Bender's Labor & Employment Bulletin

May 2026
VOLUME 26 • ISSUE NO. 5

Inside This Issue

LexisNexis®
Matthew Bender®

The DOL Wage and Hour Division's Proposed Worker Classification Rule: A Return to 2021?

By J. Thomas Spiggle

One of the landmark pieces of employment legislation is the Fair Labor Standards Act (FLSA).[1] Among other things, it established basic employment rights for eligible workers. Some of the most notable include minimum wage,[2] overtime pay,[3] and employer recordkeeping requirements.[4] However, these rights only apply to nonexempt employees[5] and not independent contractors.[6]

The distinction between an employee and independent contractor, therefore, motivates some employers to classify their workers as independent contractors instead of employees as to avoid FLSA obligations.[7] However, simply labeling a worker as an independent contractor won't be enough to remove that worker from FLSA requirements.[8] Yet it's not always easy for an employer to accurately determine whether a worker is an independent contractor or employee for FLSA purposes.

---

[1] 29 U.S.C. §201 et seq. (2026).

[2] 29 U.S.C. §206(a).

[3] 29 U.S.C. §207(a).

[4] 29 U.S.C. §211(c).

[5] *See* 29 U.S.C. §203(d), (e)(1), and (g) (establishing the employee requirement by defining the terms of employer, employee, and employ).

[6] Although the FLSA doesn't define the term "independent contractor," it's widely accepted that the FLSA protections and privileges, such as minimum wage, overtime pay, and recordkeeping obligations, don't apply to independent contractors. *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947); *Saleem v. Corporate Transp. Group., Ltd.*, 854 F.3d 131, 139–40 (2d Cir. 2017); and *Karlson v. Action Process Serv. & Private Investigation*, LLC, 860 F.3d 1089, 1092 (8th Cir. 2017).

[7] U.S. Gov't Accountability Office, GAO-09-717, Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention 4-5 (2009).

[8] *Rutherford*, 331 U.S. at 729.

continued on page 125

CONTENTS:

ATTENTION READERS

Any reader interested in sharing information of interest to the labor and employment bar, including notices of upcoming seminars or newsworthy events, should direct this information to:

Laurie E. Leader
Law Offices of Laurie E. Leader, LLC
100 Rivershire Lane
Lincolnshire, IL 60069
E-mail: lleader51@gmail.com
or
Mary Anne Lenihan
Legal Editor
Bender's Labor & Employment Bulletin
LexisNexis Matthew Bender
230 Park Avenue, 7th Floor
New York, NY 10169
E-mail: maryanne.lenihan@lexisnexis.com

If you are interested in writing for the BULLETIN, please contact Laurie E. Leader via e-mail at lleader51@gmail.com or Mary Anne Lenihan via e-mail at maryanne.lenihan@lexisnexis.com.

A NOTE ON CITATION

The correct citation form for this publication is:
26 Bender's Lab. & Empl. Bull. 123 (May 2026)

ISBN 978-0-8205-5039-8, EBOOK ISBN 978-1-4224-8015-1

(Pub. 1239)

The DOL Wage and Hour Division's Proposed Worker Classification Rule: A Return to 2021?

(text continued from page 123)

There have been numerous cases[9] and regulatory actions[10] to create a test (or modify an existing test) that employers, courts, and agencies can use to decide if a worker has been properly classified under the FLSA. As of the time of this writing, the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD)[11] has a pending proposed rule that aims to clarify the "economic reality test," which has been commonly used in worker classification litigation and regulatory enforcement for decades. To better understand this proposed rule, it helps to first examine the recent regulatory history of the FLSA and worker classification.

The 2021 Rule

On January 7, 2021, less than two weeks before President Trump's first term ended, the WHD published a final rule (2021 Rule)[12] that consolidated the prior years' worth of regulatory and case law history, attempting to modify the economic reality test. What was unique about this 2021 Rule was that instead of using six or seven non-exhaustive factors for deciding if someone was an employee or independent contractor, the WHD listed five factors[13] for determining the worker's economic reality.

The WHD then placed extra emphasis on two of these factors to create two "core" factors. The two core factors were: 1) the nature and degree of control over the work and 2) the individual's opportunity for profit or loss.[14] The WHD stated that these were "the most probative as to whether or not an individual is an economically dependent 'employee'" and therefore, should have "greater weight" in the worker classification analysis.[15] The WHD also stated that if both core factors "point[ed] towards the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual's accurate classification."[16]

In essence, the 2021 Rule was basically saying that the WHD would look at two primary factors for determining if a worker was properly classified. As for the other three factors,[17] they would likely only matter if the two core factors were split or otherwise indecisive. In some cases, they wouldn't matter at all.[18]

On March 4, 2021, the WHD published a final rule[19] delaying the date the 2021 Rule would go into effect (Delay Rule).[20] Instead of going into effect on March 8, 2021, it would go into effect on May 7, 2021. Then on May 6, 2021, the DOL published another final rule[21] withdrawing the 2021 Rule (Withdrawal Rule).

The Delay Rule and the Withdrawal Rule were both vacated by a U.S. District Court,[22] and the DOL appealed this decision to the U.S. Court of Appeals for the Fifth

---

[9] *E.g.*, *Rutherford*, 331 U.S. 722 and *Goldberg v. Whitaker House Coop.*, 366 U.S. 28 (1961).

[10] *E.g.*, Wage and Hour Division Administrator's Interpretation No. 2015-1, page 1 (July 15, 2015) (addressing the FLSA's "Suffer or Permit" standard when identifying misclassified workers); Wage and Hour Division Opinion Letter No. FLSA2025-2 (previously numbered FLSA2019-6), page 1 (May 2, 2025) (addressing the issue of independent contractor or employee classification under the FLSA for individuals working for a virtual marketplace company); and *infra* note 12.

[11] The WHD of the DOL is primarily tasked with enforcing the child labor, minimum age, overtime, and recordkeeping requirements of the FLSA.

[12] U.S. Dep't of Labor, *Independent Contractor Status under the Fair Labor Standards Act*, Final Rule, 86 Fed. Reg. 1168 (Jan. 7, 2021).

[13] 86 Fed. Reg. 1246-47.

[14] 86 Fed. Reg. 1246-47.

[15] 86 Fed. Reg. 1246.

[16] 86 Fed. Reg. 1246.

[17] These were: "the amount of skill required for the work," "the degree of permanence of the working relationship between the individual and the potential employer," and "whether the work is part of an integrated unit of production." 86 Fed. Reg. 1247.

[18] 86 Fed. Reg. 1246.

[19] U.S. Dep't of Labor, *Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date*, Final Rule, 86 Fed. Reg. 12535 (Mar. 4, 2021).

[20] It should be noted that at this specific point in time, the DOL was under the Biden Administration.

[21] U.S. Dep't of Labor, *Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal*, Final Rule, 86 Fed. Reg. 24303 (May 6, 2021).

[22] *See Coalition for Workforce Innovation v. Walsh*, No. 1:21-CV-130 (E.D. Tex. Mar. 14, 2022) (reasoning that the DOL didn't provide an opportunity for public comment for the Delay Rule and didn't provide a sufficient reason for having the Withdrawal Rule go into effect immediately. The District Court also ruled that the 2021 Rule should remain in effect as of its original March 8, 2021 effective date).

Circuit (Fifth Circuit).[23] The Fifth Circuit stayed the appeal while the DOL worked on a new rule to replace the 2021 Rule.

Eventually, the Fifth Circuit dismissed the appeal and vacated the District Court's decision as moot and remanded the case back to the District Court.[24] This new rule that rendered this appeal moot came in 2024 during the Biden Administration.

The 2024 Rule (Currently In Effect)

On January 10, 2024, the WHD published a final rule (2024 Rule) aimed to rescind the 2021 Rule and replace it with a different type of economic reality test.[25] Unlike the 2021 Rule, which focused on two core factors, the 2024 Rule focused on six factors for determining the economic realities of the employment relationship between an employer and worker. These six factors were:

- Opportunity for profit or loss depending on managerial skill.[26]
- Investments by the worker and the potential employer.[27]
- Degree of permanence of the work relationship.[28]
- Nature and degree of control.[29]
- Extent to which the work performed is an integral part of the potential employer's business.[30]
- Skill and initiative.[31]

There are a few important things to note about these six factors.

First, the analysis takes a totality-of-the-circumstances approach, meaning none of these factors are necessarily more important than the others, and their weight should depend on the unique facts and circumstances of each situation.

Second, this is not an exhaustive list, and a court or agency could consider other factors, as necessary.

Third, the 2024 Rule only included illustrative examples on applying the factors as part of the 2024 Rule's preamble, but not in the regulation itself.[32] Despite being in the preamble and not the regulation, these examples were extensive. This was in contrast to the 2021 Rule, which included within the regulation six relatively brief examples on applying the economic reality test.[33]

At least five lawsuits challenged the 2024 Rule.[34] In all of these cases, the courts have stayed litigation while the DOL (now under the second Trump Administration at this point) makes a decision on whether to modify, rescind, or replace the 2024 Rule.

On May 1, 2025, the WHD published Field Assistance Bulletin (FAB) No. 2025-1 to offer guidance on the WHD's enforcement position considering the uncertainty regarding the 2024 Rule. In this FAB, the WHD stated that it would not apply the 2024 Rule when determining worker status in FLSA investigations.[35] Instead, it would apply the principles laid out in *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)* from July 2008 and Wage and Hour Division Opinion Letter No. FLSA2025-2 (previously numbered FLSA2019-6) (May 2, 2025).[36] The 2024 Rule would continue to be applied in private litigation, though.[37]

The Proposed 2026 Rule

On February 27, 2026, the WHD published a Notice of Proposed Rulemaking aiming to change how the economic reality test should be applied for worker classification

[23] *See Coalition for Workforce Innovation v. Su*, No. 22-40316 (5th Cir. May 13, 2022).

[24] *See Coalition for Workforce Innovation v. Su*, No. 22-40316 (5th Cir. Feb. 19, 2024).

[25] U.S. Dep't of Labor, *Employee, or Independent Contractor Classification Under the Fair Labor Standards Act*, Final Rule, 89 Fed. Reg. 1638 (Jan. 10, 2024) (later codified in 29 C.F.R. § 795).

[26] 29 C.F.R. § 795.110(b)(1).

[27] 29 C.F.R. § 795.110(b)(2).

[28] 29 C.F.R. § 795.110(b)(3).

[29] 29 C.F.R. § 795.110(b)(4).

[30] 29 C.F.R. § 795.110(b)(5).

[31] 29 C.F.R. § 795.110(b)(6).

[32] 89 Fed. Reg. 1676-1715.

[33] 86 Fed. Reg. 1247-48.

[34] *Frisard's Transp., L.L.C. v. Dep't of Labor*, No. 2:24-cv-00347-EEF-MBN (E.D. La. Mar. 8, 2024); *Warren v. Dep't of Labor*, No. 2:24-CV-7-RWS (N.D. Ga. Oct. 7, 2024); *Colt & Joe Trucking, LLC v. Dep't of Labor*, No. 2:24-cv-00391-KWR-GBW (D. N.M. Jan. 9, 2025); *Littman v. Dep't of Labor*, No. 3:24-cv-00194 (M.D. Tenn. Mar. 11, 2025); and *Coalition for Workforce Innovation v. Walsh*, No. 1:21-CV-130 (E.D. Tex. Mar. 5, 2025) (on remand from the earlier challenge to the Delay and Withdrawal Rules).

[35] FAB No. 2025-1 at 1 (May 1, 2025).

[36] These use six factors to apply an economic reality test that, at least on the surface, bear a closer resemblance to the 2024 Rule than the 2021 Rule.

