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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

EEOC Demands Names and Personal Information for Jewish Employees and Students at the University of Pennsylvania. The EEOC has sued to enforce an administrative subpoena demanding the University of Pennsylvania provide it with the names and personal information of Jewish employees and students, and all clubs, groups, or organizations related to the Jewish faith or ancestry, and all their members. The EEOC states this is part of its efforts to identify antisemitism on liberal college campuses and to protect Jewish students and staff. The university has refused to turn over the information, claiming that the subpoena violates the First Amendment, staff and student privacy rights, and that there is no underlying employment suit. Additionally, the EEOC has failed to identify a single illegal employment practice. The main opposition to the EEOC's demands came from the Jewish employees, students, and every Jewish-related organization on campus. In addition to basic privacy rights, those in opposition are concerned that their names and personal information may become available to other government agencies and non-governmental actors who could misuse it, as has occurred with personal information gathered by the administration's DOGE (Department of Government Efficiency) program. Those in opposition state, "We know very well the history of governments assembling lists of Jews does not end well." They also argue that this opens the doors for the government to demand similar lists of names and personal information and affiliations of people based on race, national origin, sexual orientation, or identity, among other factors, of employees in other public and private sector companies. *EEOC v. Trustees of the University of Pennsylvania* (E.D. PA, 2026). On March 30, the Court ruled that the University must provide the information. That order has already been appealed.

Flip Flop — Department of Labor Proposes "New" Independent Contractor Rules. DOL has proposed new FLSA rules that are less strict in classifying people as Independent Contractors rather than employees. These are really not "new." They are a return to the rules adopted under the first Trump administration. That administration loosened the previous rules. Then the Biden administration reimposed the older rules. Now the second Trump administration is essentially reviving its prior position. It is a revolving door. The currently proposed rules are focused on the two main criteria of (1) Independently involved in business and not economically dependent on an "employer," and (2) Degree of independence over control of the work being done. These are still significant criteria, but the proposed rules diminish the impact of several other Independent Contractor criteria currently in effect. **Be aware** that this is just the DOL's proposed rules under the FLSA. Several other federal and state agencies **also** have often extensive sets of criteria for deciding Independent Contractors. So, one might meet DOL's FLSA standards but still run afoul of the IRS employment taxes criteria, or the many state definitions for deciding what meets the Independent Contractor criteria. (For more information on the complex web of the varying laws and criteria, request the article Independent Contractors by Boardman Clark.)

TRENDS

Artificial Intelligence

AI Layoffs. META is the latest company planning layoffs due to Artificial Intelligence. The company announced it may lay off 20% or more of its workforce due to the greater efficiency of AI. META already laid off 11,000 employees in 2022 and another 10,000 in 2023. Greater AI efficiencies have been cited by a growing number of companies in laying off workers. AI impacts office work and industrial positions in which AI-operated robotics are replacing workers. There are some industry experts who claim that AI and technology will create other highly paid technology and engineering jobs, which will counterbalance the layoffs. META, in fact, has been offering very large pay plans to recruit AI researchers and technology engineers, and plans to invest $600 million to build new data centers that will need employees. The effects of this "balance" remain to be seen. Will the layoffs be offset? Or will there be high-paying jobs for some, but nothing for others? Many workers are unlikely to be able to easily go out and get an advanced engineering degree. So, AI may exacerbate the income gap between very high pay for some and low pay or no jobs for others.

