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LEGISLATIVE & ADMINISTRATIVE ACTIONS

IRS Issues Draft of W-2 Revision for Tipped Wages and Overtime. The IRS must issue a new W-2 Form to conform with the new tax exclusions for tipped wages and overtime. It has issued a proposed draft of the form and instructions for reporting qualified tips and overtime along with a list of qualified occupations to which the tipped wage rule applies. The proposed revisions were published in the September 22, 2025, Federal Register at page 55340.

LITIGATION

THEME of the MONTH — Just When You Thought it was Done!

Usually, litigation involves one case, which is pursued from start to finish and is then eventually over. Cases alleging several causes of action are usually consolidated into one suit. However, that is not always so. This month's Update includes instances in which one case that the employer thought was settled led to another, and situations in which the employer is defending two different proceedings at the same time over the same issues. [Also see the similar case of *A One-Two Punch – Firing and Delay in Reinstatement – Police Officer Can Bring Retaliation Case and Seek Additional Award* in the September 2025 Update.]

Settlement Did Not Preclude a Second Suit Over Same Issues. A Transit Authority employee filed grievances over her working conditions and performance discipline. As her union was processing her grievances, the employee also filed her own Title VII and 42 U.S. Code Sec. 1981 claims for racial discrimination based on the same circumstances. The union reached a settlement agreement on the grievances and all claims under the Collective Bargaining Agreement (CBA). The

Transit Authority then moved to have the Title VII and Sec. 1981 cases dismissed based on the settlement of all claims. However, the court ruled that the union had only achieved settlement of the CBA grievances and it did not extend to the employee's independent Title VII and Sec. 1981 statutory claims. The CBA settlement did not contain any reference to the other suits and was therefore limited to the union grievances. *Jones v. Washington Metro Area Transit Authority* (D.C. Cir. 2025). **A lesson from the case is to clearly describe all issues you intend to be covered in an agreement.** This applies to not just Settlement and Release Agreements, but to any significant agreement, such as hiring letters, compensation/bonus/commission plans, etc. A standard rule in litigation over terms of an agreement is that "*any ambiguity will be held against the party which drafted the agreement*." That is generally the employer. So, if an issue is not included, or is vague, or is described in "industry jargon" the judge is unfamiliar with, or is open to different interpretations of meaning, then the employer loses.

Discrimination

Sex

EEOC Retains Right to Continue Investigation Even After Complainants File Their Own Suit in Federal Court. *EEOC v. AAM Holding Corp.* (2nd Cir. 2025) involved dancers at an adult entertainment club who filed an EEOC complaint regarding sexual harassment – hostile work environment. The EEOC's investigation included a subpoena for information about the club's employees: names, demographics, and other details. AAM objected to this; the EEOC asked the District Court to enforce the subpoena, which it did, and AAM appealed. In the meantime, the dancers requested a Right to Sue letter from EEOC and filed a Title VII class action case in Federal Court. AAM then argued that the EEOC's subpoena was now invalid since the case had moved beyond its process, and it was not involved in the dancers' court case. The Court of Appeals disagreed. It held that the EEOC continues to retain jurisdiction and authority to investigate even after a charging party moves on to file a lawsuit. The EEOC has an independent right to investigate discrimination for its own purposes. So, the employer now has to defend two proceedings at once, over the same issues.

Biased Statement and Shifting Reasons Provide Basis for Trial. In *Hollis v. Morgan State University, et. al.* (4th Cir. 2025) the Court of Appeals found sufficient grounds for a denial of tenure case to proceed to trial. Dr. Hollis, an Assistant Professor of Education and Urban Studies, was denied promotion and paid less than male Assistant Professors. She filed an EEOC complaint, and then when continuing to be denied tenure and equal pay, she filed a Title VII case. The

university claimed its actions were due to Dr. Hollis' lack of academic publications and that male counterparts warranted higher pay due to greater experience in educational institutions. The court found these to be seemingly pretextual. Evidence showed that Dr. Hollis had more publications than some men who received tenure. She also had experience that was arguably equal to or greater than men who received higher pay. The university's reasons also seemed to be raised only after Dr. Hollis made the discrimination complaint, and the reasons kept shifting. Witnesses also testified that the Department Chair, a woman, made sexually disparaging comments about Dr. Hollis as a "disgusting lesbian." The Chair stated that tenure was "being reserved for her boys," and also that pay was being kept low, "so she (Hollis) will leave my campus very soon." Further, the university failed to follow its normal policy regarding tenure, it skipped the standard Committee Review for tenure. The Department Chair simply forwarded the denial recommendation to the school's Dean. The court ruled that a jury could find the university's rationale not to be credible, and Dr. Hollis should have the opportunity to have the jury decide.

