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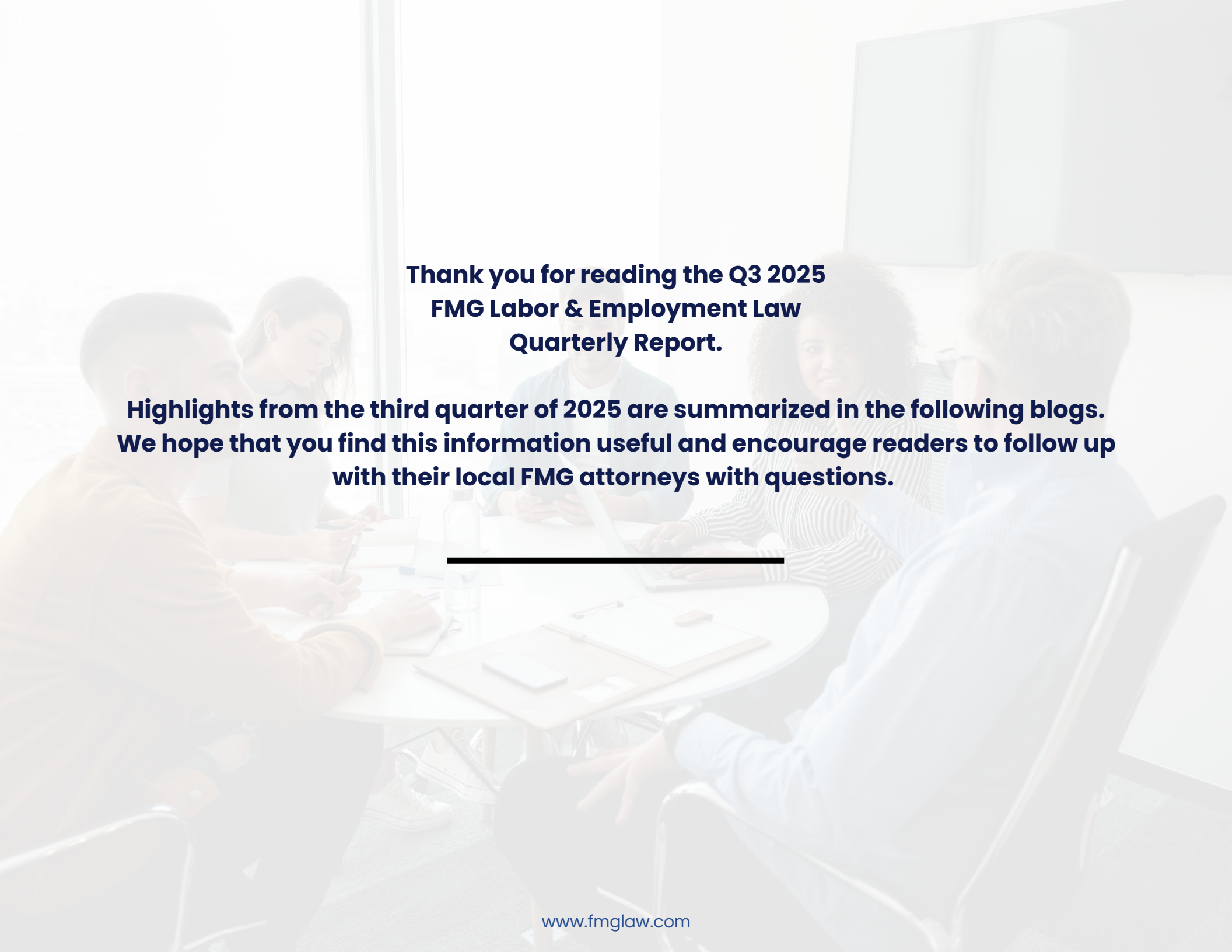
Q3 - 2025

FMG Labor & Employment Law Quarterly Report

A summary of the important labor and employment topics by our expert team members for the third quarter.



