later:
   . . . to safeguard all individuals in the state from discrimination because of race, creed, color, religion, sex, age, disability, or national origin in connection with employment. . . .
Section 51:2231(B) is changed by deleting the word "in connection with employment" and by eliminating the age 70 cap.
D. Deleted Statutes and Effective Date

The new law deleted about seventeen provisions of the revised statutes and affected many others. Governor Foster signed the bill on July 15, 1997 and it went into effect on August 1, 1997. As the act contains no provision regarding retro-active effect, it will be left to the courts to determine its effect on litigation filed prior to August 1, 1997 or to litigation concerning events occurring before August 1, 1997, but filed subsequently.

II. RESOLVED AND UNRESOLVED ISSUES

As set forth above, the new law clearly resolves various issues which have engendered litigation in both state and federal courts in Louisiana. Individual liability appears dead, whether it comes under the umbrella of "agency" or "conspiracy" theory. The legislature also appeared to intend to do away with the "front pay" remedy. But several other issues which could have been addressed, such as retaliation, prescription, attorneys' fees and, perhaps most importantly, the future of the Human Rights Commission, were left unresolved.

A. Resolved Issues

1. Individual Liability

Of all the issues under the various state employment discrimination laws, the issue of whether an individual can be held responsible for his or her acts of discrimination has been the most frequently litigated, but for mainly tactical, not strategic, reasons. Frankly, there is a widely-shared perception among both the plaintiff and management bars that certain state courts, particularly those in rural parishes and the Civil District Court for the Parish of Orleans, present a much more favorable forum for plaintiffs—both from the standpoint of facing potential motions for summary judgment and for getting the sympathy of the jury venire. To date, no empirical study has been done to verify this perception. Moreover, both the state legislature and the supreme court have in recent years become much more pro-summary judgment, both from the legal standard and in the courts' rulings. In addition, a federal court offers some advantages to a plaintiff not available in state court, such as punitive damages, front pay and a much higher standard governing the court's review of a jury verdict.

Nevertheless, this perception that a plaintiff is better off in state court persists. Accordingly, in bringing actions in state courts against out-of-state companies, plaintiffs have also joined as defendants the supervisors who either made the alleged discriminatory decision affecting the plaintiff, or who had the

ultimate power to reverse such decision (who just happen to be domiciled in Louisiana). Then, in maneuvers which have become almost automatic, the defendant employer removes the case to federal court, alleging that the individual resident defendant has been “fraudulently joined,” and thus the federal court possesses diversity jurisdiction.

In early skirmishes, wherein the issue was whether an individual could be held liable under Louisiana Revised Statutes 23:1006, the plain wording of the statute’s definition of “employer” led several courts to dismiss the joined individuals as defendants and retain jurisdiction. However, after the enactment of the Human Rights Commission Act, in a much-cited opinion, the late Judge Arceneaux, in Alphonse v. Omni Hotels Management Corp., rejected such a holding. Noting that: (a) the legislature had intended to emulate the federal legislation, such as Title VII; (b) several Louisiana courts had looked to Title VII jurisprudence in resolving questions under state law; and, (c) Title VII had then been held to impose liability upon individuals in their agency capacity, Judge Arceneaux concluded that an action against a supervisor could be brought under both Louisiana Revised Statutes 23:1006 and the Human Rights Commission Act despite the clearly different definitions of “employer” contained in the respective statutes. Thereafter, despite a state court of appeal ruling to the contrary, several Louisiana federal district judges followed the Alphonse ruling.

Starting in 1991, after the passage of the Civil Rights Act of 1991, federal courts began increasingly to review whether individuals could be sued under federal employment discrimination laws. In the seminal decision of Miller v. Maxwell’s International, Inc., the Ninth Circuit Court of Appeals held that no liability could be imposed upon individual employees for violations of the Age Discrimination in Employment Act of 1967 or of Title VII of the Civil Rights Act of 1964. The Fifth Circuit appeared to wholeheartedly endorse the Ninth
Circuit's rulings in *Grant v. Lone Star Co.*,\(^9\) in 1994. However, in a decision rendered at the about the same time, *Garcia v. Elf Atochem North America*,\(^10\) the court seemed to be suggesting that supervisors, acting in their official capacities, could still be sued as individuals under Title VII. These two rulings led to many contradictory decisions on fraudulent joinder cases, particularly within the Eastern District of Louisiana.\(^1\)

Recently, Judge Clement, in *Indest v. Freeman Decorating, Inc.*,\(^2\) effectively explained the dichotomy between *Grant* and *Atochem*, by noting that:

The Fifth Circuit has also recognized that individual employees can be liable in their official capacities under Title VII, at least when they occupy the position of the plaintiff's supervisor, with the power to hire or fire her. *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994); *see also Desormeaux*, 1994 WL 586432 at *3. However, the Fifth Circuit apparently has not addressed the question of whether a company and its employee in his official capacity may be sued together under Title VII . . . [Defendant] argues that because [his employer] would bear full responsibility for any assessment against him in his official capacity, it is redundant for plaintiff to sue them both. To support this position, he cites *Allen v. Tulane University*, 1993 U.S. Dist. LEXIS 15641, 1993 WL 459949 (E.D. La., Nov. 2, 1993). In *Allen*, the court cited the Fifth Circuit case of *Sims v. Jefferson Downs Racing Ass'n*, 778 F.2d 1068 (5th Cir. 1985) and concluded that "outside of an action against an officer personally, a plaintiff does not have an action against both the corporation and its officer in an official capacity," because "entry of judgment against both the corporation [and the officer] would . . . effectively make the corporation liable twice for the same act." *Sims*, 778 F.2d at 1081. Although *Sims* is grounded in the Louisiana law principle that a corporation is liable for the torts of its officers or agents committed in the course and scope of their employment, Title VII incorporates the similar principle that an employer is vicariously liable for the acts of its employees. The Court is persuaded that the *Sims* analysis applies to this case.\(^3\)

\(^{9}\) *Grant*, 21 F.3d 649.