[37] FAB No. 2025-1 at 2.

under the FLSA.[38] This Proposed 2026 Rule does two main things.

First, it largely reinstates the "two core factors plus three minor factors" economic reality test from the 2021 Rule. Second, it seeks to apply this economic reality test to not just the FLSA, but also the Family and Medical Leave Act (FMLA)[39] and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).[40]

Two Core Factors (Plus Three Others)

The first core factor is the nature and degree of control the employer has over the work.[41] This is a full re-adoption of the relevant portions from the 2021 Rule. The more control the employer has over key aspects of the work completed (such as scheduling, choice of work, and the worker's ability to work for other employers), the more likely the worker is an employee (and vice versa).

The second core factor is the worker's opportunity for profit or loss.[42] This is also a full re-adoption of the relevant portion from the 2021 Rule. It essentially states that the more opportunities a worker has to exercise their own initiative, manage their own investments in their work, or spend money to expand their business, then the more likely a worker will be an independent contractor (or vice versa). It's likely a worker will be viewed as an employee if the primary manner in which workers can increase their earnings is limited to working more hours or more quickly.

The proposed rule notes that workers not having an opportunity to manage their investments or exercise their own initiative won't necessarily mean they can't be classified as an independent contractor.[43]

The first "minor" factor is re-adopted from relevant portions of the 2021 Rule and refers to the amount of skill required for the work.[44] The more skills or training needed to complete the work that's not provided by the employer, the more likely the worker is an independent contractor. If the work doesn't require special skills or training, or the necessary skills or training is provided by the employer, then the worker is more likely to be an employee.

The WHD mentions in the preamble[45] that initiative isn't included in this factor (like it is in the 2024 Rule) as the WHD believes initiative is better included in the opportunity for profit and loss core factor based on case law from the U.S. Supreme Court.[46]

The second "minor" factor is a re-adoption of relevant portions from the 2021 Rule and relates to the permanence of the working relationship between the worker and the employer.[47] The more sporadic or specific in duration the job, the more likely someone is an independent contractor.

The WHD implied that this should be a minor factor because of the various exceptions that might push an individual towards being one type of worker when they are in fact another type. For example, a seasonal worker "should" be an independent contractor because the worker works for a short period of time and sometimes sporadically. Yet if the position is permanent and the worker has done this work consistently for multiple seasons, he or she is probably an employee.

Another reason the WHD considered permanence to be a minor factor was that, unlike the 2024 Rule, it didn't consider a worker's initiative and exclusivity when analyzing the permanence of the working relationship.[48] The Proposed 2026 Rule instead proposed it could improve worker classification analysis efficiency by consolidating initiative and exclusivity into the two core factors.[49]

The third "minor" factor is whether the worker is part of an integrated unit of production.[50] This is mostly a re-adoption of relevant portions of the 2021 Rule, with one minor change. Specifically, there is a slight change in wording so the description of this factor better matches the same formatting and structure of the other factors.

This third minor factor focuses on how integral a worker is to the employer's production process. The more

---

[38] U.S. Dep't of Labor, *Employee, or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act*, Proposed Rule, 91 Fed. Reg. 9932 (Feb. 27, 2026).

[39] 29 U.S.C. §2601 et seq. (2026). The FMLA provides up to 12 workweeks of protected, unpaid leave to eligible employees for qualifying family or medical reasons.

[40] 29 U.S.C. §1801 et seq. (2026). The MSPA is similar to the FLSA in that it provides employment rights and protections to eligible migrant and seasonal agricultural workers. These rights mainly apply to wages, housing, transportation, recordkeeping, and disclosures.

[41] 91 Fed. Reg. 9973-74 § 795.105(d)(1)(i).

[42] 91 Fed. Reg. 9974 § 795.105(d)(1)(ii).

[43] 91 Fed. Reg. 9974 § 795.105(d)(1)(ii).

[44] 91 Fed. Reg. 9974 § 795.105(d)(2)(i).

[45] 91 Fed. Reg. 9954.

[46] *See United States v. Silk*, 331 U.S. 704, 716 (1947) (stating several factors for worker classification within the context of the Social Security Act and mentioning skill to complete the work, without reference to initiative).

[47] 91 Fed. Reg. 9974 § 795.105(d)(2)(ii).

[48] *See* 29 C.F.R. § 795.110(b)(3).

[49] 91 Fed. Reg. 9955.

[50] 91 Fed. Reg. 9974 § 795.105(d)(2)(iii).

integrated the worker is in the employer's production process, the more likely the worker is an employee (and vice versa). This contrasts with the 2024 Rule, which looks at the worker's integration with the employer's main business as a whole.[51] The WHD justifies this distinction[52] by referencing the *Rutherford* Supreme Court case.[53]

The Proposed 2026 Rule also leaves room for the consideration of additional factors, besides the two core and three minor factors. However, the additional factors will only be considered if they relate to "whether the individual is in business for him- or herself, as opposed to being economically dependent on the potential employer for work."[54]

FMLA and MSPA Applications

The FMLA and MSPA already have connections to the FLSA. For instance, both statutes incorporate the FLSA's definitions for "scope of employment."[55] Therefore, it makes sense to the WHD that the worker classification analysis for employees and independent contractors for the FLSA would also apply to the FMLA and MSPA.[56] The WHD justifies this joint policy reasoning as making it easier for workers and employers to understand how workers should be classified.[57]

The FMLA's regulations would be amended such that the definition of "employee" from 29 C.F.R. § 825.102 would be changed to reference §§ 795.105 through 795.110 of the Proposed 2026 Rule. The MSPA's regulations would be changed in a similar way. Specifically, the six current economic reality test factors from 29 C.F.R. §500.20(h)(4) would be removed and replaced with a cross-reference to §§ 795.105 through 795.110 of the Proposed 2026 Rule.

There would also be other wording and structural edits to other relevant FMLA and MSPA regulations to create consistency with the overall intent that the FLSA's worker classification regulations would apply to the applicable FMLA and MSPA regulations.

Other Important Policy Changes from the 2024 Rule

There are two additional points to emphasize about how the Proposed 2026 Rule differs from the existing 2024 Rule. One point relates to 29 C.F.R. § 795.110 of the Proposed 2026 Rule that states the worker classification analysis should focus on what the employment relationship actually consists of, not what is theoretically or contractually possible. This reasoning stems from *Goldberg v. Whitaker House Coop.*, where the Supreme Court states that "economic reality" and not "technical concepts" should be the test for employment under the FLSA.[58]

The second point relates to the nature and degree of control core factor from 29 C.F.R. § 795.105(d)(1)(i) of the Proposed 2026 Rule. The WHD noted that even though some employers might want their independent contractors to comply with certain legal requirements (especially those relating to health and safety), those employers might refuse to confirm compliance in fear that this would constitute a level of control that might elevate the workers from independent contractor to employee status.

There is a part of § 795.105(d)(1)(i) (which also existed in the 2021 Rule) that states that employers taking steps to ensure workers comply with necessary legal requirements won't count toward classifying those workers as employees. This reasoning would also apply to employers ensuring their workers comply with non-legal obligations, such as contractual duties or quality control requirements. Exercising control over workers to confirm compliance also wouldn't count towards classifying the workers as employees.

Why the WHD Believes the Proposed 2026 Rule Is Necessary

Much of the Proposed 2026 Rule's preamble is devoted to explaining why the WHD believes its proposed rule is better than the existing 2024 Rule. Some of the more prominent reasons given include:

- The Proposed 2026 Rule offers more clarity to the economic reality factors by eliminating redundancies. For example, "managerial skill (including initiative or business acumen or judgment)," "independent business initiative," and "business-like initiative" appear in three separate factors in the 2024 Rule.[59]
- The 2024 Rule is more restrictive of independent contracting than is required by law.[60]

---

[51] 29 C.F.R. § 795.110(b)(5).

[52] 91 Fed. Reg. 9955.

[53] 331 U.S. at 729 (stating that employees were part of "an integrated unit of production" who worked "alongside admitted employees…").

[54] 91 Fed. Reg. 9974 § 795.105(d)(2)(iv).

[55] *See* 29 U.S.C. §1802(5) and 29 U.S.C. §2611(3).

[56] 91 Fed. Reg. 9959.

[57] 91 Fed. Reg. 9959.

[58] 366 U.S. at 33.

[59] 29 C.F.R. § 795.110(b)(1), (3), and (6), respectively.

[60] 91 Fed. Reg. 9941 (noting several examples of where the 2024 Rule deviates from Supreme Court precedents).

- Technological and societal changes make applying the 2024 Rule more difficult.[61]
- The 2024 Rule will deter the use of independent contractors, which will hurt workers who desire the flexibility and autonomy independent contracting offers.[62]
- The Proposed 2026 Rule offers greater uniformity and consistency when classifying workers under the FLSA, FMLA, and MSPA.[63]

What Happens if the 2026 Proposed Rule Goes Into Effect?

If the Proposed 2026 Rule were to go into effect as currently drafted, the WHD estimates the following effects:

- Job creation when employers who were deterred from hiring new workers but were afraid the 2024 Rule would force them to classify the workers as employees, are now willing to hire new workers as independent contractors.[64]
- A "minimal" number of workers currently classified as employees being reclassified as independent contractors.[65]
- The cost of the workforce and employers becoming familiar with the Proposed 2026 Rule would be $488.2 million in the first year.[66]
- The cost savings of the Proposed 2026 Rule in the first year would be $682.7 million.[67]
- An additional $14.9 billion in more taxes collected based on the creation of new jobs.[68]
- A reduced amount of worker misclassification due to greater clarity of the Proposed 2026 Rule.[69]
- A reduction in FLSA litigation.[70]
- Greater availability of services, such as those offered in the gig economy.[71]
- More job opportunities for people who need flexible employment.[72]
- Some workers classified as independent contractors will lose benefits (like health insurance and retirement contributions), as well as pay more of their income to payroll taxes (like Federal Insurance Contributions Act taxes), but this will at least partially be offset by greater pay than comparable employees.[73]

Will the Proposed 2026 Rule Help or Hurt Workers?

As a whole, if this proposed rule were to go into effect as written, it would probably not be as worker-friendly as the current 2024 Rule. The primary reason is that it would make it easier for employers to classify workers as independent contractors.

In the Proposed 2026 Rule's preamble, the WHD cites to increased clarity of the new rule and mentions how the Proposed 2026 Rule isn't really changing the economic reality test and is instead just making it easier to apply.[74] However, a closer examination of the Proposed 2026 Rule indicates that the greater "clarity" offered by the Proposed 2026 Rule results in employers having an easier time classifying their workers as independent contractors, especially for "gig economy" employment.

For example, take someone working for a rideshare or delivery company, like Uber or DoorDash, and let's see how the 2024 Rule and Proposed 2026 Rule would differ in terms of how the driver would be classified. We can start with the two "core" factors from the Proposed 2026 Rule.

The Control Factor

The Proposed 2026 Rule focuses on control in terms of scheduling, selection of assignments, and the ability to work for others. However, it disregards an employer's control over the worker in terms of health and safety legal obligations. Looking at a typical employment relationship between a rideshare or delivery company and its driver, it would be easy to argue that the employer doesn't exert significant control over the driver because the driver can:

- Set their own schedule.
- Decide which driving jobs to accept.

[61] 91 Fed. Reg. 9942 (stating that the economy has shifted from being industrial-based to knowledge-based, with many people having shorter job tenures).

[62] 91 Fed. Reg. 9942-43.

[63] 91 Fed. Reg. 9943.

[64] 91 Fed. Reg. 9961 and 9966-67.