Thank you for reading the Q3 2025 FMG Labor & Employment Law Quarterly Report.

Highlights from the third quarter of 2025 are summarized in the following blogs. We hope that you find this information useful and encourage readers to follow up with their local FMG attorneys with questions.

U.S. SUPREME COURT PROHIBITS NATIONWIDE INJUNCTIONS, BUT THE DECISION'S PRACTICAL IMPACT IS UNCERTAIN

By: William H. Buechner, Jr.

On Friday, the Supreme Court ruled in Trump v. CASA, Inc., — S. Ct. —, 2025 WL 1773631 (June 27, 2025) that district courts likely do not have the equitable authority to issue nationwide or universal injunctions, which are injunctions applicable to anyone, anywhere. Accordingly, the Court stayed the nationwide injunctions issued by three district courts enjoining enforcement of an executive order issued by President Trump limiting birthright citizenship, but only to the extent that the preliminary injunctions were broader than necessary to provide complete relief to each plaintiff with standing to sue. Id. at *15. In doing so, the Court did not rule on whether President Trump's executive order limiting birthright citizenship violates the Citizenship Clause of the 14th Amendment.

This Court's ruling in this case was widely anticipated. During the first 100 days of President Trump's second term, district courts issued approximately 25 nationwide or universal injunctions stopping enforcement of numerous executive orders and other executive actions on a broad range of issues, including tariffs, immigration enforcement, spending cuts, termination of federal employees including high-ranking agency officials, and birthright citizenship. Many of these nationwide injunctions have been issued by district courts in Democrat-leaning states by judges appointed by Democrat presidents.

Some of these nationwide injunctions have been stayed on appeal by federal appeals courts or the Supreme Court, but some have not. Proponents contend that these nationwide injunctions are necessary to stop President Trump's unlawful executive orders and actions and prevent the chaos that would ensue if these executive orders were enforced in some jurisdictions but not others. Critics contend that these "rogue" district judges are motivated by political opposition to President Trump's policy initiatives and that a single district judge should not be permitted to thwart the policies that the duly-elected president is seeking to implement. Of course, current critics of nationwide injunctions were in favor of them when district judges appointed by Republican presidents in Republican-leaning states issued nationwide injunctions to block some of President Biden's initiatives, such as forgiving student loans and COVID-19 vaccine mandates.

In its 6-3 decision in CASA, the Court explained that, although the Judiciary Act of 1789 grants jurisdiction to federal courts to adjudicate "all suits … in equity," a federal court's equity power is not "freewheeling." Id., *6. The Court explained that federal courts in equity only have the power that the High Court of Chancery in England had in equity at the time the Constitution was adopted and which was recognized in founding-era equity courts in the United States. Id. The Court concluded that the High Court of Chancery did not have the authority to issue injunctions that were binding on nonparties. Id. at *6-7. The Court also cited several previous Supreme Court decisions that rebuffed requests for relief that extended beyond the parties to the case. Id. at *7. In addition, the Court emphasized that the instances in which a lower court granted a nationwide injunction even during the 20th century were relatively sparse, and that approximately 96 of the 127 nationwide injunctions issued by the lower courts were issued since 2000 during the administrations of George W. Bush, Obama, Biden and Trump. Id. at *8.

The CASA decision may seem to significantly curtail the power of district courts to quickly halt on a nationwide basis the enforcement of executive orders, newly-enacted statutes and other executive actions that they deem to be unlawful. However, the impact may not necessarily prove to be as dramatic as it may initially appear.

To read the full blog post, click here.

For more information, please contact William H. Buechner, Jr. at bill.buechner@fmglaw.com or your local FMG attorney.

DOL WAGE AND HOUR DIVISION CHANGES FLSA LIQUIDATED DAMAGES POLICY

By: Thomas R. Starks

On June 27, 2025, the U.S. Department of Labor's Wage and Hour Division ("DOL") issued a Field Assistance Bulletin, marking a major shift in enforcement under the Fair Labor Standards Act ("FLSA"). Effective immediately, DOL staff are prohibited from seeking or collecting liquidated damages during administrative investigations and settlements. This does not impact employees' ability to pursue liquidated damages in court.