\(^{10}\) 28 F.3d 446 (5th Cir. 1994).


\(^{3}\) Id. (notes and emphasis omitted).
Thereafter, most, if not all, of the decisions on this point have weighed in against individual liability under Title VII.\textsuperscript{104}

The \textit{Grant} decision led several district courts to hold that no individual liability could be imposed upon supervisors under Louisiana employment discrimination laws, given the similarity between the state definitions of "employer" in its age and general discrimination laws as compared to the definitions in the federal ADEA and Title VII. \textit{Atochem}, of course, supported the minority view.\textsuperscript{105} After Judge Clement's ruling in \textit{Indest}, there were only a few "holdout" judges though, who stubbornly continued to remand such cases.\textsuperscript{106} Several courts have held that an individual could be sued as a "conspirator" under the provisions of Louisiana Revised Statutes 51:2256.\textsuperscript{107}

The new "Employment Discrimination Law" should remove all doubt and debate from this issue. The definitions of "employer" under the Age, Disability, Race-Creed-Color-Sex-NationalOrigin, Pregnancy and Sickle Cell sections of the new law, while differing in the number of employees over which coverage attaches, uniformly require that the employer employ a number of employees from which it receives services in exchange for compensation.\textsuperscript{108} Agency liability is also notably deleted from each definition.\textsuperscript{109} The conspiracy section of the Commission on Human Rights Act,\textsuperscript{110} as will be discussed below, has been neutered. The issue is thus settled—only employers can be sued for employment discrimination under Louisiana's laws.\textsuperscript{111}

\begin{itemize}
\item[104.] See supra note 98.
\item[105.] See supra note 100.
\item[108.] La. R.S. 23:311(A), (B), 321(A), (B), 331(A), (B), 334(A), (B), 351(A), (B) (1998).
\item[109.] Id.
\item[109.] Id.
\item[111.] The legislature's actions will not end the war between plaintiffs and employers as to forum selection. As a fallback position to naming the individual resident defendants under the state anti-discrimination laws, plaintiffs have also joined them as defendants under various independent tort law theories, such as defamation, invasion of privacy and intentional infliction of emotional distress. To quote Claude Rains, these "usual suspects" have spawned another defense tactic—deposing the plaintiff and moving for summary judgment on these often bogus claims before a remand motion can be decided. See Burden v. General Dynamics Corp., 60 F.3d 213 (5th Cir. 1995); White v. Allstate Ins. Co., No. 95-4234, 1996 U.S. Dist. LEXIS 3212 (E.D. La. Mar. 13, 1996). Of course, such a tactic depends upon the federal judges' willingness to hear the summary judgment motion. See Smith v. HSC Hospitality, Inc., No. 96-1980, 1997 U.S. Dist. LEXIS 12002 (E.D. La. Aug. 8, 1997) (allegations of complaint supported action against supervisor under intentional infliction of emotional distress, court refused to hear summary judgment motion).
\end{itemize}
2. Availability of Front Pay

Prior to the new law, Louisiana's employment discrimination statutes were silent as to whether an award of "front pay" could be given to a plaintiff. The concept of "front pay" was developed by federal courts under Title VII and the ADEA to provide victims of discrimination with full "make whole" relief. Under both statutes, the favored remedy was reinstatement to the employee's past position. However, the courts recognized that such a remedy was not always a practical solution, given the parties' potentially bitter attitudes towards each other. In other cases, intervening events, such as a plant shutdown, might have foreclosed the reinstatement remedy. So, the substitute remedy of "front pay" was developed. In effect, "front pay" is that amount of compensation a plaintiff will need, projecting into the future, to allow them to be in the same position they would have enjoyed had the unlawful discrimination not taken place. Over the years, federal courts have struggled with the question as to whether the judge or the jury should decide whether reinstatement versus an award of front pay is appropriate, as well as the amount of front pay to be awarded, given a plaintiff's obligation to mitigate damages.

While Louisiana's employment discrimination statutes did not contain any provisions specifically authorizing awards of front pay, the remedial provisions did contain broad language such as "legal or equitable relief," "all remedies available under the law . . . including, but not limited to, compensatory damages, attorneys' fees, costs, and any other relief deemed appropriate," "general or special damages," "compensatory damages," "actual damages" and injunctive relief. Given the broad nature of the above provisions, as well as the express statutory purposes to emulate federal laws, courts generally included front pay as a remedy for plaintiffs.

