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LEGISLATION AND ADMINISTRATIVE ACTIONS

Medicaid Work Requirement Rule. On June 3, 2026, the Centers for Medicare and Medicaid Services (CMS) issued an Interim Final Rule on Work Requirements for Medicaid recipients. The Final Rule is effective January 1, 2027. It will require 80 hours of employment per month, or qualifying community service or approved caregiving to receive Medicaid; will limit exclusions; and, will impose additional reporting/compliance requirements on individuals and on states that manage Medicaid benefits. This Rule follows similar requirements for other programs such as SNAP food assistance. The Administration claims the requirements will increase employment and reduce costs and the number of recipients. So far, similar work requirements in SNAP and other programs have not seemed to increase employment but have increased costs to states in implementing the new requirements, monitoring, and extra administrative compliance. It *has* reduced the number of participants. Much of the reduction appears to be people who actually qualify but cannot manage the more complicated reporting and verification systems.

Changes to Equal Opportunity, Diversity, and Equity

The current Federal Administration's concerted campaign to diminish enforcement of EEO laws and Diversity, Equity, and Inclusion (DEI)

programs is reflected in two Proposed Rules.

U.S. Equal Employment Opportunity Commission Proposes Elimination of EEO-1 Report and Data Collection. The EEOC has introduced a proposed Rule to rescind the annual EEO-1 Report on employment data, which is required for public sector companies with over 100 employees and Federal Contractors with 50 employees and their subcontractors. It also proposes to eliminate the EEO-2, 3, 4, and 5 Reports, which affect certain public sector entities that receive federal funds. This is a Proposed Rule, which must still go through a sometimes- protracted comment and review process. So, at present, the EEO Reports are still required and should be filed until any Final Rule becomes effective.

On June 11, 2026, the U.S. Small Business Administration (SBA) issued a proposed rule titled "Reforms to Remove SBA's 8(a) Rebuttable Presumption of Social Disadvantage for Individually Owned Firms Only" that will significantly change how eligibility is determined for the 8(a) Disadvantaged Business Development Program. The rule proposes eliminating the long-standing assumption that certain racial groups are automatically considered socially disadvantaged (for more complete details of this proposed rule, see Understanding the Small Business Administration's Proposed Changes to 8(a) Certification Requirements).

LITIGATION

Most Unusual Case of the Month

Failure to Arrest – Fired for Niceness. The overwhelming majority of improper police action cases involve false or improper arrests and overaggression. *Schumacher v. Lancaster County et al* (NE. S. Ct, 2026) involved the firing of a Sheriff's Deputy because he decided to be nice and *did not arrest* a couple. He had stopped a man and woman, and his standard name-drivers' license search showed that both had outstanding arrest warrants for non-payment of fines and failure to appear at court proceedings to show cause for non-payment. He did

not arrest them. Instead, he said, *“Don’t worry, no need to freak out. Because I know if I take you to jail, they’re just going to let you out anyway. So, it doesn’t really make any sense to waste my time.”* He instructed them to go pay their fines. Then he left. This was all recorded on the Deputy’s body cam. The Deputy was fired for failure to follow the law and the Department’s standard operating procedures. The Deputy sued, challenging the termination as excessive for a “minor” incident. The two people had not committed a crime; they had just not paid fines and had missed a court appearance. The situation did not amount to a significant, dischargeable infraction. The court disagreed. The Deputy had received all proper pre-termination due process and procedures. His infraction was within the coverage of three specific operational procedures and at least one state statute on the enforcement of warrants. So even though it might be sympathetic toward a Deputy’s niceness and not wanting to waste resources on a “*turnstile arrest*,” the court was not going to second-guess or reverse the Department’s termination decision. *Think about this case the next time you ask a traffic officer to let you go or just give you a warning*. Are you asking them to risk their job by doing you a good deed?

Theme of the Month

Unpopular But Protected

This month’s Update includes cases that illustrate the laws’ protection of unpopular, even disruptive expression. One person’s “*protected activity*” often irritates, offends, or disrupts and can make the employer wish to rid itself of the irritant. That is why the activity or expression is “*protected,*” to allow the person(s) to engage in important rights without retaliation. This month’s cases cover protected activities in Labor Relations, Title VII Religious expression, and Public Policy Unfair Discharge.

