

Employment Law Corner

Monthly Report



FOLEY & FOLEY^{PC}
ATTORNEYS AT LAW

September 2026

September Updates

Affirmative Action Rules Overhaul: Here's What Survived

Don't Let "Likely to End" Become "Caught Off Guard": EEO-1 Prep

Managers: Your First Line of Defense. Untrained? Your Biggest Liability.

Can You Ban Salary Talk at Your Workplace?

No Union, No Problem? Nope—NLRA Still Applies.

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

Managing an organization while ensuring compliance with evolving employment law obligations is an ongoing challenge. Our quarterly Workplace Pulse is designed to help you stay ahead of it. We keep a pulse on emerging legal developments at the state, local, and federal levels to keep our clients informed. Through 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.

Q3 2026 Legal Roundup: Recent rulings and opinions serve as a reminder that employment law continues to evolve—making it essential for employers to regularly review and adapt their practices.

- **SHRM Gets the Bill?** Last month, SHRM's employment practice liability insurer filed a federal complaint arguing that it owes no coverage for the \$10 million punitive damages award entered against SHRM in a 2025 race discrimination and retaliation verdict. The insurer relies on a Virginia anti-insurability statute barring coverage for intentional acts, arguing the jury's finding of intentional discrimination with malice or reckless indifference puts the award outside the scope of coverage, leaving SHRM to pay it.

No ruling yet. There is some irony in SHRM, the go-to resource for many HR professionals on avoiding this exact exposure, now facing it themselves. The broader lesson: an EPL policy listing punitive damages as covered does not guarantee payment if liability requires intentional conduct and the policy's choice of law points to a state with an anti-insurability statute (here Virginia), even though the underlying conduct was litigated in Colorado.

- **Mid-day Travel Pay:** The DOL issued a new Opinion Letter (FLSA 2026-9) confirming that mid-day travel between home and office is not

compensable time under the FLSA, as long as it's a genuinely voluntary commute that primarily benefits the employee, covering scenarios like splitting shift between home and office to dodge rush hour or finishing work at home after an early commute. The catch: it only holds up if employees drive the flexibility themselves. A companion letter issued the same day (FLSA 2026-10) warns that employer-directed timing or constraints can flip the analysis and make the travel compensable. Bottom line: to ensure the commute remains non-compensable, keep these arrangements voluntary and employee initiated, make sure no work happens during the travel, and keep accurate records.

- **Vassar Gets Schooled on Gender Pay Gap:** Vassar College has agreed to pay \$5 million to settle a lawsuit brought by a group of female professors alleging systematic underpayment and under-promotion of women faculty relative to male peers with comparable or stronger performance records, including claims that a flawed merit evaluation system consistently gave women lower ratings despite equal or better performance, and that Vassar failed to act on pay disparities raised as early as 2008. After the court denied Vassar's 2024 motion to dismiss the equal pay claims, the parties proceeded through discovery and reached a tentative settlement following mediation in July, with Vassar also agreeing to retain an outside consultant for three years of annual pay audits and corresponding pay adjustments, according to the professors.
- **ADA: No Sleeping on the Job Here:** The Third Circuit affirmed summary judgment for an employer on an employee's ADA claims, where the employer terminated the employee after an investigation for sleeping on duty in violation of a neutral no sleeping policy. Only after being confronted did the employee disclose, for the first time, that she had dry eyes and fatigue related to diabetes, without ever formally requesting an accommodation. The court held that the ADA's duty to accommodate arises only once an employer has actual or obvious notice that an employee has a medical condition requiring an accommodation, a threshold not met by vague disclosure made for the first time after confrontation. The court further held that even a valid accommodation request would not excuse a violation of a neutral workplace rule absence comparator evidence of pretext.
- **Timing Matters in Retaliation Claim:** A New York federal court dismissed a Mount Sinai West security supervisor's retaliation claim while allowing his overtime and weekly wage claims to proceed to trial. The court found that 13 months between his complaint about differential pay and his termination were too long to support an inference of causation, particularly since documented criticism of his performance predated the complaint by more than a year. The court also found the hospital had a legitimate, nonretaliatory reason for the termination: an investigation revealed he had repeatedly directed security officers to purchase alcohol for him while on duty and bring it onto hospital premises, in violation of the hospital's substance abuse policy.

Hot Topics from Q3 2026:

- **Q: Can a new hire complete the Form I-9 using one document in her married name and another in her maiden name?**

A: Yes, if both documents reasonably relate to the employee. We recommend attaching a brief memo to Form I-9 explaining the name discrepancy and retaining any supporting documentation provided by the employee. Please note, employees are not required to provide documentation supporting a name change.

- **Q: Can we include language about background checks in job postings?**

A: There is no issue with you mentioning in a job posting that an offer is contingent upon successful completion of a background check. You should be clear that the background check will not be initiated until after the applicant has been selected for an interview – or, if there is no interview, before extending a conditional offer of employment, to ensure you do not run afoul with the state's ban the box law.

- **Q: I have an employee who is requesting to bring an emotional support animal on site. The presence of an animal poses contamination and safety risks to the patients and hospitals who receive our products. Are we required to accommodate this request?**

A: The ADA recognizes emotional and mental impairments as qualifying disabilities, and a request for accommodation triggers the interactive process. While an emotional support animal may be requested as a reasonable accommodation, employers are not required to grant accommodations that create a direct threat to health or safety or impose an undue hardship. To deny such a request, the company should engage in the interactive process and conduct an individualized, objective assessment demonstrating that the animal's presence poses a significant risk or undue burden that cannot be mitigated through reasonable accommodation. It would be high risk to deny the request without first engaging in the interactive process and conducting an individualized, objective assessment.

- **Q: An employee is requesting two weeks off for a voluntary religious mission trip. 5 of those days fall within a time-off blackout period. Do we need to grant this request?**

A: A voluntary religious mission trip is generally protected as a religious practice or observance, and the employee request cannot be summarily denied solely because it violates an internal policy or involves a voluntary activity. If the employee's motivation for the trip is sincerely religious, the request constitutes a religious practice protected under Title VII. This means you are not excused from accommodating the trip simply because of a company policy or because the trip is voluntary. You may deny the request only if you can show that granting it would create an actual undue hardship on business operations.

Q: We are eliminating a group of positions and need to provide the OWBPA decisional unit disclosure. Can we require employees to keep it confidential?

A: No. The Older Workes Benefit Protection Act (OWBPA) does not permit an employer to require confidentiality of the decisional unit disclosure. The disclosure only needs to list the job titles/positions and ages, not names, so confidentiality concerns about individual employees are already addressed by the format itself. The disclosure exists so employees can evaluate whether the selection process had a disparate impact based on age, and that purpose is defeated if employees cannot discuss or compare that information. Imposing a confidentiality requirement can also restrict employee Section 7 rights under the NLRA to discuss terms and conditions of employment with each other.

Do You Have Questions?

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).**

Contact Us



www.foleylawpractice.com

info@foleylawpractice.com

(844) 204-0505

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!](#)