Under the FLSA, if an employer fails to pay a non-exempt employee the required minimum wage or overtime, affected employees are entitled to back pay *plus* an additional equal amount as liquidated damages—essentially "double damages." Before 2010, these damages were only awarded through the courts. Beginning in 2010, an Obama-era policy allowed the DOL to pursue them during administrative settlements. This policy has bounced back and forth over the past five years.

Proponents of the new policy believe the pursuit of liquidated damages prolongs investigations. Additionally, their legal argument is that the sections liquidated damages fall under are reserved for judicial proceedings. The DOL still has the authority to pursue litigation, when necessary, which would then allow the DOL to seek liquidated damages.

This is a welcome update for employers navigating audits. It also underscores the ongoing importance of practices that comply with wage and hour laws—especially because employees are not required to exhaust administrative remedies prior to pursuing costly lawsuits that can include liquidated damages and costly attorneys' fees.

For more information, please contact Thomas Starks at thomas.starks@fmglaw.com or your local FMG attorney.

RECENT AMENDMENTS TO PITTSBURGH'S PAID SICK DAYS ACT EXPAND EMPLOYEE PROTECTIONS

By: Sunshine R. Fellows

Following unanimous approval from City Council, Pittsburgh Mayor Ed Gainey signed an ordinance last month amending Pittsburgh's Paid Sick Days Act ("PSDA" or the "Act"). As a result, employees working for or in the City of Pittsburgh will earn more paid sick time per year at a faster rate, starting on January 1, 2026.

Background

Originally passed in 2015, the PSDA was not implemented until March of 2020 due to a number of legal challenges. The Act ultimately was upheld by the Pennsylvania Supreme Court before it took effect, and it applies to all employers in Pittsburgh, regardless of size.

What the Amendment Changes

Effective January 1, 2026, the new ordinance increases the total amount of leave that employees can earn and requires employers to increase the rate at which leave is accrued. In particular, workers in Pittsburgh will earn one hour of paid sick time for every 30 hours worked. Under the original Act, employees earned one hour of paid sick time for every 35 hours worked in the City. The amended ordinance also increases the maximum amount of paid sick leave that employees can accrue and use each year. Specifically, employees working for businesses with 15 or more employees will earn up to 72 hours of paid sick leave per year, a significant increase from the prior annual maximum of 40 hours. For employees working for entities with fewer than 15 employees, the annual cap will increase from 24 hours to 48 hours.

What Should Pittsburgh Employers Do Now?

Even though the amended PSDA will not take effect for several months, now is the best time for covered employers to review its provisions and begin planning for any necessary policy changes. Employers should update their postings and policy documents before the January 1 effective date, given that delayed implementation due to legal challenges is less likely this time around. Employers should also consider providing updated training for supervisors who are likely to encounter more frequent requests for time off.

Finally, employers need to keep in mind that Allegheny County has its own paid sick leave law. Under the updated ordinance, Pittsburgh employees will have faster accrual and higher accumulation and usage caps than employers elsewhere in Allegheny County. Employers with facilities both in the City of Pittsburgh and other locations in Allegheny County should work with counsel to navigate these differences.

For more information, please contact Sunshine Fellows at sunshine.fellows@fmglaw.com or your local FMG attorney.

DOL PROPOSES REFINED RULES FOR FEDERAL CONTRACTORS

By: Morgan M.J. Randle

Hot off the presses, on July 1, 2025, the Department of Labor's Office of Federal Contract Compliance Programs, better known as "OFCCP," released three proposed rules to President Trump's Executive Order 14173 (which eviscerated federal affirmative action requirements for federal contractors set forth in Executive Order 11246).

