2026 Barrett McNagny Human Resources Conference

February 12, 2026

CASE LAW UPDATES

Key Recent and Pending Cases- U.S. Supreme Court, Seventh Circuit and Federal Courts

By: Stephanie Nuevo & Anthony Stites
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Practice Areas:

- Labor and Employment Law, Alternative Dispute Resolution, and Litigation

Attorney Anthony Stites represents business entities in all facets of their employment matters. On a daily basis, he works with human resource personnel and in-house counsel to prevent or solve problems in the employment arena. Tony assists all sizes of employers ranging from very small businesses through large publicly traded corporations.

With an emphasis in the transportation and manufacturing sectors, Tony has presented hundreds of supervisor training sessions throughout the U.S. He has extensive experience in strike activity and trial experience defending employers in all areas of employment matters. Tony also serves as a mediator for alternate dispute resolution.

Bar and Court Admissions:

- Indiana
- Ohio
- U.S. District Courts for the Northern and Southern Districts of Indiana
- U.S. District Court for the Northern District of Ohio
- U.S. District Court for the Southern District of Ohio
- U.S. District Court for the Eastern District of Michigan
- U.S. Court of Appeals for the Fourth and Seventh Circuits

Selected Representative Matters

- Representing a regional corporation in the termination of their president.
- Taking an attorney fee award against the National Labor Relations Board (NLRB).
- Defending the drug testing policy of a company through a federal jury trial.
- Representing numerous manufacturing facilities during downsizing negotiations with unions.
- Handled numerous union election campaigns with clients in Ohio, Indiana, Illinois, Minnesota, and Michigan.
- Handled decertification petitions and decertification elections in Ohio and Indiana

Professional Honors

- Recipient of the Niemann Citation for Excellence & Professional from the Allen County Bar Association in 2023.
- AV® Preeminent™ rated attorney based on Martindale-Hubbell's peer review ratings.
- Selected for inclusion in *Super Lawyers in America*® from 2005-2007 and since 2014.
- Selected for inclusion since 2016 in the *Best Lawyers*® *in America* publication in the areas of:
  - Employment Law- Management,
  - Labor Law- Management,
  - Labor Law- Union, and
  - Litigation - Labor and Employment.

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Anthony M. Stites, J.D.

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- Recognized by *Best Lawyers in America*® as "Lawyer of the Year," Fort Wayne in:
  - Employment Law - Management, 2017, 2018, 2024 and 2026
  - Litigation- Labor and Employment, 2020, 2023 and 2025
  - Labor Law- Management, 2023 and 2025
- Selected a Paul Harris Fellow for his lifetime contributions to the Fort Wayne not-for-profit sector.
- Selected as the Notre Dame Club of Fort Wayne's 2015 "Person of the Year".

Seminars

- A frequent speaker at local, state and national conferences and seminars, with over 250 speaking engagements throughout his career.

Professional and Community Involvement

- Member, Allen County (Indiana) Bar Association
- Member, Indiana State Bar Association
  - Past chair, Indiana Bar Association's Labor, Employment & Benefit Law Section
- Member, Ohio Bar Association
- Fellow, Indiana Bar Foundation
- Member, Indiana Bar Foundation Board of Directors
- Member, Fort Wayne Mad Anthonys Inc.
  - President, 2025
  - Executive Committee Member, 2021- present

Education

- B.B.A, Finance, University of Toledo
- J.D., University of Notre Dame

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Practice Areas:

- Labor Relations and Employment Law & Litigation

Stephanie Nuevo is a member of Barrett McNagny's Labor and Employment Law group. She counsels human resources personnel regarding employment matters, including compliance with state and federal laws and regulations relating to hiring, disciplining and terminating employees, wage and hour issues, drafting employment agreements, covenants not to compete, and developing employment policies and handbooks.

Prior to joining the firm, she worked at an AM Law 200 national firm in California, where her practice centered on commercial litigation and labor and employment. She handled a wide array of cases, including breach-of-contract, business torts such as fraud and tortious interference, trademark infringement, and the defense of employers in matters involving wrongful termination, discrimination, retaliation, harassment, and wage and hour compliance. Her representation ranged from well-known franchises to small and large businesses.

Bar and Court Admissions:

- California
- United States Courts for the Northern and Southern Districts

Professional Involvement

- Member of the Allen County Bar Association

Education

- B.A., *cum laude,* Political Science with minor in Philosophy, University of Florida
  - Member, Phi Alpha Delta (pre-law organization)
- J.D., *summa cum laude*, SCALE Accelerated Two-Year Program, Southwestern Law School, Los Angeles, CA
  - Guerin L. Butterworth Award (awarded to first in class in the SCALE program)
  - Witkin Award for Academic Excellence: Legal Analysis, Writing, and Skills I, Civil Litigation, Criminal Procedure, Business Associations
  - CALI Excellence for the Future Awards in Evidence II, Civil Litigation, Jurisdiction, Constitutional Law I, MBE: Skills & Strategies
  - Moot Court Intramural Competition: Best Brief Finalist and Top Ten Oralist
  - Law Review Bluebook Award

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**Not licensed to practice law in Indiana state courts.*

Disclaimer

- The information and procedures set forth in this manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, any forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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U.S. Supreme Court

*Currently pending before the United States Supreme Court – Brock v. Flowers Foods, Inc., 121 F.4th 753 (10th Cir. 2024)

- **Issue**
  - Whether delivery-driver distributors must arbitrate claims under the FAA or fall under the § 1 "transportation workers exemption."
- **Background**
  - Brock alleged misclassification of distributors as independent contractors under FLSA and Colorado law.
  - District court found Brock engaged in interstate commerce; Tenth Circuit affirmed.
- **Key Holdings Below**
  - Last-leg intrastate delivery constituted part of a continuous interstate journey.
  - Brock and similarly situated workers fall within FAA § 1 exemption.
- **Significance**
  - Addresses the scope of the transportation-worker exemption and arbitration enforceability.

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- The case involves Angelo Brock, who filed a putative class action against Flowers Foods, Inc., Flowers Bakeries, LLC, and Flowers Baking Co. of Denver, LLC (collectively, "Flowers"), alleging violations of the FLSA and Colorado labor law. Brock claims that Flowers misclassified its delivery-driver distributors as independent contractors to systematically underpay them. Brock, who began working as an independent distributor for Flowers Baking Co. of Denver, LLC in 2016, delivered baked goods produced out-of-state to various retail stores in Colorado. The dispute centers on whether Brock and similarly situated workers are required to arbitrate their claims under the Federal Arbitration Act (FAA) and Colorado law.
- The district court had concluded that Brock fell within the "transportation workers exemption" under § 1 of the FAA, which exempts transportation workers engaged in interstate commerce from arbitration. The court determined that Brock belonged to a class of workers who deliver Flowers goods in trucks to their customers and actively engaged in the transportation of Flowers' products across state lines into Colorado.
- The Tenth Circuit agreed with the district court that Brock's class of workers is engaged in interstate commerce, thus falling within the § 1 exemption of the FAA. The court found that Brock's intrastate delivery route formed the last leg of the products' continuous interstate route, making him an integral part of a single, unbroken stream of interstate commerce. The court noted that Flowers retained significant control over Brock, Inc., indicating that the goods' delivery concluded at the various stores' locations, not the warehouse.

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E.M.D. Sales, Inc., v. Carrera, 604 U.S. 45 (2025)

- **Issue**
  - What standard of proof applies for employers asserting FLSA exemptions?
- **Background**
  - Sales reps sued for unpaid overtime; employer argued they were "outside salesmen."
- **Holding**
  - Preponderance-of-the-evidence standard applies.
- **Rationale**
  - FLSA is silent on burdens → default standard applies.
  - No special concerns warrant heightened proof.
- **Impact**
  - Rejects circuits applying "clear and convincing."
  - Aligns FLSA exemption standard with Title VII burdens.

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- The case involved a dispute over the standard of proof required for an employer to demonstrate that an employee is exempt from the minimum-wage and overtime-pay provisions of the FLSA. The FLSA requires employers to pay their employees a minimum wage and overtime compensation, but it exempts many categories of employees from these requirements, including outside salesmen. The burden is on the employer to show that an exemption applies.
- EMD distributes international food products and employs sales representatives who manage inventory and take orders at grocery stores. Several sales representatives sued EMD, alleging that the company violated the FLSA by failing to pay them overtime. EMD argued that the sales representatives were outside salesmen and therefore exempt from the FLSA's overtime-pay requirement. The District Court found EMD liable for overtime because it did not prove by clear and convincing evidence that its sales representatives were outside salesmen. The Fourth Circuit Court of Appeals affirmed this decision, applying a clear and convincing evidence standard.
- The Supreme Court granted certiorari to resolve a conflict among the circuits regarding the standard of proof. The Court held that the preponderance-of-the-evidence standard applies when an employer seeks to show that an employee is exempt from the FLSA's provisions. The Court reasoned that the FLSA does not specify a standard of proof for exemptions, and statutory silence typically leads courts to apply the default preponderance standard. The Court also noted that this case does not involve constitutional rights or unusual coercive government action that would require a heightened standard.
- The Court rejected the employees' arguments for a heightened standard, stating that the public interest in a fair economy does not necessitate a heightened standard, and that the waivability of rights does not dictate the standard of proof. The Court emphasized that the preponderance standard is appropriate for FLSA cases, similar to Title VII employment-discrimination cases. The judgment of the Court of Appeals was reversed, and the case was remanded for further proceedings consistent with the Supreme Court's opinion.

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Starbucks Corp. v. McKinney, 602 U.S. 339 (2024)

- **Issue**
  - Must courts apply traditional four-factor equitable test to NLRB § 10(j) injunction requests?
- **Background**
  - Starbucks fired employees involved in unionizing activities; NLRB sought injunction for reinstatement.
- **Holding**
  - Courts must apply traditional four-factor preliminary injunction test.
- **Significance**
  - Rejects more lenient "reasonable cause" standard used in certain circuits.
  - Raises bar for NLRB's ability to secure temporary reinstatement.

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- The central issue in the case is whether district courts must apply the traditional four-factor test for preliminary injunctions when evaluating the NLRB's request for such an injunction under Section 10(j) of the National Labor Relations Act (NLRA). This test includes assessing the likelihood of success on the merits, irreparable harm, the balance of equities, and the public interest.
- The background of the case involves several Starbucks employees at a Memphis, Tennessee location who announced plans to unionize and invited a news crew to promote their efforts. Starbucks subsequently fired multiple employees involved in the media event, citing violations of company policy. The union coordinating with the employees filed charges with the NLRB, alleging that Starbucks unlawfully interfered with the employees' right to unionize and discriminated against union supporters. The NLRB issued a complaint against Starbucks and sought a preliminary injunction to reinstate the fired employees during the administrative proceedings.
- The United States District Court for the Western District of Tennessee granted the injunction, applying a two-part test from Sixth Circuit precedent, which required showing reasonable cause to believe that unfair labor practices occurred and that injunctive relief was just and proper. The Sixth Circuit Court of Appeals affirmed this decision. However, the Supreme Court granted certiorari to resolve a circuit split regarding the standard for evaluating the NLRB's requests for preliminary injunctions under Section 10(j).
- The Supreme Court held that district courts must use the traditional four-part test for preliminary injunctions when evaluating the NLRB's request under Section 10(j). The Court vacated the judgment of the Court of Appeals and remanded the case for further proceedings consistent with this opinion. The Court emphasized that nothing in Section 10(j) displaces the presumption that traditional equitable principles govern, and that the statutory directive to grant relief when deemed "just and proper" does not override these principles.

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Muldrow v. City of St. Louis, Missouri, 601 U.S. 346 (2024)

- **Issue**
  - Does a Title VII plaintiff challenging a transfer need to show "significant" harm?
- **Background**
  - Police sergeant reassigned with changed duties, schedule, and loss of FBI privileges.
- **Holding**
  - Plaintiff must show *some* harm to a term or condition of employment—*not* significant harm.
- **Impact**
  - Lowers threshold for actionable discriminatory transfers.