Timelines and Statutes of Limitations

Electronic Notices Can Complicate the Issues of Notice and Filing Deadlines. Most employment laws require a person to file a case within a certain number of days or months following an adverse action. Failure to do so on time results in dismissal of the case. However, electronic communication is now complicating these deadlines. As technology becomes more common and complex, both technical difficulties and human error are creating grounds for "equitable tolling," extending the timeframes beyond what the employer expected. *Asuncion v. Hegseth/Dept. of Defense* (9th Cir. 2025) involved a DOD employee's suit over the agency's decision to suspend and then terminate their employment. Under the applicable rule, the employee had 90 days from receipt of the Final Agency Determination (FAD) in which to file suit to challenge that decision. DOD transmitted FAD notice electronically, using a Secure Access Exchange (SAE) which encrypts the document(s). The decision maker in HR sent the document to IT. IT sent an email stating there is "a document," a claim ID, and a link. Then the person gets a separate email with a passcode and passphrase to unlock and access the document and find out what it is. (The more steps, the more room for errors.) First, DOD sent Mr. Asuncion the wrong claim ID number. When he emailed that he could not access the document, DOD tried again – but sent the wrong passcode. Mr. Asuncion again emailed that he could not open the document. This did not end the problem. Over the next weeks, there were repeated errors by several people at DOD trying to "solve" the problem. Mr.

Asuncion begged DOD, "Would someone please send me a PDF that is not encrypted or mail to me via US Mail a hard copy." Finally, DOD did send an unencrypted document, and Mr. Asuncion discovered that the FAD had been made against him. By this time, the 90-day period was exhausted, and his court filing was beyond the timeframe. DOD moved to dismiss the case. However, the court found that the situation called for an equitable tolling of the timeframe. The 90 days did not start until Mr. Asuncion actually received and could read a clear copy of the FAD. Only then did he know the contents of the document upon which to base his legal challenge. This sort of situation is becoming more common. This instance involved too many steps to both send and access the message, with far too many people in the process. Rather than simplifying things, some of our technology and processes are becoming more complicated, thus creating legal complications as well.

Family and Medical Leave Act

Doctor's Certification of Needed Intermittent Leave is an Estimate Not a Hard Cap. Under the FMLA, protected leave can be taken on an intermittent basis, such as for medical conditions that have sudden, unexpected "flare-ups." The federal FMLA certification form has a section asking the employee's medical provider to state how many times a week or month such incidents may be expected to occur. This allows an employer to anticipate the level of absences. *Jackson v. USPS* (6th Cir. 2025) involved an employee who had a number of unscheduled absences, some of which were due to a medical condition with unpredictable flare-ups. On the FMLA certification, his doctor stated to expect occurrences of two days a month. The employee was placed in a final attendance warning regarding unauthorized absences; the warning stated that his FMLA absences would not count against him. Then the employee missed a third day in a month, which he claimed was due to the flare-up of his condition. He was fired. The employer claimed he had exceeded the two-day-a-month FMLA certification, and the certification imposed a strict monthly limit on unforeseeable intermittent leave instances. Thus, the third day was unprotected. The employee sued. The court ruled in the employee's favor, finding the employer's stance was not reasonable; the FMLA certificate provides only an estimate, it does not create a "hard cap." The employer should have explored whether the absence was for an FMLA-covered reason before acting. Further, the FMLA rules envision that some conditions may, over time, exceed the provider's original estimate, and have provisions for the employer to ask for further medical information or clarification before acting.

OTHER RECENT ARTICLES

These additional, recent articles can be found at BoardmanClark.com in the Labor & Employment section:

Clarifying the Presidential Proclamation on H-1B Petitions by Nicole S. Schram

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