More specifically, Executive Order 11246 provided regulations for federal contractors to maintain certain affirmative action programs, including placement goals, and reflection or analysis review. In pertinent part, the Order prohibited covered federal contractors (and subcontractors) from discriminating against employees (or applicants) based on protected characteristics, including race, color, religion, sex, sexual orientation, gender identity and national origin, and further outlined required affirmative action obligations.

On January 21, 2025, President Trump issued Executive Order 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," setting forth a directive to immediately cease promotion of affirmative action and diversity, and rather, merely prohibit active illegal discrimination. As this was in contravention of Order 11246, Order 14173 effectively revoked Executive Order 11246's regulations and requirements surrounding affirmative action and nondiscrimination rules for federal contractors.

Since the initial issuance, the OFCCP has now authored additional rules to the Order, further clarifying and revising federal contractor obligations, pending finalization. The pending rules seek to officially rescind Executive Order 11246's non-discrimination and affirmative obligations but permits OFCCP continued governance over veterans and individuals disabled within the meaning of the Rehabilitation Act of 1973.

The OFCCP's first proposed rule looks at official revocation of Executive Order 11246, in favor of Executive Order 14173.

The second proposed rule seeks to modify the Vietnam Era-Veterans' Readjustment Assistance Act ("VEVRAA"). The rule proposes updates and alignment with references to Executive Order 14173, as well as provision of an administrative enforcement avenue.

The third proposed rule is directed at modifying Section 503 of the Rehabilitation Act. In addition to updating references from Executive Order 11246 to Executive Order 14173 in the Act, the rule proposes dissolving the current requirement that applicants and employees be presented with a voluntary self-identification form regarding their disability status, favoring instead, a 7% target of employment of disabled individuals.

Despite recent comments arguably suggesting that he planned to dissolve the OFCCP entirely, President Trump's directive here brings into question whether the OFCCP will instead continue oversight and enforcement of regulations governing federal contractors. The future of the OFCCP remains in question.

These rules are not finalized or implemented, and it is important that employers contracting with the federal government remain diligent and abreast of anticipated regulatory changes.

In the meantime, anyone with interest can submit comments on the proposed rules until August 30, 2025. This can be done electronically or by mail, specifics of which can be found at the OFCCP's official website.

To read the full blog post, click here.

Federal contractors can check back with Morgan Randle at morgan.randle@fmglaw.com, or your local FMG attorney, for assistance or updates on specific contracting obligations and requirements.

RECENT DECISION REMINDS EMPLOYERS TO CONSIDER THE FMLA WHEN AN EMPLOYEE MISSES WORK FOR A MEDICAL REASON

By: Shane Miller

If an employee misses work for a medical reason, a prudent employer should pause to consider if the absence may be protected by the Family and Medical Leave Act (FMLA). The employer should be cautious about taking disciplinary action against the employee for the absence until resolving this question.

That is a key takeaway from the Third Circuit's recent opinion in *Isaiah Walker v. Southeastern Pa. Transportation Authority*, Case No. 24-2275, 2025 WL 1879521 (3d Cir. July 8, 2025). In that case, the employee (a bus operator) suffered from sickle cell anemia. He told his employer about this condition. The employee had a poor attendance record during his employment. He finally entered into a "last-chance agreement" with his employer. It provided that his employment would be terminated if he accrued a certain number of unexcused absences in the future.

On June 7, 2021, the employee experienced pain associated with his sickle cell anemia. He had to be hospitalized. That morning, he called his employer to say that he must go to the hospital. He also told his employer that he did not have a babysitter. The employer marked the reason for his absence as "NO BABYSITTER," which was an unexcused absence. This latest absence pushed the employee over his limit under the last chance agreement. Later that day, he submitted an FMLA leave application to the employer. The next day, the employee had another flare-up. He returned to the hospital and called in sick again. The employer also approved his FMLA leave request beginning on June 7. However, the employee was subsequently terminated for exceeding his permissible number of absences under the last-chance agreement.