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- The case involved a female police officer, Sergeant Jatonya Clayborn Muldrow, who alleged sex discrimination under Title VII after being transferred from the St. Louis Police Department's specialized Intelligence Division to a uniformed position in a different district. Muldrow claimed that the transfer was made because she is a woman and that it negatively affected the "terms [or] conditions" of her employment.
- From 2008 to 2017, Muldrow worked in the Intelligence Division, where she held significant responsibilities, including investigating public corruption and human trafficking cases, overseeing the Gang Unit, and serving as head of the Gun Crimes Unit. She was also deputized as a Task Force Officer with the FBI, which provided her with FBI credentials, an unmarked take-home vehicle, and the authority to conduct investigations outside St. Louis. In 2017, the new commander of the Intelligence Division requested her transfer to replace her with a male officer, citing the dangerous nature of the work. Despite Muldrow's objections, the department approved the transfer.
- In her new position, Muldrow's rank and pay remained unchanged, but her responsibilities, perks, and schedule were altered. She was reassigned to supervise neighborhood patrol officers, lost her FBI status and take-home vehicle, and was placed on a rotating schedule that included weekend shifts. Muldrow argued that these changes constituted discrimination based on sex, as they affected the terms and conditions of her employment.
- The District Court granted summary judgment in favor of the City, stating that Muldrow failed to demonstrate a "significant" change in working conditions that resulted in a "material employment disadvantage." The Eighth Circuit Court of Appeals affirmed this decision, emphasizing that the transfer did not diminish her title, salary, or benefits and that the changes in her job responsibilities were insufficient to support a Title VII claim.
- The Supreme Court granted certiorari to resolve a circuit split regarding whether an employee challenging a transfer under Title VII must meet a heightened threshold of harm. The Court held that an employee must show some harm with respect to an identifiable term or condition of employment, but the harm need not be significant. The Court vacated the judgment of the Eighth Circuit and remanded the case for further proceedings consistent with this opinion.

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Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024)

- **Issue**
  - Should Chevron deference be overruled?
- **Background**
  - Fishing companies challenged NMFS rule requiring industry-funded monitoring.
- **Holding**
  - Chevron deference overruled; courts must independently interpret statutes under the APA.
- **Impact**
  - Major shift in administrative law; significantly limits agency interpretive authority.

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- The plaintiffs challenged a rule promulgated by Secretary of Commerce and the National Marine Fisheries Service (NMFS) under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), which required the Atlantic herring fishery to fund the costs of on-board observers necessary for fishery management. The plaintiffs argued that the MSA did not authorize NMFS to mandate that they pay for these observers.
- The United States District Court for the District of Columbia and the District of Rhode Island both granted summary judgment in favor of the government, concluding that the MSA authorized the rule. The courts noted that even if there was ambiguity in the statutory text, deference to the agency's interpretation was warranted under the Chevron doctrine. The United States Courts of Appeals for the District of Columbia Circuit and the First Circuit affirmed these decisions, applying Chevron's framework to resolve in favor of the government.
- The Supreme Court granted certiorari to address whether the Chevron doctrine should be overruled or clarified. The Chevron doctrine, established in 1984, required courts to defer to "permissible" agency interpretations of statutes that the agencies administer, even if the court would have read the statute differently.
- The Supreme Court held that courts need not, and under the Administrative Procedure Act (APA) may not, defer to an agency's interpretation of the law simply because a statute is ambiguous, thereby overruling Chevron. The Court emphasized that the APA requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority. The Court's ruling signifies a shift away from the Chevron deference, reinforcing the judiciary's role in interpreting laws independently of agency interpretations.

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Securities and Exchange Commission v. Jarkesy, 603 U.S. 109 (2024)

- **Issue**
  - Seventh Amendment right to jury trial when SEC seeks civil penalties.
- **Background**
  - SEC pursued securities fraud penalties through ALJ proceedings.
- **Holding**
  - Defendants are entitled to jury trials in federal court for civil penalties.
- **Impact**
  - Restricts SEC (and potentially other agencies) from using in-house adjudication for penalties.

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- The case involved the Securities and Exchange Commission (SEC) initiating an enforcement action against George Jarkesy, Jr., and his firm, Patriot28, LLC, for alleged securities fraud. The SEC sought civil penalties and chose to adjudicate the matter in-house before an administrative law judge (ALJ) rather than in federal court, where a jury trial would be available.
- The legal question at the heart of the case was whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud. The Supreme Court held that the Seventh Amendment does indeed entitle the defendant to a jury trial in such cases. The Court's analysis followed the approach set forth in previous cases determining that the SEC's antifraud provisions replicate common law fraud, which traditionally requires a jury trial.
- The Court also considered whether the "public rights" exception to Article III jurisdiction applied, which would allow Congress to assign certain matters to agencies for adjudication without a jury trial. The Court concluded that this exception did not apply in this case because the action did not fall within any of the distinctive areas involving governmental prerogatives where matters may be resolved outside of an Article III court.
- The Court emphasized the importance of the right to a jury trial, noting its historical significance and the need for careful scrutiny of any curtailment of this right. The Court found that the civil penalties sought by the SEC were legal in nature, designed to punish or deter rather than solely to restore the status quo, thus implicating the Seventh Amendment right to a jury trial.

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Ames v. Ohio Department of Youth Services, 605 U.S. 303 (2025)

- **Issue**
  - Must majority-group plaintiffs show "background circumstances" to bring Title VII discrimination claims?
- **Holding**
  - No. Title VII is neutral: no heightened burden for majority-group plaintiffs.
- **Impact**
  - Rejects Sixth Circuit's "background circumstances" test.

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- Marlean Ames, a heterosexual woman, filed a lawsuit against her employer, the Ohio Department of Youth Services, under Title VII, alleging reverse discrimination based on sexual orientation. Ames claimed she was denied a promotion in favor of a lesbian woman and was demoted in favor of a gay man. The District Court granted summary judgment to the employer, and the Sixth Circuit Court of Appeals affirmed this decision.
- The central issue in the case was whether majority-group plaintiffs, like Ames, must meet a heightened evidentiary standard by showing "background circumstances" to establish a prima facie case of discrimination. The Sixth Circuit had required Ames to demonstrate such background circumstances, which it defined as evidence suggesting that the employer was the unusual one that discriminates against the majority.
- The Supreme Court held that the "background circumstances" requirement imposed by the Sixth Circuit was inconsistent with Title VII's text and the Court's precedents. Title VII's disparate-treatment provision does not distinguish between majority-group and minority-group plaintiffs, and it focuses on individuals rather than groups. The Court vacated the judgment of the Sixth Circuit and remanded the case for application of the proper prima facie standard, which does not include the "background circumstances" requirement.

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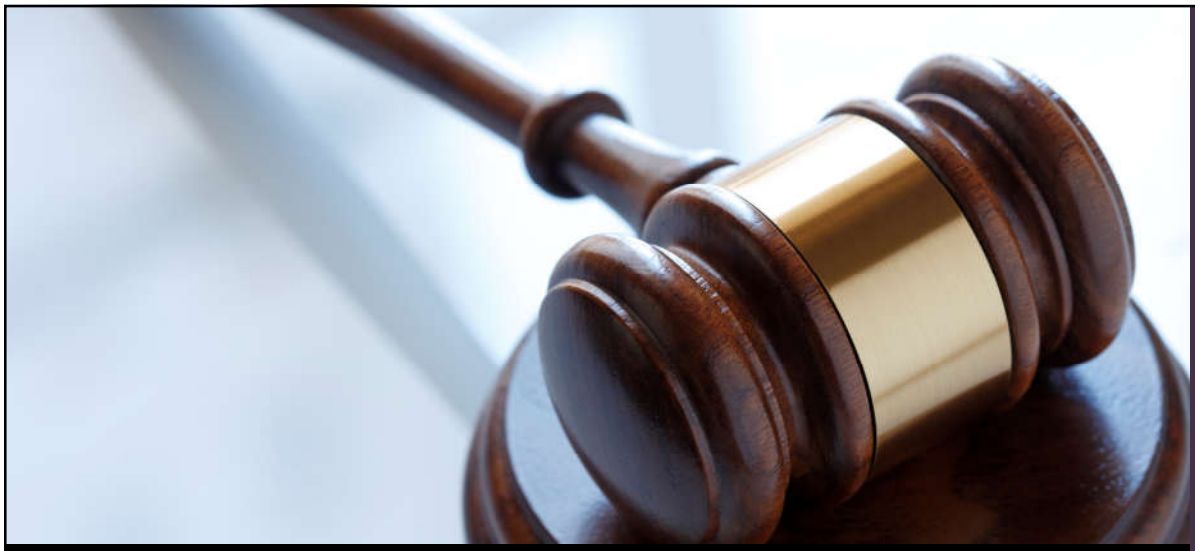

Seventh Circuit

Nawara v. Cook County, 132 F.4th 1031 (7th Cir. 2025)

- **Issue**
  - Whether back pay is available for violations of ADA § 12112(d)(4) (medical inquiries and exams).
- **Holding**
  - Yes. Violations can constitute discrimination; Title VII remedies (including back pay) apply.

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- John Nawara, a former correctional officer at Cook County Jail, was involved in several altercations with other county employees, leading the Cook County Sheriff's Office to require him to undergo a fitness-for-duty examination before returning to work. As part of this process, Nawara was asked to sign two medical information release forms, which he initially resisted but eventually signed. Nawara then sued Cook County and Sheriff Thomas Dart, alleging that the examination requirement and inquiry into his mental health violated § 12112(d)(4) of the Americans with Disabilities Act (ADA).
- Nawara prevailed at trial, but the jury awarded him zero damages. He filed a post-trial motion requesting equitable relief in the form of back pay and lost pension benefits, as well as restoration of his seniority. The district court granted the restoration of seniority but denied the request for back pay, reasoning that a plaintiff must have a disability or perceived disability for a violation of § 12112(d)(4) to constitute discrimination on account of disability.
- Upon appeal, the Court of Appeals determined that the ADA's enforcement provision incorporates remedies available to Title VII plaintiffs, including back pay. The court concluded that a violation of § 12112(d)(4)(A) constitutes discrimination on the basis of disability, allowing Nawara to recover back pay.

Richards v. Eli Lilly & Company, 149 F.4th 901 (7th Cir. 2025)

- **Issue**
  - Standard for issuing notice in ADEA collective actions.
- **Holding**
  - Plaintiff must show a material factual dispute that members are similarly situated.
- **Impact**
  - Establishes new framework emphasizing judicial neutrality and evidence-based notice.

- The case involves Monica Richards, a 53-year-old employee, who brought a collective action against her employer, Eli Lilly & Company and Lilly USA, LLC, under the Age Discrimination in Employment Act (ADEA). Richards alleged age discrimination after being denied a promotion in favor of a younger, less experienced employee. She sought to issue notice to other similarly situated employees who were 40 or older and denied promotions since February 12, 2022. The United States District Court for the Southern District of Indiana conditionally certified the collective and agreed to issue notice, applying a lenient notice standard.
- The case was appealed to the Seventh Circuit, which addressed the proper standard for issuing notice in a collective action. The court clarified that to secure notice, a plaintiff must make a threshold showing of a material factual dispute regarding whether the proposed collective is similarly situated. Defendants must be allowed to submit rebuttal evidence, and the court's decision to issue notice will depend on its assessment of the factual dispute. The court may issue notice while postponing the similarly-situated determination until after opt-in and discovery are complete, and it may authorize limited and expedited discovery to determine whether a proposed collective is similarly situated.
- The Seventh Circuit vacated and remanded the district court's decision, providing a new framework for assessing the propriety of notice in collective actions. This framework emphasizes the importance of timely and accurate notice, judicial neutrality, and the efficient and proper joinder of additional parties.

Schoper v. Board of Trustees of Western Illinois University, 119 F.4th 527 (7th Cir. 2024)

- **Issue**
  - ADA discrimination and accommodation claims related to tenure denial.
- **Holding**
  - Request for delayed tenure review not a reasonable accommodation.
- **Impact**
  - Clarifies limits on ADA accommodations in academic tenure processes.

