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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

New Mexico Implements Universal Childcare. New Mexico has become the first state to guarantee no-cost childcare for all. The state claims that this action will greatly benefit families, businesses, education, and the state's economy. The new law provides loans for constructing new childcare facilities, pays subsidies for childcare providers to pay workers at least $18 per hour, and more. Childcare has been a growing national concern, even a crisis. More people cannot find or afford childcare, limiting people's ability to hold full-time jobs. Nationally, government subsidies, which enabled over 220,000 childcare programs to exist and provide lower-cost care for working parents, are now gone, and many childcare programs are closing. There are now "childcare deserts" where only the affluent can find childcare, and there are waiting lists for those. The result is a growing negative impact on employers due to a downward trend in the ability to find needed employees. New Mexico's guarantee is already having an employment effect. While the national childcare workforce has seen a recent 7% decline, New Mexico's childcare programs are actually seeking up to 12,000 new workers.

LITIGATION

Strangest Case of the Month

SHRM tries to claim it has no expertise in employment issues. In the racial discrimination and retaliation case of *Mohamad v Society of Human Resources Management (SHRM)* (D. Col., 2025), the attorneys for SHRM attempted to argue that the Society could not be considered as having any special expertise or knowledge in human resources/employment practices. Some might consider this a strange argument, considering that SHRM's entire business and mission is HR and

employment practices. It trumpets to the world that it is the know-all and be-all for all things HR, and charges for seminars and guidance on proper employment practices. The argument was an effort to avoid having the court and jury hold SHRM to a higher standard in an employment case than would be applied to a general employer. The effort did not work. The judge found it contradictory to SHRM's public declarations that it is the expert on HR best practices and that it sets the national standard for everyone in HR. So, SHRM had to defend the case under the standard it has always so proudly proclaimed – the nation's employment expert. A jury then awarded $11.5 million against SHRM to the former Instructional Designer in SHRM's Education Department. ($1.5 million in compensatory damages and $10 million in punitive damages.) There was evidence that in its treatment of Ms. Mohamed, SHRM violated a number of practices and guidelines SHRM has developed and strongly advocated for everybody else to follow.

National Labor Relations Act

Stray Bullets and Angry Comments. Constellis, LLC is a company that trains security officers. Several of the company's Firearms Instructors, including Mr. Macri, complained that the firing ranges were unsafe. The layout and conditions allowed stray bullets and ricochets to whiz by students and instructors, and several users of the range had been hit by ricochet fragments. The company then claimed it had fixed the problem. However, wayward bullets continued with more ricochet hits. Mr. Macri confronted his managers in a meeting about the continuing danger. He was upset and raised his voice about people having to dodge bullets. He was then fired. Macri filed a charge with the NLRB alleging retaliation for engaging in protected activity. The company defended by claiming: 1.) Macri was a supervisory employee, and thus not covered by the NLRA's protections. 2.) He was fired for "insubordination," having angrily yelled at his managers, rather than out of retaliation. The NLRB disagreed and ordered reinstatement and back pay. On appeal, the court affirmed the Order. It found Macri had no supervisory authority over any other employee, only students. Further, the Act recognizes that employee-management interchanges are often confrontational, accusatory, and indignant, with raised voices from both sides, and this robust exchange is within the scope of protected activity. One does not have to be mild, polite, or even civil – especially when dodging bullets. *NLRB v Constellis, LLC d/b/a ACADEMI Training Center, LLC* (4th Cir., 2025)

Discrimination

Sex

Personal Liability for University President Hiring Process. A court ruled that administrators involved in hiring a university president can be personally sued for