After his termination, the employee sued the employer under the Americans with Disabilities Act and the FMLA. The trial court dismissed his claims at the summary judgment stage. In relevant part, the trial court ruled that the employee's claims for FMLA interference and retaliation warranted dismissal because he failed to provide adequate notice to his employer that he needed to take FMLA leave on June 7, 2021.

On appeal, the Third Circuit ruled that the trial court erred by dismissing the employee's FMLA claims. The Third Circuit noted that "[s]howing that notice was provided is not particularly onerous." In fact, an employee "need not expressly assert rights under the FMLA or even mention the FMLA" in providing notice to an employer. Although simply "calling in 'sick' without providing more information" is not enough, the Third Circuit ruled that the employee arguably provided sufficient notice of his intent to invoke his FMLA rights on June 7 for the following reasons:

- He called his employer and requested an emergency day off because he had to go to the hospital;
- He initiated a formal FMLA leave application several hours later; and
- The employer subsequently granted his FMLA leave application, which covered his absence on June 7.

At bottom, the Third Circuit ruled that the employer "could not legally penalize [the employee] for an absence that became FMLA leave before his firing."

Walker serves as a useful reminder for a simple point: an employee generally must clear a low bar to request FMLA leave.

To read the full blog post, click here.

For more information, please contact Shane Miller at shane.miller@fmglaw.com or your local FMG attorney.

FLORIDA'S "CHOICE" ACT ESTABLISHES NEW EMPLOYER-FRIENDLY PROTECTIONS FOR GARDEN LEAVE AND NONCOMPETE AGREEMENTS

By: Emily R. Muzyka

Florida's Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth Act (also known as the CHOICE Act), has gone into effect as of July 1, 2025. The Act provides for non-competition periods of up to four (4) years after employment is ended. The Act also calls for streamlined enforcement of covered non-compete agreements, which includes automatic temporary injunctions against covered employees and their new employer. Both non-competition and garden leave agreements are covered under the Act.

Covered Employees

Under the Act, a "covered employee" is defined as "an employee or an individual contractor who earns or is reasonably expected to earn a salary greater than twice the annual mean wage of the county in Florida in which the employer has its principal place of business, or the county in Florida in which the employee resides if the employer is not principally based in this state." Notably, healthcare practitioners are excluded from being a covered employee regardless of their salary level. A "covered employer" is defined as an entity or individual who employs or engages a covered employee.

Garden Leave Agreements

The Act states that a covered garden leave agreement "means a written agreement, or part of a written agreement, between a covered employee and covered employer in which: (a) the covered employee and covered employer agree to up to, but no more than, 4 years of advance, express notice before terminating the employment or contractor relationship; (b) the covered employee agrees not to resign before the end of such period; and (c) the covered employer agrees to retain the covered employee for the duration of such notice period and to continue paying the covered employee the same salary and providing the same benefits that the covered employee received from the covered employer in the last month before the commencement of the notice period. The covered employer is not obligated to provide discretionary incentive compensation or benefits or have the covered employee continue performing any work during the notice period." A covered garden leave agreement will not violate public policy as long as the covered employee was advised, in writing, of the right to seek counsel before the agreement was executed and was provided notice of the provision at least 7 days before the offer of employment expired, the covered employee acknowledged, in writing, receipt of confidential information or customer relationships, and the covered garden leave agreement follows the specifications set forth within the Act. These specifications include that a covered employee does not have to provide services to the covered employer after the first 90 days of the notice period, that a covered employee may engage in nonwork activities at any time during the remainder of the notice period, that the covered employee may work for another employer during the remainder of the notice period with permission from the covered employer, and that the garden leave agreement notice period may be reduced if the covered employer provides at least 30 days' advance notice in writing to the covered employee.

If a covered employee breaches a covered garden leave agreement, then a court, upon application, must issue a preliminary injunction prohibiting the employee from providing services to any other person or entity during the notice period.

To read the full blog post, click here.

For more information, please contact Emily Muzyka at emily.muzyka@fmglaw.com or your local FMG attorney.