114. Goldstein, 758 F.2d at 1449 (front pay appropriate when "discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy").
117. Compare Dominic v. Consolidated Edison Co. of New York, Inc., 822 F.2d 1249 (2d Cir. 1987) (judge must decide question of whether front pay is appropriate and amount of such award) with Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1470 (5th Cir.), cert. denied, 492 U.S. 842, 110 S. Ct. 129 (1989) (trial judge must determine initially that front pay is appropriate, then jury must determine the amount of the award).
118. See, e.g., Dunlap-McCuller v. The Riese Org., 980 F.2d 153 (2d Cir. 1992) (seven weeks in view that plant was scheduled to close down); Padilla v. Metro-North Commuter R.R., 92 F.3d 117 (2d Cir. 1996) (twenty years of difference between current pay and past pay).
119. See Delchamps, 897 F.2d 815 (front pay damages are available under LADEA, up to five years in this case).
Under the new law, however, age discrimination is remedied by "back pay, reinstatement, reasonable attorneys fees and court costs," disability discrimination by "compensatory damages, back pay, benefits, reinstatement, reasonable attorney fees and court costs," race-sex-religious-national origin discrimination by "compensatory damages, back pay, benefits, reinstatement, reasonable attorneys' fees and court costs," and sickle cell trait discrimination by "compensatory damages, back pay, benefits, reinstatement, reasonable attorneys' fees and court costs." By eliminating such terms as "general or special damages," "actual damages," and "other relief deemed appropriate," it is clear that the legislature intended to narrow the relief courts and juries could afford. And, by specifically listing "back pay" as an item of damages, but omitting "front pay," by implication, the legislature must have meant to foreclose that remedy.

In so doing, however, the legislature left open a counter argument sure to engender litigation. By retaining "compensatory damages" as an item of relief in the disability, race-sex-religious-national origin and sickle cell sections, the legislature left open the possibility that "front pay" could still be available.

B. Unresolved Issues

1. The Future of the Commission on Human Rights

The "Louisiana Employment Discrimination Act" did not make any substantive changes to the functions of the Louisiana Commission on Human Rights ("LCHR"). While certain provisions of the LCHR Act delineating the functions of the Commission were deleted, the new law transferred those same functions back in a new provision. So, as before, the Louisiana Commission on Human Rights is, in theory, an active state agency under the Louisiana Department of Labor. Under a "Memorandum of Understanding" reached between the LCHR and the EEOC in 1993, a charging party filing a charge with either agency will be considered to also have filed a charge with the other. In addition, each agency is charged with investigating and resolving charges that are originally filed with it. In a separate agreement, the EEOC has also agreed to compensate the LCHR for any cases it processes—as it does with other state agencies it "defers" to in the rest of the country. Since Louisiana is now a jurisdiction with a "deferral agency," charging parties have up to three hundred (300) days in which to file a timely charge with the EEOC.

Theoretically, agencies such as the LCHR and the EEOC serve the practical purpose of bringing the potential plaintiffs and defendants together at an early stage prior to litigation—whereby after the agency's preliminary investigation, each party can size up the other party's arguments and make an early decision to amicably resolve their differences. As the late Joseph Rauh, the noted civil

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120. La. R.S. 51:2231(C) (1997). Unfortunately, adequate funding to perform these functions was not provided.
rights activist put it, administrative remedies are to court remedies as wholesale is to retail. Clearly, for plaintiffs who are unwilling or unable to obtain quality legal representation, such agencies are the only avenue to relief.

In reality, the LCHR cannot hope to achieve the above effect. Practically, its only effect has been to extend the charge filing period. At present, the Commission on Human Rights has a staff of two persons in its Baton Rouge office—clearly inadequate to perform any of the statutory and/or contractual tasks for which it is responsible. Year after year, the legislature has refused to increase its funding of the Commission and private donations have not been large enough to allow for any growth of its enforcement staff. Proponents of the agency’s existence, such as Professor Joel Friedman of Tulane, have argued that it will permit Louisiana to address employment discrimination without “federal intervention.” Critics of the agency have asserted that given the long pre-Commission operation of the EEOC in Louisiana, such “federal intervention” is now an accepted fact of life. Further, given that the legislature has now reduced the number of employers covered by state law by raising the employee level to fifteen—the exact same number covered by the EEOC—there is doubt that the state should undertake funding such an agency whose statutory obligations are already being performed by a federal agency.

After weighing the above arguments, the author must come down on the side of the Agency’s critics. While the EEOC is not without its critics, it has usefully served as a clearinghouse for unmeritorious charges and honorably as a settlement catalyst over the past twenty-five years in Louisiana. Unless the legislature decides to adequately fund the continued existence of the LCHR in order to enable it to perform such functions effectively, it should be allowed to die a peaceful death.

2. Retaliation

One glaring omission in the new law is the failure of the legislature to include a broad provision prohibiting an employer from retaliating against an employee who asserts rights under the law. Again, by “cutting and pasting” the old legal provisions, the causes of action differ nonsensically—based upon the underlying type of discrimination. Apparently, a Louisiana plaintiff may sue his employer for retaliation based upon his or her opposition to, or participation in any proceeding against, age discrimination or sickle-cell trait discrimination—although the legislature uses the term “discriminate” rather than “retaliate.”121 However, there is no retaliation provision with regard to claims of disability or pregnancy discrimination. Perhaps even more significantly, given the number of claims arising in the various areas, the legislature failed to include a retaliation provision in Part IV of the new law relating to discrimination based on race, color, sex, religion or national origin.

Given the "cut and paste" tactics of the authors of the new law, this current situation mirrors prior law—with one glaring exception. Section 23:1006 did not contain an express retaliation provision. Nor did the Civil Rights Act for Handicapped Persons contain a retaliation provision. However, LADEA did prohibit retaliation. Most importantly, the Commission on Human Rights Act did contain an express retaliation provision at Section 51:2256—a provision which the authors chose to retain in the old law, but apparently has no application to the new law—perhaps because, among other things, that provision allowed for individual liability for those who committed such acts of retaliation and for those who participated in conspiracies to violate the


125. To determine the exact construction the legislature intended to give to the retained Section 51:2256 is a formidable task. First, that section states as follows:

§ 2256. Conspiracy to Violate this Chapter Unlawful.