[65] 91 Fed. Reg. 9961 (noting that after the publication of the 2021 Rule, no significant worker reclassification occurred and estimating that the number of independent contractors might increase be 1%-3%).

[66] 91 Fed. Reg. 9962.

[67] 91 Fed. Reg. 9962.

[68] 91 Fed. Reg. 9962.

[69] 91 Fed. Reg. 9965.

[70] 91 Fed. Reg. 9965.

[71] 91 Fed. Reg. 9967.

[72] 91 Fed. Reg. 9967.

[73] 91 Fed. Reg. 9968.

[74] *See, e.g.*, 91 Fed. Reg. 9939 and 9947.

- Work other jobs if they so choose.

And even though the rideshare or delivery company would impose safety and health requirements on the driver, such as telling them not to violate traffic laws and how drivers may interact with customers,[75] the Proposed 2026 Rule says those requirements shouldn't be considered in the worker classification analysis.

Compare this with the 2024 Rule, where similar control factors are mentioned, but also additional considerations, such as using technological means to supervise work, having the right to discipline workers, placing restrictions or demands on where or when they work, and controlling the pay rate or prices for the work the driver does. These are all examples of ways that some rideshare and delivery companies control their drivers.[76]

The Opportunity for Profit and Loss Factor

The Proposed 2026 Rule states that "While the effects of the individual's exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor."[77] This is notable because this is the weakest of the two core factors in terms of classifying a rideshare or delivery driver as an independent contractor due to the limited effect the driver's initiative or managerial skill will have on their earnings. Put another way, the primary way a rideshare or delivery driver can earn more money is to simply drive more, i.e., work more hours or complete more jobs in a set amount of time.

Compare this with the opportunity for profit or loss factor from the 2024 Rule,[78] where it explicitly considers, among other things, a worker's ability to negotiate their pay rate and the worker's ability to advertise or market themselves to increase their earnings. These are both things that rideshare and delivery drivers have little to no influence over and would weigh strongly in favor of classifying them as employees and not independent contractors.

Based on these two factors, if using the Proposed 2026 Rule, the WHD would likely conclude that both factors support the conclusion that a rideshare or delivery driver would be an independent contractor. This would largely render an examination of the other three minor factors moot.[79]

That said, one of the key differences between the 2024 Rule and the Proposed 2026 Rule concerns the decision for the Proposed 2026 Rule to focus on whether the worker's job is part of an integral unit of production[80] instead of an integral part of the employer's business.[81]

This is an important distinction when comparing the two rules to a gig economy job, such as driving for Uber. Under the 2024 Rule, the integration factor looks at how the worker fits in with the employer's overall principal business. This helps explain why Uber has worked hard to establish itself as a technology company, not a transportation company.[82]

If Uber can convince the world that it's a tech company, then it is easier for Uber to argue that driving a vehicle to deliver passengers, food, or goods isn't an integral part of a technology-based company. But if Uber is considered a transportation company, then what its drivers do can easily be considered as an integral part of its core business.

---

[75] See, e.g., *Follow the law*, Uber, https://www.uber.com/us/en/safety/uber-community-guidelines/follow-law/ (last visited Mar. 29, 2026).

[76] Technological monitoring: *Introduction to Uber's Data Processing*, Uber, https://www.uber.com/legal/en/document/?name=data-processing-agreement&country=united-states&lang=en (last visited Mar. 29, 2026) (discussing, among other things, how Uber monitors its workers); Worker discipline: Understanding why drivers and delivery people can lose access to their accounts, https://www.uber.com/us/en/drive/driver-app/deactivation-review/ (last visited Mar. 29, 2026) (stating, among other things, that a driver can lose access to the Uber platform if their ratings fall below a certain average for their city or the driver engages in fraudulent activities); Working demands or restrictions: *Overall Dasher Rating Pilot*, DoorDash, https://help.doordash.com/dashers/s/article/Overall-Dasher-Rating?language=en_US (last visited Mar. 29, 2026) (stating that how often a person accepts a job, completes a job, and the number of jobs they take within the last 30 days will determine what "tier" the driver has. Higher tiers can offer greater benefits, such as more flexibility on when the driver can work, how much they can earn, and the ability to pause certain types of job offers that drivers may find undesirable); and Pay rate and pricing: *Your earnings, explained,* Uber, https://www.uber.com/us/en/drive/how-much-drivers-make/ (last visited Mar. 29, 2026) (explaining how Uber's pricing and pay rates work for drivers).

[77] 91 Fed. Reg. 9974 § 795.105(d)(1)(ii).

[78] 29 C.F.R. § 795.110(b)(1).

[79] *Supra* note 18.

[80] 91 Fed. Reg. 9974 § 795.105(d)(2)(iii).

[81] 29 C.F.R. § 795.110(b)(5).

[82] Joel Rosenblatt, *Uber's Future May Depend on Convincing the World Drivers Aren't Part of its 'Core Business'*, Time, https://time.com/5675637/uber-business-future/ (last visited Mar. 29, 2026).

This distinction between being a tech or transportation company still matters when applying the Proposed 2026 Rule. But the proposed rule makes it easier to argue the worker's job is less integral to the employer. For instance, it's one thing for an employer to argue that driving a vehicle is less integral to the production process of developing and implementing technology to match up drivers with customers (if applying the Proposed 2026 Rule). Yet it might be harder for an employer to argue that driving a vehicle is less integral to the overall business of helping people find someone else to drive for them (if applying the 2024 Rule).

How Big Will the Proposed 2026 Rule's Effect Be on Workers?

Assuming the above predictions are true, the negative impact of employers having an easier time classifying their workers as independent contractors will be blunted for a few reasons.

First, there are still state worker classification laws that may be more worker-friendly than the Proposed 2026 Rule. A good example of this is the "ABC" test used in several states.[83] This test states that an individual is presumed to be an employee unless all three of the following elements or conditions have been met:

- The individual is free from employer control (actual control and contractual control) when doing their work;
- The work the individual completes is outside the usual course of the employer's potential business; and
- The individual is customarily engaged in an independently established occupation, trade, or business that's the same as the work being done for the employer.[84]

This test is far more restrictive in terms of allowing employers to designate their workers as independent contractors.

Second, the Proposed 2026 Rule only applies to the FLSA, FMLA, and MSPA. There are other important federal contexts where worker classification plays a role, but the Proposed 2026 Rule won't apply. Instead, a common law control test applies,[85] which the WHD notes is usually more permissive of employers classifying their workers as independent contractors.[86]

Third, courts involved in private litigation might still choose to disregard the Proposed 2026 Rule. While duly enacted regulations carry the force of law, *Chevron* deference[87] is no more, thanks to *Loper Bright Enters. v. Raimondo*.[88] *This means federal courts have more leeway in how they apply, or even accept, regulations promulgated by federal agencies. In other words, it's much easier for federal courts to ignore the Proposed 2026 Rule in FLSA litigation or hear cases challenging the regulation.*

What's Next

The Proposed 2026 Rule is currently in the notice-and-comment stage of the rulemaking process. The WHD will continue accepting comments until 11:59pm EST on April 28, 2026. It's unlikely any comments will produce significant changes to the proposed rule.

Any major changes to the Proposed 2026 Rule, including its failure to go into effect, would likely come from legal challenges in court. But it's important to note that even if a court invalidates the Proposed 2026 Rule, Section 10 of the Portal-to-Portal Act[89] allows employers to avoid FLSA liability for unpaid overtime or minimum if they relied on an FLSA regulation in "good faith."

[83] Some of these states include California, Massachusetts, New Jersey, and Vermont.

[84] 91 Fed. Reg. 9970 (citing Jon O. Shimabukuro, Cong. Research. Serv., R46765, *Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC Test* (2021)).

[85] *See, e.g.,* 26 U.S.C. §3121(d)(2) (stating that under the Internal Revenue Code, an employee is "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee") and 42 U.S.C. §410(j)(2) (stating that under the Social Security Act, an employee is "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee").

[86] 91 Fed. Reg. 9969-69.

[87] *See Chevron U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984) (creating the doctrine that federal courts should defer to agency interpretation of congressional statutes when that interpretation was necessary due to inherent ambiguity or silence on the issue and the interpretation taken by the agency was reasonable).

[88] 603 U.S. 369 (2024) (overturning *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council*).

[89] 26 U.S.C. §259(a).

The bottom line is that, absent any dramatic events, it's likely that worker classification analysis within the FLSA context will soon be closer to 2021 than 2024. But elimination of *Chevron* deference means the Proposed 2026 Rule's effect will probably be smaller than when the WHD published the 2021 Rule.

Tom Spiggle is the founder of the Spiggle Law Firm. He has dedicated his career to protecting the rights of employees.

California's Captive Audience Law Enjoined: Federal Court Blocks Enforcement of SB 399*

By Courtney O. Chambers and Cirrus B. Jahangiri

In September 2025, the U.S. District Court for the Eastern District of California issued a preliminary injunction prohibiting enforcement of California Senate Bill (SB) 399, California's Work Freedom from Employer Intimidation Act, also known as *captive audience* meetings.[1] SB 399, effective January 1, 2025, added section 1137 to the California Labor Code to restrict employers from taking adverse action against employees who declined to attend employer-sponsored meetings addressing certain political or religious matters, *i.e.*, captive audience meetings.

In granting the preliminary injunction, the Court concluded that plaintiffs—several employer associations—were likely to succeed on the merits of their claims based on two primary grounds (1) SB 399 is preempted by the National Labor Relations Act (NLRA) and (2) SB 399 violates the First Amendment of the United States Constitution:

- **NLRA preemption controls:** The Court held that the NLRA preempts SB 399, reaffirming that regulation of employer-employee communications about unionization rests exclusively with federal law and the NLRB.
- **A content-based restriction on speech:** The Court rejected the claim that the law merely regulated conduct, noting that its prohibition turns entirely on the *subject* of a mandatory meeting. Because the law restricts core expressive activity—an employer's views on political, religious, or union matters—it cannot withstand strict First Amendment scrutiny.

The decision highlights ongoing tensions between state efforts to regulate workplace speech and longstanding federal labor law principles, particularly in light of recent changes at the National Labor Relations Board (NLRB or the Board).

This article examines the Court's ruling with a focus on the legal reasoning underlying the injunction and the broader implications for labor-management relations in California.

Relationship to Existing Federal and State Labor Law Frameworks

The Court's injunction against SB 399 fits within a broad and evolving framework governing workplace speech, employee organizing rights, and the respective roles of state and federal regulators. For decades, the NLRA has served as the primary mechanism for regulating labor-management communication concerning the workplace, primarily the topic of unionization, with the NLRB tasked with drawing the line between protected speech and unlawful communication. Employer speech regarding unionization has historically been evaluated under Section 8(c) of the NLRA, which permits employers to express views, arguments, or opinions so long as such communications do not contain threats of reprisal or promises of benefit. Courts have repeatedly emphasized that this provision reflects Congress's intent to protect robust debate in the workplace while guarding against coercive conduct. Against this backdrop, SB 399 represented a departure from traditional labor regulation by imposing state-law consequences tied to the subject matter of employer communications.

The Court's Injunction Order

In granting plaintiffs' motion for a preliminary injunction, the Court applied the four-factor test articulated in *Winter v. Natural Resources Defense Council*[2]: (1) likelihood of success on the merits; (2) irreparable harm; (3) balance of equities; and (4) the public interest. The Court found that Plaintiffs satisfied each factor, emphasizing that alleged violations of First Amendment rights constitute irreparable harm and that there is a strong public interest in preventing enforcement of unconstitutional laws.