National Labor Relations Act

90-Minute Timing Shows Retaliation – And Disruption of Reorganization Was Not a Defense. A Court of Appeals upheld the National Labor Relations Board's (NLRB) decision that the firing of four employees was an unfair labor practice and retaliation for their engaging in protected, concerted activity. One employee was dissatisfied with his new software developer role and salary under a company reorganization plan. He asked a co-worker about his restructured job and pay, and they then asked two others and began comparing notes. The four then started a salary spreadsheet on software developer pay in the company and began sharing it and adding the pay of multiple other co-workers, noting that they were all underpaid by national standards. One worker shared the spreadsheet with a manager, who gave it to the Department Director. Within 90 minutes of this, the company terminated the person who began the sheet, followed by the other three. All four filed NLRB charges. The company claimed the discharges were for pre-existing performance issues. It also argued that *even if* the spreadsheet was a reason for discharge, it was *not* because of discussing comparative pay; instead, it was due to the "disruptive" effect the publication of the spreadsheet had on the company's reorganization effort. The NLRB ruled in favor of the employees, granting reinstatement, back pay, and other relief. The company appealed. The Appellate Court upheld the NLRB's decision. First, the lightning-fast 90-minute discharge process was impossible to ignore. Especially since there was no evidence of any performance concern or discussion of termination prior to learning of the pay spreadsheet. This showed the company's "pre-existing performance problems" argument was a pretext. Second, the "disruption" argument fell flat. Concerted activity is often disruptive, and that disruption is exactly what the NLRA protects. The court noted there is "*no authority that permits an employer to terminate an employee for engaging in protected activity in a disfavored manner or for disfavored reasons; such a loophole would enable employers to evade the NLRA's requirements by simply framing their antipathy to lawful activity in terms of its potential for disruption." Vermont Information Processing v. NLRB* (D.C. D.C., 2026)

Unfair Discharge - Entwined Litigation

Was the 72-Year-Old Store Clerk Engaged in Protected Activity When She Defended Herself Against An Armed Robber? *Moreno v. Circle K Stores, Inc.* (10th Cir.) **and** (S. Ct. of CO, 2026), show how complicated some cases can become. *Moreno* involved two court systems having to become involved in order to decide one case. Ms. Moreno was a 72-year-old convenience store clerk. A robber demanded cigarettes and came behind the store counter, brandishing a hunting knife. She held out her arms in front of her in self-defense. He grabbed cigarettes and left (later apprehended for armed robbery). The company then **fired** Ms. Moreno for violating its Don't Chase or Confront Policy, which states, "*This is for your protection and the safety of everyone. Do not confront, pursue, follow, or resist any person suspected of shoplifting or other confrontational situations. You will be immediately terminated*." The company claimed that Ms. Moreno's putting up her arms was an act of "confrontation" and that she had space to keep backing away. She sued for unfair discharge, claiming that self- defense is a Public Policy right and thus a protected activity. The company claimed that Colorado does not recognize a public policy right of self-defense, and it was free to discharge her At Will. An exception to At Will employment is that if the discharge is contrary to a significant Public Policy. The case was filed in the Federal Court. However, it required a determination of Colorado state law. The 10th Circuit Federal Court of Appeals determined that it must defer to the state court for that one question of public policy before the case could proceed. So, it certified the question to the state court, generating a separate proceeding in that arena. The State Supreme Court then ruled that in Colorado, self-defense does constitute a clear Public Policy and an employer cannot lawfully terminate an employee for the exercise of her right to defend and try to protect herself from being attacked. This did not resolve the case. It only answered the one underlying question as to whether Moreno could maintain her cause of action. Now it bounces back to the Federal Court to determine whether the situation was self-defense, or did Ms. Moreno have time and space to retreat, and her arm raising was an act of resistance and

confrontation rather than self-defense. This is an illustration of how litigation rarely follows a simple, straight path. There can be complex detours along the way. It may also be an example of poor public relations since this sort of case results in public attention and sympathy for the employee and a negative reputation for the employer. It might have been wiser to enforce the policy in regard to those who tried to counterattack or chased and tackled a robber, rather than a 72-year-old clerk who threw up her arms when confronted with a knife (if that is what the facts show, now the case is finally going to trial.)

Discrimination

Religion

One Hostile Comment by Supervisor Was Enough to Sustain Discrimination Case. This case serves as a warning to supervisors to stop and think before they blurt out a negative comment about an employee's religion, culture, or any other protected category. Just one inappropriate, biased comment can be enough evidence to allow a case to proceed to a jury trial. *Naz v. Wright (Secretary of Dept. of Energy)* (D.C. Cir., 2026) involves a Muslim employee of Pakistani origin who was terminated from her U.S. Dept. of Energy position allegedly due to poor performance. She, however, alleged discrimination, claiming her supervisor was hostile and biased against her religion and national origin, and had unfairly focused on her in order to achieve the discharge. The Department moved for Summary Judgement to dismiss the case for a lack of enough basis to support the claim. However, the court found that one comment made by the supervisor could be enough to prevent dismissal and to forward the case to trial. When Ms. Naz had requested a schedule accommodation for her religious observance of Ramadan, as provided under Title VII, the supervisor denied the accommodation request. Instead of citing any work-related reasons that made the request unreasonable, he gave his personal opinion that he "*does not believe in Islamic religious extremism.*" Denying accommodation of a standard

religious observance as "extremism" was itself a violation of the Title VII accommodation principles and also an indication of overt hostility toward Ms. Naz's religion. It was evidence that the supervisor's treatment and decisions regarding her could be biased. So, one hasty personal opinion comment made the difference between dismissal and a lengthy, expensive trial.