sex discrimination in the process. *Jackson v Duff et al (Jackson State University)* (5th Cir., 2025) alleges that Dr. Jackson was rejected for the position of University President due to her gender. She was a Vice President and had been the Chief Executive during presidential absences and gaps. When there was a vacancy in 2021, she was interested in the presidency. The Board of Trustees appointed a man as president, who openly admitted he was less qualified than Dr. Jackson, without allowing any applicants. There was again a presidential vacancy in 2023. Dr. Jackson applied but was denied an interview. Instead, the Board appointed a man who never even applied, had no university administrative experience, had earned his Doctorate degree only a few months earlier, and was clearly less qualified than Dr. Jackson, based on the qualification criteria which had been set by an outside consulting firm. Dr. Jackson filed a 42 US Code Sec. 1983 sex discrimination case in which she named eight members of the Board of Trustees in their personal capacity. The university and Board members raised an immunity defense. However, the court allowed the case to proceed against each of them individually. It ruled that freedom from sex discrimination is "a clearly established statutory or Constitutional right of which a reasonable person would have known." "Sex discrimination in public employment violates the Equal Protection Clause of the 14th Amendment." Assessing the allegations of the case, the Board members' conduct regarding Dr. Jackson "was objectively unreasonable in light of clearly established law." This ruling did not decide the case. It allowed it to proceed to a trial in which a jury will decide. However, the Board members are now subject to personal liability if a jury does decide in Dr. Jackson's favor.

Disability

Sitting Accommodation Was Unreasonable as a Matter of Law. A restaurant hired a Service Team member. The duties were to handle multiple tasks throughout the restaurant, restocking, cleaning, serving, cash register, etc., requiring constant movement. The new hire stated she had arthritis in her knees and must sit and rest for five minutes after every 10 minutes of standing or moving. The restaurant stated it could not accommodate her and did not allow her to start the job. She filed an ADA suit. The court ruled in favor of the restaurant. The accommodation restriction would impact a full one-third of the job, significantly impacting the essential functions and fundamentally altering the position. The employee's accommodation "was not objectively reasonable as a matter of law," and no further interactive process would have altered that. *Bowles v SSRG II, LLC* (6th Cir., 2025)

Damages and Fee Awards

A number of federal laws provide for the award of attorneys' fees to a "prevailing party." A question is, what degree of success does one have to achieve to qualify as

"prevailing"?

Moral Victory Gets No Fees. Former NFL running back, Michael Cloud, filed an ERISA suit against the NFL Players' Retirement Plan claiming he should receive a higher, Top Tier, disability benefit due to the number and seriousness of concussions during his seven-year playing career. He claimed the retirement plan's process denied him a full and fair review. A District trial court agreed and awarded the Top Tier benefits and ordered the Plan to make corrections in its process, which it found to be "a lopsided system aggressively stacked against disabled players." It awarded Cloud's attorneys $1.2 million in fees as the prevailing party. The NFL appealed. The Appellate Court found that Cloud may have filed his suit beyond the time limit for challenging the Plan's decision. It was remanded to the District Court. On reconsideration, the court ruled Cloud was not eligible for Top Tier benefits due to having missed his appeal deadline. However, it still kept the $1.2 million attorneys' fee award since Cloud's case had resulted in the order to change the Plan's process and thus had achieved an amount of "vindication." The NFL again appealed the fee award. The Court of Appeals overturned the fees, ruling that in order to receive fees, a prevailing party must achieve some degree of success on its claim for Top Tier payments. Though there may have been a change in the process which will benefit others, "he received no relief." "Moral satisfaction without relief cannot support a fee claim." A moral victory is not a merits victory. *Cloud v Bell, Rozelle, and NFL Players Retirement Plan* (5th Cir., 2025)

Fair Labor Standards Act

The FLSA requires payment of at least minimum wage and overtime to hourly, non-exempt employees. Sometimes this is not as straightforward as it seems. In certain circumstances, one cannot pay the correct amount and then take part of it back. Some operations require employees to pay for mandatory uniforms, cleaning, safety garb, special equipment, etc. These are for performing the work and are not discretionary for the employees to choose to have, or not. They are essentially a charge to the employees for doing their work. If the cost of these company-mandated expenses, when subtracted from wages, results in a net of less than the minimum wage and overtime level, it can violate the FLSA.

Employees' Signed Authorization is No Defense for Pay Deductions. To comply with the FLSA, you must pay at least minimum wage and overtime, but you also cannot take too much of it back. *Gessele v Jack In the Box* (9th Cir., 2025) is a class action in which a central issue was shoes. The company required its restaurant workers to purchase a specific brand of non-slip shoes, which they could elect to pay for in cash or have the cost deducted from pay. However, employer-required purchases or expenses can impact the actual effective wage. The purchase, once subtracted from

wages, brought the wage below the minimum and overtime for some workers. The company defended by showing that most employees had signed an authorization for their shoe purchase to be deducted from their pay. The court, though, ruled that written authorization was not a defense against minimum wage and overtime violations. The key issue is the end amount of pay, not whether the employee authorized it.

