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LEGISLATION AND ADMINISTRATIVE ACTIONS

EEOC Moves to Rescind Guidance on Employee Selection Procedures. The U.S. Equal Employment Opportunity Commission (EEOC) has begun the process of rescinding its long-standing Uniform Guidance regarding discrimination in the hiring and promotion process. It covers the range of advertising, recruiting, testing, interviewing, and other practices used by employers and placement agencies. The EEOC seeks to eliminate the Guidance because it includes adverse impact and to downplay validity (meaning "based on sound principle")—two concepts that have long served as the foundation for identifying sex and race discrimination. Those concepts do not align with the current administration's values. Removal of this guidance will also allow more unrestricted use of Artificial Intelligence to make decisions in the hiring process.

LITIGATION

Theme of the Month - Wages and Hours

Wages and Hours are covered by federal laws and a multitude of state laws. Employers must remember to comply with both when creating and monitoring pay policies and practices. This month's Update includes cases in which Federal Fair Labor Practices Act (FLSA), Worker Adjustment and Retraining Notification (WARN) Act, and even the Immigration laws intersect with state wage payment laws. Of particular interest are the cases about pay-rounding policies and meal breaks in which certain times before or after clocking in may qualify as payable.

Paid if You Do - Paid if You Don't

Time is Payable if You Do Work on Unpaid Breaks. Under the FLSA, unpaid meal breaks are supposed to be totally free of any work obligations, and free to leave the premises. In Hamm v. Ochsner-Acadia (5th Cir., 2026) hospital employees brought a class action suit claiming that they were required to remain on-call during meal breaks and had to promptly do work during the meal period if a situation arose. Thus, they were not free from duties or free to leave and did have to work if called upon. Thus, all meal periods then should be paid time and should also factor into the overtime calculation. The court affirmed certification of a class action under both the FLSA and as a case alleging the hospital enjoyed "unjust enrichment" by getting work without paying for it under Louisiana state law. Meal breaks are a frequent topic of FLSA cases and state labor audits when employers either require employees to work or to be on call during meal breaks, or even unknowingly allow employees to shorten meal breaks and do work without monitoring for this and sanctioning the employees who do not follow the rules; the employer "should have known."

Time is Paid if You Don't Work. A supermarket required workers to arrive 15 minutes before each shift in order to assure they were present and able to punch in and start work exactly when the shift began. Often the manager would not arrive to unlock the store until the start of shift time. So, the workers would wait outside – doing nothing. They did, however, file an FLSA and New York labor law claim that they should be paid for all of this pre-clock in, doing nothing, time. The company claimed this was all "preliminary activity" which is not paid time under the Portal-to Portal-Act, such as when employees decide to arrive early to change into work uniforms, etc. The court disagreed. If employees have a choice to come early or not, that is unpaid. However, these employees did not have an option. They were required to show up early and waiting time is compensable if it is required. So, the workers had a valid claim that the pre-clock in, do-nothing time should be on the clock, paid, and counted toward any overtime calculation. Santos v. Lidl US, LLC (2nd Cir., 2026)

Time Rounding

"Time Rounding" is the practice of rounding starting or quitting times to the next shift start or stop time. So, if one clocks in a few minutes early or late, the pay is rounded to the regular shift start time. This practice is supposed to even out with a worker's early and late clock-ins balancing each other. Time rounding is permitted under the Federal FLSA. However, a number of states do not permit this. Employers should check state law before just assuming they can use the FLSA provisions. Even if allowed, time rounding can still be a dangerous practice. Cooper v. Alro Steel Corp.

(Wis. Ct. App., 2026) is a case in which the state law is confusing. The court questioned whether the state wage and hour laws actually allowed time rounding, but then decided that even if it did, the company employees still had a valid class action case for improper application of the rounding practice. Production workers could clock in or out early or late and the system rounded the start of pay to the nearest 10th of an hour. The company argued that after punching in, workers went to get coffee, went to the locker room to change into work garb (while they could have worn the garb to work), or other non-work duty activity. However, evidence showed that many began actual work immediately after clocking in early or kept working right up until a late clock-out. Further, the practice did not balance to even out early vs. late arrivals in a neutral manner. The company obtained a great advantage in getting work which it did not pay for. Over a two-year period, the balance tipped in the company's favor by over 1,473 hours, or approximately 147 hours per employee, for unpaid work. Even if time rounding is permitted under both the FLSA and states laws, it is not sufficient to simply write a policy and stand back to let it operate. The FLSA Guidance clearly states that the employer has a continuing obligation to monitor the practice to ensure that rounding either evens out or over time operates in favor of the employees. The DOL advises: 1. Have a clear policy for employees to understand. 2. Train supervisors and payroll staff. 3. Use reliable time tracking systems. 4. Routinely review and audit the results. Failure to do so can result in invalidating the rounding system and lead to "wage theft" cases under state laws when the "balance" tips too far in favor of the employer. Time rounding is also becoming antiquated and ill-advised in most situations. It was useful when 40 people lined up to punch one clock and not everyone could clock in exactly at the start of shift. Now, one can clock in exactly on time via computer or cell phone, and modern payroll systems are more able to track exact time. So, even where it is legal, it is less and less necessary and increasingly subject to scrutiny and liability. If you allow employees to clock in early, you should make sure they don't perform work until their start time.