Applicant Screening Software Developer Can Be Liable for Discriminatory Criteria. Web-based AI applications and applicant screening software can

determine who gets interviewed and hired. Employers contract with the software providers and then use the AI screening tools. *Mobley et al v. Workday, Inc.* is a California class action lawsuit initiated by Mr. Mobley, who is disabled, Black, and over age 40. He applied to approximately 100 jobs at companies that used Workday AI screening tools and received no job offers. Rather than suing any of the companies that rejected hiring him, he filed a class action against Workday under Title VII, the ADA, and ADEA for race, disability, and age discrimination. The suit alleges that Workday's software is *"designed in a manner that reflects employers' biases and relies on biased data."* Workday argued that it is not the employer and should not be liable for any of the multiple companies' hiring decisions. However, the court ruled that an *"employer's agent can be independently liable when the employer has delegated to the agent functions that are traditionally exercised by an employer."* This has often been the ruling regarding recruiting and placement agencies that engage in discrimination when selecting people for their clients. So, Workday's software does the screening that is traditionally done by the employer, and it can be sued by rejected job applicants. This decision allows the case to continue to trial to determine whether the AI software is biased and has an adverse impact on age, race, or disability. It is a new wrinkle in the AI liability arena and is drawing national attention from other software providers and advocacy organizations. The AARP has been active, filing amicus briefs in support of Mr. Mobley and the class of plaintiffs.

LITIGATION

Statutes of Limitations

Hurricane Extends Filing Deadline. In *Beazer v. Richmond County Constructors, LLC* (11th Cir., 2026), the court's opinion began with *"Everyone's heard the famous U.S. Postal Service Motto: Neither snow, nor rain, nor heat, nor gloom of night stays these couriers from the swift completion of their appointed rounds. But the slogan says nothing about hurricanes*." Mr. Beazer filed an EEO complaint against his former employer. The EEOC issued a Right to Sue letter, which has a 90-day period to file the case in a federal court. Mr. Beazer had a law firm seemingly ready to take the case, but it backed out just days before the 90-day deadline. So, he drafted a *pro se* Title VII race discrimination case and two days before the deadline paid the U.S. Postal Service for Overnight Delivery to the court. Hurricane Idalia hit and swamped the entire area. "Overnight" became four days, and the filing arrived two days past the deadline. The company sought dismissal for the late filing. The court carefully considered the circumstances and invoked the Equitable Tolling Doctrine. Mr. Beazer used reasonable diligence in trying to send

the complaint two days early through an official government agency, which guarantees overnight delivery. The clear evidence showed the postal service was unable to deliver any sort of mail for several days due to the hurricane. The circumstances were outside Beazer's control. So, the court deemed the filing timely and allowed the case to proceed.

Wages and Hours

Walmart Agrees to Pay $10 Million to Settle Deceptive Pay Case. Walmart has agreed to pay a $10 million judgment to settle a case brought by the Federal Trade Commission (FTC) and eleven states, regarding deceptive practices that lowered the pay of delivery drivers. The company's Spark Driver program made false, inflated representations about the amount of compensation, bonuses, and tips that they would receive. This included representations that the driver would receive 100% of tips, when in fact, tips were often placed in a tip pool. Failing to reveal all "conditions" for receiving incentive pay and using these unrevealed reasons to deny the pay. The company adjusted the promised compensation after the driver accepted the route and did not inform the driver of the reductions until after deliveries were completed. The FTC suit claimed that drivers accepted routes based on Walmart's representations, yet received tens of millions less because of the company's deceptive practices. *FTC v. Walmart Inc.* (N.D. IL, 2026)

Win One – Lose One: More Than One Law Can Apply to the Same Situation. A realty management company hired a Building Superintendent. At some point, it discovered he had an invalid Social Security number and was probably an undocumented worker. Rather than termination, the company took him off the employee list, paid him a small amount of cash, and gave him a rent-free apartment as he continued to do his Building Superintendent duties. The company kept no records of his work; he did not officially exist. Then the company terminated the Superintendent's services and apartment arrangement. He sued under the U.S. Fair Labor Standards Act and the New Jersey Wage and Hours law for back wages and overtime. The court dismissed the FLSA case. Under the federal law, an undocumented worker cannot enter into an employment relationship and can be barred from any relief. However, state laws are a different matter. The New Jersey law is not preempted by the federal law and requires pay for all hours worked regardless of whether a person is undocumented. The employer should have kept records and paid wages and overtime, and the Superintendent was entitled to backpay and related damages. *Lopez v. Marmic LLC* (S. Ct. of NJ, 2026) This is a far too common situation, which extends beyond the immigration/documentation issue. Employers often focus on being in compliance

with federal laws, especially when they operate in several states, yet do not pay enough attention to the state laws, which may have very different coverage and requirements. One must follow both. State laws often require the employer to go beyond the Federal Standards.