It shall be an unlawful practice for a person or two or more persons to conspire:

(1) To retaliate, or discriminate in any manner against a person because he has opposed a practice declared unlawful by this Chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this Chapter.

(2) To aid, abet, incite, compel, or coerce a person to engage in any of the acts or practices declared unlawful by this Chapter.

(3) To obstruct or prevent a person from complying with the provisions of this Chapter or any order issued thereunder.

(4) To resist, prevent, impede, or interfere with the commission, or any of its members or representatives, in the lawful performance of duty under this Chapter.

From the above language, it is reasonable to assume that a plaintiff claiming "retaliation" must be able to point to a right protected by that "chapter," i.e. revised Chapter 38 of Title 51. However, the revised Chapter 38 does not contain any prohibitions against employment discrimination. Thus, the still existing provisions of Sections 51:2256 and 51:2264 (authorizing civil actions) would appear to have no application to the employment setting—except perhaps to prohibit retaliation against those who file a charge with the Louisiana Commission on Human Rights.

A counter-argument could be made that the legislature, by assigning enforcement powers to the Commission over various types of employment discrimination, in Section 51:2231 (C), meant for those rights in Section 23:301 et seq. to be incorporated by reference into Chapter 38—such that the conspiracy to retaliate and/or discriminate provisions in Section 51:2256 would still have some teeth. However, given that the legislature clearly intended to do away with individual liability, such a construction seems improbable.
Act.¹²⁶ Hopefully, this omission will be cured in the next legislative session—as proposed later in this paper.

3. Prescriptive Periods

As with prior law, the new law is silent as to what prescriptive period applies to employment discrimination actions. Under the old laws, courts analogized employment discrimination actions to tort or "delictual" actions, such that the one year period of Civil Code article 3492 was applicable.¹²⁷ Louisiana courts also looked to federal precedent to determine when the prescriptive period starts to run,¹²⁸ what constitutes a "continuing violation,"¹²⁹ and when, if ever, is prescription interrupted or tolled.¹³⁰ By not changing the new law to reflect a particular prescriptive period, the legislature apparently has approved of the courts' adoption of the one year period and the federal jurisprudence regarding ancillary questions.

However, a separate enactment, not part of the "Louisiana Employment Discrimination Law" Act, has created some ambiguity in this area. Act No. 1123, signed by Governor Foster on July 14, 1997, created Section 23:333 (C), providing as follows:

The prescriptive period, applicable to a plaintiff's cause of action under the provisions of this statute, shall be suspended during the pendency of


¹³⁰. Koppman v. South Central Bell Tel. Co., 59 Fair Empl. Prac. Cases (BNA) 345 (E.D. La. 1992) (federal "equitable estoppel" doctrine analogized to Louisiana's "ill practices" doctrine whereby "one may not seek the benefits of prescription where one engages in 'ill practices' that 'hinder, impede or prevent the plaintiff from timely asserting her cause of action.'" (citing Nathan v. Carter, 372 So. 2d 560, 562 (La. 1979)).
any administrative review or investigation of the claim conducted by the federal Equal Employment Opportunity Commission or the Louisiana Commission on Human Rights, but in no event longer than eighteen months.

The purpose of the bill was obviously to protect potential plaintiffs who were "asleep at the agency" while their state law claims were prescribing. Implicitly, by limiting the effect of such a suspension of the prescriptive period to eighteen months at most, the new provision seemingly gives legislative approval to the courts' application of the one year prescriptive period of Civil Code Article 3492 for situations where no administrative complaint is filed.

Unfortunately, as one court has noted, this protection now only extends to those who file race, color, sex, religion or national origin claims under Section 23:333—and not to claims for age discrimination, disability discrimination, pregnancy discrimination or sickle cell trait discrimination. That court also impliedly suggested that the eighteen month prescriptive period applied to all claims brought under Section 23:333, regardless of whether an administrative complaint had been filed.


"Act 1409 "consolidated all employment discrimination provisions of state law in one Chapter of Law." The age discrimination law was recodified as Part II of that Chapter, R.S. 23:311-314, which Part still does not provide a prescriptive period. The law related to race, color, etc., with its eighteen-month prescriptive period, was recodified as Part IV of the Chapter, R.S. 23:331-334. The eighteen-month period does not apply to age discrimination claims. The one-year period still applies and plaintiff's state law claims prescribed before the filing of this action.


134. Benton, 1998 U.S. Dist. LEXIS 756. Prior to the above quote, the court also stated that "Act 1123 of 1997 amended only § 1006 (race, color, etc.) to provide an eighteen-month prescriptive period."
4. Plaintiff’s Duty to Mitigate

Under federal employment discrimination laws, courts have imposed a duty upon all plaintiffs claiming to have suffered from discrimination an obligation to engage in good faith efforts to mitigate their damages. To date, under jurisprudence interpreting Louisiana’s employment discrimination laws, courts have also imposed that duty upon Louisiana plaintiffs.

Nevertheless, an argument has been, and probably will continue to be made, that no such obligation should exist in Louisiana. Proponents of this view assert that the federal obligation to mitigate is based upon common law principles requiring plaintiffs in breach of contract cases to mitigate their damages. But, under Louisiana Civil Code Article 2749, stating that an individual employed for a definite term can only be terminated for “serious ground of complaint,” also indicated that in the event that he is not terminated for cause, his damages amount to the difference between what he should have received under the contract and what he did in fact receive. No mitigation is required.