- The case involves Sarah Schoper, an assistant professor, who filed a lawsuit against the university's Board of Trustees. Schoper alleged that the university violated the Americans with Disabilities Act (ADA) by discriminating against her due to her disability and failing to provide reasonable accommodations after she suffered a traumatic brain injury. The district court granted summary judgment in favor of the university, and Schoper appealed.
- In 2015, Schoper suffered a traumatic brain injury due to a pulmonary embolism, resulting in high-functioning mild aphasia and other physical disabilities. Her neurologist advised that engaging in complex intellectual activities would aid her recovery, so she returned to teaching later that year. The university provided physical accommodations and allowed her to teach the same courses without serving on committees.
- The tenure process at the university was governed by a collective bargaining agreement, which included a "stop-the-clock" provision allowing an extra year for tenure application due to significant illness. However, Schoper did not request this extension, as she was unaware of the procedure and believed her options were limited to taking a leave of absence or continuing to teach.
- Schoper's teaching evaluations were crucial in the tenure decision process. Before her injury, her scores were above the preferred threshold of 4.0, but they dropped to 3.8 after her return. Negative student comments also emerged for the first time. Despite these challenges, Schoper did not request accommodations until it became apparent that she would receive a negative tenure recommendation.

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- In 2017, Schoper applied for tenure, but the Department committee recommended against it due to her teaching scores. Schoper requested reconsideration, citing her disability and including a neurologist's letter, but the decision was affirmed. She then asked for more time to achieve tenure, but the Department chair stated he lacked the authority to grant this request. The tenure application process involved multiple levels of review, and while the University Personnel Committee recommended tenure, the negative recommendations from other committees and university officials prevailed. Consequently, Schoper was issued a terminal contract.
- Schoper's lawsuit claimed disability discrimination and failure to accommodate under the ADA. The district court found no genuine dispute of material fact regarding whether her disability was the but-for cause of the negative tenure recommendation. It also concluded that Schoper failed to demonstrate how her requested accommodation—a delay in tenure consideration—would enable her to perform essential job functions.
- On appeal, the court affirmed the district court's decision. It held that Schoper's request for more time was not a reasonable accommodation under the ADA, as it effectively sought a do-over rather than an adjustment to perform essential job functions. The court also found that Schoper's disability was not the but-for cause of the tenure denial, as the reviewers considered multiple factors beyond her scores, and there was no evidence of reliance on discriminatory comments.

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Walters v. Professional Labor Group, LLC, 120 F.4th 546 (7th Cir. 2024)

- **Issue**
  - Whether overnight travel during normal working hours is compensable under FLSA.
- **Holding**
  - Yes. 29 C.F.R. § 785.39 requires compensation for travel during normal hours, even on nonworking days.
- **Impact**
  - Reinforces compensability of overnight travel for nonexempt workers.

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- Walters alleged that PLG violated the FLSA by failing to compensate employees for time spent traveling to and from overnight work assignments at remote sites during their normal working hours. PLG is a staffing firm that matches skilled tradesmen with temporary work at client job sites, often requiring employees to travel to remote locations where they stay for days or weeks. PLG provided per diems and mileage reimbursements but did not compensate for travel time or count it as hours worked. Walters, an hourly and nonexempt employee eligible for overtime pay, believed he was entitled to compensation for travel time during his normal workday.
- Walters filed suit, claiming the travel time was compensable under 29 C.F.R. § 785.39 and should count as hours worked toward overtime. PLG argued that the travel time was non-compensable under the FLSA. The district court denied PLG's motion for summary judgment and granted Walters' motion, concluding that federal law requires PLG to treat employee travel to overnight work assignments as compensable worktime when it occurs during normal work hours.
- The Seventh Circuit found that the FLSA does not require compensation for normal commuting but does require compensation for overnight travel that cuts across an employee's workday. PLG's argument that the travel was normal, non-compensable commuting was rejected because the employees did not return home at the end of their workdays, and their travel was not ordinary commuting.
- The court further held that 29 C.F.R. § 785.39 requires compensation for overnight travel during normal working hours, even on nonworking days. PLG's arguments that travel did not cut across workdays and that employees were not substituting travel for other duties were found unpersuasive.
- Ultimately, the court affirmed the district court's decision, holding that Walters and similarly situated tradesmen were entitled to compensation for travel time during their normal working hours, and PLG should have counted it as hours worked for overtime purposes.

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Federal Court

Plano Chamber of Commerce et al v. United States Dept of Labor et al

- **Issue**
  - Legality of DOL's 2024 overtime rule increasing salary thresholds and automatic updates.
- **Holding**
  - Court set aside the rule as beyond DOL's statutory authority.
- **Impact**
  - Blocks nationwide enforcement of 2024 overtime rule.
  - Creates uncertainty for employers pending appeals or future rulemaking.

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- In April 2024, Barrett McNagny's Labor and Employment section reported that the Department of Labor ("DOL") released a final rule that raised the salary threshold to qualify for certain overtime exemptions (the "2024 Rule") under the Fair Labor Standards Act ("FLSA"), which was designed to expand employee overtime pay eligibility.
- Litigation ensued over the 2024 Rule, and it was challenged on the basis of running afoul of the DOL's statutory authority to create certain salary thresholds and allow for automatic adjustments of those thresholds every three years. The United States District Court for the
- Eastern District of Texas heard the legal challenge and agreed with the rule's challengers. On November 15, 2024, the Texas district court issued its opinion and order, thus setting aside the 2024 Rule as an unlawful exercise of the DOL's power and prohibiting the DOL's enforcement of the 2024 Rule nationwide.

LEGISLATIVE UPDATES

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Bar and Court Admissions:

- Indiana
- U.S. District Courts for the Northern and Southern Districts of Indiana

Practice Areas:

- Labor and Employment Law and Litigation

Carta Robison focuses her practice in the area of labor and employment. She works with employers to help prevent and solve disputes with employment contracts, and claims involving Title VII, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), the Indiana Wage Payment Statute, the Indiana Wage Claims statute, and the Indiana Worker's Compensation Act. She also represents clients in general liability defense and has experience handling jury trials.

Professional Honors

- Selected for inclusion in the 2023, 2024 and 2025 *Best Lawyers in America®: Ones to Watch* publications.
- Co-lead the effort to update the Indiana State Bar Association Labor Treatise in 2023
- Honoree for the Women in NAACP Black History Event, "Women in Hats, Who Continue to Make a Difference ...in Law" for the year 2021.

Professional and Community Involvement

- Board Member, Healthier Moms and Babies
- Member, Gourmet Dinner Committee, Big Brothers Big Sisters of Northeast Indiana
- Volunteer, Allen County Public Library Audio Reading Service
- Member, Allen County Bar Association
  - Chair, Labor & Employment Section
- Former Member, Unity Performing Arts Foundation, Inc. Board of Directors

Education

- B.A., English, *summa cum laude*, Fisk University in Nashville, Tennessee
- J.D., Indiana University Maurer School of Law, Bloomington
  - Executive Articles Editor, *Indiana Journal of Law and Social Equality*
  - Published "Assessment of Federal Rule of Evidence 609 and the Necessity of a Deeper Collaboration with the Social Sciences for Racial Equality", *Indiana Journal of Law and Social Equality*, 7 Ind. J. L. Soc. Equal. 312 (2019).

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Practice Areas:

- Labor Relations and Employment Law, Health Care Law, Litigation and Biotechnology

H. Joseph Cohen works with clients in the areas of labor and employment matters and litigation including insurance defense. Concentrating on health care providers, his practice works with hospitals, physician offices, dentists, and doctors on their employment law needs. He has extensive experience in defending all types of employment claims, including those based on race, sex, national origin, religion, and sexual harassment. His experience also includes handling insurance defense claims.

Bar and Court Admissions:

- Indiana state courts
- U.S. Court of Appeals for the Sixth Circuit
- U.S. Court of Appeals for the Seventh Circuit
- U.S. District Courts for the Northern and Southern Districts of Indiana

Professional Honors

- AV Preeminent™ rated attorney by Martindale-Hubbell peer review ratings.
- Listed since 2021 in the *Best Lawyers® in America* publications in the areas of labor law- management, employment law- management and health care law.
- Listed since 2024 in the *Indiana Super Lawyers* publications in the area of employment and labor law.
- Recipient of the 2021 Monsignor Thiele Award for his work with the United Way of Allen County.
- Recipient of the *Greater Fort Wayne Business Weekly* "40 Under 40" award.

Professional and Community Involvement

- Allen County Bar
- Indiana State Bar Association
- Former Member, United Way of Allen County Board of Directors
- Member, Brightpoint Board of Directors
- Member, Hope's Harbor House Board of Directors
  - President, 2022; Vice-president, 2021
- Member, Easterseals Arc of Northeast Indiana Board of Directors
  - Board Chair, 2021
- Member, Fort Wayne Urban League Board of Directors
- Appointed to the Indiana University - Fort Wayne School of Nursing External Advisory Board.

Seminars

- He has presented more than 100 lectures/seminars to statewide and local audiences on various labor and employment topics.

Education

- B.S., Law and Public Policy, Indiana University, Bloomington
- J.D., Indiana University School of Law, Indianapolis

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Disclaimer

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Preface: Predictions Ahead

- **Most of what is discussed today will consist of updates in the law.**
- **The "pendulum swing" effect of a new presidential administration impacts rules, guidance, enforcement priorities we operate under today.**
- **We can give our best guess or "crystal ball" future outcomes based on what we know today.**
- **Actively monitoring the items discussed herein.**

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Equal Employment Opportunity Commission (EEOC)

What is the EEOC

- The EEOC is the sole federal agency authorized to investigate and litigate against businesses and other private sector employers for violations of federal laws prohibiting employment discrimination.
- For public sector employers, the EEOC shares jurisdiction with the Department of Justice's Civil Rights Division.
- The EEOC is responsible for investigating charges against state and local government employers before referring them to DOJ for potential litigation.

EEOC Update

- Five (5) member panel: Two (2) Republican Commissioners, one (1) Democrat Commissioner; however, there are two (2) vacancies.
- Strategic Enforcement Plan (SEP) – 2024-2028, includes:
  - Protecting workers under PDA, PWFA, and ADA, those with prior criminal and conviction records, LGBTQ workers, temporary workers, older workers, immigrant and migrant workers, and those with intellectual disabilities
  - Prioritizing equal pay, preserving access to the legal system (including retaliatory practices that could dissuade employees from exercising rights under anti-discrimination laws), preventing and remedying systemic harassment
- With a quorum, majority vote needed to modify SEP and other guidance; EEOC can resume filing suit.

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EEOC & Procedural Changes

- Jan. 14, 2026 – voted 2-1 to shift voting priorities to Chair Andrea Lucas.
- Significant shift in procedural process, allowing Chair Lucas to set the agenda and dates for public meetings and decide the issues to be voted on without a public meeting.
- In essence, this authority determines what issues will actually reach the full panel of Commissioners.

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EEOC & Harassment Guidance

- Jan. 22, 2026 – voted 2-1 to revoke "Enforcement Guidance on Harassment in the Workplace," originally approved in 2024.
- Guidance issued following the U.S. Supreme Court's 2020 decision in *Bostock v. Clayton County*.
- The Guidance provided examples of prohibited conduct based on gender identity.
- Revocation of the Guidance is the "pendulum swing" we expect.
- Employers should continue to adhere to federal employment laws which prohibit discrimination, harassment, and retaliation.

EEOC & Procedural Changes

- Jan. 23, 2026 – voted 2-1 to change its process for initiating or intervening in "almost all" litigation matters.
- Now requires Commissioner approval for most litigation – which centralizes decision making.
- General Counsel submits cases to the Commission for vote.
- General Counsel will retain delegated litigation authority in limited circumstances, including during a loss of quorum.
- Commissioners must vote within five or seven business days, depending on the type of case, to decide whether to initiate or intervene in litigation.
- Eliminates authority of field office lawyers to bring cases autonomously.

Impact of these Changes

- Last conference, we discussed a variety of Executive Orders intended to eliminate Diversity Equity and Inclusion ("DEI") policies and practices.
- The revocation of prior harassment guidance coupled with the new procedural changes, likely means strict agency alignment with current administration priorities.
- Employers may face increased exposure to discrimination claims from majority-group employees and heightened scrutiny of diversity-related policies and programs.

Practical Take Aways

- Review DEI policies/recruiting practices for legal risk.
- Apply all employee policies uniformly.
- Conduct and/or update supervisor training to ensure awareness of "majority group" discrimination as a form of unlawful discrimination – Project Firewall.
- Follow these changes closely. EEOC, including Chair Lucas, is taking to social media to discuss the agency's agenda and priorities. As of July 2025 – webpage created for employees to report DEI workplace discrimination.