Deduction of Ride Fees from Wages Did Not Violate the Act. A placement company provides temporary workers to other industries. Workers were responsible for commuting to the locations and could do so in their own vehicles, public transit, or ride company vans if they authorized the ride fee to be deducted from pay. The workers filed a Fair Labor Standards Act class action alleging that they should be paid for the ride time, and that the travel fee deduction at times resulted in a net paycheck that was less than the required minimum wage and overtime. The court disagreed. It ruled that local commute time is not part of a job, no duties are performed, and it is non-compensable under the FLSA. Employees were not required to take company vans and pay a fee. They could choose to use their own vehicle or take public transportation, which was more expensive. So, the ride deductions were for the employee's own personal benefit, and not part of a company-required wage rebate plan. *Villarino v Pacesetter Personnel Services, Inc.* (11th Cir., 2025)

Employment Contracts

(Multi-State Business And Conflicting Laws)

Companies doing business in several states need to be aware that each state has its own, and often differing, employment laws. One-size-fits-all Employment Agreements and policies are difficult to enforce. Many companies put a "choice of law" provision in agreements, specifying which state laws will apply and where any lawsuits must be brought. Courts are more closely examining these provisions and finding many to be unfair, overly restrictive, and unenforceable. Sometimes employers are unpleasantly surprised by the court applying laws they did not expect, and which can bite back. The following two cases are illustrative of this.

Agreement was Designed to Eliminate Most Employees' Rights Instead of Providing a Fair Process. A national trucking company was sued by some of its New Jersey delivery drivers, claiming violation of the New Jersey Wage and Hours Act. At hire, the company had all drivers sign an agreement with a "choice of law provision" requiring any cases to be filed in Tennessee and be governed by Tennessee law. The company was able to have the case removed from New Jersey to a federal court in Tennessee, which then ruled that Tennessee law did not recognize New Jersey statutes, so there was no remedy, and the case was dismissed. The drivers appealed.

The Federal Court of Appeals found the agreement unenforceable and unconscionable. The company was headquartered in New York and Illinois, with only one terminal in Tennessee. The New Jersey drivers, and most of the drivers in the nation, never went to Tennessee. So, there was no "material connection" or logical reason to warrant the use of Tennessee law. The effect of the agreement could be to allow the company to violate wage laws in states around the country with impunity, since the Tennessee law mandated by the Agreement would never apply. Further, there was no power for the drivers to negotiate over this provision, it was one-sided; a sign the provision or don't work adhesion contract. The court ordered the suit to proceed using New Jersey law. *Andujar et al v Hub Group Trucking, Inc.* (6th Cir., 2025)

One Agreement but Differing State Laws. CH Robinson (CHR), a nationwide logistics company headquartered in Minnesota, had employees sign stringent Non-Solicitation Agreements. Five employees left and went to work for Traffic Techs (TT), a rival nationwide company headquartered in Illinois. CHR filed suit in Minnesota federal court to enforce the Non-Solicitation Agreement against the five individuals and against TT for tortious interference with the CHR/employee relationship. The court first found that one employee had insufficient ties to any Minnesota operation, and California law should be used. It found the Agreement void and unenforceable under California law and granted summary judgment in favor of the employee and TT. CHR then tried to "voluntarily withdraw" this part of its complaint and have it dismissed. TT and the individual objected because California law allows the prevailing party to seek its attorneys' fees and costs, and did not want CHR to be dismissed before they could get that award. The Federal Court then applied Minnesota law to the rest of the case and also found the Agreements were unenforceable under that Minnesota law, and granted summary judgment to TT and the four individuals. CHR appealed, and the Circuit Court of Appeals upheld the decision, including the refusal to allow CHR to withdraw. It would be unfair, after having put the other parties through the great expense of litigation, to just drop the case and avoid the consequences. "A party is not permitted to dismiss merely to escape an adverse decision, nor to seek a more favorable forum." So, this action over one Agreement turned into two suits under two states' laws, and CHR may still have to continue litigation over how much it owes in fees and costs for the California portion. *CH Robinson Worldwide, Inc. v Traffic Tech Inc, et al* (8th Cir., 2025)

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