Fired for Expressing Religious Opinions on Company's Opinion Commentary Message Board. Alaska Airlines has an internal intranet site, AlaskaWorld, on which it invites employees to share comments about internal and external current events. It is labelled as helping foster, "*a safe place culture where employees feel empowered to have open and critical dialogue with their peers and leaders,*" and "*can openly and constructively share ideas, ask respectful questions, and understand one another and our company.*" The site often included commentary on social issues such as Black Lives Matter, etc. When the company announced it was supporting the effort to pass the Federal Equality Act to expand protections against LGBT discrimination, two employees posted their opinions that the Equality Act was counter to their Christian moral beliefs, and they believed the company should not be supporting legislation. These posts received a lot of backlash and complaints from other employees who felt the posts were discriminatory and offensive. The company placed the two employees under investigation. Neither post advocated discrimination. Both employees stated an intent to treat all co-workers and customers equally and provide equal service to all. The posts were objecting to the proposed law and the company's support for that legislation. The Association of Flight Attendants (AFA) Union officials also received many ongoing complaints from its members. Internal emails between union officials expressed the opinion that the two employees "*need to go.*" One union official's email stated that the two should be "*put in a burlap bag and dropped down a well.*" The company terminated their employment. It claimed the posts violated its Anti-Harassment Policy, being disrespectful of others and containing discriminatory statements. The two employees then filed Title VII suits against both the company and their AFA Union, for religious discrimination and

against the union for discriminatorily failing to adequately represent them in the discharge process. Both the company and the union sought to get the case dismissed, claiming that there was no Title VII obligation to accommodate hostile, discriminatory statements. However, the court found ample evidence to support the claims. The company had invited postings of opinions in its "*safe place.*" Neither post expressed an intent to discriminate nor hostility toward co-workers or customers. They were opinions about a proposed law and that law's conflict with their own religious beliefs. The discharge appeared to be in violation of Title VII due to their expression of religious beliefs. The union had also shown animosity toward the two members' expressions of religious beliefs and overtly expressed a desire to have them fired even before the company began the discharge process. It was not plausible that the union could provide fair representation when its leadership had already sent emails that they "need to go" and "should be dropped down a well." *Brown and Smith v. Alaska Airlines, Inc. and Association of Flight Attendants* (9th Cir., 2026) Protected expression often involves people saying things with which others may strongly disagree. This can be especially so in the Title VII areas of gender, religion, race, and national origin. There are numerous cases growing out of conflicting workplace expressions on Black Lives Matter, Pride events, and immigration. Finding the balance between hostile discriminatory conduct and protected expression can be difficult. This can be especially challenging when an employer has allowed, or even encouraged, people to express their opinions in the workplace. One should expect some counter opinions. Title VII gives even more protection and may require more reasonable toleration of a certain level of religious expression. [For more information on this accommodation requirement and balancing the interests between conflicting views, request the article Religion in the Workplace by Boardman Clark.]

Employment Retirement Income Security Act

Fiduciary Duty is About Process – Not Results. *Johnson et al v. Quest Diagnostics Inc. Profit Sharing Plan et al* (3rd Cir., 2026) is a class action

filed by participants in the company's 401(k) Plan. The plaintiffs alleged the Plan's Managers violated their fiduciary duty under ERISA by their "*imprudent choice*" of continuing to use two under-performing investment funds, rather than shifting to better performing funds. This resulted in loss or lesser results for the Plan's beneficiaries. The court ruled in favor of the Plan managers. ERISA's *"Standard of Prudence for a fiduciary is to discharge duties with respect to a plan … with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character. Appropriate consideration [of] those facts and circumstances that … the fiduciary knows or should know are relevant to the particular investment."* The court found the Plan Managers had engaged in a good faith assessment of the investments, hired reputable independent advisors, and followed their advice regarding the funds in question and followed a reasonably sound process, and made decisions within the scope of reasonable methodology. The fact that the funds did not perform as well or recover as well as expected did not mean the Plan Managers violated their fiduciary duty. The court held that "*Fiduciaries do not have crystal balls*" or guarantee the success of all investments. *"A fund's poor performance alone does not mandate drastic or sudden action to drop that investment if there is a good faith standard reason to continue to hold it in the Plan during a market dip."* ERISA is concerned with sound process, not outcomes.

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