Pregnant Workers Fairness Act (PWFA)

- Effective June 27, 2023.
- Purpose: Requires reasonable accommodations for "known limitations" related to pregnancy, childbirth, or related reproductive medical conditions.
- Coverage:
  - Employers: 15+ employees
- Functionally expands ADA to mandate interactive process when employee discloses a known limitation, requiring a temporary accommodation.
- Employer cannot require an employee to take leave, if another reasonable accommodation can be provided.

PWFA– Overlap with Other Laws

- Pregnancy is a temporary condition that does not rise to the level of a disability under the ADA; however, pregnancy related complications may.
- Pregnancy is also under the umbrella of sex as a protected class under Title VII via the Pregnancy Discrimination Act.
- Pregnancy may present a "serious health condition" for which the employee may be entitled to FMLA leave.

PWFA – Future Reg Changes?

- Chair Lucas has expressed opposition to certain portions of the PWFA.
- Previously stated she does not agree with the EEOC's interpretation in the Final Rule of the phrase "pregnancy, childbirth, or related medical conditions."
- "[M]enstruation, infertility, menopause, and the like are not caused or exacerbated by a particular pregnancy or childbirth – but rather the functioning, or ill-functioning, of the female worker's underlying reproductive system." Therefore, according to Chair Lucas, they are not subject to accommodation under the PWFA.
- **CAUTION**: these conditions could be protected under ADA, even if removed from the PWFA.

National Labor Relations Board (NLRB)

New NLRB Board Members/GC

- Crystal Carey was confirmed, replacing acting General Counsel, William B. Cowen, who served following President Trump's removal of GC Jennifer Abruzzo.
- Board Member nominees Scott Mayer and James Murphy were confirmed by the Senate on Dec. 18, 2025.
- Quorum to the Board is restored.
- This will enable the NLRB to return to close-to-normal operations in the coming year and further implement the Trump administration's policy priorities (pendulum swing back to employer friendly policies).

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Memorandum Rescinding Initiatives

- In early 2025, Acting General Counsel, William Cohen, issued several memorandums which rescinded dozens of former General Counsel Jennifer Abruzzo's enforcement initiatives.
- GC Memo 25-05 reversed initiatives that:
  - Expanded protected concerted activities;
  - Provided additional rights for student athletes;
  - Sought to expand use of 10(j) injunctions and eliminate stay or pay provisions; and
  - Provided restrictions of employee monitoring by employers.

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Memorandum Rescinding Initiatives, cont.'d

- NLRB's mandates on settlement agreements especially as to settlements that waive NLRA rights.
- Added restrictions on the use of non-competes.
- Reversed the *Cemex* view of failure to bargain remedies.

Memorandum GC 26-01

- Dec. 23, 2025 - Memo creates new "docketing protocol."
- Response to existing back log of cases, lack of staffing, and the recent 43-day government shutdown.
- Changes applicable to all Charges filed after October 1, 2025:
  - Within 2 weeks of the filing of the Charge, various information, including timeline of events, witnesses must be e-filed to NLRB.
  - Failure to present evidence may result in dismissal of the Charge.
  - Once that evidence is submitted and evaluated, the Region will determine if it is appropriate for assignment or dismissal.
  - Charges are not immediately assigned to Board Agent; rather it remains on "unassigned case list" until there is a Board Agent who has sufficient capacity to allow them to timely investigate the charge.
- Employers may see dismissals of Charges if there is insufficient support.

General Counsel Crystal Carey

- Declined to issue "Mandatory Submissions to Advice" memo.
- Appears to focus (at least initially) on the existing backlog, improving efficiency in case processing and enforcement actions across regions.
- Though we expect to see changes to prior Board precedent (Biden era), it may not happen as immediately as anticipated.
- No immediate announcement of policy priorities means we must monitor closely.
- Notably, GC Carey did not rescind Acting GC Cowen's 2025 Memo. It stands.
- Regions must continue to submit to headquarters cases that are normally submitted, such as cases with novel legal theories, cases with no existing Board law, or cases where the Federal Courts of Appeals are split.

States v. NLRB

- Several states (CA, NY, MA) have passed statutes to expand state law to cover areas traditionally covered by the NLRA with respect to private sector labor disputes when it is unable to (e.g., lack of quorum).
- The constant "pendulum swinging" and the prior lack of a quorum have resulted in this effort to keep employment/labor disputes moving forward.
- These efforts are not without challenge – NLRB filed suit against NY arguing their law was preempted by federal statutes.
- Outcomes of these new laws remain unclear.

U.S. Immigration Policies

- Expanded travel bans and visa pauses (effective Jan. 1, 2026).
- Eliminating national origin discrimination (EEOC) is a top priority.
  - Project Firewall focuses on preventing, investigating, and punishing unlawful bias in hiring, pay, and promotion, targeting "anti-American" practice
- Birthright Citizenship: Challenges to 2025 EO attempting to revoke birthright citizenship for children of undocumented immigrants are expected to reach the Supreme Court in spring 2026.
- Documentation/recruitment practices need to be tight. Expect heightened scrutiny.

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Employer Rights – "ICE Advice"

- ICE agents are required to identify themselves and present credentials – you may request this.
- Know the difference between an audit and a raid
  - To enter nonpublic spaces for a raid, a warrant is required
  - An audit is accompanied by notice and opportunity to respond
- Ask for the scope of the visit – audit, investigation, seeking information about certain employee(s).
- Provide access; allow inspection of I-9 forms and employment records; track and take notes of actions should those actions taken by ICE need to be challenged.
- Do not discriminate against employees who may be subject to investigations.
- Consider employee rights, such as the right to counsel.

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DOL's 2024 Overtime Pay Rule

- No changes to report.
- Legal challenges resulted in final rule being vacated or set aside by federal district court ruling on Nov. 15, 2024.
- Court restored salary level in effect prior to July 1, 2024 ($684/week or $35,568 annually).
- DOL timely filed an appeal of the ruling to the US Court of Appeals for Fifth Circuit; litigation is pending in two other federal district courts.
- The U.S. Department of Labor collected $318 million in back pay and penalties in fiscal year 2025 –33% increase from 2024.

Status of FTC Ban on Non-Competes: No Nationwide Ban

- Final rule would require all employers who have entered into contracts with employees or independent contractors that include a non-compete clause to rescind the non-compete clause by the compliance date.
- As of August 20, 2024, proposed ban on non-competes was blocked nationwide by court injunction, meaning it cannot be enforced.
- Oct. 2025 - FTC voted 3-1 to withdraw its notice of appeal in both Fifth and Eleventh Circuits; Sept. 8, 2025, the Fifth Circuit officially dismissed the FTC's appeal.
- Heightened scrutiny expected; non-competes remain of interest to FTC; maintain diligence in drafting agreements, seek legal counsel.

Changes in Indiana

Changes in Indiana Law

- **Ind. Senate Enrolled Act 475:**
  - Prohibits hospitals (including parent company of hospital, an affiliated manager of a hospital, or hospital system) from entering into non-compete agreements with physicians for any period of time.
  - Excluded from the definition of non-compete agreements are non-solicitation agreements not exceeding 1 year and NDAs protecting confidential business information or trade secrets, agreements for the bona fide sale of a business entity when the physician owns more than 50% of the entity at the time of sale.
  - Any non compete agreement entered into on or after 7/1/2025 is void and unenforceable.

Changes in Indiana Law, cont'd.

- **Ind. Senate Bill 409:**
  - One absence per calendar year for employee to attend child's education attendance conference, case conference committee meeting (e.g. IEP)
  - "Child" means biological child, adopted child, foster child, or stepchild
  - Prohibits employer from taking adverse action against employee for attending conferences noted above for the employee's child
  - Adverse action may be taken:
    - For more than one conference for the calendar year
    - Failing to give employer notice of at least 5 days
    - Absence was longer than "reasonably necessary" to travel to/from and attend

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Indiana Proposed Legislation

1. **SB 214 –** Codifies certain DWD and UI administrative rules (experience ratings, reporting, seasonal workers, hearings, and claims processing). Passed Senate; now in the House.
2. **SB 162 –** Provides certain UI technical and substantive changes: removing vacation and sick pay from "deductible income," narrowing "suitable work" to extended benefit claims, and updates UI administration. Passed Senate; now in House, referred to House "ELP Cmte."
3. **HB 1290 –** Modifies wage payment matters: updates definition of "employee", clarifies wage assignments, permits suit for improper deductions, and revises limitation periods. Introduced in House; referred to House "ELP Cmte."
4. **SB 245 – Tip pooling:** Expressly authorizes tip pooling under defined circumstances. Passed Senate; in House.
5. **HB 1054 –** Makes certain non-competes in the plumbing trade void if entered after April 1, 2026. Introduced in House; referred to House "ELP Cmte."
6. **HB 1421 – Automated decision systems:** Limits exclusive reliance on automated systems for hiring or discipline, requires disclosures, creates anti-retaliation protections, and allows private enforcement. Introduced; in House committee.
7. **HB 1404 – Workplace violence restraining orders:** Clarifies that labor injunction rules do not block restraining orders when disputes are personal between 1 or more employees and not governed by a CBA. Introduced; in House committee.
8. **SB 186 – Hoosier Family Leave Insurance Program:** Creates a state-run paid family leave wage replacement program for periods of qualified leave funded through an insurance trust fund. Introduced; in Senate Pensions and Labor.
9. **SB 288 – Organ donation leave:** Requires unpaid job-protected leave for organ donation. Introduced; in Senate committee.
10. **SB 154 – Hair discrimination (CROWN-style bill):** Prohibits race discrimination based on hair texture or protective hairstyles. Introduced; in Senate committee.

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Federal Proposed Legislation

1. **PRO Act (H.R. 20) -** Major rewrite of NLRA, expanding union rights and penalties for unfair labor practices. Introduced; committee stage.
2. **Raise the Wage Act (S.1332 / H.R. 2743) -** Phased increases to federal minimum wage and related tipped wage rules. Introduced; committee stage.
3. **More Paid Leave for More Americans Act (H.R. 3089) -** Federal grants to support state paid family leave programs and interstate coordination. Introduced; committee stage.
4. **Workforce Mobility Act (S.2031) -** Would prohibit or severely limit employee noncompete agreements nationwide. Introduced; committee stage.
5. **No Robot Bosses Act (H.R. 6371) -** Restricts employer use of automated decision tools in hiring, pay, and discipline. Introduced; committee stage.
6. **Empowering App-Based Workers Act (H.R. 6646) -** Requires transparency about algorithmic management and automated decisions for gig workers. Introduced January 2026.
7. **AI Whistleblower Protection Act (S.1792)-** Protects employees who report AI-related legal or security violations. Introduced; committee stage.

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2026 Wage Increases

- 22 States put higher wages into effect as of January 2026.
- No changes for Hoosiers.
- **Indiana Neighbors**:
  - Illinois increased from $14/hour to $15/hour in 2025 (final increase in series)
  - Michigan increases to $12.48/hour until Feb.21, 2026, then $13.73/hour (increase each year per schedule)
  - Ohio increased from $10.70/hour to $11/hour (adjusted for inflation)

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AI Hiring, Wages and Privacy

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- Indiana
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Licensures

- Licensed by the National Basketball Players Association (NBPA) as a player representative/agent.
- Licensed by the Womens National Basketball Players Association (WNBPA) as a player representative/agent.
- NCAA Certified Agent
- Licensed by the International Basketball Federation (FIBA) as a player representative / agent.
- NCAA Registered NIL Agent

Education

- B.A., Psychology, Emory University, Atlanta
- J.D., Loyola University College of Law, New Orleans

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Practice Areas:

- Employment Law and Labor Relations, Sports Law, Cybersecurity & Privacy, Litigation, and Worker's Compensation

James O'Connor's employment law practice involves consulting with clients on compliance matters and advocating on behalf of clients in litigation matters. He has extensive experience with asserting and defending insurance-related claims and coached clients through cybersecurity/data breach events. In the Name Image and Likeness space, he has documented marketing agreements for Student Athletes and drafted NIL policies for universities. He has been a registered civil mediator for more than 13 years and has significant experience with negotiations of all kinds.

