



2011 Agribusiness Symposium

Panel Discussion on Labor Issues

Nichole M. Mooney, Esq.

Dean, Mead, Egerton, Bloodworth,
Capouano, & Bozarth, P.A.

J. David Richeson

Richeson & Coke, P.A.

Mike Carlton

Florida Fruit & Vegetable
Association





Nichole M. Mooney

Office: Orlando
Title: Shareholder
Phone: (407) 428-5110
Fax: (407) 423-1831
Email: nmooney@deanmead.com



Nichole Mooney represents individuals and businesses of all sizes in business litigation and employment related issues. Her representation includes drafting employment and severance contracts, drafting handbooks and policies, and counseling and representing employers in litigation regarding all types of employee actions, rights and obligations, including, but not limited to, wage and hour questions and disputes, FMLA issues, claims of discrimination, retaliation, theft of trade secrets, and all other manner of employment related litigation under Florida and federal law. Ms. Mooney also addresses claims regarding restrictive covenants including non-compete agreements, trade secrets litigation and protection of confidential information.

In addition, Ms. Mooney is involved in all areas of complex business litigation in both state and federal courts ranging from simple contract disputes to issues arising from the dissolution of a business entity and derivative litigation. Ms. Mooney has state and federal courtroom experience in both jury and non-jury trials. She also has experience in administrative proceedings with the EEOC, Florida Commission on Human Relations and Orlando Human Relations Department.

Key Practice Areas

American with Disabilities Act (ADA)
Commercial Litigation
Employment Litigation
Family and Medical Leave Act
Federal and State Court Litigation and Appeals
Wage and Hour Disputes and Litigation

Primary Industries

Healthcare and Life Sciences

Professional and Civic Activities

- American Bar Association
 - Litigation Section
 - Employment Law Section
- The Florida Bar
 - Employment Law Section
 - Business Law Section
 - Trial Lawyers Section
- The Florida Bar Foundation, Inc. - Fellow
- Central Florida Association of Women Lawyers
- Orange County Bar Association
 - Executive Council
 - Former Chair – Business Law Committee

- Committee Member - 2010-2011 Judicial Circuit Civil Courts Commission for Orange County
- ALFA
 - Labor and Employment Practice Group
 - Women's Initiative

Education

Juris Doctorate: University of Florida Levin College of Law, Gainesville, Florida, *with high honors*, 1995

- Order of the Coif, University of Florida Law Review, Member and Associate Editor

Undergraduate Degree: Florida State University, Tallahassee, Florida, *cum laude*, 1992

Bar Admissions

Florida, 1995

U.S. District Court Middle District of Florida

U.S. District Court Southern District of Florida

U.S. District Court Northern District of Florida

U.S. Court of Appeals 11th Circuit

Recognition & Awards

Committee Member – 2010/2011 Judicial Circuit Civil Courts Commission for Orange County

Martindale-Hubbell: Preeminent AV Rating

Speaking Engagements

Legal Ethics, August 25, 2010

FLSA 10 Things an Employer Should Know – Featured speaker, June 23, 2010, seminar presented by Wallace Welch & Willingham

ALFA 2010 Florida Conference – Health Legislation Update; Employment Law panel member, May 20 – 21, 2010, Orlando, Florida

ALFA 2008 Florida Conference – Employment Law panel member

Publications

“Ask a Lawyer” response, published in the *Orlando Sentinel* Law & You section, September 27, 2010

Are You Required to Implement or Identify Theft Prevention Program, Fall 2009

Update in Florida's Guns-at-Work Law, Dean Mead Third Quarter Newsletter, 2008

Florida's New Guns-at-Work Bill, Dean Mead Second Quarter Newsletter, 2008

Computer Information and Litigation, co-authored with Lynn J. Hinson, Esq., February 2007

RICHESON & COKE, P. A .

LABOR AND EMPLOYMENT LAW
RICHESONPAEBPROOIGY.NET

317 SOUTH 2nd STREET
POST OFFICE BOX 4049
FORT PIERCE, FLORIDA 34948
TELEPHONE (772) 465-5111
FAX 1772) 466 0375

FORUM III BUILDING, SUITE 900
1655 PALM BEACH LAKES BOULEVARD
WEST PALM BEACH, FLORIDA 33401
TELEPHONE 1561) 629--6660

PLEASE REPLY TO:

Some Continuing "Hot" Employment Issues For Agriculture.