Discrimination

Settlement Contracts

Officials Can Be Personally Liable for Failing to Implement Provisions of Settlement Agreement. A Black school district faculty member, Dr. Foster, sued the district for racial discrimination and harassment. The case was settled with the Settlement Agreement, providing relief to Dr. Foster, and the District also agreed to (1) revise its recruiting and hiring practices to eliminate racial discrimination; (2) conduct anti-discrimination training for all administrators. After many months, the District had made no effort to act on either the recruiting and hiring practices or the training. Dr. Foster filed a new case for breach of contract under Title VII and 42 U.S. Code Secs. 1981 and 1983 and state law to enforce the Agreement. She sued the District and the Superintendent and all Board of Education members personally. The District objected to the personal liability, claiming the officials had Qualified Immunity and that several were not actually parties to the Settlement Agreement. The court ruled against the District. Qualified Immunity does not apply when the individual *"violates a clearly established statutory or Constitutional right of which a person would reasonably know."* The court found the contract clearly created rights under both state law and the Constitution. Any public official should clearly know they had an obligation to abide by the terms of a contract like the Settlement Agreement and could not refuse to comply with the terms. Further, the *"not a party to the agreement"* did not exempt the named officials. Under 42 U.S. Code Sec. 1981, any person who "interferes" with contract rights can be liable. The named officials had the power and ability to effectuate or to not implement the terms of the Agreement, whether they were originally parties to it or not. Their not doing so was actionable. *Foster v. Echols Gunty School District and Board of Education, et al.* (11th Cir., 2026)

Age & Race

Do-Over – New Process Gets Same Result. *Jiang v. City of Tulsa* (10th Cir., 2026) involves the hiring of a Water Treatment Plant Superintendent. The job posting required an engineering degree and leadership experience. Dr. Jiang, a middle-aged Asian American, was a Senior Engineer at the Water Treatment Plant. He had an Engineering Ph.D. and excellent evaluations. He applied for the

Superintendent position. Two others applied; neither had a degree. However, a younger White applicant with no degree was selected, due to many years of plant work and supervising experience. Dr. Jiang had no supervising experience. Jiang objected that the applicant did not meet the posted degree requirement. The City Civil Service Commission agreed and voided the hire. Dr. Jiang believed that since he was the only qualified applicant with a degree, he should be awarded the job. Instead, the City re-posted the job, deleting the degree and requiring "*degree **or** equivalent experience*" and leadership experience. The same three applied. A new hiring panel chose exactly the same younger, White applicant due to equivalent experience and many years of supervisory experience. Dr. Jiang sued for age and race discrimination, claiming that the do-over was a ploy; a sham to simply get around the Civil Service Commission and accomplish the pre-determined discriminatory result; it was a pretext to discriminate and retaliate against him. The court found that though changing the hiring criteria and reaching the same result could be viewed as suspect, there was not sufficient evidence to show it was discriminatory. There was no overt evidence of any age or racial factors. The City had, in the past, voided and redone hiring processes, changing the criteria for various reasons. So, this redo was not at all unique. Leadership/supervisory experience was a valid criterion for a Superintendent position managing a large number of employees. Dr. Jiang had no such experience. A different panel was used for the second hiring process, so there was no evidence of influence by the earlier panel. In all, there was no evidence of pretext that would indicate discrimination. The court ruled in favor of the City.

