

Employment Law Corner

Monthly Report



FOLEY & FOLEY^{PC}
ATTORNEYS AT LAW

October 2024

October Updates

[When 100% Is Not a Good Goal](#)

Extra! Extra! Read All About It!

Nobody has the time to run an organization and stay up to date on employment law obligations. That is where we come in. We live and breathe new and upcoming legal developments—state, local, and federal—to safeguard our clients. We research case law and track trends to get ahead of the game and provide you with proactive guidance. It is our day job so you can do yours.

This is the first of a new resource: our *Quarterly News Update*. Each quarter, we will publish a summary of complex legal developments in a straightforward and easily digestible format. Included in the Update will be noteworthy and frequently asked questions from the thousands of clients who use our [Employment Counsel On-Call Triage Service](#).

Litigation Roundup

- A District Court in Texas shut down the Federal Trade Commission's "Non-Compete Rule." As a result, the Non-Compete Rule did not take effect in September. We do not expect this rule to be resurrected anytime soon. *Ryan LLC v. FTC*, Civil Action No. 3:24-CV-00986-E, 2024 U.S. Dist. LEXIS 148488 (N.D. Tex. Aug. 20, 2024)
- The Fifth Circuit upheld the Department of Labor's increase to the salary basis threshold, stating the proposed rule was within the boundaries of Congress's delegation of power to the DOL. *Mayfield v. United States DOL*, No. 23-50724, 2024 U.S. App. LEXIS 23145 (5th Cir. Sep. 11, 2024).
- The Fifth Circuit issued a nationwide injunction, preventing enforcement of the Department of Labor's regulations revising the tip credit rule, leaving the current law unchanged. The rule would have restricted when employers would be permitted to pay less than minimum wage as a "tip credit" for "tipped employees." *Restaurant Law Ctr. v. United States DOL*, No. 23-50562, 2024 U.S. App. LEXIS 21449 (5th Cir. Aug. 23, 2024)
- The First Circuit held that an employee alleging retaliation must only show that the alleged retaliatory action "might have dissuaded" the employee from bringing a complaint. This lower standard is

noteworthy. *Stratton v. Bentley Univ.*, No. 22-1061, 2024 U.S. App. LEXIS 20706 (1st Cir. Aug. 15, 2024).

- Despite North Carolina’s “lawful use of lawful products” statute, the Fourth Circuit ruled in favor of an employer who terminated an employee for testing positive for marijuana. *Anderson v. Diamondback Investment Group, LLC*, No. 23-1400 (4th Cir. Sept. 4, 2024)
- The Seventh Circuit ruled in favor of a former Wal-Mart employee against Wal-Mart for failing to accommodate under the Americans with Disabilities Act where Wal-Mart failed to engage in the ADA interactive process with the employee despite their knowledge that the employee’s difficulty in keeping to a schedule was likely linked to the employee’s disability. *EEOC v. Wal-Mart Stores E., L.P.*, Nos. 22-3202, 23-1021, 2024 U.S. App. LEXIS 21705 (7th Cir. Aug. 27, 2024).

Noteworthy Questions

- What is the standard for evaluating an employee’s request for religious accommodation?
 - An employer would need to show that providing the requested accommodation would pose a substantial burden on the company. This is a recent change from the de minimus standard used for decades.
- Can employees complain about their work conditions on social media?
 - Generally, an employee can complain about their work conditions publicly and on social media. Section 7 of the National Labor Relations Act protects complaints about unsafe or abusive working conditions.
- Who should perform an investigation into potential allegations of harassment?
 - This may be conducted internally or externally. If a conflict of interest is present by having the investigation conducted internally, then it is beneficial to have an outside firm investigate and provide recommendations on best next steps.
- What happens to PTO payout requirements for employers who offer unlimited PTO?
 - For an employer to owe an employee accrued, unused PTO upon termination, then the amount owed must be determinable. If employees are actually provided unlimited PTO for use and this is appropriately reflected in the policy, then the PTO is not determinable and would not need to be paid out. Be aware: if there is any cap in practice—say 120 hours—then amount must be applied for payout.
- What notice must you provide an employee if you are changing their classification between exempt to non-exempt?
 - State law controls how much notice must be provided when there are changes of pay, salary, or employment policies and practices.

Do You Have Questions?

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

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 not like other firms: Anyone can tell you what the law states 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 get back to business. Learn how we can help your business: **Foley & Foley PC attorneys specialize in Employment and Labor Law in the Public and Private Sectors (foleylawpractice.com).**

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Meet Julia Pomella-Griggs

Julia has experience on a wide range of employment matters in the public, private, and nonprofit sectors. Julia's experience includes counseling clients, drafting and analyzing policies, managing workplace misconduct, and conducting trainings.

For more info, check out her full bio [here!](#)

