Employment Law Corner

Monthly Report

FOLEY & FOLEY P C
ATTORNEYS AT LAW

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September Updates

Employment Law Corner
Workplace Pulse: Your Quarterly Litigation News and Need-to-Know FAQs

Managing an organization while ensuring compliance with evolving employment law obligations is a significant challenge. That is where this 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.

Q2 2025 Litigation Roundup: Recent rulings from Q1 2025 serve as a reminder that employment law is never static—making it essential for employers to regularly review and adapt their practices.

- **Majority Group Plaintiffs Do Not Have Extra Burden**: The Supreme Court answered a question that lower courts were divided on: Are members of majority-groups required to provide additional evidence to establish their prima facia case for Title VII discrimination claims? Some lower courts had adopted a rule requiring majority-group plaintiffs to show that, in addition to usual prima facia case elements, the plaintiff had to show that there were "background circumstances" suggesting that the defendant was the "rare employer who discriminates against members of the majority group." Writing for the Court, Justice Jackson noted that applying an additional evidentiary burden to majority-group plaintiffs went against the text of Title VII, which prohibits discrimination against any individual. The rule adding special additional burdens on certain plaintiffs based on their protected class therefore flouted that "basic principle" of Title VII – that the statute "works to protect individuals . . . from discrimination, and does so equally." The concurrence by Justice Thomas, joined by Justice Gorsuch, once again called for the Court to do away with the McDonnell Douglas framework. Ames v. Ohio Dept. of Youth Services, 605 U.S. (2025).

- **Employer First Amendment Not Defense for NLRB Violation**: The 4th Circuit upheld an NLRB decision finding that an employer engaged in an unfair

labor practice, rejecting the employer's First Amendment defense. After a failed union election, the union filed a grievance alleging that the employer had engaged in a range of unfair labor practices, including a response posted on the company's internal message board attacking union activity and stating that the employees would have received raises already "if it were not for" union organizing activity. Though most of the post was acceptable in rebutting the claims of union organizers (with an admittedly brusque and combative tone), the Court found that the sentence could be interpreted as a threat tying employee compensation to union activity violated the NLRA. Garten Trucking LC v. NLRB, Nos. 24-1571, 24-1614, 2025 U.S. App. LEXIS 13365 (4th Cir. June 2, 2025).

- **"Culture" Fit Not Blanket Age Defense:** The 6th Circuit finds that Chili's may have engaged in age discrimination when it used "culture" as a catch-all excuse to part ways with its oldest – and highest performing – manager in the region and replaced him with a much younger, inexperienced manager. Because the defendant failed to keep any records explaining why the manager was terminated, it was unable to rely on the "honest belief" defense; instead, the court ruled that the only admissible evidence regarding the reasons for the termination were the plaintiff's memories of the event. The court vacated summary judgment in favor of the defendant and ordered that the case continue. Kean v. Brinker Int'l, Inc., No. 24-5514, 2025 U.S. App. LEXIS 14958 (6th Cir. June 17, 2025).

- **Failure to Engage in ADA Interactive Dialogue Cost Millions:** The 1st Circuit upholds a $24,000,000 award against an employer who retaliated against an employee for seeking reasonable accommodations, including $10,000,000 in punitive damages. When the plaintiff balked at the defendant employer's attempt to expand the plaintiff's public speaking-related job duties due to her anxiety, the defendant embarked on a strategy to move on from the plaintiff. Discovery showed that the defendant's management team did not engage in good faith in the interactive process and began building a case for dismissing her based on what appeared to be pretextual performance issues. Employee went on leave in June 2018, and when she could not return to work through February 2019, the defendant terminated her. Because the defendant's attorneys failed to preserve fact issues for appeal, the Court did not address the merits of the district court's findings. Menninger v. PPD Dev., L.P., No. 23-2030, 2025 U.S. App. LEXIS 18405 (1st Cir. July 24, 2025).

