Employment Law Corner

Monthly Report

FOLEY & FOLEY P C
ATTORNEYS AT LAW

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June Updates

Yes, EEO-1 Reporting Season Just Opened.

The EEOC is Back Baby! Now What?

Summer's Coming. Is Your Workplace Ready?

Workplace Pulse: Your Quarterly Litigation News & Need-to-Know FAQs

Managing an organization while ensuring compliance with evolving employment law obligations is a significant and ongoing challenge. That is where our *Workplace Pulse*, quarterly update proves valuable. We keep a pulse on emerging legal developments at the state, local, and federal levels to keep our clients well informed. Through in-depth case law analysis and trend tracking, we offer proactive guidance designed to keep you ahead of the curve-so you can focus on what you do best.

Also inside: a roundup of key employment law questions we've been asked this Quarter from the thousands of clients who use our **Employment Counsel On-Call Triage Service**, with answers you can use.

Q1 2025 Litigation Roundup: Recent rulings from Q1 2025 serve as a reminder that employment law continues to evolve—making it essential for employers to regularly review and adapt their practices.

- As noted in our last issue, but worth reiterating, SCOTUS determined that the appropriate standard for resolving overtime exemption classification disputes under the Fair Labor Standards Act (FLSA) is the "preponderance of the evidence" standard, rather than the more heightened "clear-and-convincing" standard applied by some courts. *E.M.D. Sales, Inc. v. Carrera*, 2025 U.S. LEXIS 364 (U.S., Jan. 15, 2025).

- SCOTUS declined to hear a 9th Circuit case that sought to overturn the McDonnell Douglas burden-shifting framework used in employment discrimination cases where plaintiffs lack direct evidence of discrimination. In a dissenting opinion, Justices Thomas and Gorsuch criticized the McDonnel Douglas burden-shifting framework for its confusion and frequent misapplication. Nonetheless, the framework remains in place. *Hittle v. City of Stockton*, 2025 U.S. LEXIS 975 (U.S., Mar. 10, 2025).

- The Illinois Supreme Court held that S&C Electric Company violated the state minimum wage law by failing to include non-discretionary bonus payments when calculating employees' overtime rate. S&C argued the production bonuses at issue did not have to be considered when calculating the overtime rate because the bonuses were not measured by or dependent on hours worked. However, the court held that the overtime rate must include all bonuses not in the nature of gifts. *Mercado v. S&C Electric Co.*, 2025 IL 129526 (Jan. 24, 2025).

- The 11th Circuit held that merely notifying an employer of an injury, does not, on its own, create a duty to accommodate under the ADA. The employee's request for FMLA leave, which was denied due to insufficient hours worked, also did not trigger

an obligation on his employer to accommodate. Because the employee failed to communicate with his employer about his recovery or anticipated return date, the employer was not required to accommodate his leave. *Massa v. Teamsters Local Union 79*, No. 23-13855, 2025 U.S. App. LEXIS 1470 (11th Cir. Jan. 23, 2025).

- SCOTUS broadened the application of Fed. Rule of Civ. Pro. 60(b), which allows a party to request relief from a final judgment, order or proceeding, holding that a voluntary dismissal without prejudice in an age discrimination case constitutes a "final judgment, order, or proceeding." As such, the plaintiff could seek to reopen the case via rule 60(b) to challenge an arbitration award favoring the employer. This ruling makes it easier for employees to revive voluntarily dismissed claims, even after the statute of limitations has expired in some cases. *Waetzig v. Halliburton Energy Servs.*, 2025 U.S. LEXIS 868 (Feb. 26, 2025).

- The 2nd Circuit recently addressed whether an employer can deny a reasonable accommodation—not because it poses an undue hardship, but because the employee can perform the job without it. The Court held that an accommodation may still be required even if the employee is able to perform the essential functions of the position, if the accommodation would enable the employee to work more safely, with less pain, or without exacerbating disability-related symptoms. *Tudor v. Whitehall Cent. Sch. Dist.*, 2025 U.S. App. LEXIS 6879 (2nd Cir., March 25, 2025).