While the Court's order is interlocutory and does not resolve the ultimate merits of the case, it reflects a detailed assessment of SB 399's interaction with federal labor law and constitutional speech protections.

Federal Preemption Under the NLRA

A central pillar of the Court's analysis was federal preemption under the NLRA. Although the NLRA does

[1] *Cal. Chamber of Commerce v. Bonta,* 2025 U.S. Dist. LEXIS 193529.

[2] 555 U.S. 7 (2008).

not contain an express preemption clause, courts have long recognized implied preemption doctrines designed to preserve the NLRB's primary jurisdiction and Congress's intention for labor and management rights to be regulated on a federal level.

Garmon Preemption

Under *San Diego Building Trades Council v. Garmon*[3], states may not regulate conduct that is arguably protected or prohibited by Sections 7 or 8 of the NLRA. The Court held that SB 399 falls within this preempted category insofar as it restricts mandatory meetings concerning unionization—conduct the NLRA either protects or prohibits. *Garmon* preemption applies not only where state law directly conflicts with federal labor law, but also when it risks encroaching on the NLRB's primary authority to interpret and apply the NLRA. The Court explained that even well-intentioned state laws may be preempted if they require courts or enforcement agencies to determine whether particular labor-related conduct is lawful under standards that parallel or overlap with federal law.

Plaintiffs relied on the NLRB's recent *Amazon* decision[4], which held that mandatory antiunion "captiveaudience" meetings violate Section 8(a)(1). The Court concluded that although that ruling undercuts Plaintiffs' argument that such meetings are protected under Section 8(c), it also confirms that the conduct SB 399 regulates is at least *arguably prohibited* by federal law and, therefore, enough to invoke *Garmon* preemption. In other words, where the NLRB disfavors certain conduct, the authority to regulate that conduct remains with the Board, not the states. The Court reasoned that allowing states to impose parallel or overlapping regulations risks inconsistent outcomes and undermines the uniform application of federal labor policy.

The Court also rejected arguments that SB 399 fit within recognized exceptions to *Garmon* preemption: (1) the reasonable opportunity exception and (2) the deeply rooted local feeling exception. The reasonable opportunity exception applies when a party cannot reasonably bring the issue to the NLRB, and the Court found it inapplicable because employer speech about unionization is plainly within the NLRB's jurisdiction, citing the *Amazon* decision to show that the Board can and does address the legality of captive-audience meetings. The deeply rooted local feeling exception protects state regulation of traditionally local interests (*e.g.*, violence, trespass). The Court held that SB 399 does not fall within this category because it expressly targets union-related communications—a matter Congress reserved for federal regulation—and not a long-standing area of state concern. The Court reasoned that speech regarding unionization is a core concern of federal labor law rather than a traditionally local area of regulation. It reasoned that *Garmon* preemption does not turn on whether a state statute provides broader or narrower relief than the NLRA, but rather on whether the regulated conduct falls within the ambit of Section 7 or 8 of the NLRA. Because SB 399 regulates conduct that is at least arguably protected or prohibited by the NLRA, the court concluded that federal law must control regardless of the state's remedial objectives.

Machinists Preemption

The Court further concluded that SB 399 is likely preempted under the *Machinists* preemption[5], which prohibits states from regulating areas Congress intended to leave to the free play of economic forces. The Court concluded that SB 399 interferes with federally protected noncoercive employer speech and places the State's thumb on the scale in debates about unionization, conduct Congress intended to leave unregulated.

Although California characterized SB 399 as a neutral, minimum labor standard focused on protecting employee autonomy and regulating only employer *conduct* (*i.e.*, adverse employment action), the Court found that the statute directly affects the balance of labor-management debate by limiting employer communications on unionization. In other words, enforcing the statute necessarily requires evaluating the *content* of employer speech, including whether an employer expresses views about unionization. The Court concluded that the statute also sweeps beyond truly coercive "captiveaudience" meetings. By applying to *any* employer communication expressing opinions on political or religious matters (including unionization), and by not distinguishing between coercive and noncoercive speech, SB 399 risks chilling employers' lawful, noncoercive expression.

Additionally, the Court rejected the State's argument that SB 399 is a neutral minimum labor standard as it directly affects the employeremployee dialogue on unionization. In the Court's view, SB 399 does not merely establish background employment standards, such as minimum wage or safety rules, but instead regulates the mechanics of labor-management discourse itself. Because the statute restricts the use of noncoercive employer speech—an economic "weapon" Congress intended to leave unregulated—it cannot qualify as a permissible minimum labor standard.

[3] 359 U.S. 236, 245 (1959).

[4] *Amazon.com Servs. LLC*, 373 NLRB No. 136.

[5] *Lodge 76, International Association of Machinists & Aerospace Workers, AFLCIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

Constitutional Challenges

In addition to NLRA preemption, the Court held that SB 399 is likely unconstitutional under the First Amendment. The Court held that SB 399 violates the First Amendment because it is a contentbased restriction on employer speech and cannot survive strict scrutiny. Because it found SB 399 to be a content-based speech regulation, the Court concluded that SB 399 is subject to strict scrutiny.

California contended that SB 399 regulates employer *conduct* (adverse actions against employees who refuse to attend certain meetings) rather than speech, analogizing the statute to anti-discrimination and whistleblower protection laws. The Court rejected this characterization, noting that whether SB 399 applies depends entirely on the subject matter of the employer's communication, *i.e.*, whether the communication involved political or religious matters, including unionization. Because liability turns on the content of the employer's speech, the law necessarily regulates speech and triggers First Amendment scrutiny. For example, an employer may discipline an employee for skipping a mandatory meeting about charitable giving, but not for skipping one about the minimum wage or unionization. Laws that regulate based on subject matter are presumptively unconstitutional. In sum, the Court held that SB 399 fails strict scrutiny because it imposes a broad, content-based restriction on employers' political and religious speech—including speech about unionization—without adequate justification or narrow tailoring.

Broader Context and Ongoing Uncertainty

This preliminary injunction illustrates the dynamic, and complex, nature of labor law at both the state and federal law. The decision underscores a core principle of federal labor law: uniform national regulation takes precedence over state-level experimentation, even where state and federal policymakers share similar objectives. The Court emphasized that Congress has vested primary authority over labor speech in the NLRB.

The preliminary injunction notably does not resolve whether captive audience meetings are lawful under the NLRA (which currently are prohibited following the NLRB's recent *Amazon* decision), instead it reinforces the boundary between federal and state authority in regulating workplace speech. Additionally, the Court's decision does not diminish an employee's protection under existing law. Federal labor law continues to prohibit employer conduct that interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. Similarly, California's robust anti-retaliation statutes remain available to address adverse actions unrelated to the content-based speech restrictions imposed by SB 399.

The injunction also leaves open questions about how courts and regulators will reconcile state interests in protecting employee autonomy with federal labor policy moving forward. As workplace communications increasingly intersect with broader political, social, and cultural issues, legislatures may continue to explore mechanisms aimed at limiting perceived coercion in the employment relationship. The Court's ruling suggests that such efforts will face closer scrutiny where they implicate speech of labor organizing.

At bottom, the preliminary injunction against SB 399 highlights enduring tensions between state regulation, federal labor policy, and constitutional free speech protections. While the statute remains unenforceable pending litigation, the case raises broader questions about the extent to which states may regulate employer communications in the workplace. As the litigation proceeds, and as federal labor law continues to evolve, employers, employees, and labor organizations alike will need to closely monitor developments in this area.

Courtney Chambers (cchambers@littler.com) is a Shareholder and Cirrus Jahangiri (cjahangiri@littler.com) is an Associate at Littler Mendelson in San Francisco. Littler Mendelson, P.C. is global leading labor and employment law firm that continually monitors all employer/employee concerns. Please contact Ms. Chambers at the email above for further information.

Illinois Employers Beware: A March 2026 Illinois Supreme Court Ruling Redefines What Constitutes Compensable Time Under Illinois Law

By Laurie E. Leader

In *Johnson v. Amazon.com Services, Inc*.,[1] the Illinois Supreme Court answered a certified question from the United States Court of Appeals for the Seventh Circuit, specifically: "Does Section 4a of Illinois' Minimum Wage Law ["IMWL"] (820 ILCS 105/4a) incorporate the exclusion from compensation for employee activities that are preliminary or postliminary to their principal activities, as provided under the federal Portal-to-Portal Act of 1947 (29 U.S.C. §254(a)(2))?"[2] The court answered this question in the negative, thereby breaking a long-standing tradition of looking to federal law for guidance in interpreting the IMWL but, more importantly, in the process exposing Illinois employers to potential liability for failing to properly compensate employees for all hours worked.

Background

The plaintiffs in *Johnson* were former employees of Amazon.com Services, LLC ("Amazon"), which owns and operates large distribution warehouses throughout the United States. These warehouses operate twenty-four (24) hours per day and employ more than 20,000 workers in the State of Illinois. The plaintiffs worked in Illinois warehouses on an hourly basis and their primary duties included moving, stacking, and loading packages.[3]

During the COVID-19 pandemic, Amazon required that all hourly nonexempt employees undergo "medical screenings" prior to clocking in for their shifts. Employees waited in line at the facility entrance for these screenings, which included temperature checks and symptom screening questions. Employees who passed the examination were given masks and permitted to clock into their shifts. Plaintiffs alleged that these uncompensated preshift COVID-19 screenings took ten to fifteen minutes on average, but were sometimes longer, requiring employees to clock in after their scheduled start times. The plaintiffs filed a class action complaint in the Circuit Court of Cook County, alleging that Amazon violated federal and state law by failing to pay them and other warehouse workers overtime for time spent undergoing these mandatory screenings.[4]

Amazon removed the action to the United States District Court for the Northern District of Illinois pursuant to the Class Action Fairness Act.[5] It then filed a motion to dismiss which the district court granted.[6] With respect to the IMWL claim, "the district court summarily concluded that [the state law claims] necessarily failed with the [Fair Labor Standards Act] FLSA claims."[7]

In dismissing both the FLSA and IMWL claims, the district court found that both claims were foreclosed by the federal Portal-to-Portal Act of 1947 ("PPA"), which amended the FLSA to exclude certain pre-shift activities from compensable time.

The plaintiffs appealed only the district court's dismissal of their IMWL claim. They contended, in particular, that Illinois law afforded them broader protections than federal law, that the IMWL did not incorporate the PPA's exclusions for compensable time, and, accordingly, that their IMWL claims should have survived dismissal in the district court.[8] Noting the lack of Illinois authority on the question of whether the IMWL is subject to the PPA exclusions from compensable time, the plaintiffs requested that the Seventh Circuit certify this question to the Illinois Supreme Court.[9]

The Seventh Circuit acknowledged that "[n]o Illinois decision squarely addresse[d] whether the IMWL integrates the PPA's limitations on pre-shift compensation."[10] In the court's words, "[r]ather than decide this important and unsettled question of state law in the first instance, we certify it to the Illinois Supreme

[1] 2026 IL 132016, 2026 Ill. LEXIS 240 (IL S. Ct. Mar. 19, 2026).

[2] 2026 IL 132016, at ¶1.

[3] 2026 IL 132016, at ¶2.

[4] 2026 IL 132016, at ¶6.

[5] 2026 IL 132016, at ¶6, citing 28 U.S.C. §§1332(d), 1453(b).

[6] *See Johnson v. Amazon.Com Servs*., *LLC,* 2023 U.S. Dist. LEXIS 217499, at **6-7 (N.D. Ill. Dec. 7, 2023).

[7] 2026 IL 132016, at ¶7, citing the district court case, 2023 U.S. Dist. LEXIS 217499, at *3.

[8] 2026 IL 132016, ¶8.