Since the legislature failed to address this issue in the new law, the argument remains open. As a management lawyer, I admit that I am in favor of the mitigation requirement. Moreover, despite the provisions of Article 2749, and the cases interpreting it, Louisiana does generally require plaintiffs in breach of contract actions to mitigate their damages.

5. When Is an “Employer” an “Employer”?

One of the criticisms made of the old laws were the different employee-number levels required for employer coverage. Unfortunately, the new law retains some, if not all, of these dichotomies. The following table shows the coverage levels for the different types of prohibited discrimination:

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   An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 706(g). This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied.


139. La. Civ. Code art. 2002. See also Glazer v. Glazer, 278 F. Supp. 476, 485 n.21 (E.D. La. 1968) (“In the absence of LSA-C.C. Art. 2749, the rule in Louisiana appears to require . . . that damages be reduced in an amount equal to what the plaintiff reasonably could have earned had he chosen to work”).
<table>
<thead>
<tr>
<th>EDL Section</th>
<th>Type of Discrimination</th>
<th>Employee No. for Coverage</th>
</tr>
</thead>
<tbody>
<tr>
<td>23:311 (A)</td>
<td>Age</td>
<td>20</td>
</tr>
<tr>
<td>23:321 (A)</td>
<td>Disability</td>
<td>15</td>
</tr>
<tr>
<td>23:331 (A)</td>
<td>Race, Color, Religion, Sex and National Origin</td>
<td>15</td>
</tr>
<tr>
<td>23:241 (A)</td>
<td>Pregnancy</td>
<td>25</td>
</tr>
<tr>
<td>23:351 (A)</td>
<td>Sickle Cell Trait</td>
<td>20</td>
</tr>
</tbody>
</table>

There are two apparent problems with the new scheme. First, under the above scheme, an employer with seventeen employees must not discriminate with respect to disability, race, color, religion, sex and national origin, but is perfectly free to discriminate on the basis of age, pregnancy and sickle cell trait. While there are some legitimate policy considerations supporting different levels of coverage for the pregnancy leave laws, such considerations would appear not to apply towards differing levels for age and sickle cell trait discrimination.

Second, by raising the minimum number of employee requirement for any coverage at all to fifteen employees, the legislature has ensured that Louisiana’s employment discrimination laws will not reach any further down into small workplaces than the federal Title VII—which also sets coverage for employers with fifteen employees. The question must then be raised—why even have these provisions—given that Title VII actions, as well as other federal employment discrimination provisions, can be filed in state court.

6. Applicability of ADR to Employment Discrimination Actions

The old “Civil Rights Act for Handicapped Persons” contained a provision whereby a plaintiff had to give thirty (30) days’ notice to a defendant that a

140. Small employers, for example, could argue that they suffer a much greater burden in providing four months of leave to a pregnant employee than larger employers. However, one federal court recently failed to detect such a distinction, in construing prior law support. In Lapeyronnie v. Dimitri Eye Center, Inc., 693 So. 2d 236, 238 (La. App. 4th Cir. 1997), the court held that an employer with less than twenty-five employees could nevertheless be prohibited from committing pregnancy discrimination by virtue of the sex discrimination provisions of the LCHR, “[s]ince the expressed purpose of the act was to mirror Title VII its prohibition against sex discrimination necessarily included pregnancy discrimination.”

court action would be filed—each party then bearing a good faith obligation to attempt to settle the matter. While this provision was retained in the new law with respect to disability discrimination, it was not extended to other employment discrimination actions. Since the new "Louisiana Employment Discrimination Law," unlike the federal Title VII, does not require that any administrative agency remedies be exhausted prior to the onset of litigation, such suits can continue to be filed without the parties being mandated to take any steps to achieve a pre-litigation resolution. Nor did the legislature speak to the growing trend to refer such cases to various forms of alternative dispute resolution, such as voluntary or court-ordered mediation or arbitration.

Given the failure of the legislature to adequately fund the Commission on Human Rights, an agency which could have the salutary effect of eliminating the extreme cases from litigation—such as those which are frivolous or obviously without merit and those cases where employer liability is equally obvious, an alternative measure by which the parties could be required to settle their differences prior to litigation via some neutral forum has apparent social utility. Utilization of alternative dispute resolution mechanisms will be proposed later herein.

7. Standards for Awarding Fees to Defendants

Each one of the sub-sections of the new "Employment Discrimination Law" allow the court to award a plaintiff attorneys' fees as a part of the available remedies. However, there is no uniformity among the statutory provisions as to when an award of attorneys' fees would be appropriate to a prevailing defendant.

Under federal law, a prevailing defendant in an employment discrimination action is usually not entitled to attorneys' fees unless the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." In theory, this same principle could be applied to Louisiana's employment discrimination laws with respect to prevailing defendants—but for the wording of the different attorneys' fees provisions.


144. See supra note 15. One court has recently held, however, that Louisiana employment discrimination actions are subject to mandatory arbitration agreements. Freeman v. Minolta, 699 So. 2d 1182 (La. App. 2d Cir. 1997).


