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LEGISLATIVE & ADMINISTRATIVE ACTIONS

Department of Labor Issues Opinion Letter on Calculating FMLA for Partial Week Shutdowns. A January 5, 2026, Opinion Letter, FMLA 2026 – 1, was issued for a school district; however, it would seem to apply to any employer that has partial week shutdowns for repairs, slow business, snow/inclement weather days, etc. If the operation is shut down and the employee was scheduled to be off for FMLA that day, the hours cannot be counted as an FMLA usage, since the employee would have been told not to come in anyway. The letter opines that the result is different if the person was scheduled for a full week of FMLA. Then the full week can still be counted against the FMLA allotment.

Trapped At Work Act. The state of New York has implemented a new Trapped At Work Act, which prohibits employers from having agreements requiring employees to pay a penalty, or repay reimbursements for training, expenses, or portions of wages for leaving employment before a certain timeframe. The employee can also recover the pay, penalties, and attorneys' fees for challenging the agreement. These "Stay or Pay" Agreements are seen as a restriction on trade. The Act does not prohibit requirements to repay wage advances, signing bonuses, and retention bonuses. Though the federal law and agencies have not restricted these agreements, many states are eliminating or limiting the scope of restrictive employment provisions. Employers operating in multiple states need to know each state's rules and beware of asking employees to sign, or of trying to enforce any sort of "restrictive covenant" in the wrong state.

National Labor Relations Board Again at Full Strength. After almost a year lacking a quorum, the NLRB now has the two new members needed to issue binding decisions. The Board lost its quorum when two members' terms expired, and

President Trump then removed a third. This placed hundreds of cases on hold. These cases are now expected to be quickly decided.

EEOC Rescinds Harassment Guidance. On January 22, 2026, the EEOC, in a three-to-one vote, voided its 2024 Harassment Guidance, which had comprehensive coverage and advice for employers on how to comply with the law and address situations of harassment. The two Republican Commissioners cited concern about the Guidance's inclusion of LGBTQ status. However, those provisions had already been struck down a full year ago by a federal court ruling that these inclusions exceeded EEOC scope of authority; they had already been removed. The January 22nd action removes the guidelines affecting all women. This seems to be in tune with the EEOC and Dept. of Labor abandoning not only LGBTQ issues but also abandoning equal pay cases for women in general, cases on equality, programs to enable women to enter non-traditional professions, and other sex discrimination matters under the current administration's efforts to root out Diversity, Equity, Inclusion, and "Gender Ideology Extremism." **Be aware** that the prohibitions against sex discrimination, including LGBTQ discrimination, are still the law, and the courts will provide remedies. The EEOC's retreat does not change this and can make the situation worse for employers. Without guidelines and with the decline in the EEOC's mediation and screening processes, more cases are going to federal and state courts, where the litigation process is far more expensive and burdensome for employers. So, this may be the time to put **more** emphasis on anti-harassment policies, training, and problem-solving.

LITIGATION

Discrimination

Sex

Harassment Can Be a Stockholder Issue — For Misuse of Human Resources. The employment laws are not the only way workplace discrimination can be a liability, and the affected employee is not the only person who can sue. A corporation has a duty to its stockholders to have good employment practices which do not create legal violations, bad public image, loss of business, or liability that then impacts the value of stocks and reduces dividends to the stockholders. A large realty company ignored and rejected complaints by employees, supervisors, and a board member that two of its most successful agents drugged and then sexually assaulted multiple female agents over several years at conferences and other business events or trips. The company only acted after several employees filed suit, and it became public. Courts then sustained anti-trafficking charges against the company and individual officers for allowing this situation to continue and to continue to profit from the top

agents' sales while they committed these acts. Then stockholders, including several pension funds, filed a "diversity action" suit in Delaware, where the company is incorporated. The court found that there had been a breach of the fiduciary duty of loyalty to pursue the best interests of the company and its stockholders. The stockholders are secondary victims of the company's acts or failure to act and can be entitled to resulting damages. The court held that *the duty of loyalty to stockholders extends to the misuse of human resources.* Thus, the company and individual officers can be liable*. LA City Employees' Retirement System, et al v. eXp World Holdings, Sanford, et al* (Del. Ct. of Chancery, 2026)

Fair Labor Standards Act

Turkey Loaders and Oyster Shuckers

The vast array of types of jobs is one of the factors that makes employment law and Human Resource practice continually interesting. Behind every service or product you use or consume, there may be a person doing a job you may not have been aware existed. It can also be confusing, keeping up with the variety of alternative pay methods which can apply to different jobs, and the array of different applicable laws and regulations.