[9] 2026 IL 132016, ¶8.

[10] *Johnson,* 142 F.4th 932, 935 (7th Cir. 2025).

Court. Certification respects federalism and ensures a definitive answer to this dispositive issue."[11]

The Illinois Supreme Court Decision

The Illinois Supreme Court noted that in its order certifying the issue of whether the IMWL incorporates the PPA's exclusions for preliminary and postliminary activities, the Seventh Circuit stated that it was certifying the question based on its view of compelling arguments on both sides and its uncertainty as to how the Illinois Supreme Court would decide the issue.[12] Notably, the U.S. Chamber of Commerce filed an amicus brief urging the Illinois Supreme Court to hold that the IMWL incorporates the PPA's exclusions for preliminary activities, while the Illinois Department of Labor and the Illinois Attorney General filed a joint amicus brief supporting the plaintiffs' position that the IMWL does not incorporate the federal exclusion.

In deciding the issue, the Illinois Supreme Court first looked to subsection 1 of Section 4a of the IMWL which provides:

> (1) Except as otherwise provided in this Section, no employer shall employ any of his employees for a workweek of more than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1 1/2 times the regular rate at which he is employed.[13]

The statutory exceptions to the foregoing mandate are expressly set forth in subsection 2 of Section 4a. The court noted that none of the exceptions "mention or reference" the PPA or preliminary or postliminary activities, although four of the exceptions incorporate by reference specific provisions of the FLSA, regulations of the United States Department of Labor, or both in describing an exception.[14] Thus, the IMWL's plain language supported the plaintiffs' position that the IMWL was not subject to the PPA.

The court found further support for this position from IDOL regulations promulgated under the IMWL.[15] Notably, these regulations define "hours worked" as "all the time an employee is required to be on duty, or on the employer's premises, or at other prescribed places of work, and any additional time the employee is required or permitted to work for the employer."[16] Neither this definition nor any other IDOL regulations specifying how "hours worked" are calculated reference the PPA exclusion of preliminary and postliminary activities from compensable time.[17] The court found this absence of reference compelling, particularly in light of an IDOL regulation's reference to PPA regulations governing the compensability of travel time in determining "hours worked" under the IMWL.[18]

Taken together, the court concluded that:

> [A] plain reading of section 4a of the Wage Law, as well as the regulations promulgated by IDOL per the mandate of section 10 of the Wage Law, reveals that the General Assembly did not signify any intention to incorporate the preliminary and postliminary activities exclusions set forth in the PPA. Rather, the General Assembly delegated the authority to define "hours worked" to IDOL. In turn IDOL adopted a definition of "hours worked" that necessarily includes preliminary and postliminary activities, explicitly encompassing all time that an employee is *required* to be on an employer's premises.[19]

The court thus rejected Amazon's argument that the court should interpret section 4a of the Wage Law coextensively with section 207(a)(1) of the FLSA, "because the general overtime provision in section 4a(1) of the Wage Law is patterned after the general overtime provision found in section 207(a)(1) of the FLSA and because Illinois courts regularly look to the FLSA for guidance when interpreting the Wage Law."[20] To do so would require the court to impermissibly ignore "the dramatic departures in the subsequent text of these provisions, which set forth exclusions as described above."[21] As the court explained,

---

[11] 142 F.4th at 935.

[12] 2026 IL 132016, at ¶9, citing 142 F.4th at 944.

[13] 2026 IL 132016, at ¶13, quoting 820 ILCS 105/4a(1).

[14] 2026 IL 132016, at ¶14, citing 820 ILCS 105/4a(2). The specific exceptions referencing the FLSA, its regulations or both are set forth at 820 ILCS 105/4a(2)(D)-(F), (J).

[15] *See* 2026 IL 132016, at ¶15, noting that the IMWL, 820 ILCS 105/10a, provides that IDOL's Director "shall make and revise administrative regulations, including definitions of terms, as [the Director] deems appropriate to carry out the purposes of [the Wage Law]." The applicable regulations are set forth at 56 Ill. Admin. Code 210.110.

[16] 56 Ill. Admin. Code 210.110.

[17] 2026 IL 132016, at ¶16.

[18] 2026 IL 132016, at ¶15, citing 56 Ill. Admin. Code 210.110's references to 29 C.F.R. §785.33-785.41.

[19] 2026 IL 132016, at ¶18 (emphasis in original).

[20] 2026 IL 132016, at ¶19.

[21] 2026 IL 132016, at ¶19.

it was constrained from adopting such argument given the plain statutory language and the principle that "[i]t is the dominion of the legislature to enact laws and the courts to construe them, and we can neither restrict nor enlarge the meaning of an unambiguous statute."[22]

The court further stated that where the IMWL's provisions are parallel to the FLSA, federal authority interpreting the parallel provision may be "persuasive in interpreting the Wage Law."[23] However, while Section 4a of the IMWL contains the same general overtime requirement as the FLSA, it does not include the PPA's preliminary and postliminary activity exclusion incorporated into the FLSA. "As such, these provisions are not parallel but rather state the same general rule with marked differences in their respective statements of exceptions."[24] Under the circumstances, to accept Amazon's argument "would be to read exceptions into the statute that depart from its plain language" in violation of "well-established rules of statutory interpretation."[25]

Implications for Employers

Illinois employers that have designed their pay policies and timekeeping practices around federal legal standards governing compensable time should immediately review and revise their policies and practices, where necessary, to comport with the decision in *Johnson*. Their failure to do so could result in significant backpay liability going forward.

Laurie E. Leader, formerly a Clinical Professor at Chicago-Kent College of Law, is a practicing attorney, author, certified mediator and principal of Effective Employment Mediation, LLC - Chicago, Northfield & Libertyville Offices (effectiveemploymentmediation.com). She has authored numerous articles and book chapters and two treatises and is Editor-in-Chief of Bender's Labor and Employment Bulletin. Laurie earned an A.B. degree from Washington University in St. Louis and her J.D. degree from Cleveland State University.

[22] 2026 IL 132016, at ¶19, quoting *Prazen v. Shoop*, 2013 IL 115035, ¶ 38.

[23] 2026 IL 132016, at ¶20, citing *Mercado v. S&C Elec. Co.,* 2025 IL 129526, ¶33.

[24] 2026 IL 132016, at ¶20.

[25] 2026 IL 132016, at ¶20, citing *Lavery v. Dep't. of Financial and Prof'l Reg.,* 2025 IL 130033, ¶22.

RECENT DEVELOPMENTS

ADA

District Court Did Not Err in Rejecting Complaint of Disability Discrimination Under Americans with Disabilities Act on Timeliness Grounds

Serian v. Jetblue Airways Corp., 2026 U.S. App. LEXIS 7845 (11th Cir. Mar. 17, 2026)

Elisabeth Serian ("Serian") was a flight attendant for JetBlue. In April 2020, JetBlue Airways Corporation ("JetBlue") adopted a mandatory mask policy for its crewmembers in response to the COVID-19 pandemic. Serian requested an accommodation supported by a physician's note stating that she could not wear a mask for health reasons. JetBlue denied the request in August 2020 and offered Serian leave or a position reassignment instead. JetBlue suspended Serian pending an investigation. During an investigatory meeting, Serian presented research on the "adverse effects of prolonged mask usage" and a detailed account of her specific health concerns. After JetBlue terminated Serian for violating company policies when in April 2022, Serian announced that she would no longer wear a mask, Serian filed a charge of disability discrimination under the Americans with Disabilities Act ("ADA") with the Equal Employment Opportunity Commission ("EEOC" or "Commission"). Serian alleged that JetBlue violated the ADA by failing to provide her with a reasonable accommodation. Serian subsequently sued JetBlue in the district court. JetBlue moved for summary judgment on the ground that Serian's complaint was untimely. Although JetBlue denied the requested accommodation in 2020, Serian did not file her EEOC charge until 2022. The United States District Court for the Middle District of Florida granted summary judgment for JetBlue on timeliness grounds. The Eleventh Circuit affirmed.

The court stated that a claimant must file a charge of discrimination with the EEOC within 180 days of an unlawful employment practice or 300 days if the complainant first filed with an agency in a deferral state, such as Florida. Filing a timely charge is a prerequisite to filing a lawsuit under the ADA. Serian's complaint was untimely. JetBlue denied her request for accommodation in August 2020, but Serian did not file her EEOC to contest that denial of accommodation until October 2022 -- more than two years later. The charge of discrimination was, therefore, untimely when filed.

Serian raised three arguments on appeal. She contended that the Commission's right-to-sue letter constituted prima facie evidence of the timeliness of her claim, that her claim was otherwise timely under the doctrines of equitable tolling and continuing violations, and that JetBlue violated the Act by refusing to provide her with a reasonable accommodation. All of these arguments failed. Specifically, the Commission's letter did not establish timeliness. It contained no such finding and explicitly advised Serian that it did not certify her compliance with any statutes. In any event, even if the Commission had made a finding of timeliness, the district court would not have been bound by it.

The doctrine of continuing violations did not apply in Serian's case, since that doctrine does not cover discrete acts of discrimination, such as the denial of an accommodation request. JetBlue's denial of Serian's request for accommodation in 2020 was a discrete act for which any claim of discrimination accrued. Serian failed to establish that any new violation occurred in April 2022 to make her otherwise untimely complaint timely. Her email to JetBlue's chief executive officer at that time was not a request for an accommodation; it was merely a declaration that she was "done complying to tyranny." Nor did her statements during the investigatory meeting about her research on mask usage or her personal health concerns constitute a request for accommodation.

ARBITRATION

District Court Erred in Deciding Question of Arbitrability in Connection With Motion to Compel Arbitration Based on State Law

Sandler v. Modernizing Med., Inc., 2026 U.S. App. LEXIS 8134 (9th Cir. Mar. 19, 2026)

The employment contract between Kara Sandler ("Sandler") and her employer Modernizing Medicine Inc. ("ModMed") specified that any employment-related disputes "shall be subject to binding arbitration under the Federal Arbitration Act in conformity with the procedures of the California Arbitration Act." Sandler sued ModMed in federal court, alleging state- and federal-law claims that accused ModMed of discriminating against her on the basis of age and disability. ModMed moved to compel arbitration. Sandler opposed it, contending that the arbitration agreement was unconscionable. The United States District

Court for the Southern District of California agreed with Sandler and denied ModMed's motion. ModMed appealed. The Ninth Circuit reversed and remanded.

The court stated that the clear and unmistakable nature of the delegation to arbitration was not negated by the presence of a severability clause. Many contracts, including this one, contain a generic severability clause that authorizes a court or other body of competent jurisdiction to sever provisions deemed unconscionable or otherwise unenforceable. Such a severability clause did not conflict with the clear and unmistakable delegation to an arbitrator to resolve questions of the arbitration agreement's validity. Nor did the severability clause render the delegation ambiguous. The reference to a "court" in the severability clause did not mean that the parties did not agree to have an arbitrator decide questions about an agreement's validity; all it meant was that, in the event that a court interpreted the contract (as the court did here, whether or not it had the authority to do so), severance would be permitted.

The district court's reliance on state-court opinions purporting to apply state law to negate a delegation clause constituted legal error. Whether the parties manifested a clear and unmistakable intent to delegate arbitrability to an arbitrator was a question of federal law. Stated differently, federal law governed the arbitrability question by default because the Agreement was covered by the FAA. The reason for the application of federal law was clear. The "clear and unmistakable" standard was an arbitration-specific rule. To have state law rather than federal law control the content of that rule in a way that disfavors arbitration would subject it to FAA preemption. The district court thus misapplied federal law and erroneously relied on state-court decisions pointing to the existence of a severability clause to refuse to compel arbitration. As a result, the district court should not have addressed the issue of arbitrability in the first place, but instead should have enforced the delegation clause requiring an arbitrator's resolution.