For example, under the age discrimination section, a plaintiff can seek attorneys' fees—but the provision is silent as to defendants. However, the attorneys' fees provision in the disability discrimination section provides that "[a]ny party filing suit under this Part who fails to prevail in his cause of action shall be held responsible for reasonable attorney fees and all court costs at the discretion of the judge." The main section dealing with race-sex-color-national origin-religious discrimination provides that "[a]ny plaintiff found by the judge to have brought a frivolous claim under this Part shall be held responsible for reasonable damages incurred as a result of the claim, reasonable attorney fees, and court costs." Finally, the sickle-cell trait section provides only that plaintiffs may be awarded attorneys' fees.

As with other matters discussed herein, there is no logical reason to allow for defendants to recoup their fees under some theories of discrimination, but not under others. Again, a proposal below will suggest a fix for this problem.

C. Disability Discrimination Issues

Perhaps no other area of discrimination law is in as great a period of flux as in the development of case law under the Americans with Disabilities Act. Basic workplace concepts, such as the need to be physically present in the workplace and the employer's prerogative to set a job's duties, are being re-examined every day by the courts. Thus, unlike in other areas of discrimination, where Louisiana courts have a large body of federal case law to draw upon, in the area of disability law, there is virtually a "clean slate." Given this situation, the differences between the language of the federal ADA and the disability section of the new Discrimination Law give Louisiana courts the opportunity to take disability law in different directions than those chosen by federal judges.

1. "Essential Functions" Versus "Duties of Position"

One of the central tenets of the federal Americans with Disabilities Act is that an employer need not change the "essential functions" of its jobs in accommodating the disabilities of applicants and employees who are otherwise qualified disabled individuals. Furthermore, the ADA provides that the

employer's judgment as to what those essential functions are will be given deference if the employer has prepared a written job description before advertising or interviewing applicants for the position in question.\footnote{154}

The new disabilities provisions in the Employment Discrimination Law provide that an "otherwise qualified disabled person" means a disabled person who, with reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires.\footnote{155} In turn, "essential functions" are defined as "the fundamental job duties of the employment position the disabled person holds or desires" but do not include the "marginal functions of the position."\footnote{156} There is no reference to an employer's judgment or to a pre-existing written job description. In addition, all of the prohibited practices, defined in the chapter, speak in terms of the disabled individual's "ability to perform the duties of a particular job or position."\footnote{157} Accordingly, Louisiana courts can enjoy much more latitude in second-guessing an employer's classification of job functions than federal judges can in applying federal law.

2. Are Certain Cases Now Covered?

As discussed above, the new Louisiana provision regarding disability discrimination fails to exclude various classes of individuals specifically excluded by the federal ADA.\footnote{158} For example, the ADA authorizes religious entities to discriminate in favor of their adherents. The ADA also excludes from its coverage current users of illegal drugs, transvestites, transsexuals, homosexuals, compulsive gamblers, kleptomaniacs and pyromaniacs. Louisiana courts are now free, with a clean slate, to determine if such individuals are "otherwise qualified individuals with a disability."

III. RELATIONSHIP OF PREGNANCY LEAVE LAW TO FMLA

The legislature left the Pregnancy Discrimination Law largely untouched in the new law. While the language of the bill is somewhat inartful, the law appears to create a four month "floor" of unpaid pregnancy leave for Louisiana females.\footnote{159} Since the enactment of this provision, however, Congress passed the Family Medical Leave Act of 1992,\footnote{160} providing that an employee shall be entitled to a total of twelve (12) work weeks of leave during any twelve month period in order to take care of a new-born or adopted child; to take care of a spouse, son, daughter or parent with a serious health condition or because of the

\footnotesize{\textit{154.} \textit{Id.}}
\footnotesize{\textit{156.} La. R.S. 23:322(5) (1998).}
\footnotesize{\textit{157.} See La. R.S. 23:323(B)(1), (2), (3) (1998).}
\footnotesize{\textit{158.} See 42 U.S.C. §§ 12113(c), (d), 12114, 12210, 12211 (1995).}
\footnotesize{\textit{159.} See La. R.S. 23:342(2)(b) (1998).}
employee's own serious health condition. Given that the Louisiana Pregnancy Leave Law does not provide for leave with respect to matters other than pregnancy, it is now possible that a Louisiana female employee, who might become pregnant in the same year she has to take care of a sick relative, could "piggy-back" the federal and state leave laws into an eight month leave.

The pregnancy discrimination provision, both under the old and the new forms, has internal inconsistencies which the legislature failed to address. For example, Section 23:342(2)(a)(ii) provides that "[n]o employer shall be required to provide a female employee disability leave on account of normal pregnancy, childbirth or related medical condition for a period exceeding six weeks." The very next section, however, Section 23:342(2)(b), requires that an employer allow a female employee "[t]o take a leave on account of pregnancy for a reasonable period of time, provided such period shall not exceed four months." Similarly, Section 23:342(3) requires an employer with a policy, practice or collective bargaining agreement allowing for light duty transfers to apply such a policy to pregnant employees. The following section requires that the employer do so, even if it does not have such a policy—provided that in so doing, no additional employment is created, no employees are discharged and no non-qualified employees are promoted.

IV. SUGGESTED AMENDMENTS

To be fair, the new law has accomplished its main purpose in consolidating Louisiana's hodge-podge of employment discrimination laws to one place. Furthermore, it is probable that its passage through the legislative labyrinth was made possible by the assurance that it would not make any significant substantive changes to the old laws. Nevertheless, in view of the new issues the new law has created, as well as the old issues left unresolved, the following suggestions are made for the next Legislative session.

