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LEGISLATION AND ADMINISTRATIVE ACTIONS

Proposed Rules on Joint Employment Covering Three Laws. The Department of Labor (DOL) has issued a Proposed Rule covering what constitutes *joint employment* under the Fair Labor Standards Act (FLSA), Family Medical Leave Act (FMLA), and Migrant Seasonal Agricultural Worker Protection Act (MSAWP). This is intended to create more clarity and consistency. Joint employment is when two or more employers can be jointly liable for leased, placed, or shared workers. The Rules cover both "vertical and horizontal" business relationships between the employers and propose new "factors tests" for determining a joint relationship. Joint employment is a significant and growing area of concern for companies that utilize employment placement or leasing agencies, and for those that manage several "separate corporations" or franchises with a common ownership or control group. DOL is taking comments on the Proposed Rules until June 22, 2026.

TRENDS

Increased Focus on Technology System Vendors

The vendors your company uses to gather, store, and provide information in the hiring process are your **Agents.** If their practices are not appropriate, your company can be liable for their acts even if you were not fully aware of what the vendor or its system was doing. This has long been the case when using recruiting services or placement agencies. The discriminatory recruiting or other wrongful acts done by your recruiting service Agent is attributable to you, and your company pays the resulting liability. Technology is further complicating this liability. Artificial Intelligence Systems run by technology vendors receive applicant information. IT is programmed to screen applications, rate them, and provide rankings in deciding who

gets rejected and who gets forwarded on to the employer, all without a human being involved. The use of these systems is being challenged, and employers are being sued for contracting out their pre-employment process to these systems vendors. The vendors themselves are also being sued. *Mobley et al v. Workday* (N.D. Cal. 2026) [Reported in the April 2026 version of this Update] is a class action alleging that the Workday System's algorithm operated to screen out applicants based on race and age in violation of Title VII and the ADEA. **Now the Fair Credit Reporting Act (FCRA)** is the newest area of challenge. *Kistler et al v. Eightfold AI, Inc.* (Cal App., 2026) alleges that the Eightfold system, which many employers contract with to screen applicants, goes beyond simply screening the materials submitted by those applicants. It allegedly is programmed to also "scoop" online data about those candidates from a variety of other sources and then incorporate that information into its ratings of the applicants. Since Eightfold is a third-party vendor, the suit alleges that this extra information gathering is an "investigative process" under the FCRA and requires the employer to provide FCRA notices, disclosures, copies of the reports and ratings, etc. Since these notices are not being provided, the use of Eightfold puts the employers and Eightfold in violation of the FCRA, even though the employers were not aware that the AI system was gathering this data. **The lesson** is that employers who contract for screening services need to be much more aware of what the vendor supplied AI is actually doing and how it is doing that.

LITIGATION

Arbitration

Many companies have employees sign Arbitration Agreements requiring all employment-related disputes to be decided by an arbitrator rather than a court. The Agreements are often the topic of disputes as to whether they have the correct provisions or scope in order to be enforceable. Courts periodically find that the Agreements are not enforceable and allow the employee to sue in court. The following cases are about the scope of an agreement and time limits.

Arbitration Agreement Cannot Have Shorter Time Limits Than Comparable Laws. *Thomas v. EOTECH, LLC* (4th Cir., 2026) involved an Arbitration Agreement that required employees to file a dispute within 180 days. Ms. Thomas was fired and filed her dispute at 195 days. The company rejected it, and she filed a Title VII and ADEA age discrimination complaint in court. The company claimed this was barred by the Arbitration Agreement. The court ruled that both Title VII and the ADEA have up to a 300-day time period for filing a complaint. The Arbitration Agreement thwarted the law's intent, and a private agreement may not "*abrogate substantive rights and contravene Congress's uniform nationwide regime for Title VII and ADEA lawsuits*." Since

the Arbitration Agreement's timeframe did not match the relevant laws, the court voided the Agreement and allowed the lawsuit to proceed.

Arbitration Agreement Cannot Trim Out Parts of Case. Though agreements to arbitrate all employment disputes are generally enforceable, Congress has made specific exceptions. In 2021, Congress passed the Ending Forced Arbitration of Sexual Assault and Harassment Act (EFAA), which exempted harassment disputes from arbitration. In *Bruce v. Adams and Reese LLP* (6th Cir., 2026), a discharged employee filed ADA disability and Title VII sexual harassment charges. The company moved to compel arbitration of all issues, or in the alternative, to compel arbitration of the disability claims, since the EFAA only covered the sexual harassment issues. The court ruled that the law prevented the arbitration of "*cases*" alleging sexual harassment, and since the sexual harassment and disability issues were in the same "*case*" and all grew out of the same discharge situation, the court would not separate them. When a suit has multiple claims and one of those claims alleges sexual assault or harassment, then the EFAA makes the arbitration agreement unenforceable with respect to all of the claims in the suit.