Sufficiency Standard

Performance Improvement Plan is Not an Adverse Action. In 2024, the U.S. Supreme Court decision of *Muldrow v. City of St. Louis* lowered the definition of what constitutes an "adverse action" sufficient for a discrimination case. This has allowed plaintiffs to sue for employment actions which are less severe "terms and conditions" than hiring, firing, wage reduction, or serious discipline. *Walsh v. HNTB Corp.* (1st Cir., 2026) involved a Technology Specialist who was placed on a Performance Improvement Plan (PIP). She alleged this was unwarranted and due to age discrimination. She eventually met the PIP requirements, but alleged it was a tangible adverse action that created hostile, intolerable employment conditions and was now part of her personnel records. The court ruled that the PIP did not rise to the level of "adverse action" even under the new *Muldrow* standards. Performance critique, even in a formal PIP, is not sufficient. She was not demoted, nor her pay reduced, nor had there been a change in duties or level of responsibility. So, there was no concrete effect. If any of those things had

occurred, then the results of the PIP may have been adverse enough to meet the standard. In this situation, though, the court dismissed the case.

National Labor Relations Act

Free Bourbon For All Sways Election. *Brown-Forman Corp dba Woodford Reserve Distillery v. NLRB* (6th Cir., 2026) is an unfair labor practice case. Employees were disappointed with a meager $1 an hour raise and the company's refusal to consider more. So, employees began a union organizing effort. The effort gained momentum, and when it looked like the employees would vote for union representation, the company suddenly announced an across-the-board $4 an hour raise, plus an expansive merit-based pay increase policy, plus extra vacation, **plus** it made gifts of bottles of high-end bourbon to all employees. The union effort lost momentum, and the employees voted not to unionize. This resulted in the filing of unfair labor practice charges with the National Labor Relations Board (NLRB). The NLRB ruled that the company's actions were designed to interfere with its employees' efforts to unionize and wrongfully negated a fair election. The NLRB voided the election and issued an order that the company recognize the union and start bargaining. The company appealed to the court. The court still viewed the company's actions as being an unfair interference with the election, and the election should be voided. It found, though, that the Order to recognize the union may have been too severe a remedy. The remedy for unfair interference is often to void the election and order a new election, which may be monitored for fairness. The NLRB's decision did not thoroughly support the basis for the more drastic bargaining order. So, the matter was remanded to the NLRB for reconsideration of the remedy and a clear explanation of the remedy it orders.

Family Medical Leave Act

Applying For FMLA After You are Fired Does Not Solve the Problem. Sometimes, retroactive notice works. Notifying the employer of a serious medical condition after the fact may generate FMLA coverage if you are still employed. It is often difficult if one is in serious medical trauma to have the ability to go through the hoops of official notice and completing forms. So, notice after the fact can be reasonable. However, when there has been a discharge, it is generally too late. *Chitwood v. Ascension Health Alliance* (7th Cir., 2026) involved an employee who had taken periods of FMLA leave and knew the requirement to inform the company of a FMLA situation *"as soon as practicable."* There was a certain grace period built into the company practice. The employee was on an FMLA leave, which expired on November 3rd. She did not return to work. The company contacted her three

times to inquire why she had not returned, and informed her that failure to return by November 15th would result in termination. She then applied for a "personal leave" until December 1st. This was denied. November 15th came, and there was no return. The company ended the employment. The next day, she sent in an application for FMLA to cover her absences for November 11th to 15th. The company informed her that the application was too late. She filed the FMLA case for interference with FMLA rights and retaliation for having taken prior leave. The court ruled in favor of the company. The employee had not reported a need for FMLA "*as soon as practicable,*" even though she received ample warnings. Her application for "personal leave" did not trigger a notice that FMLA was at issue. She could have applied for FMLA while she was still employed, but did not. At the time of her retroactive application, she was no longer employed and was no longer eligible for or entitled to FMLA. **Be Careful**. This case is about a company which did try to communicate, gave warnings, and had an "*as soon as practicable*" process. On the other hand, courts have been tougher on employers who seemed "*too eager*" to jump to discharge the minute the employee did not return from leave. An "instantaneous" termination approach has been viewed as evidence of retaliation for having taken the leave, or may be evidence of disability discrimination, since the ADA can require providing a longer leave after exhaustion of FMLA.

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