Professional Honors

- Selected for inclusion since 2021 in the *Best Lawyers in America*® publications for labor law-management and worker's compensation law- employers.
- Selected for inclusion in the *Indiana Super Lawyers*® publication (2018).
- Recognized as a "Rising Star" by the *Indiana Super Lawyers*® publication (2011, 2014, 2015).
- AV® Preeminent* rated attorney based on Martindale-Hubbell's peer review ratings since 2016.
- Selected as a "Future 40 Under 40" award recipient from *Greater Fort Wayne Business Weekly*.

Professional and Community Involvement

- Current or former member of the following organizations:
  - Allen County Judicial Nominating Commission,
  - Benjamin Harrison chapter of the American Inns of Court,
  - Allen County Bar Association,
  - Indiana State Bar Association,
  - Defense Research Institute.
- Member, Purdue Fort Wayne's Mastodons Athletics Advisory Board
- Member, Purdue Fort Wayne Community Engagement Board
- Director, Northeast Indiana Base Community Council Board
- Member, Mad Anthony's Children's Foundation

Seminars

- Presents at local, statewide and national seminars on topics, including:
  - Employment law compliance and policies,
  - Cybersecurity/Data Breach Response,
  - College Student Athlete's Name, Image and Likeness,
  - Worker's compensation, and
  - Alternative dispute resolution.

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AI in Hiring

- Currently, no federal statute exists that specifically regulates the private sector.
- Federal agency action:
  - EEOC: AI and Algorithmic Fairness Initiative - guidance issued to raise awareness and prevent discrimination in use for hiring practices
  - DOL: federal contractors must ensure that AI hiring tools comply with existing non-discrimination and EEO laws regarding bias.
  - DOJ: guidance issued restating potential civil rights violations for discriminatory outcomes
- Indiana & Ohio: no laws in effect
- Illinois: passed in 2024 and took effect January 1, 2026,
  - Illinois Human Rights Act amended to prohibit employers from using AI in a way that has a discriminatory effect in recruitment, hiring, promotion, or other employment decisions
  - Prohibits substitution of zip codes as a proxy for protected class status
  - Requires employers to provide notice to applicants/employees when AI is used in these processes.

Federal legislation coming?

- "No Robot Bosses Act"
- Bipartisan support: Dem. Bonamici (OR) and Deluzio (PA); Rep. Moylan (Guam)
- Goal: ER prohibited from relying exclusively on automated decision systems to make employment-related decisions, including hire & fire
- 3 main components:
  - Human Oversight
  - Discrimination & Disparate Impact Liability
  - Transparency
- Enforcement through DOL
  - Private right of action by individuals

Best Practices for Using AI in Hiring Process

- Stated goal: transparency, notice and measurable fairness
- Foundational tenant: protect applicant and employee data
- Tip 1: Ensure Tools are Valid, Job-related & Defensible
  - Conduct formal validation studies tied to essential job functions
  - Document vendor due diligence, data sources, and testing methodology
  - Comply with recordkeeping rules
- Tip 2: engage in Proactive Risk Mitigation
  - Inventory all AI tools and determine which laws apply'
  - Implement periodic adverse-impact testing and bias auditing
  - Establish cross-functional governance to oversee AI-driven decisions

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Wages

- Agency Action - DOL Opinion Letters
- Cases – SCOTUS / 7th Circuit
- Legislation – Indiana, Illinois & Ohio

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Department of Labor – Opinion Letters
(Wage and Hour Division)

- What are they?
  - Written response from US DOL to a specific employer question with a specific fact pattern
  - Usually apply to FLSA
- Why are they important?
  - "sub-regulatory guidance"
    - Not a law passed by Congress
    - No input / feedback from constituents through 'notice and comment' rulemaking period
  - "Good faith" defense – acting in conformity to written response provides immunity for FLSA violations
    - Back wages / liquidated damages / attorneys fees / collective actions
  - Persuasive authority
    - Agency expertise / thoroughness of reasoning / consistency over time
  - Enforcement Priority
    - Independent Contractor classification / salary basis test issues / OT exemptions / tip credit rules
- Risks?
  - Not a law… can change with federal administrations

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FLSA "Exempt vs. Non-Exempt" Classification
Jan 5, 2026; FLSA 2026-1

- Learned Professional Exemption:
  - No OT for EE whose primary duty requires advanced knowledge in field of science or learning customarily acquired through prolonged, specialized intellectual instruction and paid salary at or above the threshold
- LCSW relieved of supervisory responsibilities following corporate restructuring was reclassified from 'exempt' to 'non-exempt'
  - Likely still satisfying the 'duties' requirements of FLSA exemption
- Rationale: 'supervision' is not required for this exemption
  - EE still had to perform 'work requiring advanced knowledge'
    - Examples: conducting clinical assessments, psychosocial evaluations, treatment planning and documentation

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Bonus Payments in Regular Rate calculation

Jan 5, 2026; FLSA 2026-2

- Incentive bonuses awarded by employer based on predetermined, detailed criteria established in the employer's "Safety, Job Duties, and Performance" bonus plan are nondiscretionary.
  - Because bonus payments are non-discretionary, include with EE regular rate of pay to calculate OT
- These incentive bonuses must be included when calculating employees' regular rate of pay for overtime purposes.
- Rationale: bonus plan expressly states criteria that automatically trigger eligibility for the bonus and the bonus amount.
  - ER does not exercise sole discretion whether to award the bonus or the amount.
- To be discretionary, a bonus must not be awarded based on a "prior contract, agreement, or promises."

Union Negotiated "Roll Call" Time

Jan 5, 2026; FLSA 2026-3

- Employer may not exclude a union-negotiated, mandatory 15-minute pre-shift roll call for emergency dispatch employees from compensable "hours worked" when determining overtime due
  - Note: EE had to attend the roll call
- Note: under certain circumstances, ER may minimize overtime exposure by structuring CBA to take advantage of partial overtime exemptions under FLSA section 7(b)(1) or 7(b)(2).
  - These partial exemptions allow for payment of OT only for those hours that over 12 in a workday or 56 in a workweek

Minimum Wage Rate for Sec 7(i) Exemption

Jan 5, 2026; FLSA 2026-4

- Eligibility: No OT to certain retail or service employees, if: (1) their regular rate exceeds 1.5x the minimum wage; and (2) more 50% of compensation over a representative period is from commissions.
  - Sales folks for personal or household use items
  - Ex: cars; furniture; appliances; jewelry; travel agents; department store
  - "representative period" = not less than one month
- Federal minimum wage: $7.25/hour (OT rate: $10.875 / hour)
- Note: federal rate used pay standard – even if state has higher minimum wage

Minimum Wage Updates

- Notes: applies to workers ages 18+ and not tipped as compensation
  - Tipped workers rate: $2.13/hour (same since 1991)
- Federal Rate: $7.25/hour
  - Last increase: July 24, 2009
  - Longest elapsed time without increase since established in 1938
- In 2026 – 23 states and 71 cities / counties lift minimum wage laws
- Indiana: $7.25/hour
- Kentucky: $7.25/hour
- Michigan: $13.73/hour (effective 1/1/26)
- Illinois: $15/hour
- Ohio: $11/hour (effective 1/1/26)

SCOTUS: *EMD Sales, Inc. vs. Carrera*, 145 S. Ct. 34, 2025 (01/15/2025)

- Only SCOTUS decision re FLSA in last session
- FLSA exemption: "outside sales"
  - EE primary duty is making sales and who are customarily and regularly engaged away from the employer's place of business when performing that duty
- Issue: Established the evidentiary burden on employers when asserting a statutory exemption as a defense to an OT claim
- Holding: ER need to prove application of FLSA Exemption by a 'preponderance of the evidence' standard of proof
  - ER not required to meet heightened 'clear and convincing' standard

Evidence: *Osborn v. JAB Management Serv., Inc., 126 F.4th 1250, 7th Cir.* (Jan. 22, 2025)

- EE was a technical support specialist. She brought an FLSA claim for alleged substantial work without overtime without pay.
- Work included vague assertions of working weekends and late hours taking calls, answering emails, and traveling to client sites outside of business hours patching client servers.
- She provided no coherent testimony about how many hours she worked most weeks, offered only rough estimates, and failed to show a consistent pattern of overtime hours.
- Her evidence of the amount of uncompensated overtime she worked was vague, conclusory, inconsistent, or "flatly refuted."
- 7th Circuit clarified that while a lower "just and reasonable inference" standard may apply to show the extent and amount of hours worked when time records are inaccurate or missing, that standard applies only to *damages* — and only after the plaintiff first establishes that she actually worked overtime.

  Result: Summary Judgment for Employer: vague and conclusory evidence did not raise genuine issue of material fact that she worked uncompensated overtime; and failure to show amount and extent of damages by a 'just and reasonable inference' presents no reason to preclude summary judgment in favor of employer.

FLSA Exemption: Highly Compensated Employee *Gilchrist vs. Schlumberger Tech Corp.*, 5th Cir (July 2025)

- Employers need not prove that the employees performed work related to the general business operations *and* that they exercised independent discretion and judgment with respect to matters of significance.
- Employers need only prove the employees performed one of these duties.
  - a simpler "duties" test to satisfy
- To qualify under the HCE exemption (29 C.F.R. § 541.601), an employee must:
  1. Earn a total annual salary above a regulatory threshold specified in the regulation (currently, $107,432);
  2. Customarily and regularly perform any one or more of the exempt duties of an executive, administrative, or professional employee; and
  3. Have within his or her primary duties the performance of office or non-manual work.
- To apply the standard "administrative" exemption, EE's *primary duty* must involve office or nonmanual work directly related to the management or general business operations of the employer *and* the employee must exercise discretion and independent judgment with respect to matters of significance

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Federal Legislation: Portal To Portal Act (PPA)

- PPA amends FLSA to make time spent traveling to and from principal work activities noncompensable.
  - Not all states follow PPA
  - Indiana does follow PPA
  - Pending now: 7th Cir asked IL Supreme Court to resolve whether Illinois Minimum Wage Law incorporates the PPA
- Certain "preliminary or postliminary" activities are noncompensable unless those activities are "integral and indispensable" to EE's primary work duties.
  - "integral and indispensable" activities is a fact sensitive inquiry

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Federal Legislation: OBBBA "no tax on OT"

- Effective 7/4/25 through 2028
- Overtime. limited deduction for overtime pay premiums earned for hours worked beyond 40 hours in a workweek.
  - Premium pay = amount paid in excess of an employee's regular rate of pay.
  - Example, if an employee's regular rate is $15 per hour, the employee's overtime rate (time and one-half) is $22.50 per hour.
  - Only the $7.50 overtime premium for that hour may be deducted. The annual deduction is capped at $12,500 (or $25,000, in the case of a married employee filing a joint return).
- Only overtime pay required by the FLSA is eligible for the deduction.
- "Daily overtime" premiums required by state law, or premium pay pursuant to a collective bargaining agreement, for example, are not deductible (except to the extent any such amounts would also have been payable under the FLSA)

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Federal Legislation: OBBBA "no tax on tips"

- Separate deduction for tipped workers, allowing them to deduct up to $25,000 of qualified tips earned.
- To be a "qualified" tip, the tip must be paid voluntarily by the customer or client, not subject to negotiation.
- Earnings from mandatory service charges assessed automatically to customers are not deductible.
- Tips received under tip-sharing arrangements count as qualified tips.

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Federal Legislation: OBBBA Employer Impact

- No tax form changes for 2025
- Beginning with the 2026 tax year, IRS will begin enforcing the requirement that employers report qualified tips and qualified overtime on Form W-2.
- This means additional reporting obligations and adjustments to payroll systems.
- For example, employers will need to distinguish FLSA overtime premium from other overtime earnings, which are not eligible for the tax deduction.
- The legislation also presents opportunities to reclassify overtime-exempt employees so they can benefit from the temporary partial tax relief.