Both Violations at Once - Improper Time Rounding and Meal Breaks Resulted in $229M Award. Bennett v. Providence Health Services (King County Cir. Ct, WA, 2026) was a class action in which the jury found a large healthcare company violated state and federal law. An unlawful pay rounding system favored the employer and resulted in a $9.3 million dollar award. Then the jury went further and awarded $90.3 million due to work during unpaid lunch breaks which should have been paid time. **Then** there was a finding that the violations were intentional; the company failed to properly monitor and knew or should have known of the violations. So, the damage award was doubled to $199.2 million plus interest and attorneys' fees were added to

bring the total against the company to $229 million. A very expensive result for not properly designing and monitoring time and break policies and practices.

WARN ACT & The Long Arm of Personal Liability

Personal Liability for Unpaid Wages Extends Beyond Company's Executives and Owners. A Hawaiian airline abruptly shut down, with no advance warning to employees and no pay for their final weeks of work. The employees filed suit under state and federal wage laws and under the WARN Act for failure to provide 60 days' notice or 60 days' pay due to the company closure. The WARN Act and federal and state wage payment laws provide for both corporate and personal liability for those unpaid wages. If the company goes bankrupt, then the individuals in charge – executives and owners may have to pay out of their personal assets. In Kane v. PaCap Aviation Finance, LLC (9th Cir., 2026) this liability reached even further. Non-owners and non-stockholders of the airline were also found liable for payment of the wages. Prior to the closure, the airline had engaged in a number of efforts to keep the company afloat. It had arranged deals with individuals, corporate lenders, and other companies to provide company assets as collateral, made equipment sales and lease-back arrangements, and had given decision-making authority to "outside interests." These other individuals and entities were deeply entangled in the airline's operation, control of equipment and assets, and benefited from the deals struck with the airline. They were in-part involved in the decisions eventually leading to the shutdown, including "allowing assets to dissipate in furtherance of their own interests" rather than preserving enough assets to pay employees. The court found these "others" had enough control to also be held responsible for the back wages and WARN Act payments.

DISCRIMINATION

National Origin - Immigration

Supreme Court Allows Wage Payment to Illegal Immigrants. In Lopez v. Marmic, LLC, the U.S. Supreme Court declined to consider an appeal of a New Jersey case, leaving in place that state's decision that an employer could not employ illegal immigrants and then refuse to pay for work that had been done. The employer had argued that since workers were illegal under federal law, it was prohibited from paying wages. It also argued that if no wages were paid, the illegal person was not actually "employed." The state court had distinguished between unlawful hiring under the federal immigration laws and the requirement to

pay for work under the wage and hour laws. Not paying wages did not somehow cure the illegal hiring. The employer could be in violation of both laws. This is not the only such incident in which employers have refused to pay workers, claiming that illegal aliens have no right to wages. Some have also threatened to report workers to Immigration and Customs Enforcement (ICE) for deportation if they try to take action to collect wages due. This latest case may send a message that the wage and hour laws must still be followed. Former workers can still file cases or class actions even after deportation.

Constructive Discharge

Former Director Sues EEOC for Abandoning its Mission and Creating Hostile Environment for Those it is Legally Supposed to Protect. During the past two years the U.S. Equal Employment Opportunity Commission has dramatically shifted its focus away from the enforcement of several types of discrimination. It has withdrawn a number of guidances, withdrawn from cases on equal pay and equal access to jobs for women, it has ceased to process many sex, race, and disability discrimination cases, it has announced that it no longer recognizes adverse impact as a form of discrimination, and that it will not act on sexual orientation and identity complaints, though these are all clearly still part of the anti-discrimination laws. This has resulted in several suits against the EEOC for not fulfilling its responsibilities. The latest such case is Seawright v. Lucas (Chair of the EEOC) (N.D. CA, 2026). Seawright is a transgender man who was the EEOC's Director of Information Governance and Strategy. The case alleges that the EEOC abrogated its anti-discrimination responsibilities by, among other things, removed all reference to LGBT+ from its materials, eliminated LGBT+ non-binary references on its forms, revoked gender identity non-discrimination policies, and refused to process gender identity discrimination charges. He, himself, was excluded from meetings, had his network access cut, his work responsibilities were diminished, and he was isolated due to his gender identity status and retaliated against for objecting to the agency's actions, to the point of constructive discharge. The EEOC sought dismissal of the case. However, the court found sufficient basis for the sex based hostile work environment, harassment, and retaliation claims to proceed to a jury trial.

Conviction Record Discrimination

Cursing at HR is Not the Best Way to Get a Job. The majority of states have laws prohibiting employment discrimination on the basis of a conviction record, unless it is substantially job related. A 65-year-old soon to graduate student applied for a job

in the university's Student Resource Center. He was hired conditional upon passing the background check, which revealed three drug convictions and time in prison. Human Resources informed him of the issue and concerns of the conviction's reasonable relationship to the job, which might disqualify him. HR then provided the required Fair Credit Reporting Act forms and state law opportunity to provide any clarification or additional facts, mitigating circumstances or rehabilitation information to counter the concerns about the conviction record. Instead, he launched an angry attack upon HR and the Resource Center Manager. He sent a series of scathing email messages repeatedly calling the HR staff "a—holes," "corrupt," and "witch hunters," equating the HR process to "the Great Inquisition" asking "How do you people sleep at night" and suggesting "You probably get a promotion for abusing your power to harm a harmless man." He provided no tangible information about the convictions. The university viewed the belligerent and unprofessional response as grounds for not going through with the hire. The applicant then filed suit under the state's conviction record discrimination law and state and federal Fair Credit Reporting Acts. The court found in favor of the university. Instead of taking the opportunity to appropriately address the concerns about the convictions, the response was the unprofessional, angry, and profane tirade. This itself was sufficient to result in the decision not to complete the hiring, regardless of any conviction record McInerney v. Regents of the University of California (Cal. Ct. of Appeals, 2026)

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