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LEGISLATION AND ADMINISTRATIVE ACTIONS

Wage and Hour Opinion Letter Clarifies Mid-Day Commuting Time. Work from home and partial work from home arrangements have complicated wage and hour issues. Traditionally, the normal morning commute to work and evening return are not compensable paid time. The Continuous Workday Doctrine requires that all activity, including all travel once the workday starts, is compensable until the workday ends. However, some employees are now working part days from home and part days in the office. So, is their normal commute between home and office at mid-day a paid event? A July 22, 2026, Department of Labor Opinion Letter has clarified this issue. It categorizes the midday commute as the same as the traditional home to work or back commute, regardless of when it occurs. So, it is not paid time. However, commuting between worksites during the day is still part of the continuous workday and is paid time.

NLRB Memo Reverses its Position on Non-Compete Agreements. The General Counsel of the National Labor Relations Board (NLRB) issued a Memorandum pulling back from the agency's prior 2023 opinions that Non-Competition Agreements are unfair labor practices which unduly restrict employees' concerted activity rights in violation of the National Labor Relations Act. The new Memorandum states that standard Non-Competition Agreements do not create an automatic unfair labor practice. This new interpretation does not give a *carte blanche* approval of all restrictive agreements. It recognizes that highly restrictive, overbroad Agreements could still violate the Act and lists some areas of concern which the NLRB would consider. However, the memo suggests that the majority of standard non-competition restrictions, reasonably limiting work for competitors, are not in those categories. *Be Aware* that this is only the NLRB's position. Other agencies such as the Federal Trade Commission (Restraint of Trade cases) and

state courts continue to view with skepticism and give close scrutiny to Non-Competes and other restrictive covenants. A recent example is *Steffes v. Fond du Lac Regional Clinic S.C.* (Wis. Ct. of App., 2026), which voided a Non-Compete Agreement due to its “overbroad” remedy provision of having the employees forfeit their vested retirement plan if they violated the agreement.

TRENDS

Scam of the Month – Staged Hearings

As fraud becomes more sophisticated, scammers are creating Administrative Hearings with fake Notices, imposter judges, and all the trappings to simulate a real Administrative Hearing. Recently, a number of Spanish speaking workers in six different states were lured into virtual Workers Compensation Hearings in which the judge listened to their evidence and awarded them Workers Compensation, which will be paid *after* they first paid the “administrative legal fees.” They paid the fees, but there was NO benefit payment. The scammers received thousands of dollars. The current practice of state and federal agencies holding remote, virtual hearings makes it easier to create false agency sites and phony Zoom hearings with all the appearance of the real agency’s offices or hearing room. The scammers can easily gain access to the names of employees and employers involved in Workers Compensation or a variety of other administrative processes, make contact, and set up bogus proceedings which purportedly offer employees or employers the opportunity to settle or reduce claims, once the administrative fees are paid. Employers should be aware that these deepfake and elaborate simulations are becoming more realistic and convincing. Double-check Notices and Internet sites with the real agencies to verify legitimacy. Beware of *any* request to pay fees. State and federal agencies are funded by your taxes; they do not require payments of any fees in order to conduct hearings or finalize determinations.

LITIGATION

Theme of the Month

Retaliation

This month’s Update features cases on retaliation. Retaliation is the single largest category of discrimination cases. Virtually every employment law and many other laws prohibit retaliation for an employee having engaged in “protected activities” as defined under each of those laws. Since there are many laws, there are many

sorts of “protected activities.” Some require an employee to have done very specific things or very clear and unambiguous actions. Other laws can define protected activity as very informal, less obvious actions, such as just asking Human Resources about FMLA eligibility, rights, or forms. This month’s cases cover the limits of protected activity when an employee goes beyond the scope of protection; and personal liability for retaliation; losing the underlying discrimination case, but still winning the retaliation claim. Retaliation is a large and complex area. *For a more comprehensive explanation of the multiple laws, types of retaliation, and how to prevent retaliation cases*, request the article [Retaliation](#) by Boardman Clark.