Indiana Legislation: Earned Wage Access

- Effective January 1, 2026
- Earned Wage Access = short-term access to wages already earned before payday.
- Providers that let employees access their earned but unpaid wages before scheduled payday must obtain a license from the Indiana Department of Financial Institutions and comply with licensing, disclosure, reporting, record-keeping, and consumer-protection requirements;
- When in compliance with the Act, these funds are not treated as loans or violations of wage deduction laws

Earned Wage Access (con't)

- If ER chooses to participate, ER partners with a compliant "EWA" provider.
  - Provider advances $$$ to EE
  - ER confirms hours worked and process repayment via payroll
- Payroll still must track accrued wages in near real time.
- ER must reconcile at the normal payday.
- Any deductions or offsets must comply with IN wage deduction laws

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Earned Wage Access (con't)

Earned Wage Access -
early payment of earned wages

- Employee accesses wages already earned
- Typically lower or flat fees
- Regulated as a financial service, not a loan (if compliant)
- No "interest rate" in the traditional sense
- Usually repaid automatically via payroll

Traditional Payday Loan –
credit extended in advance of earning wages

- Employee borrows against future wages not yet earned
- Often high interest and finance charges
- Regulated as a consumer loan
- Subject to lending laws and APR disclosures
- Repaid from next paycheck, often via ACH withdrawal
- Designed as short-term credit

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Illinois Legislation: NICU Leave

- Effective 6/1/2026; Enacted 8/15/25
- "Family Neonatal Intensive Care Leave Act"
- 16-50 EEs: up to 10 days of unpaid neonatal intensive care leave while any child of the employee is a patient in the NIC Unit.
- 51+ EEs: up to 20 days of unpaid neonatal intensive care leave while any child of the employee is a patient in the NIC Unit.
- Upon conclusion of leave, EE will be reinstated to former position or substantially equivalent one with no loss of benefits held or accrued prior to taking leave.

Ohio Legislation: Pay Stub Protection Act (HB 106)

- Took effect April 9, 2025
- requires Ohio employers to provide a detailed, written or electronic earnings and deductions statement to employees at each pay period on regular paydays.
- The statement must provide details of the amount of each addition or deduction from wages paid during the pay period and the basis for the addition/deduction, among other information.

Privacy in the Workplace

- Workplace Recording Policy – pro Employer NLRB ruling
- Indiana Consumer Data Privacy Act

Employer Policy: No recording in the workplace

- Policy: no audio or video recordings in the workplace.
  - Employer rationale: confidentiality & protection of trade secrets
- Biden administration: NLRB determined policy unlawful
  - *Stericycle, Inc.* – 2023 decision
    - Overturned *Boeing Co.* and *LA Specialty Produce Co.*
  - New test: presumption that employer policy limiting EE activity in the workplace have unlawful 'reasonable tendency to chill' exercise of protected rights unless ER shows 'legitimate and substantial business interest' that cannot be addressed through more narrowly tailored rules.

United Parcel Service vs. James Cotter
NLRB:12-CA-340701 (Jan 13, 2026)

- NLRB ALJ dismisses ULP
- GC did not meet initial burden to show language of ER policy could have been reasonably interpreted by EEs to prohibit them from engaging in Sec. 7 speech
- Policy cited several business-related reasons for limiting recordings.
  - "seeks to encourage and foster spontaneous and honest dialogue, practical problem-solving and direct and ethical dealings"
  - Eliminating the chilling effect on free exchange of information created when a person is concerned someone is recording, protecting the company's partners and customer proprietary information and trade secrets

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UPS / Cotter, con't

- Supporting ALJ decision that GC failed to first demonstrate EE reasonable interpretation:
- ALJ differentiated the "No Recording Devices" policy from NLRB decisions that found broad and sweeping recording policies unlawful under the NLRA.
- Those unlawful policies were unlimited in time and location and subjected violators to discipline and discharge or involved situations where policies were applied to directly prevent employees from engaging in NLRA protected activity.
- Employer also included carve out language: "this policy does not apply to any recording activity protected under the NLRA"
- Policy permitted recording in 'non-work areas' and during 'non-work time'
  - Also did not ban outright Ees from having recording devices while on ER property
  - Requested that individuals consider and respect potential targets of recordings

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UPS / Cotter: current procedural status

- Case still subject to full NLRB review
  - Reversal is possible
- Still good for guidance on compliance with *Stericycle* standard

Indiana Consumer Data Protection Act (INCDPA)
(Effective 01/01/2026; Enacted 2023)

- Applies to for-profit entities conducting business in Indiana or offer products / services targeted to Indiana residents if they meet one of the following thresholds in prior calendar year:
  - Controlled or processed personal data of at least 100k Hoosiers; or
  - Controlled or processed personal data of at least 25k Hoosiers and derived 50%+ gross revenue from sale of personal data.
- Exemptions: government entities, non-profits, HIPAA covered entities and business associates, public and private higher education institutions, any entity regulated under Gramm-Leach-Bliley Act (financial and insurance institutions), licensed riverboats using facial recognition approved by the Indiana Gaming Commission.

INCDPA – Consumer Rights Conferred

- Patterned after the Virginia data privacy law
- Allows 'Controllers' to respond to consumer access request with either full copy of the personal data sold or a 'representative summary'.
  - Response due within 45 days (extensions available)
- Consumer Rights:
  - Right to Access – consumer can confirm whether controller possess personal data
  - Right to Correction – consumer can request correction to inaccurate personal data
  - Right to Deletion – consumer may request deletion of personal data collected or maintained by controller
  - Right to Data Portability – consumer can obtain copy of personal data in readily usable format
  - Right to Opt Out – consumer may opt out of processing their personal data for purposes of targeting advertising, sale of personal data or profiling that produces legal or similarly significant effects.

INCDPA - Enforcement

- Exclusive enforcement by Indiana Attorney General Office
- No private rights of action
- If reported violation is not cured within the allotted time, AG may seek civil penalties up to $7500 per violation and injunctive relief to ensure compliance.
- No 'one stop shop' to submit one request and delete all data wherever found
  - A new request must be submitted to each controller or processor of data
- "Personal Data" does not include any information that is publicly available

INCDPA – Best Practice Tips

- Automate Consumer Rights Requests
- Maintain compliant Data Inventory
- Simplify Consent and Opt-Out Management
- Third Party Oversight & AI powered Risk Management

REAL LIFE SCENARIOS

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Anthony M. Stites, J.D.

PARTNER

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Practice Areas:

- Labor and Employment Law, Alternative Dispute Resolution, and Litigation

Attorney Anthony Stites represents business entities in all facets of their employment matters. On a daily basis, he works with human resource personnel and in-house counsel to prevent or solve problems in the employment arena. Tony assists all sizes of employers ranging from very small businesses through large publicly traded corporations.

With an emphasis in the transportation and manufacturing sectors, Tony has presented hundreds of supervisor training sessions throughout the U.S. He has extensive experience in strike activity and trial experience defending employers in all areas of employment matters. Tony also serves as a mediator for alternate dispute resolution.

Bar and Court Admissions:

- Indiana
- Ohio
- U.S. District Courts for the Northern and Southern Districts of Indiana
- U.S. District Court for the Northern District of Ohio
- U.S. District Court for the Southern District of Ohio
- U.S. District Court for the Eastern District of Michigan
- U.S. Court of Appeals for the Fourth and Seventh Circuits

Selected Representative Matters

- Representing a regional corporation in the termination of their president.
- Taking an attorney fee award against the National Labor Relations Board (NLRB).
- Defending the drug testing policy of a company through a federal jury trial.
- Representing numerous manufacturing facilities during downsizing negotiations with unions.
- Handled numerous union election campaigns with clients in Ohio, Indiana, Illinois, Minnesota, and Michigan.
- Handled decertification petitions and decertification elections in Ohio and Indiana

Professional Honors

- Recipient of the Niemann Citation for Excellence & Professional from the Allen County Bar Association in 2023.
- AV® Preeminent™ rated attorney based on Martindale-Hubbell's peer review ratings.
- Selected for inclusion in *Super Lawyers in America*® from 2005-2007 and since 2014.
- Selected for inclusion since 2016 in the *Best Lawyers*® *in America* publication in the areas of:
  - Employment Law- Management,
  - Labor Law- Management,
  - Labor Law- Union, and
  - Litigation - Labor and Employment.

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Anthony M. Stites, J.D.

CONTINUED

- Recognized by *Best Lawyers in America*® as "Lawyer of the Year," Fort Wayne in:
  - Employment Law - Management, 2017, 2018, 2024 and 2026
  - Litigation- Labor and Employment, 2020, 2023 and 2025
  - Labor Law- Management, 2023 and 2025
- Selected a Paul Harris Fellow for his lifetime contributions to the Fort Wayne not-for-profit sector.
- Selected as the Notre Dame Club of Fort Wayne's 2015 "Person of the Year".

Seminars

- A frequent speaker at local, state and national conferences and seminars, with over 250 speaking engagements throughout his career.

Professional and Community Involvement

- Member, Allen County (Indiana) Bar Association
- Member, Indiana State Bar Association
  - Past chair, Indiana Bar Association's Labor, Employment & Benefit Law Section
- Member, Ohio Bar Association
- Fellow, Indiana Bar Foundation
- Member, Indiana Bar Foundation Board of Directors
- Member, Fort Wayne Mad Anthonys Inc.
  - President, 2025
  - Executive Committee Member, 2021- present

Education

- B.B.A, Finance, University of Toledo
- J.D., University of Notre Dame

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PARTNER

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Practice Areas:

- Labor Relations and Employment Law, Health Care Law, Litigation and Biotechnology

H. Joseph Cohen works with clients in the areas of labor and employment matters and litigation including insurance defense. Concentrating on health care providers, his practice works with hospitals, physician offices, dentists, and doctors on their employment law needs. He has extensive experience in defending all types of employment claims, including those based on race, sex, national origin, religion, and sexual harassment. His experience also includes handling insurance defense claims.

Bar and Court Admissions:

- Indiana state courts
- U.S. Court of Appeals for the Sixth Circuit
- U.S. Court of Appeals for the Seventh Circuit
- U.S. District Courts for the Northern and Southern Districts of Indiana

Professional Honors

- AV Preeminent™ rated attorney by Martindale-Hubbell peer review ratings.
- Listed since 2021 in the *Best Lawyers® in America* publications in the areas of labor law- management, employment law- management and health care law.
- Listed since 2024 in the *Indiana Super Lawyers* publications in the area of employment and labor law.
- Recipient of the 2021 Monsignor Thiele Award for his work with the United Way of Allen County.
- Recipient of the *Greater Fort Wayne Business Weekly* "40 Under 40" award.

Professional and Community Involvement

- Allen County Bar
- Indiana State Bar Association
- Former Member, United Way of Allen County Board of Directors
- Member, Brightpoint Board of Directors
- Member, Hope's Harbor House Board of Directors
  - President, 2022; Vice-president, 2021
- Member, Easterseals Arc of Northeast Indiana Board of Directors
  - Board Chair, 2021
- Member, Fort Wayne Urban League Board of Directors
- Appointed to the Indiana University - Fort Wayne School of Nursing External Advisory Board.

Seminars

- He has presented more than 100 lectures/seminars to statewide and local audiences on various labor and employment topics.

Education

- B.S., Law and Public Policy, Indiana University, Bloomington
- J.D., Indiana University School of Law, Indianapolis

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Sarah L. Schreiber, J.D.

PARTNER

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Practice Areas:

- Labor Relations and Employment Law
- Mergers & Acquisitions (Labor and Employment)
- Complex Civil Litigation
- Alternative Dispute Resolution (Registered Civil Mediator)

Bar and Court Admissions:

- Indiana
- U.S. District Courts for the Northern and Southern Districts of Indiana
- U.S. Court of Appeals for the 7th Circuit
- U.S. Supreme Court

Sarah Schreiber represents clients in the areas of labor and employment. On a daily basis, Sarah works with companies of all sizes, from small employers to publicly traded companies. She engages directly with company leadership and human resource personnel to prevent and solve employment-related problems. Sarah prides herself on spending much of her time on client counseling.

From her nearly twelve years representing employers, Sarah understands that two companies coming together can be complex. There are several factors related to L&E to consider before, during, and after the M&A process; Sarah counsels at every step. Sarah also routinely conducts labor and employment diligence on deals of all sizes and prepares employment agreements, consulting and independent contractor agreements, restrictive covenant agreements and all other employment-based documents.