DISCRIMINATION

District Court Did Not Err in Dismissing Discrimination Complaint Arising Under the Affordable Care Act

Holland v. Elevance Health, Inc., 2026 U.S. App. LEXIS 8982 (1st Cir. Mar. 27, 2026)

As a Falmouth Public Schools employee, Rebecca Holland ("Holland") was enrolled in a health insurance plan (the "Plan") through the Maine Education Association Benefits Trust, administered by Anthem Health Plans of Maine ("Anthem"), a subsidiary of Elevance Health. The Plan contained an exclusion in its "What's Covered" section under the heading "Bariatric Surgery / Morbid Obesity," which stated, in relevant part, that "benefits are not provided for weight loss medications." Holland visited one office "to discuss anti-obesity treatment." There, Holland met with a physician assistant who diagnosed Holland with obesity and indicated that Holland had been unable to sustain weight loss despite her diet and exercise attempts. Accordingly, the physician assistant prescribed Holland an FDA-approved weight-loss medication, Wegovy, to treat her obesity. However, Anthem denied coverage for Wegovy. When the physician assistant prescribed Holland another FDA-approved weight-loss medication, Contrave, Anthem again denied coverage. Holland filed a putative class action against Elevance Health, Inc. ("Elevance"), alleging that it designed and administered a health insurance plan through Anthem that excluded coverage for weight-loss medication in violation of the disability nondiscrimination prohibition under Section 1557 of the Affordable Care Act (which incorporates definitions of "disability discrimination" from the Rehabilitation Act and the ADA). Holland argued, in particular, that while other enrollees had access to prescription medications medically necessary to treat their conditions, she and the proposed class were denied coverage for obesity medications that appeared on Anthem's National Drug List as medications necessary to treat obesity. The United States District Court for the District of Maine dismissed the matter, concluding that Holland's allegations failed to plausibly support her theories of unlawful disability discrimination. Holland appealed. The First Circuit affirmed.

The court stated that Holland had not adequately pled that the exclusion was "so closely associated with" people with disabling obesity as to amount to proxy discrimination. Instead, the exclusion seemed to apply to all enrollees regardless of disability status and did not target disabled individuals for discriminatory treatment. This was because Anthem's Prescription Drug List did not provide a basis to reasonably infer that the weight-loss medications enumerated within it were medically necessary only when treating obesity such that those with disabling obesity were the enrollees "overwhelmingly or entirely" impacted by the exclusion. Anthem's Prescription Drug List did not set forth the criteria an enrollee must meet for a provider to prescribe, as medically necessary, any of the listed drugs. Even the sources Holland cited and linked to in her complaint indicated that the "anti-obesity" medications in Anthem's Prescription Drug List, such as Wegovy and Zepbound, were FDA-approved for weight management for individuals with obesity or who were overweight with a weight-related condition "such as high blood pressure, type 2 diabetes or high cholesterol." These sources showed that individuals without disabling obesity might also require and be eligible for treatment with the prescription weight-loss medications included on Anthem's Prescription

Drug List. Thus, despite Holland's assertions, Anthem's Prescription Drug List did not support a plausible claim that there was a close "fit" or a sufficiently close association between individuals with obesity and those who required prescription weight-loss medications.

Moreover, the First Circuit had never held that a plaintiff alleging disability discrimination might show intentional discrimination by showing deliberate indifference. But even assuming that a plaintiff might do so, Holland had not plausibly stated a claim for deliberate indifference. To state a deliberate indifference claim, Holland Had to allege that the defendant had "knowledge that a harm to a federally protected right is substantially likely" and "failed to act upon that likelihood." The ACA's prohibition on discrimination in benefit design and implementation did not give rise to a reasonable inference that health entities must design benefits in a manner that provided coverage for every form of medically necessary treatment for a disabled individual's particular condition. Accordingly, absent sufficient factual allegations as to the scope of the benefits guaranteed under the ACA, Holland failed to plausibly allege lack of meaningful access, and thus her disparate impact claim failed.

District Court Did Not Err in Rejecting Race and Age Discrimination Claim on Summary Judgment

Hua Jiang v. City of Tulsa, 2026 U.S. App. LEXIS 7755 (10th Cir. Mar. 17, 2026)

When he applied to be the superintendent of City of Tulsa's ("City") A.B. Jewell water-treatment plant, Hua Jiang ("Jiang") was an accomplished engineer. But the City wanted someone with leadership experience, and Jiang -- a middle-aged man from China – lacked that experience. The City instead hired a younger, white candidate – Dylan Hutchcraft ("Hutchcraft") -- who was the operations supervisor at one of Tulsa's other water-treatment plants. Although Hutchcraft had the experience that Jiang lacked, he did not have a college degree. The fact that the City hired Hutchcraft without a degree violated its written hiring policies. Specifically, those policies required that the City hire someone with a college degree in biology, engineering, environmental sciences, or a related field for the position.

Jiang reported the City's error to its civil-service commission, which confirmed that Hutchcraft's hiring violated City policies. In response, the City removed the job posting's degree requirement to reflect the City's customary practice of substituting experience for education and then redid its hiring for the superintendent job. The same three candidates applied, and, again, the City hired Hutchcraft, the candidate with more leadership experience. Jiang sued the City for discrimination, alleging that his non-selection was because of his age and race. At summary judgment, Jiang pointed to his superior qualifications, the City's subjective hiring process, and the procedural shortcuts the City took to hire its preferred candidate. In the court's view, Jiang failed to highlight facts upon which a jury could find that the City was untruthful about valuing a candidate with leadership experience over Jiang. Accordingly, the United States District Court for the Northern District of Oklahoma granted summary judgment to the City. Jiang appealed. The Tenth Circuit affirmed.

The court acknowledged that the City hired a younger, white applicant without a degree over an older, Asian applicant with a degree, even though the job posting required a degree. However, the City introduced evidence that it regularly substituted experience for education, even for jobs requiring a specific degree – evidence that Jiang failed to contradict. Nor did Jiang contradict evidence showing that the personnel director had previously certified a treatment-plant superintendent who had not met the degree requirement. Relaxing the education requirement did not undermine the City's explanation that it wanted a candidate with both technical knowledge and leadership experience. Hutchcraft had technical knowledge, even though he did not have a degree. And though Stefanie Hunter ("Hunter") and the City's personnel department might have cut corners to hire Hutchcraft, their corner cutting cohered with the City's nondiscriminatory explanation that it wanted a candidate with both technical knowledge and leadership experience.

Stated differently, the court found that Jiang failed to prove pretext under the *McDonnell Douglas* burden-shifting model. At summary judgment, an employer's justification is pretextual if it is "so incoherent, weak, inconsistent, or contradictory" that a reasonable jury could find it "unworthy of belief." *Bekkem v. Wilkie*, 915 F.3d 1258, 1268 (10th Cir. 2019) (citation omitted). When deciding whether an explanation is pretextual, courts consider the facts from the decisionmaker's point of view and ask whether the employer honestly believed the reason asserted for the selection — not whether the hiring decision was "wise, fair or correct."

On appeal, Jiang disputed the City's explanation that it wanted a candidate with more leadership experience. He offered three theories of pretext. First, there were two procedural irregularities. Second, Hunter used subjective selection criteria, and third, Jiang's qualifications eclipsed those of Hutchcraft.

The court rejected Jiang's arguments, finding that none rendered the City's explanation pretextual or "unworthy of belief." The court acknowledged that while a prospective employee can show pretext by pointing to a procedural irregularity, not all procedural irregularities show pretext. To be pretextual, the irregularities must "directly and uniquely disadvantage[] a minority employee" or

applicant, and ultimately, the factfinder must be able to infer that "the employer didn't really believe" the reasons it gave for hiring someone else. Although the City hired a younger, white applicant without a degree over an older, Asian applicant with a degree, even though the job posting required a degree, Jiang failed to contradict the City's evidence that it regularly substituted experience for education, even for jobs requiring a specific degree. Nor did he contradict evidence showing that the personnel director had previously certified a treatment-plant superintendent who hadn't met the degree requirement. For years, the City had followed a custom inconsistent with its written policy.

To the extent that the City's action in relaxing the requirements and reposting the position constituted an irregularity, generally, relaxing requirements and reposting a position won't by itself let a jury find pretext. Unlike the precedent which found similar actions unlawful, here the City revised the position and restarted its entire hiring process instead of retroactively justifying a facially unqualified candidate. Without more, the alleged procedural irregularities were not enough to show pretext.

Similarly, on the issue of subjectivity, true, an employer's system for evaluating employees can be so subjective that it reveals pretext. But juries are only asked to decide questions of subjectivity when hiring rationales are so opaque that they might hide "unspoken discriminatory input." For a rationale to be *that* opaque, the "criteria on which the employers ultimately rely"must be "*entirely* subjective."Even subjective evaluations — opinions on qualities like leadership or professionalism — do not support pretext when evaluators explain their impressions and grade all candidates using the same criteria, as the evaluators did in Jiang's case.

The court also rejected Jiang's argument that not being hired despite his superior qualifications could let a jury find pretext, notwithstanding the City's concession that Jiang had better technical knowledge than Hutchcraft. According to the City, Hutchcraft's technical knowledge sufficed for the role. But more importantly, Hutchcraft had leadership experience while Jiang did not, and Hunter wanted someone with both. A jury can find pretext based on overqualification only when there's an "overwhelming disparity in qualifications." The court found that a jury couldn't find pretext through overqualification in Jiang's case.

Finally, the court rejected Jiang's argument that his disparate-treatment arguments cumulatively allowed a jury to find pretext. Even taken together, in the court's view, the evidence supporting Jiang's three theories would not allow a jury find the City's explanation for choosing Hutchcraft pretextual. Accordingly, the court affirmed summary judgment on Jiang's disparate-treatment claims.

Dismissal of Religious Discrimination and Retaliation Claims Proper for Failure to Plead Plausible Claims

Jackson v. Amazon.Com, Inc., 2026 U.S. App. LEXIS 7747 (2d Cir. Mar. 17, 2026)

When Amazon.com, Inc. ("Amazon") informed employees that it would require them to submit proof that they had received a COVID-19 vaccination, Silicia Jackson ("Jackson") submitted a religious exemption request explaining that vaccinations violated her deeply held religious beliefs. She told Amazon that she believed the vaccine would "undermine the way my Creator designed my natural body to work and function on Earth, my spiritual body, my soul's purpose and my soul's ascension and passage into heaven." Amazon approved her request for a religious exemption and told her she could come to work if she agreed to wear a mask, maintain social distancing, and take a COVID-19 test every seven days. Jackson responded that "testing is also against her sincerely held religious beliefs." Amazon replied that if Jackson did not agree to testing, it "would put her on a personal leave of absence" and "would work with the job search reassignment team to try and place her at a site outside of New York." After Jackson was unable to find another position, Amazon placed her on a leave of absence. She then sued, alleging that Amazon violated Title VII by failing to give her a reasonable accommodation to the testing requirement and by treating her differently than other coworkers by requiring her to wear a mask and take regular COVID-19 tests. The United States District Court for the Eastern District of New York granted defendants' motion to dismiss. Jackson appealed. The Second Circuit affirmed.