- **...But Employees Cannot Have "Indefinite Leave" Under ADA**: The 11th Circuit held that an employer did not violate the ADA by refusing a leave accommodation request or by failing to engage in the interactive process where a former employee requested an "indefinite leave of absence." The Court said that the former employee's request for a leave of absence was indefinite because she consistently told her employer that she could not return to work until cleared by her doctor and she did not provide an indication of when or how she would be able to resume her job in the future. Hairston v. Cmty. Hosp. Holding Co., LLC, No. 24-11407, 2025 LX 390517 (11th Cir. Aug. 21, 2025)

Hot Topics from Q2 2025:

- **Q: We have an employee who has reported that her supervisor causes her extreme anxiety. Is it appropriate for me to send her the ADA request for a reasonable accommodation for her to request a different supervisor?**
  A: Yes. If they have anxiety and are seeking an accommodation to move to another supervisor, you'll want to walk through the ADA process to see if this is an accommodation you can provide. You'll want to get information from the employee's health care provider, determine the limitations of her disability and then determine if there is an accommodation available. Moving supervisors can be an accommodation but it can also be job modification, leave, assistive equipment, schedule modification, etc.

- **Q: We have a candidate who has applied for a Housekeeping position. Their primary language is Spanish. I am wondering if we need to, as an employer, provide all the onboarding/hiring documents in Spanish or if they should be able to read/write/comprehend English?**
  A: Generally, there is no requirement to translate materials and you can require that the employee is able to speak English as long as its reasonably related to communicating with coworkers, supervisors, clients, and for efficiency. In some states, you do have to translate the pay notice document you are required to provide if they cannot read and write in English. The EEOC also held a company liable for not translating their sexual harassment policy to employees who were not fluent in English. If this employee cannot read English, I would consider translating your Harassment, Discrimination, and Sexual Harassment policies as well.

- **Q: If an employee is suspected of coming to work under the influence of drugs or alcohol and we decide to send them to drug/alcohol testing, do we not allow them to drive themselves? If they refuse to take the test, do we offer to have someone drive them home?**
  A: I would recommend, if you are sending them to get a drug test, you have another employee drive or call them a ride service. Similarly, if they refuse, to get the test and leave work, do the same thing so that they are not driving under the influence.

- **Q: I have a staff member who has temporary guardianship of her granddaughter. She was asking about time off, but this seems to be a gray area, or not explicitly stated. Under FMLA law, is an employee eligible for leave if they have temporary custody of a grandchild?**
  A: Yes, it is possible for a grandparent to use FMLA to care for a grandchild in some circumstances. Any person may take federal FMLA if the employee stands *in loco parentis* to a child – in other words, if she has an ongoing duty of care to her grandchild similar to what a parent would ordinarily provide. The person standing in loco parentis is not required to have a biological or legal relationship with the child, though it is not unusual for grandparents or other relatives, such as siblings, to stand in loco parentis to a child under the FMLA where all other requirements are met. The in loco parentis relationship exists when an individual intends to take on the role of a parent. The individual's intent is the key factor – there does not need to be legal recognition of the relationship, though that is certainly helpful. The FMLA regulations define standing in loco parentis as including those with

day-to-day responsibilities to care for and financially support a child. Typically, when deciding whether an in loco parentis relationship exists, courts will consider:

- the age of the child;
- the degree to which the child is dependent on the person claiming to be standing in loco parentis;
- the amount of support, if any, provided; and
- the extent to which duties commonly associated with parenthood are exercised.

Providing financial support does seem to be a key factor, though other factors – such as feeding, cleaning, providing care for, transporting, and providing shelter for the child would also play a role in determining whether the right relationship exists.

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 day in, day out 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).**

Meet Wendy Hansen

Wendy brings a broad range of employment law skills to our team. She is the Practice Leader of the Employment Counsel On-Call Triage Service which services thousands of clients across the country. She has experience in handling a variety of questions and claims in employment law, including: FMLA, ADA, FLSA, criminal background checks, medical marijuana, wrongful termination, and harassment.

For more info, check out her bio **here**!

Contact Us

FOLEY & FOLEY PC
ATTORNEYS AT LAW

www.foleylawpractice.com

info@foleylawpractice.com

(844) 204-0505