- 9th Circuit clarifies that a plaintiff can satisfy one element of her prima facie discrimination case simply by showing she was replaced by a white male co-worker, without needing to prove she was treated less favorably than similarly situated employees. This deliberately low threshold can make it challenging to resolve such cases quickly when the replacement is outside the plaintiff's protected class. *Lui v. DeJoy*, No. 23-35378, 2025 U.S. App. LEXIS 4468 (9th Cir. Feb. 26, 2025)

Hot Topics from Q1: The following highlights a selection of frequently asked questions from Q1 and our recommended guidance:

- **We have an employee who is not eligible for FMLA. She is having a baby and taking short term disability. Can we post her position and move her to a different role if she returns?** Even if the employee is not eligible for parental bonding FMLA, she may still be entitled to job protected leave to medically recover from birth under the Pregnant Workers Fairness Act (PWFA). Under the PWFA, the employee may be entitled to short term medical leave as an accommodation in connection with her pregnancy and childbirth. EEOC guidance explicitly lists leave to recover from childbirth or other medical conditions related to pregnancy or childbirth as a reasonable accommodation. So, if the employee's leave is to recover from childbirth, then she may be entitled to job-protected leave as an accommodation under the PWFA. She may also be entitled to additional leave for complications relating to pregnancy and childbirth.
- **If an employee is regularly scheduled to work 35 hours a week but takes on a second job within the company, do we consider the hours worked in both jobs for purposes of determining if overtime is owed? If the second job is at a different rate of pay, which one is used for overtime?** You must count all hours worked by an employee in both jobs for purposes of overtime. For example, if the employee works 35 hours as a cashier and 10 hours as a janitor, they must be paid overtime for 5 hours. You calculate the overtime rate by determining the employee's blended rate under the FLSA. To determine the blended rate, you would combine the earnings from all rates and divide the total by all hours worked in all jobs in the week and then multiplied by .5 for the overtime amount.
- **We have an employee who exhausted FMLA in December. They are now out again for a medical reason. Do I need to send them the notice stating**

they do not qualify for FMLA? Yes, you still need to send the notice to the employee when they request FMLA leave even if they have no time available. In the notice, you should indicate that the employee is not eligible for FMLA leave due to their exhaustion of their leave entitlement during the current 12-month period.

- **We have an employee who does not wear a bra and given her uniform shirt, it is not appropriate for the workplace. Can we ask her to wear a bra?** While you cannot ask the employee to wear a bra, you can enforce your gender-neutral dress code by stating that clothing must not be see-through or inappropriately revealing. Please note that you would need to apply that standard to both men and women as applying a requirement only to women would likely be seen as gender discrimination under Title VII and state law. We suggest having a conversation with the employee about the dress code requirements (stress that the requirement not to wear see through or inappropriately revealing clothing applies equally to men and women) and then leave it to the employee to decide how they wish to comply with the policy (i.e., by wearing a bra, thicker shirt, or another alternative).

Do You Have Questions?

We can help! Our **Employment Counsel On-Call Triage Service** is a great resource for employers of all sizes looking for guidance on employment law and HR-related questions. We work with clients daily to help navigate complex legal issues and implement best practices. We receive unique questions every day through the **On-Call Service** and are ready to help you tackle any issue!

Who We Are:

- We represent employers exclusively from coast to coast in all facets of employment law and litigation. Our mission is solving problems and anticipating issues so you can concentrate on your business.
- We are constantly searching for the trends and upcoming issues in the law that will impact our clients. We want our clients to be informed and ready. Our familiarity with the workplace and our approach sets us apart from other law firms, making us well equipped to handle your unique needs.
- We are unlike other firms: Anyone can advise on what the law says and its limits. That is easy. We find creative solutions within those restrictions that move your business forward. We seek to minimize your risk so you can focus on your business. Learn how we can help: **Foley & Foley PC attorneys specialize in Employment and Labor Law in the Public and Private Sectors (foleylawpractice.com).**

Meet Martine Wayne

Martine concentrates her practice on advising and representing businesses on a wide range of labor and employment matters. Her experience includes employment litigation and providing strategic guidance on matters such as discrimination, wage and hour compliance, leaves of absence, terminations and employment policies and agreements. As the Leader of the Firm's Employment Law Audit Services, Martine helps organizations, both small and large, proactively identify and address labor and employment risks before they escalate. Check out her full bio here!

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