Family and Medical Leave Act

Employee May Not Qualify for FMLA, But Inquiring About Leave is a Protected Activity for Retaliation Cases. A Technician for a machinery company expressed an intent to take FMLA leave for anxiety-related issues. He was provided FMLA request forms, and said he would be filing them. A month later, the Technician was fired for violating company policies. He then sued, claiming (1) the termination violated his FMLA rights and (2) was also in retaliation for having inquired about and expressed an intent to take FMLA. The court granted summary judgment for the company on the first claim. The Technician never submitted the FMLA forms. A statement that he “would be filing” is not actually filing. He gave the company no information to show he actually had a serious condition which could qualify for FMLA coverage. The company could not deny FMLA rights if he never applied or otherwise gave qualifying information. As to the second claim, however, the FMLA anti-retaliation provisions can apply even if one is not qualified for the leave. The inquiry about FMLA rights itself is a protected activity. The termination occurred very soon after the Technician made the inquiry, and one could challenge a discharge as being retaliatory. *Paris v. McAllister Machinery Co., and International Union of Operating Engineers* (6th Cir., 2026) The court did proceed to dismiss the case on other grounds, but *the lesson* of this case is that the anti-retaliation, protected activities provision can be broader than expected. Frequently, people who are not eligible for the protection of the law’s standard benefits can *still* be covered and sue for even greater damages under the retaliation provisions.

Discrimination

Sex

Engaging in Protected Activity Does Not Immunize One from Discipline for Wrongful Conduct – Even If “In the Course of Opposing Discrimination.”

An ambulance service EMT complained about a co-worker's overt sexual harassment, sexual comments about her body, groping her, and trying to stuff her into a trash can. Management investigated and then separated the two employees to prevent further interaction but took no disciplinary action. A couple of years later, the EMT took it upon herself to warn new female EMTs about the co-worker's harassment. Besides sharing her prior incident, she also retrieved photos the co-worker and his wife had posted on an adult website, which showed the couple engaged in sexual activity. She showed them to the ambulance service employees to emphasize her warnings about the character of the co-worker. When this came to the attention of management, the EMT was discharged for violating policies, displaying pornography in the workplace, and subjecting others to unwelcome conduct/material of a sexual nature. The ambulance service Board found the pictures were of off-work content which was not necessary to warn anyone about a co-worker's on-the-job conduct. They were shown in the workplace and were “*way over the top.*” The fired EMT filed a Title VII case for retaliation for having engaged in protected activity of opposition to discriminatory harassment. The court ruled in favor of the ambulance service, stating, “*Title VII protects a broad range of employee conduct ... but an employee is not protected when she violates legitimate rules of her employer, disrupts the employment environment or interferes with the attainment of her employer's goals.*” The display of the co-worker and his wife's graphic off-the-job sexual activities to other workers while at work was not protected activity. The EMT had taken her actions to oppose and warn others of discrimination beyond the scope of any Title VII protection and into the area of her own offensive conduct and policy violations. *Crisp v. Scioto Ambulance District* (6th Cir., 2026)

Age

Department Chair Loses Age Discrimination Case But Preserves Retaliation

Case. The 62-year-old Chair of Neurosurgery at West Virginia University Medical School was counselled about his administrative performance, poor attendance, insufficient communication, and failure to follow procedures. Eventually, he was informed he would be replaced, but given a transition option to continue for one year as Chair, then become a professor. As negotiations on this transition option proceeded, one of the administrators commented that the school wished for a replacement who was “*younger, with more runway.*” The Chair made an internal age discrimination complaint. The school promptly accelerated the transition, ending the Chairmanship, and placed him into a professor position. It claimed he had walked out of a negotiation meeting about the terms of the transition. The now

ex-chair sued, claiming the removal was due to age discrimination and the accelerated timeframe was retaliation. The court ruled that there was no age discrimination. The decision to replace the Chair had already been made for non-discriminatory reasons well *before* any comment about a “*younger*” person was ever made. So, an after-the-fact stray comment could not be attributed to the removal decision. Further, the actual replacement turned out to be the same age as the former Chair. *However*, the retaliation claim had substance. The withdrawal of any transition period and demotion occurred quickly after the complaint of age discrimination. The temporal proximity was sufficient to support a trial on the matter. *Lee v. WVU Medical Corporation* (4th Cir., 2026) *Be aware* that employers often win the underlying discrimination case, but then lose the retaliation case. One does not have to be right about the alleged discrimination to be protected from retaliation. One just has to engage in the protected activity of raising a concern about discrimination.