The court stated that Title VII made it unlawful "for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." To survive a motion to dismiss, plaintiffs asserting that they were denied reasonable accommodations for their religious practices under Title VII must plausibly allege that: they held a bona fide religious belief conflicting with an employment requirement; they informed their employers of this belief; and they were disciplined for failure to comply with the conflicting employment requirement. Jackson did not plausibly allege in her complaint a bona fide religious belief conflicting with Amazon's testing requirement. Jackson asserted only that "testing" was against her "sincerely held religious beliefs." She did not say what these beliefs were or how weekly testing violated them. Jackson's bare assertion that she had unspecified religious beliefs that conflicted with Amazon's testing requirement was insufficient to state a claim for religious discrimination under Title VII.

Jackson did not plausibly plead that she was treated differently than other similarly situated employees. She asserted that Amazon treated unvaccinated employees less favorably than vaccinated employees by requiring them to wear masks and to take routine COVID-19 tests but did not explain why vaccinated and unvaccinated employees were similarly situated. Nor did she argue that she was treated differently than other unvaccinated employees who did not share her religious beliefs; instead, she acknowledged that all employees who received either a religious or a medical exemption to the vaccine requirement were subject to the same requirements. Moreover, Amazon offered Jackson the disparate treatment of which she complained -- being asked to wear a mask and to test weekly to accommodate her objection to receiving the COVID-19 vaccine. Based on her request to be treated differently than other employees, Jackson could not now point to the accommodation that Amazon offered as impermissible disparate treatment.

The district court did not abuse its discretion in denying Jackson leave to replead. Jackson's complaint made clear that she was not treated differently than similarly situated employees, and she did not suggest any amendments that could cure deficiencies with her disparate treatment claim.

District Court Did Not Err in Entering Judgment Against the Plaintiff Following Trial of His Title VII Discrimination and Retaliation Claims But Erred in Entering Summary Judgment on His First Amendment Claims on Qualified Immunity Grounds

Joyner v. City of Atlanta, 2026 U.S. App. LEXIS 8750 (11th Cir. Mar. 25, 2026)

Terry Joyner ("Joyner") worked as a police officer with the City of Atlanta Police Department ("APD"). He was denied a promotion to Captain in December 2014, and he was moved from a flexible to a fixed schedule in October 2015. He filed a lawsuit claiming that the City through his former supervisors -- Police Chief George Turner ("Turner"), Major Earnest Finley, and Major Van Hobbs ("Hobbs") -- engaged in racial discrimination and retaliation in violation of Title VII; that Turner and Hobbs retaliated against him in violation of the First Amendment; and that the City of Atlanta ("City") through Turner and Hobbs retaliated against him. Joyner filed a motion for judgment as a matter of law and for a new trial. The United States District Court for the Northern District of Georgia denied the motion. Joyner appealed. The Eleventh Circuit affirmed in part and reversed in part and remanded.

The court stated that to prevail on a Title VII retaliation claim, the causation element required a plaintiff to show that the decisionmaker was aware of the protected conduct, which in this case was the complaint Joyner had made about racial discrimination six years earlier. Sometimes a "close temporal proximity" between the protected conduct and the adverse action is enough to bolster a causal link between the two. But the proximity here was not even close to close. More than six years and over 2,500 days passed between Joyner's complaint about racial discrimination in February 2008 and Chief Turner's decision not to promote him to Captain in December 2014. Nothing in the record allowed the court to infer that those two distantly spaced events were in any way related. Joyner failed to identify any particular positions in specific zones to which he should have been promoted at any particular times during those six years or any position for which he requested to be considered.

Moreover, his theory of simmering resentment against him was contradicted by the fact that Chief Turner gave him the opportunity to lead an elite unit, the fugitive squad, between 2012 and 2014. Turner put Joyner in that position because Turner believed at that time Joyner was "on the right track," and he wanted to give Joyner an opportunity to prove himself. But Joyner didn't prove himself, at least not in a positive way. Joyner's argument did not deal with the fact that he had multiple performance issues during the six years between his complaint and denial of promotion, which ran counter to any argument that he deserved to be promoted.

Under the circumstances, there was sufficient evidence for a jury to find (as it did) that Turner did not take an adverse employment action against Joyner when he failed to promote him to Captain in 2014. For one thing, the jury heard evidence that Joyner was not qualified because of various performance issues. He failed to appear for court when he was subpoenaed to testify against a criminal defendant and disappointed his supervisors as the head of the fugitive squad by showing up at meetings unprepared, ultimately leading to his performance-based removal from that position. Joyner also was disciplined for sending an unprofessional and profane email from his work email account. Accordingly, the court affirmed the judgment against Joyner on his Title VII discrimination and retaliation claim entered following a trial; however, the court reversed a summary judgment entered against Joyner as to his First Amendment claims against Major Hobbs and Chief Turner.

Joyner's claims against Hobbs and Turner alleged that their decision to no longer allow Joyner to work a flexible schedule was made in retaliation for his reports of ticket fixing to the FBI and OPS. It was undisputed that for more than a decade, Joyner had used his flextime schedule to work a second job with a private security company, which supplemented his income. Not having a fixed schedule of hours had also enabled him to pick up his young children (ages 5 and 9) from school, which was both a personal

commitment and a legal obligation under his divorce decree. The loss of flextime prevented him from picking them up on Fridays. And if "something came up where [he] needed to go get them" from school, without flextime he would have to "call [his] supervisor and take of[f] from work and clock out and go do it." Moreover, the loss of his flextime privilege meant Joyner could not work as many hours at his second job, which reduced his wages at that job by at least two-thirds.

The facts construed in Joyner's favor persuaded both the district court and appellate court that Turner and Hobbs violated Joyner's constitutional rights. But the district court was persuaded that Turner and Hobbs were entitled to summary judgment on qualified immunity grounds; the Eleventh Circuit disagreed.

Although the facts viewed in Joyner's favor showed that Turner and Hobbs violated his First Amendment rights, they would be entitled to qualified immunity if they were "performing discretionary functions"(which is not disputed) and if "their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known."(Citation omitted). The district court concluded that their conduct did not meet this standard, which is why it ruled that Hobbs and Turner were entitled to qualified immunity-based summary judgment on the First Amendment claim.

Courts recognize three ways in which a plaintiff can demonstrate a violation of clearly established law: (1) "he can point us to a materially similar case that has already been decided"; (2) "he can point us to a broader, clearly established principle that should control the novel facts of the situation"; or (3) "the conduct involved in the case may so obviously violate the Constitution that prior case law is unnecessary." *Echols v. Lawton*, 913 F.3d 1313, 1324 (11th Cir. 2019) (alterations adopted) (quotation marks). Under any approach, "we look for fair warning to officers that the conduct at issue violated a constitutional right."(Citations omitted). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable state official that his conduct was unlawful in the situation he confronted." *Leslie v. Hancock Cnty. Bd. of Educ.*, 720 F.3d 1338, 1345 (11th Cir. 2013) (alteration adopted) (quotation marks omitted) (emphasis omitted).

The court found that "the broad principle of law approach" applied to the particular circumstances of Joyner's case. *See Echols*, 913 F.3d at 1324. At the time of the alleged misconduct, it was clearly established that government officials could not lawfully strip an employee of "privileges of [his] employment" where those privileges are important enough to the employee that taking them away would chill his expression of protected speech. (Citation omitted). With the facts viewed in the light most favorable to Joyner, the court found that that was exactly what Hobbs and Turner did by taking away Joyner's privilege of his flextime benefit.

Any reasonable supervisor would know that flextime was a "privilege[] of employment" important enough to Joyner that if he engaged in protected speech, as he did, taking that privilege away would chill his, and any reasonable officer's, expression of speech in the future. The Eleventh Circuit thus reversed the entry of summary judgment in favor of Turner and Hobbs on Joyner's First Amendment claims.

District Court Partly Correct in Affirming Claims of Discrimination, Retaliation and Hostile Work Environment

Vuong v. VA, 2026 U.S. App. LEXIS 7639 (5th Cir. Mar. 16, 2026)

Judy Vuong ("Vuong") a Vietnamese female and United States citizen, was employed with the Michael E. DeBakey VA Medical Center ("VAMC") in Houston, Texas from October 2013 until February 2022. During her employment with the VAMC, Vuong first worked as a Supervisory Health Systems Specialist, also referred to as "Chief of Telecare" (GS-13), until that position, among numerous others, was eliminated in August 2018 due to the reorganization of the VAMC's Health Administrative Service ("HAS"). After the reorganization, Vuong began working as a Program Analyst (also GS-13) for HAS. Vuong was then "detailed" in 2018 to the Office of Nursing Services at the Veterans Affairs Central Office ("VACO") in Washington, D.C. She was subsequently detailed to Human Capital Management at VACO from April 2019 until February 2022. In February 2022, she requested and received a transfer to VACO as a full-time employee, where she works remotely while living in California.

Vuong alleged that various VA upper-management officials -- including Christopher R. Sandles, Curtis Bergeron, and Carolyn F. Baldwin -- badgered, harassed and humiliated her "on almost a daily basis." She claimed that their conduct was motivated by or because of her race, color, sex and that she was subjected to a hostile work environment and retaliation for her prior protected Equal Employment Opportunity ("EEO") activity. Vuong filed suit against the Department of Veterans Affairs ("VA") and the VA's Secretary in his official capacity, alleging claims of discrimination based on sex, race, color, and retaliation pursuant to Title VII of the Civil Rights Act of 1964. The United States District Court for the Southern District of Texas granted summary judgment as to all of Vuong's claims except for her hostile environment claim which was previously dismissed sua sponte by the district court. Vuong appealed both the dismissal of her hostile

environment claim and the entry of summary judgment. The Fifth Circuit affirmed in part and reversed and remanded in part.

The court stated that even if Vuong could meet her burden to show a prima facie case under *McDonnell Douglas*, she failed to show that the VA's purported reason for replacing her with Denise Ryals as Chief of Telecare – specifically, its reorganization and alteration of the position to require clinical credentials -- was mere pretext. In particular, Vuong failed to point to a connection between the VA's decision to assign Ryals to the Chief of Telecare position and Vuong's membership in a protected class. Stated differently, Vuong did not present evidence to support her claim that she lost the position because she was Asian and that Ryals was later assigned to the position because she was not.

To the contrary, as Vuong admitted in her response to the VA's summary judgment motion, because she did not have clinical credentials, she was considered "non-clinical leadership" in any supervisory position that she held. Consequently, after the HAS reorganization, Vuong was not qualified for the Chief of Telecare position because its job description required an employee with credentials to supervise clinical staff. In contrast to Vuong, Ryals was qualified to supervise clinical staff and could serve in the Chief of Telecare position as it was modified after the reorganization. Vuong thus failed to carry her burden of showing that the VA's asserted reason for replacing her with Ryals four years after Vuong's termination was mere pretext.

Vuong similarly failed to show that she received low performance ratings or was denied various other positions and promotions because of discrimination. Because the record did not support Vuong's discrimination claims that she was subjected to an adverse employment decision (Vuong retained her GS-13 status and pay after the reorganization), the court viewed the purportedly racist and derogatory comments about which she complained as stray remarks and not tied to a discriminatory action.

Vuong's arguments related to retaliation, likewise, faltered at causation. As the district court observed, Vuong merely stated that the loss of her Chief of Telecare position, her negative treatment by her supervisors and colleagues, and her non-selection for various positions, was in retaliation for her protected EEO activity. But she did not provide objective evidence that any of these events were connected to her EEO activity. Under these circumstances, the court affirmed entry of summary judgment on Vuong's discrimination and retaliation claims.

By contrast, the court reversed the district court's dismissal of Vuong's hostile environment claim. The court noted that the dismissal came without warning and that there was no motion pending at the time the sua sponte ruling was made. Moreover, the district court failed to identify any elements that Vuong failed to plead. Essentially, it dismissed the claim for lack of a heading, despite the fact that Vuong's complaint repeatedly referenced the term "hostile work environment" and both parties understood her to be bringing such a claim and, in fact, briefed the claim on summary judgment.