Discrimination

Age

Cockroaches and Pests Outweigh Past Performance. A chain restaurant Field Manager in his mid 50's had years of excellent evaluations, including recognition as Top Performer. Then a severe cockroach infestation occurred at one of his assigned restaurants. He was not previously aware of this condition and promptly acted to cure it. However, this led to closer scrutiny, which revealed persistent pest and cleanliness problems at other restaurants for which he was responsible. The manager was discharged for failure to maintain company food and safety standards and for not properly reporting critical problems. He filed a lawsuit claiming the discharge was due to age discrimination and citing his long history of excellent evaluations. The court found no evidence that the company's reasons for termination were pretextual; cleanliness, food safety, and cockroaches are serious issues. Present serious performance problems can overcome years of otherwise excellent performance. *Sousa v. Chipotle Services* (10th Cir., 2026)

Race

Hiring To Leverage the Caucasian Market was "Exceedingly Reprehensible." — $3.4 Million Award. A Taiwan-based transportation company opened a US subsidiary. It lost a race discrimination case filed under 42 U.S. Code Section 1981 after offering a sales position, then withdrawing it when it discovered the applicant was Black. A jury awarded $90,000 in lost wages, $150,000 for emotional distress,

$150,000 for future emotional distress, and $3 million in punitive damages. The company appealed the verdict, requesting a reversal and claiming the emotional distress and punitive damage awards were impermissibly excessive. The court reviewed the evidence. The company's Taiwan-based management had explicitly proposed hiring Caucasian sales and marketing people, *"to attract the Caucasian Market."* The Human Resources Manager testified that she was instructed that *"it was easier to get a Caucasian through the door to obtain sales"* and she was instructed to *"only hire White Caucasians."* The HR Manager tried to abide by the law and informed management that its directive was improper, but any non-white she considered was rejected. She tried to hire the Black applicant because he was the most qualified. However, his background check showed one misdemeanor conviction and listed his race. The company management immediately withdrew the job offer. It then drafted an offer for a White applicant. HR pointed out that this person had four misdemeanor convictions, but was told to hire that person. When she objected, she was again instructed that the company wanted to hire White only in order to "leverage the Caucasian Market." Soon after, the HR Manager chose ethics over a paycheck and resigned. She then contacted the rejected applicant and told him the reason for his rejection. The Appellate Court ruled against the company. It upheld the full $3.4 million damages award, finding the company's conduct *"was exceedingly reprehensible"* and intentional, despite repeated warnings from HR. This warranted the large damages award. *Faulk v. Dimerco Express USA Corp.* (11th Cir., 2026). This was a case under 42 U.S. Code Section 1981. Many racial discrimination cases are filed under Title VII, which has "caps" on damages. However, Section 1981 has no "caps" and can result in unlimited damage awards. It is crucial for employers to be aware of all of the different laws and their coverage which can apply to the same EEO category in order to prevent huge liability, as in this case.

Disability

"Less Than Optimal Outcome" — Disability Does Not Excuse Behavior. A Texas State Trooper/Criminal Investigator received a call from his daughter's high school counselor informing him that she was having a mental health crisis and to keep her safe, she was not allowed to leave to go home. The trooper grabbed his badge, handcuffs, and firearm, rushed to the school, and confronted two counselors. In what the court characterized as *"a truly terrifying incident,"* he began yelling, ordered the counselors out of their offices, and when two school district police officers came in, the trooper flashed his badge and threatened to handcuff them and to arrest the school's police officers and put them all *"in jail for interfering with his rights as a parent."* The counselors reported being trapped and fearing for their safety and lives. The school police department filed charges for the trooper's abuse of his official capacity, official oppression, and obstruction of police. The trooper blamed

the incident on his PTSD disability and explained that "*When it takes over, things often end with less than optimal outcomes*." The State Department of Public Safely (DPS) reviewed the situation and decided to discharge the trooper. The trooper then sued under Texas state law and the ADA for disability discrimination arguing his disability was the reason for the discharge. The court dismissed the case. It found that DPS had a valid basis to conclude the trooper's misuse of his badge and position to intimidate and interfere with the school counselors and other police officials warranted discharge. His PTSD disability was not an accommodatable defense to his actions. By his own admission, "*it takes over*" and "*impaired his ability*" to reasonably perform essential functions of his job. The court found this "*would unreasonably endanger citizens and officers alike*" if he were allowed to continue as a law enforcement officer. *Callaway v. Texas Dept. of Public Safety* (TX Ct. of Appeals, 2026).