Sarah also defends employers against claims involving unfair competition, employment contracts, Title VII, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA), the Indiana Wage Payment and Claims Statutes, and other federal, state and local laws. She regularly represents companies before the Equal Employment Opportunity Commission (EEOC), National Labor Relations Board (NLRB), other state and federal agencies and state and federal courts.

Professional Honors

- Selected for inclusion in the 2025 & 2026 *Best Lawyers in America*® publications in the area of Litigation- Labor and Employment
- Selected "Lawyer of the Year", Fort Wayne in the area of Employment Law-Individuals by Best Lawyers in America in 2026.
- Selected since 2018 as a "Rising Star" by the *Indiana Super Lawyers*© publication.
- Winner of the 2022 *Fort Wayne Newspapers* Readers' Choice Award for Best Attorney-General Practice
- Registered Civil Mediator

Professional and Community Involvement

- Member, Erin's House for Grieving Children Board of Directors
- Member, Allen County Bar Association
  - Past President, Board of Director
- American Inns of Court, Benjamin Harrison Chapter
  - Past President
- Former Member, Downtown Improvement District Board of Directors

Education

- B.A., *magna cum laude,* University of Illinois at Urbana- Champaign.
- J.D., *magna cum laude,* Valparaiso University School of Law

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Disclaimer

- The information and procedures set forth in this manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, any forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

- Barrett McNagny LLP and contributing authors hereby disclaim any and all responsibility or liability arising from or claimed to have arisen from reliance upon the procedures and information, or utilization of same, set forth in this manual.

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Scenario 1

- Human Resources receives a complaint from a female employee that a male co-worker has been harassing her. The Human Resources team immediately begins an investigation into the allegations of sexual harassment. The investigation begins by interviewing the female employee who made the complaint. During the interview of the female employee, she provides allegations of this male employee following her to different workplaces, waiting in the parking lot for her, making suggestive remarks concerning his feelings towards her, as well as disclosing to patients where the female employee resides. In addition, the female employee provides text messages allegedly from the male employee where it would appear that the male is potentially stalking the female employee and using marijuana. The female employee also provides the names of three witnesses to the complained of behavior.

- What is the next step for this Human Resource Manager?

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- The Human Resource Manager interviews the three witnesses to the alleged behavior by the male employee. All three individuals seem to confirm the peculiar behavior by the male employee but all three admit that none of them have seen much of the behavior in person as they have been advised primarily from the complainant.
- The Human Resource representative interviews the supervisor of the employee who is making the complaint in regard to any knowledge she may have.

- The Manager indicates that she had received complaints from both the male and female employee in question but deemed them to be "spats."
- What happens? What should the Human Resource team do next?

- The Human Resource team interviews the male employee who emphatically denies ever harassing or stalking the employee. In fact, the male employee alleges that he considers the female employee a close friend and is very surprised in regard to these allegations. The Human Resource teams requests copies of text messages between the male and female employee which the male employee provides. The text messages from the male employee provided a quite different story in regard to the text conversations between the male and the female employee.

- What should the Human Resource team do next?

- The Human Resource team circles back and interviews the three witnesses again to determine whether they were aware of the behaviors that seemed to be described in the unedited text messages between both the male and the female employees. Since the messages seem to indicate that the female employee was at least a willing participant, the male employee at this time would avoid any consequences for his behavior.

- What happens to the female complainant who edited text messages and provided them as evidence of harassment?

- During the investigation, it became apparent that the male employee was using marijuana prior to appointments with patients. In the Human Resource investigation, the male employee admitted to this behavior.

- What should the Human Resource team do next?

Scenario 2

- In October of 2025, the Human Resource Manager receives a complaint from an employee regarding what the employee claims was inappropriate treatment by a co-worker during their shift. Specifically, the complaining employee indicated that she was yelled at inappropriately by this co-worker. Upon receiving the complaint, the Human Resource representative contacted the other co-worker in regard to the allegations which described a mutual disagreement between the parties. As a result of the conflicting stories, Human Resources reviewed surveillance footage which revealed a verbal altercation between both employees in front of patients/residents. This behavior is in direct violation to a policy prohibiting employee disagreements/arguments in front of residents.

- What should Human Resources do?

- After issuing final warnings to both individual employees, the minority employee filed a Charge of Discrimination with the Fort Wayne Metropolitan Human Relations Commission claiming that she had been discriminated against when she received this final warning based upon her race as she alleged that other employees similarly situated were not given final warnings for this behavior.
- What should Human Resources do?

- For the next three months, this employee remained employed with the employer. Subsequently, a student intern complained to Human Resources that this same employee made inappropriate comments to her in regard to her national origin.
- What should Human Resources do?

- After a complete discussion with the student intern about what was specifically said, Human Resources also interviewed several witnesses to the conversation as well as the employee who was accused of making the comments. All of the testimony was consistent in that the employee admitted to making the comments but did not feel they were inappropriate.

- What should Human Resources do with the repeated violation?

Scenario 3

- Two employees are having a consensual relationship; however, one employee is the supervisor of the other employee. Is this a problem?

- The subordinate goes to Human Resources and files a complaint against the Supervisor for sexual harassment at which time Human Resources begins an investigation by talking to the subordinate regarding the basis of the claims for sexual harassment. The subordinate, a male, claims he has tried to end their relationship, but the Supervisor, female, has refused and in fact threatened to report him to Human Resources for sexual harassment.

- What should Human Resources do next?

Scenario 4

- Employer has three employees with intermittent FMLA for migraines. One of those employees is considering dropping from four days per week to three days per week. Would this change in schedule decrease the amount of FMLA days an employee would be entitled to?

- The employee who requested the change has currently taken 38 days of FMLA in the last 12 months. The employer uses a rolling 12 month period to determine the amount of FMLA time available for its employees. How does the employer transition the employee from being allowed 48 days to 36 days should she drop her schedule to work three days a week?

Scenario 5

- A Plant Manager terminates a new employee for poor performance. The Plant Manager does not discuss the termination with Human Resources prior to terminating this new employee. After the termination, the former employee reaches out to Human Resources regarding the safety issues he has observed and concerns he has for his former co-workers at the facility. The former employee also indicates that the Plant Manager intentionally excluded the former employee from projects and disciplined the employee for bringing up safety concerns.

- What should Human Resources do next?

Scenario 6

- An employee suffered a heart attack while performing routine assembly-line work. They were hospitalized and released soon thereafter. It was reported that the employee's heart attack may have been caused by or related to alcoholism and/or alcohol withdrawal. The employee was certified for and exhausted FMLA and all available paid time off.
- Upon exhaustion of leave, the employee was released to return to work by his specialist without restrictions, but instructed to follow-up with their primary care provider in two weeks. The company returned the employee to work. The PCP then found the employee was indeed restricted from performing strenuous physical labor and operating powered equipment.
- What is the best approach to addressing what *appears* to be a contradiction in the medical opinions and determining whether or not the employee can work with or without any reasonable accommodation(s)?

Scenario 7

- Employee begins leave of absence as planned for the birth of her baby. Employee exhausts FMLA and all available paid time off. Despite employee having anticipated returning on her originally scheduled return to work date, employee informs company a few days before her anticipated return to work that she cannot return. She cites post-partum anxiety as the reason she is unable to return. She also requests the ability to move from full-time work to part-time work whenever she is able to return.

Scenario 8

- Employee submits complaint for sexual harassment, alleging a co-worker has been making vulgar comments and telling sexist jokes. She also alleges he has brushed up against her and placed his hands on her shoulders. She admits this conduct has been ongoing for some time, and this is the first time she is complaining about it.
- Following receipt of the complaint, you begin your investigation. You interview the accused, and he denies all allegations. You then interview those the complaining employee suggested may have overheard the comments or witnessed the touching. Two of the three witnesses support her account, while one refuses to cooperate in the investigation. And, one of the witnesses says not only did he see the conduct, but he also reported it to the department supervisor three months ago.

Scenario 9

- An payroll specialist, who was ineligible for FMLA and STD, and had already exhausted all available paid time off, requested a leave of absence for six (6) weeks for anxiety/treatment related thereto. Company determined it could reasonably accommodate the requested 6-week leave.
- At the conclusion of the 6-week leave, the employee was prescribed in-office, ongoing counseling three times per week for three months. It was also anonymously reported near the end of his leave, that the employee was seen bartending at a local restaurant. Finally, the employee requested the ability to work remotely, citing the need for coping mechanisms such as use of white noise, ability to take breaks for brief journaling, and to have their pet present while working.
- What do you do?
- What about providing a private office to the employee?

Scenario 10

- Employee is constantly posting politically charged comments on Facebook. Some of your employees "like" the comments on social media, while others report the comments make them uncomfortable. What do you do?
- Assume you chose to do nothing when the comments were politically charged but relatively harmless. The comments escalate and begin to denigrate members of a certain religion. Does this change your analysis and, if so, what do you do?

EMPLOYEE BENEFITS UPDATE

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Larry W. Rudawsky, J.D.

SENIOR COUNSEL

Direct: 260.423.8883
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Bar and Court Admissions:

- Only in Ohio
- U.S. Tax Court

Practice Areas:

- Employee Benefits exclusively in the areas federal tax law and federal benefits law, including ERISA

Larry W. Rudawsky has over thirty years of experience in the area of employee benefits and has extensive knowledge in the areas of reviewing, developing and implementing defined benefit plans, defined contribution plans, non-qualified deferred compensation plans, employer-sponsored IRA plans and managed IRAs. Larry has overseen regulatory compliance for qualified, nonqualified, and VEBA plans and he has drafted plan documents for Taft-Hartley, 401(a), 401(k), 403(b), 457 and 409A plans. He counsels clients on employee benefit issues in mergers and acquisitions, on equity incentive compensation, and on the design and operation of Employee Stock Ownership Plans (ESOPs).

Prior to joining the firm, he was an attorney with a firm in New York, served as the Vice President and Retirement Services Manager for a multi-state trust company and was the Senior Retirement Plan Administrator for a 150-year-old financial institution in Pennsylvania.

Education

- Bachelor's Degree, Kent State University
- Graduate, American Bankers Association Stonier Graduate School of Banking.
- J.D., Case Western Reserve University
  - Volunteer, National Alumni Association

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Practice Areas:

- Mergers & Acquisitions; Corporate & Business Law

John Frandsen works with our transaction group which serves business clients of all sizes from sole proprietorships to Fortune 500 companies. The group provides assistance with entity selection for new businesses, the drafting of operating agreements, bylaws and shareholder agreements, and the sale and purchase of businesses, including the due diligence process and the enforceability of non-competition agreements in connection with the sale of a business.

Bar and Court Admissions:

- Indiana

Professional and Community Involvement

- Member, Allen County Bar Association
- Member, Indiana State Bar Association

Education

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Agenda:

- ***Loper Bright***
- **Voluntary Benefits**
- **Panel Discussion**

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Loper Bright

Background: Chevron Deference

- In **Chevron U.S.A., Inc. v. NRDC (1984)**, the Supreme Court established **Chevron deference**
- Courts were required to defer to reasonable agency interpretations of **ambiguous statutes**

Loper Bright Enterprises v. Raimondo (2024)

- **Decided June 28, 2024**
- **Chevron deference definitively overruled**
- Courts **may not defer** to agency interpretations solely because a statute is ambiguous
- Courts must exercise **independent judgment** on questions of law
- Agency expertise may still be considered **persuasive**, not controlling

Factual Background

- Case involved **Atlantic herring fishing companies**
- Challenged an **NMFS rule** requiring industry-funded on-board observers
- Estimated cost: **up to $710 per day**
- Reduced annual vessel owner returns by **up to 20%**
- **D.C. Circuit and First Circuit** upheld the rule using Chevron deference

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The Supreme Court's Holding

- Reaffirmed that it is the judiciary's duty to **"say what the law is"**
- Chief Justice Roberts: **"Chevron is overruled"**
- The **Administrative Procedure Act (APA)** requires courts to:
  - Decide **all relevant questions of law**
  - Interpret statutory and constitutional provisions independently
- Courts cannot abandon their own legal judgment in favor of agency interpretations

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New Framework for Judicial Review

- Courts must independently determine whether agencies acted within statutory authority
- Agency interpretations may still inform courts as **persuasive guidance**
- When statutes delegate discretion:
  - Courts must define the **boundaries of delegated authority**
  - Ensure agencies engage in **reasoned decision making**
  - Enforce congressional intent within constitutional limits

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Loper Bright – Impact on Employee Benefits Law

Immediate and far-reaching effects in a highly regulated area

Courts applying heightened skepticism to agency authority

Increased challenges to long-standing benefits regulations

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Early Judicial Applications

State of Texas v. U.S. Dept. of Labor

- Texas district court enjoined DOL's 2024 overtime rule (EAP exemptions)
- Court explicitly followed *Loper Bright* and APA principles

Texas Medical Association v. HHS (5th Cir.)