By: David Richeson

- I. Determine which business operations and employers are considered to be "Agriculture" for the purpose of the Fair Labor Standards Act (FLSA) and National Labor Relations Act (NLRA)?
 - A. General definition to determine whether employees qualify for "Agriculture exemption"? (See attached definition from FLSA, also applies to NLRA)
 1. Agriculture activities performed by a farmer; or
 2. Employed on a farm as an incident to or in conjunction with farming operations even if employer not a farmer i.e. harvesting contractor.
 3. Above test stated simply, but answer not always clear.
 - B. Two areas of importance because of certain exemptions available to persons employed in agriculture.
 1. Fair Labor Standards Act (FLSA) - exemption from overtime requirements.
 2. National Labor Relations Act (NLRA) - Employees in agriculture (as defined in FLSA attachment) are not covered under this law that protects the right of employees to unionize. The National Labor Relations Board just announced a new requirement for all employers covered by the NLRA to post a government prepared notice advising employees of their right to unionize.

II. Determine Who the "Employer" Is.

- A. Utilizing an independent contractor or leasing company to furnish employees to perform a function does not necessarily isolate a company from liability under such laws as the Fair Labor Standards Act and Migrant and Seasonal Agricultural Employees Act because of the broad definition of "employer" in labor and employment laws and "joint employment" and "economic realities" legal theories.

III. What is compensable work time?

A. Compensable Waiting Time

1. Simplified tests:

- a. Waiting to be employed or employed to be waiting?
- b. Is waiting time arguably for benefit of employer?

- B. Waiting time is particularly an important issue for harvest workers.
- C. If it is determined that waiting time should be treated as compensable work time and the worker has not been paid, the employer may be ordered under the FLSA to pay additional money to the worker to the extent the total compensable hours divided into the wages paid for the workweek are less than the minimum wage for each compensable hour. Fines may be levied. Also, for H2A employer's failure to properly compute compensable time may result in additional liability.
- D. Communication systems should be established to prevent harvesting contractors from bringing crews to the field before the starting time for harvesting or compensate for waiting time.
- E. Travel between work locations during work day generally compensable hours.
- F. Travel between home and work location generally not compensable as hours worked unless some work done on the way to the work location *such as picking up ladders, boxes, tools, etc. depending on the facts.*

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- G. Waiting time during work day because of rain, lack of equipment etc. is normally compensable unless workers released to leave work place, and it is feasible to do so, and time is sufficient for worker to use personally. Such factors as group transportation and isolated location of work place complicates ability to determine time to be noncompensable.
 - H. FLSA requires that the employer keep accurate hours of time worked. Hours cannot be estimated or matched to equate to number of boxes or tubs picked.
- IV. Discrimination because of race, national origin, sex, disability, religion, age, etc.
- A. Generally, problems arise not through intentional discrimination, but through alleged different treatment or application of policies to employees who are in a protected class.
 - 1. Need established and communicated policies
 - 2. Need consistent enforcement
 - 3. Need accurate documentation
- V. Immigration and Legal Authorization to Work.
- A. Audit I - 9 compliance
 - B. Alternative sources of employees such as H2A and compliance issues

ATTACHMENT

Section 203, Fair Labor Standards Act

"Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 114j(g) of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

J. DAVID RICHESON

Attorney

Richeson & Coke, P.A.

Fort Pierce and West Palm Beach, Florida

Mr. J. David Richeson is the founding attorney of the law firm of Richeson & Coke, P.A., Fort Pierce and West Palm Beach.

The practice of the law firm of Richeson and Coke is limited to labor relations and employment law representing management. David Richeson has practiced this specialty for over thirty-five years. The firm represents a number of agricultural employers. David is Board Certified in Labor and Employment Law by the Florida Bar and a member of the Florida and Texas Bars, the American Bar Association, and their Labor Law Sections and is a Certified Civil Mediator. He and his firm are rated AV by Martindale Hubbell and he is recognized in the annual "Florida Super Lawyers" publication. He has served on the Executive Board of the Florida Labor Law Section as well as chaired its Wage-Hour and Equal Employment Opportunity Committees. He is co-author of the book entitled "Employment in Florida - A guide to Employment Laws, Regulations and Practices." David has also been a former field attorney for the National Labor Relations Board and Washington Legislative Assistant to U.S. Congressman J.J. Pickle. David graduated from the University of Texas Law School.

Mike Carlton
Biographical Sketch

As Director of Florida Fruit & Vegetable Association's Labor Relations Division, Mike Carlton's primary responsibilities are representing the association in labor related legislative efforts on the federal level and coordinating members' use of the H-2A guest worker program and assisting with compliance efforts with labor laws affecting agriculture.

An industry veteran, Carlton held numerous management positions at Florida Citrus Mutual in Lakeland for 26 years before joining FFVA in 2007, including serving as Director of production and labor affairs and Director of grower relations. Among his numerous accomplishments was designing a \$400 million hurricane relief program for the state's citrus growers in 2004 and successfully pushing the U.S. Department of Agriculture to adopt the program.

In addition to his duties at FFVA, Mike currently serves on the Board and Executive Committee of the National Council of Agricultural Employers in Washington DC and on the Executive Committee of the DC based Agricultural Coalition for Immigration Reform.