Violations of Procedures and Confidentiality. A security officer for a contractor at a Department of Energy (DOE) nuclear facility had a back condition for which he had long taken opiate pain medication prescribed by his doctor. He revealed this at the time of hire and worked successfully for 10 years, passing the annual DOE medical fitness evaluation and drug test, with an approved verification for use of prescribed pain medication, as long as he took none with eight hours of work. Then the company's new medical director changed the interpretation of the test and ruled the officer not fit for duty due to the medication. Nothing about the employee had changed; only the medical director had changed. The company did not follow the protocol to inform DOE of the drug test and the circumstances in order for DOE to make a final decision. The contractor removed the officer. Then, management informed other employees that the officer was losing his job for being an "*opioid abuser.*" In the ensuing ADA and Rehabilitation Act suit, a jury found the company had engaged in discrimination by its failure to follow procedures, and informing others that the officer was "regarded as" having an opiate abuse disability. On appeal, the court upheld the verdict. Besides violating the confidentiality of medical testing results, the company's major flaw was removing the officer without following the requirement to inform DOE of employee test results and letting the agency make an informed decision. *Gonzalez v. Battelle Energy Alliance,* LLC (9th Cir., 2026)

The Law Requires Reasonable, Not Perfect, Accommodations. The State Department provided a Science and Engineering fellowship to Ms. Qashu, who was visually impaired. Ms. Qashu soon requested accommodation of screen-reading software and a quieter work area, since noise was distracting her ability to listen to the software. She also requested someone read to her since the software was not always effective. The Department made attempts to get the software working better, it provided readers as available, but could not always do so due to having to balance her request with those of other visually impaired employees. It took weeks to find

a quieter office, but she was provided with noise-cancelling headphones in the interim. She filed an internal complaint over being denied prompt accommodation. When Ms. Qashu was offered a one-year extension of her fellowship, she did not return the papers by the acceptance deadline. The Department then withdrew the offer. Ms. Qashu filed a Rehabilitation Act suit alleging the failure to promptly provide the accommodations she needed, and that the fellowship offer withdrawal was in retaliation for having filed the internal disability complaint. The court ruled for the Department. It found the Department engaged in the Interactive Process which is required by the Rehabilitation Act and the ADA. It addressed each accommodation and continued to do so when Ms. Qashu said accommodations were not effective. The court noted that the accommodation process may often include certain frustrations, delays, and problems; "*disability law requires reasonable, not perfect, accommodation*." Immediate solutions are often not available. The Department acted reasonably, provided alternatives it could during any delays, and continued the interactive communication. As to the fellowship offer, Ms. Qashu failed to meet the acceptance deadline. The Department could not plausibly be accused of retaliation for her past complaint when it then offered her continuation of the job. Her own inaction was a valid non-discriminatory reason for withdrawing the offer. *Qashu v. Rubio, Secretary of State* (D.C., D.C. 2026)

Retaliation

Retaliation by Investigation and Revelation. There are more retaliation cases than any other area of employment law. This is because virtually all employment laws and many others have anti-retaliation provisions allowing suits for those who experience adverse consequences for having engaged in protected activities, and there are a wide array of activities that can be adverse actions. In *Pechkis v. Trustees of California State University* (Cal. Ct. of Appeals, 2026), a faculty member complained about harassment and discrimination against women of Korean origin. She then resigned, alleging that no action was taken to address those concerns. She accepted a job at another university. The California State University launched an investigation of the professor's alleged violation of student privacy rules due to long-past blog posts. Then the university Provost informed her new employer that it had serious concerns about privacy violations and was investigating her. This delayed her start at the new college. The university also delayed the transfer of her personal laboratory equipment to the new college, further impairing her transition. She filed discrimination and retaliation claims under California State Law and Title VII. The university claimed immunity because employment investigations were absolutely protected activities. The court ruled otherwise. Though most internal investigations are protected by "qualified immunity," this requires good faith and reasonable cause. Starting an investigation of old issues only after an employee makes a protected

complaint can indicate a lack of good faith or reasonable cause. Further, the university went beyond mere investigation; it informed the new employer of possible issues before the investigation had concluded. This could indicate a retaliatory motive to harm the new employment. Thus, the suit could proceed.

Fair Labor Standards Act

A Lot of Wasted Effort to Avoid a Class Action. *Garcia v. Merchant of Tennis, Inc.* (Cal. Appellate, 2026) An employee filed a Fair Labor Standards Act and State law lawsuit about failure to pay proper wages and overtime to herself and others. In an effort to avoid the suit from becoming a class action, the company quickly entered into 954 separate settlement agreements with individual employees. The plaintiff claimed these were invalid and obtained by fraudulent representation and coercion, thus all employees should be allowed to be part of the class action. The company claimed the agreements were valid, but also claimed that those who signed the agreements must pay back whatever they received under the individual settlements before being allowed to join the class action. The court ruled that the individual agreements could be rescinded by anyone who wished to join the class action and they did not have to first repay. They could wait for the outcome of the class action, and then any amounts already paid could be offset against awards in the case.

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