- Surprise billing regulations invalidated
- Decision based on traditional statutory interpretation, not deference

Regulatory Areas Most Affected

- Mental health parity regulations
- Surprise billing rules
- Retirement plan administration standards

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Litigation & Regulatory Outlook

- Insurers citing *Loper Bright* in disability benefits litigation
  - Challenges to DOL claims-procedure rules (with mixed results)
- Agencies now required to offer stronger statutory support for regulations
- Ongoing and future rulemaking likely to face increased scrutiny

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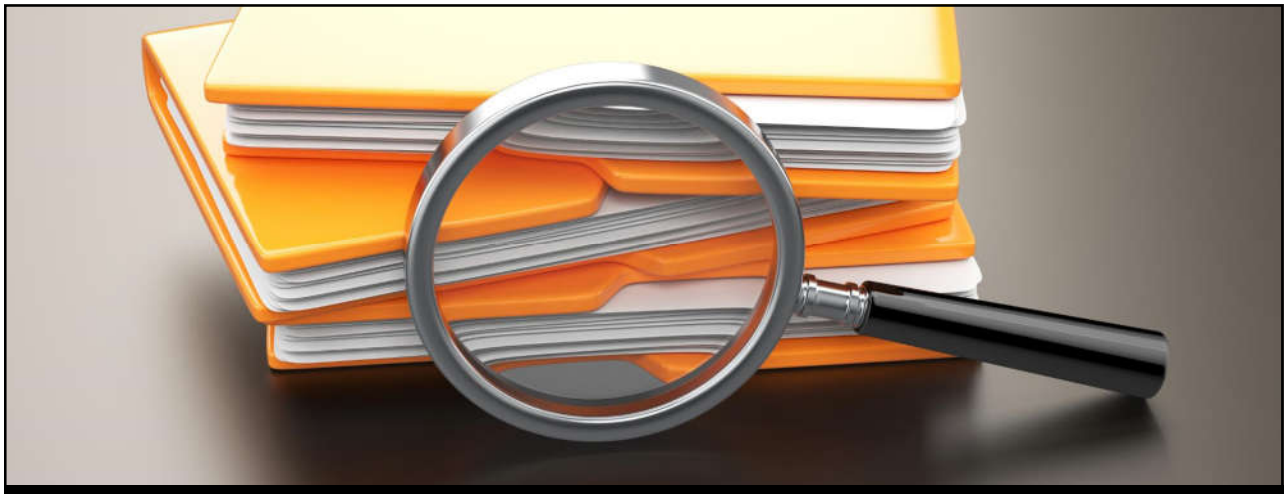

ERISA RISKS FOR VOLUNTARY BENEFITS

UNDERSTANDING COMPLIANCE CHALLENGES IN EMPLOYEE BENEFIT PLANS

Understanding Voluntary Benefits and Common Misconceptions

Definition of Voluntary Benefits

Voluntary benefits include workplace insurance like accident, critical illness, and supplemental life or disability coverage.

Common ERISA Misconception

Employers often mistakenly believe voluntary benefits are exempt from ERISA if they do not pay premiums. A recent analysis by ComplianceBug, LLC, the leading provider of online risk assessment and compliance monitoring tools for employers and their advisors, discovered more than 80% of "worksite and voluntary benefits" plans are actually subject to ERISA despite employers (and their brokers) believing the plans were exempt from compliance requirements

Need for Compliance Review

Employers must review benefit presentation and administration to avoid legal risks and ensure regulatory compliance.

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How Voluntary Benefits Become ERISA Plans Through Safe Harbor Failures

Four-Part Safe Harbor Criteria

ERISA exemption requires meeting all four safe harbor conditions without exception to avoid full plan applicability.

Employer Contribution Restrictions

Employers must avoid any direct or indirect financial contributions including fee subsidies or negotiated discounts.

Voluntary Participation Only

Employers may not require any of their employees to participate in these plans.

Minimal Employer Involvement

Employer role is limited to payroll deductions and communication facilitation without endorsing or managing the plan.

No Employer Compensation

Employers may not receive any compensation for participating in these plans. However, they may receive reimbursement for administrative costs

Consequences of Safe Harbor Failure

Failure of any condition results in ERISA plan status, triggering fiduciary duties and compliance obligations.

Employer Actions That Commonly Trigger ERISA Classification

Employer Negotiation Impact

Negotiating group rates may appear helpful but often signals employer endorsement, triggering ERISA classification.

Promotion Suggesting Sponsorship

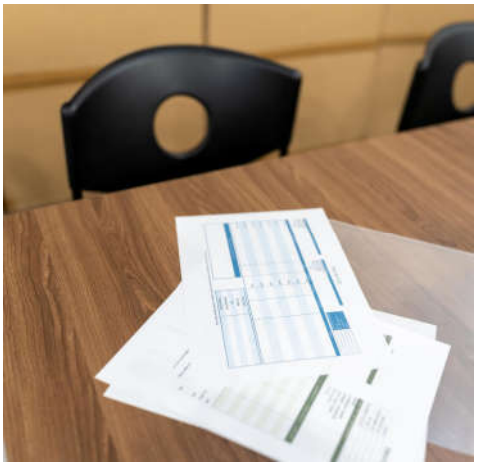
Promoting voluntary benefits as part of employer plans risks creating ERISA plan classification.

Compensation and Broker Relations

Employers receiving compensation or advantages through brokers may violate ERISA safe harbor rules.

Employer Administrative Involvement

Assisting with claims and appeals can align employers with fiduciary roles under ERISA, increasing liability.



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Overview of Recent Litigation Against Employers and Brokers

Litigation Focus on ERISA Issues

Lawsuits target voluntary benefit programs alleging improper ERISA plan treatment by employers and brokers.

Fiduciary Responsibility Failures

Employers and brokers are accused of neglecting oversight on commissions, pricing, and carrier monitoring.

Allegations of Conflicts and Prohibited Transactions

Complaints claim compensation structures created conflicts benefiting intermediaries over employees.

Implications for Employer Governance

Employers must adopt governance reflecting fiduciary standards due to expanding ERISA litigation risks.

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Why Employers Face Increased Exposure in Today's Litigation Climate

Expanded Litigation Focus
Plaintiffs' firms now target welfare and voluntary benefits beyond traditional retirement plans, increasing employer litigation risk.

Complex Compliance Challenges
Safe harbor compliance complexities and employer misunderstandings create vulnerabilities in voluntary benefit oversight.

Fee Reasonableness Concerns
Indemnity products and broker incentives raise questions about fee fairness and employer fiduciary duties.

Need for Proactive Management
Employers must enhance documentation, monitor vendors, and reevaluate benefits to reduce litigation exposure.

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Recommended Actions to Strengthen Compliance and Reduce Risk

Establish Fiduciary Committee
Create a formal fiduciary committee to oversee benefits, monitor carriers, evaluate pricing, and document decisions.

Review Voluntary Benefit Classifications Carefully
Many voluntary benefits already fail the safe harbor and are subject to ERISA

Review and Renegotiate Agreements
Thoroughly review voluntary benefit classifications and renegotiate agreements to avoid fiduciary risks and unclear terms.

Evaluate Broker Compensation
Assess broker compensation including indirect payments to identify potential conflicts of interest and ensure transparency.

Conducting RFPs
Periodically conduct a request for proposal ("RFP") process for all insurer, third-party administrator, and broker/consultant services.

Benchmark Information
benchmark premiums, loss ratios, and vendor performance.

Maintain Detailed Documentation
Document committee discussions, evaluations, and vendor reviews to demonstrate compliance and defend against litigation.

Conclusion: Reframing Voluntary Benefits Through an ERISA Lens

Voluntary Benefits Risk

Voluntary benefits can become ERISA plans when employers provide support or compensation, increasing fiduciary responsibilities.

Litigation and Oversight

Recent lawsuits highlight the need for documented fiduciary oversight and transparency to mitigate legal risks.

Compliance Strategies

Employers should implement formal governance, clear documentation, and transparent vendor evaluations to manage risks.

Proactive ERISA Application

Applying ERISA principles reduces litigation exposure and improves the integrity of employee benefit offerings.

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Panel Discussion

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Defined Contribution Retirement Plans Cycle 4 Restatement

- An employer restated its 401(k) plan in 2021. Will another restatement be required this year?

Cycle 3 Restatements

- Six-year cycle
- Required for preapproved defined contribution plans
- All document provider letters issued the same day
- Restatement window was 8/1/2020 through 7/31/2022
- Needed Basic Plan Document, Adoption Agreement, and Trust Agreement

Cycle 4 Restatements

Provider applications deadline was in 2024

New law after 2024 will not be preapproved

Expect restatement window to begin in 2026.

Catch-Up Contributions for 2026

- Our 401(k) plan would not pass ACP/ADP testing without reclassifying some HCE contributions as catch-up. All deferral contributions in our plan are pre-tax. How can we pass testing in 2026?

Catch-Up Contribution Limits & Roth Requirements (2026)

Catch-Up Eligibility	• Employees age 50+ may make catch-up contributions beyond standard limits • Base catch-up limit: $8,000
Enhanced Catch-Up (SECURE 2.0)	• Applies to employees ages 60–63 • Limit: $11,250 (inflation-adjusted)
Mandatory **Roth Catch-Ups** for High Earners	• Required if prior-year FICA wages exceed ~$150,000 in 2025 • All catch-up contributions for High Earners must be Roth

Plan Design, Nondiscrimination & Effective Dates

- Universal Availability Rule. If Roth catch-ups are allowed for one eligible participant:
  - All catch-up eligible participants must have Roth access
  - Plans without Roth features:
    - High earners subject to Roth rule cannot make catch-ups
- Nondiscrimination Safe Harbor
  - Plans may exclude certain HCEs above the wage threshold
  - Safe harbor prevents nondiscrimination failures
- Effective Dates & Transition Relief
  - Roth catch-up requirement: statutory effective after 12/31/2023
  - Final regulations effective after 12/31/2026
  - Good-faith compliance allowed through 1/1/2027
  - Enhanced age 60–63 limits effective began in 2025

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Failure to Adopt Section 125 Cafeteria Plan

- Our auditor is asking for a copy of our Section 125 plan. We don't have a document in our files. What do we do?

Consequences of Lacking an Agreement

IRC Section 125 mandates that a cafeteria plan must be a written plan document

Without an agreement:

employees must typically pay for their portion of health insurance premiums with **after-tax** dollars	**employers are liable for FICA and FUTA**	the employee contributions to the plan are compensation subject to income tax withholding

Limited Correction Options

- Section 125 plans are excluded from EPCRS
  - So, no provision for retroactive correction
- Can result in immediate disqualification from favorable tax treatment
- Basic approach: **adopt a proper written plan prospectively**
  - Accept potential tax consequences for the period of non-compliance
- Explore private letter ruling by IRS
  - Historically, IRS has declined to issue rulings

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ACA Form 1095 Series Reporting

- An employee who is eligible for our self-insured health plan has not provided a TIN. What should we do?

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Collecting TINs for Self-Insured Medical Plans

- Under the **(ACA)**, applicable large employers must report employee **full-time status** and **offers of coverage**
- **IRS reporting forms (e.g., Form 1095-C)** require inclusion of TINs
- Employers sponsoring self-insured plans are responsible for **collecting or attempting to collect TINs** for enrolled employees and covered family members
- **IRS proposed regulations** allow a **penalty waiver** if employers take "reasonable steps" to obtain TINs. "Reasonable steps" include TIN solicitations made:
  - At **initial enrollment**
  - **Within 75 days** after the first request
  - By **December 31 of the year following** the year coverage is elected or a dependent is added
- If a TIN is not provided, the employer may report the individual's **date of birth** on Form 1095-C instead

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Thank you for attending.

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