EQUITABLE TOLLING

District Court Erred in Rejecting Claim of Equitable Tolling to Extend the Timeframe for Filing Title VII Complaint

Beazer v. Richmond Cty. Constructors, LLC, 2026 U.S. App. LEXIS 7052 (11th Cir. Mar. 10, 2026)

Phillip Beazer ("Beazer") worked for Richmond County Constructors ("RCC"). Beazer's tenure there was uneventful until February 2022. But then he experienced a pattern of race-motivated harassment and discrimination. After Beazer reported the alleged harassment and discrimination, he asserted, his employer retaliated against him. RCC gave him impossible and sometimes demeaning work assignments, engaged in other harassment, and ultimately, terminated his employment in May 2022. After he was fired, Beazer filed a charge of racial discrimination with the Equal Opportunity Employment Commission ("EEOC"). Beazer received a right-to-sue notice from the EEOC. Within a week of receiving the right-to-sue letter, Beazer paid a consultation fee to a law firm and tried to retain an attorney. He sent the attorney his file and consultation fees but did not hear back for several weeks. When Beazer protested, the attorney told Beazer to file his case pro se only days before the filing deadline. So, Beazer quickly prepared his complaint. Then, two days before the 90-day deadline, Beazer paid $28.75 to ship the complaint and a motion to proceed in forma pauperis via Priority Express Mail guaranteed overnight delivery. Hurricane Idalia, which caused extreme weather conditions in the southeastern United States, occurred during the postal delivery period. As a result, the Postal Service delivered Beazer's complaint to the United States District Court for the Southern District of Georgia two days after the ninety-day deadline, and four days after Beazer had mailed it. RCC moved to dismiss the complaint arguing that the complaint was untimely. The district court agreed. Beazer appealed. The Eleventh Circuit vacated and remanded.

The court rejected RCC's timeliness argument, specifically that Beazer should have used a private delivery service to ensure timely delivery. In the court's view, there was no evidence the private delivery service would be more

reliable than the guaranteed postal service. Nor did RCC explain why using a private courier rather than the Postal Service's guaranteed overnight delivery would somehow make a plaintiff more diligent. Equitable tolling did not require a plaintiff to use a private delivery service or to personally deliver his filing to the courthouse. It required only "reasonable diligence." Beazer's actions here satisfied that threshold. The combination of attorney abandonment after accepting consultation fees and Hurricane Idalia's documented impact on postal services created extraordinary circumstances.

An extraordinary circumstance, sufficient to support equitable tolling, exists when there was "some extraordinary circumstance" beyond the litigant's "control"; and the circumstance "caused" the filing delay. Both conditions occurred here. The combination of Beazer's attorney's shortfalls and Hurricane Idalia's treacherous conditions that slowed the Postal Service's delivery of Beazer's complaint created an extraordinary circumstance beyond Beazer's control. And that extraordinary circumstance prevented timely filing here, despite Beazer's diligence. RCC suffered no prejudice from the five-day delayed filing. RCC had notice of the substance of Beazer's claim through the EEOC process, and it had identified no basis for finding that Beazer's late filing prejudiced it.

ERISA

District Court Did Not Err in Rejecting Long-Term Disability Benefits Claim Under ERISA

Alexander v. Unum Life Insurance Company of America, 2026 U.S. App. LEXIS 7745 (2d Cir. Mar. 17, 2026)

Katherine Alexander ("Alexander"), a woman in her mid-forties, worked as a nurse practitioner from March 13, 2017 until December 27, 2021. As part of her employment, Alexander received short-term and long-term disability coverage under an Employee Retirement Income Security Act of 1974 ("ERISA") regulated "employee welfare benefit plan" managed by Unum Life Insurance Company of America ("Unum"). Alexander contracted COVID-19 in or around March 2020 while on the job, appeared to recover, but then developed Long COVID symptoms that grew worse over time. On her doctor's recommendation, Alexander stopped working altogether. After Alexander stopped working, she received short-term disability benefits under the plan from Unum for the next thirteen weeks - the maximum duration permitted by the plan. Near the end of that period, an Unum representative interviewed Alexander by phone in connection with her application for long-term disability benefits. Unum reviewed additional statements provided by Alexander's doctor, which further reflected Alexander's self-reported symptoms and advised that Alexander needed more time to recover before returning to work. Unum ultimately rejected Alexander's application for long-term benefits. Alexander then filed an ERISA action in the United States District Court for the Eastern District of New York. The district court concluded that Alexander had failed to prove, by a preponderance of the evidence, that she was totally disabled throughout the elimination period and entered judgment in favor of Unum. Alexander appealed. The Second Circuit affirmed.

The court stated that the district court did not clearly err in holding that Alexander failed to prove that she was totally disabled throughout her elimination period. Unum's vocational rehabilitation consultant found that Alexander's work was light in physical exertion with significant mental demands, and Alexander did not dispute that characterization. And Alexander did not point to any legal error by the district court, and, in her reply brief, she did not contest Unum's assertion that the standard of review here was clear error. Alexander's own "psychiatric care provider agreed that Alexander was not prevented from working from a cognitive standpoint." Moreover, Alexander presented only sparse evidence to support her claim of being unable to meet the light physical exertion requirements of her position throughout the elimination period.

The court found that Alexander's arguments to the contrary were unpersuasive and failed to meet the clear error standard. For starters, she argued that Unum's decision to grant her short-term disability benefits "alone made it error for the district court to conclude that she failed to meet her burden of proof to show she was incapable of performing the duties of her occupation during the entirety of the elimination period." But nothing in the language of the plan suggested that Unum's decision to grant Alexander short-term benefits is binding for purposes of whether she was eligible to later receive long-term benefits. Like other courts confronted with arguments of this sort, the court held that here was neither a basis in the plan's language nor any reasoned basis on which to "effectively require a merger of short-and long-term benefits determinations." Accordingly, there was no error -- clear or otherwise -- in the district court's decision to assign minimal weight to Alexander's self-reported symptoms and to focus, instead, on the paucity of objective record evidence supporting her claimed inability to work. While Alexander marshalled some evidence to the contrary, the district court's conclusion that Alexander failed to adequately prove a lack of cognitive fitness was "plausible in light of the record viewed in its entirety" and thus was affirmed on appeal.

CALENDAR OF EVENTS

2026

June 9-11	NELI: Mid-Year Employment Law Conference Webinar	
Nov. 5-6	NELI: Employment Law Conference	Coronado, CA
Nov. 17-19	NELI: Employment Law Conference Webinar	
Dec. 3-4	NELI: Employment Law Conference	New Orleans, LA

SUBSCRIPTION QUESTIONS?

If you have any questions about the status of your subscription, please call your Matthew Bender representative, or call our Customer Service line at 1-800-833-9844.

ATTENTION READERS

Any reader interested in sharing information of interest to the labor and employment bar, including notices of upcoming seminars or newsworthy events, should direct this information to Laurie E. Leader, Law Offices of Laurie E. Leader, LLC, 14047 W Petronella Dr., Suite 202B, Libertyville, IL 60048, lleader51@gmail.com or Mary Anne Lenihan, Legal Editor, Labor & Employment, LexisNexis Matthew Bender, 230 Park Avenue, 7th Floor, New York, NY 10169, maryanne.lenihan@lexisnexis.com.

If you are interested in writing for the BULLETIN, please contact Laurie E. Leader via e-mail at: lleader51@gmail.com or Mary Anne Lenihan via e-mail at: maryanne.lenihan@lexisnexis.com.

(Pub. 1239)

EDITORIAL BOARD CONTACT INFORMATION

Lexis+™ or Lexis® Service Labor & Employment Practice Page

Find top labor and employment sources as soon as you sign in. The **Lexis+™ or Lexis® service Labor & Employment Practice Page** brings your trusted, go-to employment sources to the first screen you see--comprehensive primary sources (cases, codes and regulations); authoritative analysis, practical guidance and expert commentary; plus relevant and trusted news you can't find elsewhere. Designed specifically for labor and employment practitioners, you can see the sources you count on and discover what else can help you, even tools beyond Lexis+™ or Lexis® service, before your first click. Add your own favorite or often-used sources to the page for even faster access. Lexis+™ or Lexis® service Labor & Employment Page … **Cut right to the chase.**

EXCEPTIONAL CONTENT

Get the best information to work from--authoritative LexisNexis® resources, coupled with expertise from veteran authors and legal editors who specialize in labor and employment law.

- **Powerhouse treatises--**Rely with confidence on more than 75 authoritative treatises covering nearly every niche topic within labor and employment law, including **Matthew Bender®** titles such as *Larson on Employment Discrimination*, *Labor and Employment Law*, *ADA: Employee Rights and Employer Obligations*, and *Wages and Hours: Law and Practice*. Take advantage of expertise from Littler Mendelson and Xpert HR with sources written by top attorneys and designed to make the law accessible and practical.
- **Monitor the current state of labor and employment law** with immediate access to a vast catalog of primary-law content including cases, full-text labor arbitration decisions and agency materials, as well as the high-quality analysis provided with *Shepheard's*® Citations Service. Spend less time finding, and more time analyzing, with immediate access to federal and state statutes and regulations and 50-state surveys.
- **Better news, better insights** from an **exclusive combination of top daily news sources** including *The Wall Street Journal*®, *The New York Times®* and *Mealey's™ Daily News: Labor and Employment*, plus timely analysis and commentary on breaking labor and employment news from Law360®, *Bender's Labor & Employment Bulletin* and *Mealey's™ Litigation Report*.

EXPERT ORGANIZATION

Start working faster with better direction. LexisNexis editors review the deep resources across LexisNexis and ensure the most relevant labor and employment sources are at the top of the page. **You uncover the best labor and employment resources--the ones most likely to help you--in the least time.**

- **Top titles stay within reach.** Most-used and best-regarded labor and employment sources--primary law, treatises, daily industry news and more--are in your sightline. Click once and go.
- **Uncover the unexpected.** What you don't know *can* hurt you. The Labor & Employment Practice Page brings brings you the best possibilities, including resources you didn't know existed.
- **Need a bigger picture? You've got it--A to Z.** Select **View all sources** and get a full, alphabetical listing of LexisNexis labor and employment resources. *You can be confident you don't miss a thing.*
- **Research a legal topic--no search needed.** No extra steps either. **Key legal topics** for labor and employment practitioners are right on your page. Select and review results.
- **Make it your page.** Add other most-used sources or your source combinations to the easy-to-access **Favorites pod**.

EXCLUSIVE TOOLS

Leverage the differentiators, i.e., Lexis+™ or Lexis® service tools that help you dig deeper faster, tools no other online publisher offers.

- **Get more of what you need for transactional work.** **Lexis Practice Advisor® Labor & Employment module*** provides step-by-step practical guidance on labor and employment related transactional matters and issues, plus with model forms drafted by leading practitioners, you can quickly customize documents for specific client situations.
- **Get built-in research help.** The **red search box** offers legal phrase suggestions and points you to popular labor and employment cases and statutes as you enter your search. Plus your search is automatically filtered to your practice area.
- **Select a case passage--and uncover connections.** No search or cite is needed with **Legal Issue Trail™**, exclusive to Lexis+™ or Lexis® service. Pinpoint cases that reference a passage you select, revealing connections you may not see otherwise.
- **Work anytime, anywhere on practically any device.** Screens for Lexis+™ or Lexis® service Practice Pages **adapt automatically** to fit the size of your device. (And you can print easily with a Safari® plug-in.) No apps needed.

**Requires additional subscription.*