Turkey Loaders Validly Paid Piece-Rate; Company Documented Correct Process. There are a number of pay arrangements that do not match the traditional hourly rate with time-and-a-half overtime beyond 40 hours. A large number of employees work under Piece-Rate Plans. *Figueroa v Butterball, LLC* (4th Cir. 2026), was brought by a Turkey Catcher/Loader whose job was to catch live turkeys and load them into trucks to be taken for processing. He alleged that he sometimes worked 60+ hours a week and did not receive the proper overtime due on his hourly wage. The company claimed Turkey Loaders were under a piece rate of $10 for each truck they participated in loading (a team effort). Piece rate can result in more or less earnings per hour depending on skill and efficiency. Mr. Figueroa's records showed he sometimes earned less than $10 per hour, but also often earned $18 an hour for faster work. Overtime and pay on piece rate is generally less than what one receives on straight hourly pay. It is a fluctuating amount. The more hours worked, the **less** OT pay per hour. The weekly earnings are divided by hours worked to get an "average." Then the extra half-time of that is paid for hours over 40 in a work week, rather than the full time-and-a-half for a straight hourly wage worker. So, Mr. Figueroa could claim a lot more OT pay if he had a regular hourly rate. The court found in favor of Butterball. It had done everything correctly. The Turkey Loader offer letters stated that pay was piece rate at a specific amount per truck loaded. The company kept very accurate records of trucks loaded, hours worked, and pay calculations. The company retained these records for longer than the FLSA statute of

limitations requires. The pay was done under a valid piece rate plan. **This case provides a good example regarding alternative pay arrangements.** The Dept. of Labor and courts closely scrutinize these non-traditional pay plans, often finding them deficient and assessing large amounts of backpay, interest, and fees. To survive this scrutiny, a company **must** have the pay plan in writing, with a clear explanation of how it works. There must be the employee's signature of understanding. Clear and accurate pay records must be maintained, documenting appropriate pay under the plan. All of these must be retained and produced when there is an audit or a challenge, which can be up to three years under the federal and state wage and hour laws. Any failure to do the above can result in an adverse decision against the company.

Oyster Shuckers. The new tax rules on tips have generated some confusion and much inquiry into who can validly be a tipped worker and/or share in a tip pool. The Department of Labor's view is that traditionally tipped workers are waitstaff, counter servers, bartenders, room cleaners, porters, etc., who have a direct service interaction with customers. The Dept. of Labor issued an Opinion Letter, FLSA 2025-03, regarding Oyster Shuckers at a seafood restaurant. Some shuckers can be considered as tipped workers because they stand behind a counter in view of customers, interact with customers, answering questions about the various oyster types and qualities. Even though they do not serve the oysters to the customers, they are deemed to fit the direct customer service criteria and can take tips and be part of a tip pool. However, there are other Oyster Shuckers in the "back of the house" who do not see customers and cannot be categorized as tipped employees and cannot be in the tip pool. (Even though they **shuck more oysters** than those out front, because they are not busy talking to customers). Those seafood workers in the back of the house, who shuck more but are denied tips, probably think there is something fishy about this situation.

Benefits

Social Media Posts Undo Long-Term Disability Payments. This case goes into the "You can be your own worst enemy" category. *Eggleston v Unum Life Ins.* Co. (11th Cir. 2025) involves Ms. Eggleston, who received long-term disability (LTD) payments due to being unable to perform her regular job, and due to her inability to work any gainful employment due to her medical conditions. A few years later, it was found that she was regularly posting on social media accounts, pictures and descriptions of traveling, catering food events, and other personal and business activities, contrary to being unable to do any work. Unum Life cut off the LTD benefits. Ms. Eggleston sued under the Employment Retirement Income Security Act (ERISA). The court upheld the termination of benefits. Ms. Eggleston's own social media posting was the

evidence that she had "*evidently greatly improved functional capacity*" and no longer fit the LTD eligibility criteria.

WARN ACT

Piercing the Corporate Protection

Separate Companies Can be Combined for WARN Act Liability. The Federal Workers Adjustment and Retraining Notification Act (WARN) affects employers that have layoffs or termination of 50 or more employees. It requires 60-day notice or 60 days of pay to those affected. In *Gautier v Tams Management* (5th Cir. 2026), a small West Virginia coal mine, Burke Mountain Mine, shut down, without notice or pay. It had fewer than 50 miners. Burke Mountain was a separate company, but was under the operation of a larger management group that operated several mines and had closed or reduced the work force in some of those mines as well. In the ensuing WARN Act case, the evidence showed that the companies shared common officers, directors, a single corporate address, and regularly exchanged personnel and equipment. The court found they were managed collectively, and the multiple companies were a single employer for WARN Act purposes. The court found in favor of the terminated miners and awarded damages. This case is a caution to businesses which have multiple branches or divisions that may be separately incorporated. There can be strict scrutiny of the actual operations, and it requires diligence and special practices if one wishes to maintain the legal separateness and the employment law liability separateness of each unit.

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