Personal Liability & Hostile Environment

Retaliation for Unpopular Opinion Results in Personal Liability Defamation Case Against Other Facility Members. A medical school professor and cardiologist at the University of Pittsburgh authored an academic journal article voicing concerns that race based Affirmative Action in medical schools and hospital residencies discriminated against some minorities in favor of others and could violate the discrimination laws. He cited research to support that position. This was an unpopular viewpoint and drew immediate backlash from Journal readers. A number of colleagues and administrators at the University denounced the article as false and racist on social media, including misquoting or misrepresenting the article and successfully pressing the Journal to retract it. The professor was ostracized and demoted. He then sued the University for retaliation and sued five professors and administrators personally for defamation, resulting in harm to his position and national reputation. The court found sufficient grounds for the defamation case to proceed against the personally named colleagues. The evidence showed their media campaign against the professor had misquoted his article, or intentionally ignored the truth, or intentionally avoided learning the true contents of the article and his position before spreading their characterizations. The university administrators’ actions in demotion and allowing others to ostracize the professor appeared to be in retaliation for the professor’s Title VII protected activity of objecting to what he believed to be discriminatory practices. The court noted that “*Academics may not harm one another by recklessly disregarding the truth. Administrators may not demote professors for calling out discrimination, managers may not create or tolerate a hostile work environment.*” The retaliation laws are expressly for the purpose of protecting unpopular opinions

and actions which others strongly disagree with. *Wang v. University of Pittsburgh, et al* (3rd Cir., 2026)

Disability – Reasonable Accommodation

The General Rule Does Not Always Apply When Considering Accommodations.

When considering a reasonable accommodation under the ADA, the *general rule* is that it is not reasonable to require an employer to bump someone else out of an already filled position in order to place a person with a disability into that job.

Raymond v. 1199 SEIU National Benefit Fund (2nd Cir., 2026) involved an Outreach Coordinator for a union benefit fund whose job was to service a number of healthcare facilities in a territory. He developed Superficial Thrombophlebitis, a nerve and vein condition which prevented him from driving/sitting more than 30 minutes without at least 30 minutes non-seated afterward. A number of his assigned facilities were more than a 30-minute drive. The employer accommodated by removing the four furthest facilities from his territory. This helped, but did not solve the problem, since several other facilities were still more than 30-minute drives. The employee requested reassignment to a neighboring territory which had more concentrated facilities, not requiring 30-minute drives and which had once been his territory. This was denied because that territory already had an assigned Outreach Coordinator and the Fund would not require that person to trade territories and have to learn a new territory. The employee could not medically continue to drive the more than 30 minutes required by his territory due to potentially “life-threatening” consequences and had to leave work. He then sued for failure to reasonably accommodate. The Fund defended by citing its accommodation by removing the furthest facilities *and* the ADA general rule that a disabled employee should be placed into an available vacant position, but it is not reasonable to displace someone else from a filled position in order to replace them with the disabled employee. This would normally be sufficient defense to a case. *However, accommodation assessments should never rely on the “normal General Rule.”* The ADA requires every interactive process accommodation assessment to be individualized to the employee’s condition and needs and the specific operations and needs of the employer. In this case, there was evidence that the Fund often switched the territories of Outreach Coordinators. There was no pattern of guaranteeing that a current territory was “yours.” Territory changes could happen at any time. The Plaintiff himself had been subject to prior territory reassignment. So, in this case the General Rule could not be used as a defense, since the Fund could not show it was unreasonable to reassign territories. The court found “*A normally unreasonable accommodation may be found reasonable on a case-by-case basis where the employee’s desired accommodation aligns with the company’s practice.*” It also may

not have helped the Fund's defense in that there may have been some favoritism involved. The court's decision noted that the territory the employee requested transfer to was held by a person who had a previous romantic relationship with a manager making assignment decisions.

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