First, as stated above, it makes no sense that the different types of discrimination prohibitions should not apply to employers of equal sizes. Therefore, I suggest that there be one central definition of employer in the beginning "Definitions" section of the law. Furthermore, given that the law should apply to more employers than the federal laws, the number of employees should be uniformly set at ten (10). To avoid supervisory liability, the same requirements regarding the provision of services and giving of compensation could be retained.

Second, there should be a central provision, governing all types of discrimination, setting forth the right to file a court action, the applicable prescriptive period, the available remedies, the plaintiff's duty to mitigate damages and when, if ever, attorneys' fees should be awarded to both parties.

In addition, "front pay" should be restored as an available remedy, in order to provide victims of discrimination with full "make-whole" relief.

Third, a central provision should be inserted providing that employers and labor organizations are prohibited from retaliating against those who oppose practices made unlawful by the law and/or who participate in administrative and/or judicial proceedings under the law. Clearly, allowing employers who practice racial, sexual, national origin or religious discrimination to retaliate against those who object undermines the whole public policy supporting the laws in the first place.

Fourth, if it is not ever going to be adequately funded, the Louisiana Commission on Human Rights should be allowed to cease its operations, thereby allowing the federal EEOC to better perform its central functions in Louisiana. In place of the LCHR, a provision should be inserted in the law authorizing various forms of alternative dispute resolution to resolve claims made under the law, similar to provisions contained in the Civil Rights Act of 1991 and the Americans with Disabilities Act of 1990. The issue as to whether such measures can include mandatory arbitration could also be thrashed out.

Fifth, the disability provisions should be amended to more closely resemble their federal counterpart provisions in the ADA. An employer should be allowed to have the "first crack" at determining what are the "essential functions" of a job. The legislature should also affirmatively deal with the issues as to whether drug users, alcoholics, transvestites, transsexuals and homosexuals should be given rights under the law.

Sixth, given the existence of the federal Family and Medical Leave Act, the pregnancy leave law should be repealed, as it clearly would not be practical for a business with between ten and fifty employees to comply with the law. In its place, the legislature should include in the sex discrimination section a statement that discrimination based on sex includes "on account of pregnancy," similar to the language inserted by Congress in the Pregnancy Discrimination Amendment of 1978.

V. THE NEW LOUISIANA "WHISTLEBLOWER" LAW

In addition to re-arranging the state's employment discrimination laws, the legislature also enacted Louisiana Revised Statutes 23:967 which specifically protects any employee who discloses illegal workplace acts, provides information to or testifies before any public body investigating an illegal workplace act or refuses to participate in any illegal workplace act. Our state has always been
defined as an employment "at-will" jurisdiction, in which an employer can discharge an employee for any reason or for no reason, with the exception that the employee's constitutional or statutory rights cannot be violated. However, the courts faced an interesting dilemma when asked to consider whether an employee could legally be fired for refusal to perform an illegal act on behalf of his employer, in the absence of a specific statute which prohibited the employer from terminating the employee. Courts struggled to strike a balance between promoting public policy and adhering to Louisiana's time-honored employment at-will doctrine.

In 1982, the Fourth Circuit Court of Appeal concluded that an employee may be lawfully discharged for refusing to perform an illegal act, as long as the termination by the employer does not violate the employee's constitutional or statutory rights. The Court observed that while the employee's public policy arguments were appealing, broad policy considerations creating exceptions to the employment at-will doctrine should not be considered by the court.

The Louisiana Supreme Court also struggled with this dilemma in 1992 in Cheramie v. Plaisance. In Cheramie, the Court addressed whether an employee could be fired because he reported the fact that his employer had committed an environmental law violation. Avoiding any discussion of the employment at-will doctrine, the Court ruled that the employee's action was protected under Louisiana Revised Statutes 30:2027(B) of the Louisiana Environmental Quality Act. However, the court did not address whether the employee's actions would have been protected in the absence of Louisiana Revised Statutes 30:2027(B).

Following these cases, it appeared that an employer could legally fire an employee who refused to engage in an illegal workplace act or who threatened to disclose an illegal workplace practice as long as no specific statute prohibited it. Realistically, most employers were free to terminate employees who refused to engage in illegal workplace acts because only a few statutes prohibited it in certain types of industry (i.e. Louisiana Environmental Quality Act).

Now, that has all changed—Louisiana Revised Statutes 23:967 provides that an employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of the law, discloses or threatens to disclose a workplace act or practice that is in violation of state law, provides information to or testifies before any public body conducting an investigation, hearing or inquiry into any violation of law, or objects to or refuses to participate in an employment act or practice that is in violation of the law. Reprisal is broadly defined and includes firing, layoff, loss of benefits, or any discriminatory action the court finds was taken as a result of an action by the employee that is

protected under the statute. Employers who violate Louisiana Revised Statutes 23:967 are subject to suit by the employee who may recover damages which are defined as compensatory damages, back pay, benefits, reinstatement, reasonable attorney fees, and court costs.

Employees are not, however, automatically protected under Louisiana Revised Statutes 23:967. Section 967(A) specifically provides that an employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation discloses an illegal act, refuses to perform an illegal act or participates in an official investigation into the illegal act. Therefore, the employee must in good faith believe his employer is actually engaged in an illegal act. In addition, before the employee takes any action, he must notify the employer that he believes the employer is participating in an illegal workplace act.

Louisiana Revised Statutes 23:967 also, unlike some of the discrimination provisions, provides some protection for the employer against frivolous suits. Section (D) provides that if a suit or complaint is brought in bad faith or if it should be determined by a court that the employer's act or practice was not in violation of the law, the employer may be entitled to reasonable attorney fees and court costs from the employee.

VI. MISCELLANEOUS ADDED PROVISIONS

A. Medical Costs Reimbursement

Act 1398, signed by Governor Foster on July 15, 1997, provides that an employer may recoup the costs of pre-employment medical examinations and drug tests, provided that:

1) The agreement is in writing,
2) The employee is paid at least $1 per hour more than the federal minimum wage (currently $5.15 per hour),
3) The employee is hired on a full-time basis,
4) The employee works less than ninety working days, and
5) The employee resigns for any reason other than a substantial change to the employment relationship made by the employer.

If these criteria are fulfilled, an employer may withhold from an employee's final paycheck the costs of a pre-employment medical examination and/or drug test. Of course, if the employee works longer than ninety days, or if the employer terminates the relationship, Louisiana law still prohibits an employer from requiring an employee to pay the costs of pre-employment medical examinations and/or drug tests.171

The only ambiguity in the law which might create difficulties for employers is the requirement that the employee's resignation be unrelated to any "substantial changes in the employment relationship made by the employer," as determined by the Louisiana Employment Security Law, i.e. the unemployment statutes. Generally, under current law, an employee who voluntarily resigns his employment for reasons unrelated to a substantial change in the relationship made by the employer is not eligible for unemployment compensation. Previously, the employee's qualification for unemployment compensation was based upon whether he left the employer for "good cause" connected with the job. The meaning of the phrase has been the subject of many cases before the Office of Employment Security, its Board of Review and Louisiana state courts. Recent decisions have held that a "substantial change" to the employment relationship occurs when the employer alters the wages, hours, working conditions, benefits, or location of work, without the approval of the employee. If such a change occurs and the employee consents, his later action in resigning will not be deemed due to the change.

In most cases where an employee leaves before ninety days, the employee will have left simply because he did not like the work. An employee's mere dissatisfaction with his wages, hours and/or working conditions does not constitute a substantial change to the employment relationship. Nor will an employer's enforcement of productivity standards, including reprimanding an employee, justify an employee's resignation.

B. Vacation Pay Clarification

The legislature also tackled an issue that had been the subject of much litigation under Louisiana's Wage Payment Law. In Act No. 56, the legislature enacted Section 23:631 D, regarding when an employer must pay earned, but unused, vacation pay to an employee upon his or her separation. Under this amendment, vacation pay will be considered an "amount due under the terms of employment," if under the employer's "stated vacation policy":

I. the employee is deemed eligible and has accrued the right to take vacation time with pay, and

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173. Id.
175. See Gray v. Brookshire Grocery Co., 635 So. 2d 1284 (La. App. 3d Cir. 1994); Gaudin Equip. and Supply Co. v. Administrator, 534 So. 2d 493 (La. App. 5th Cir. 1988).
II. the employee has not been compensated for such vacation pay as of the date of his discharge or resignation.\textsuperscript{181}

The law further provides that an employer’s policy cannot produce a forfeiture of earned vacation pay.\textsuperscript{182} Practically, this bill codifies the majority view of Louisiana’s appellate courts which have ruled that “vacation pay” is equivalent to “wages” under the statute.\textsuperscript{183}

VII. CONCLUSION

The 1997 session of the Louisiana Legislature was a “banner” year for employment law. In one area, employment discrimination law, the legislature sought to simplify and clarify the piecemeal legislation enacted over a twenty year period. In another area, the legislature created a massive new area of employment litigation for Louisiana—wrongful termination—by providing a cause of action for whistleblowers in the workplace. For this, the authors of the bills and the legislators who voted for their passage should be commended.

In reality, however, Louisiana’s Employment Discrimination Law still needs work to simplify and clarify its provisions. Specifically, the fate of the Human Rights Commission should be finally determined—is it a bona fide “deferral agency” with funding sufficient to allow it to perform its statutory functions or should it be abolished? The law should also be streamlined and simplified with respect to the employer coverage, retaliation and available remedies, as suggested above.

In addition, for our employment discrimination laws to have relevance apart from the plaintiff’s desires to have an exclusive state forum in which to litigate, the legislature should act to bring different perspectives to the law than those contained in the federal anti-discrimination laws. The “me too” approach courts have used in construing Louisiana’s laws by adopting federal case law even in the presence of differing statutory language also must stop. Louisiana could be a model for the rest of the country in using alternative dispute resolution to efficiently resolve these disputes. To sum up, the legislature has wrought the first step in pushing Sisyphus’ rock up the hill—its up to the rest of us to encourage it to keep pushing.

\textsuperscript{181} La. R.S. 23:631(D)(1)(a), (b) (1998).
\textsuperscript{183} See, e.g., Barrilleaux v. Franklin Found. Hosp., 683 So. 2d 348 (La. App. 1st Cir. 1996), \textit{writ denied}, 686 So. 2d 864 (1997); Macrellis v. Southwest Louisiana Independence Cir., 657 So. 2d 135 (La. App. 3d Cir. 1995); Berteau v. Weiner, 362 So. 2d 806 (La. App. 4th Cir. 1978), \textit{writ denied}, 365 So. 2d 242 (1979). However, the Fifth Circuit continued to allow an employer to withhold earned, but unused vacation pay. See Huddleston v. Dillard Dep’t Stores, 638 So. 2d 383 (La. App. 5th Cir. 1994); Howser v. Carruth Mortgage Corp., 476 So. 2d 830 (La. App. 5th Cir. 1983).