TRUMP MOVES TO RESTORE QUORUM ON NATIONAL LABOR RELATIONS BOARD

By: Sunshine R. Fellows

President Donald J. Trump has formally nominated Scott Mayer and James Murphy to fill the two vacant Republican seats on the National Labor Relations Board ("NLRB"), sending their names to the U.S. Senate for confirmation. These nominations follow an unprecedented move earlier this year when Trump removed Democratic board member Gwynne Wilcox, a firing that has triggered ongoing legal battles.

Nominees at a glance:

Scott Mayer: Currently Boeing's chief labor counsel, Mayer has extensive experience on the management side, including roles at InterContinental Hotels, MGM Resorts and Aramark. His term, if confirmed, would run through December 16, 2029.

James Murphy: A seasoned NLRB career attorney, Murphy has been a law clerk since 1974 and most recently has served as Chief Counsel to Acting Chair Marvin Kaplan. His term would extend to December 16, 2027.

Why this matters:

The NLRB has lacked its required three-member quorum since January, following Wilcox's removal, leaving it unable to issue rulings or enforce hundreds of pending labor cases. If confirmed, Mayer and Murphy would join current Republican Chair Marvin Kaplan (term expiring August 27, 2025) and Democratic member Dave Prouty, restoring the Board to a Republican-majority quorum.

A functioning Board could soon revisit several Biden-era employee-friendly decisions such as limits on captive-audience anti-union meetings and expansions of union election procedures, and potentially reverse them.

Legal and political context:

The Supreme Court has allowed Wilcox's firing to stand temporarily while legal appeals continue keeping the Board stalled.

Critics, including labor unions like the Communications Workers of America, are raising alarms calling the nominations part of an "anti-worker" agenda and urging Congress to await the resolution of Wilcox's lawsuit before confirming new appointees.

What's next:

Both Mayer and Murphy must be confirmed by the full Senate, likely after Senate HELP Committee action. With Chair Kaplan's term ending in late August, timing is tight. A potential confirmation window exists before a Board reshuffling might follow.

Overall, Trump's latest move seeks to revive a stalled NLRB, shifting its ideological composition toward the management side and setting the stage for a broader rollback of worker-friendly policies. With the Senate's timetable and court rulings still in flux, all eyes will be on Washington in the coming weeks.

For more information, please contact Sunshine Fellows at sunshine.fellows@fmglaw.com or your local FMG attorney.

LEGAL ISSUES WITH WORKPLACE ROMANCES: WHY EMPLOYERS SHOULD TAKE NOTICE OF THE ASTRONOMER CEO KISS CAM SCANDAL

By: Emaan Ali Bangash and Robert Chadwick

With the Astronomer CEO Coldplay kiss cam scandal taking the internet by storm, employers should take a good hard look at their workplace romance policies. Though most employers have anti-harassment policies, these policies only cover potentially unwelcomed romantic or sexual advances. They do not address potential issues that may arise when such advances are welcomed. Beyond the potential for internet embarrassment, tolerating a welcomed romance between a supervisor and a subordinate or lower-level employee can lead to a lengthy legal battle for an employer.

One of the most obvious issues with permitting workplace romances is the potential for favoritism, though circuits differ significantly on whether sexual favoritism of an employee, known as the "paramour theory," violates Title VII. *See generally Maner v. Dignity Health*, 350 F. Supp. 3d 899 (D. Ariz. 2018), *aff'd*, 9 F.4th 1114 (9th Cir. 2021). Moreover, even welcomed workplace romances can sour and develop into costly retaliation, sexual harassment or hostile work environment claims. Whether or not they're ultimately meritorious, the complex facts involved in such relationships make it difficult to determine what claims pass legal muster, taking significant time and costs to defend.

That a soured office relationship can easily become fodder for a sexual harassment or retaliation claim became clear for a male employee, who began a romantic relationship with his married female supervisor. *Friel v. Mnuchin*, 474 F. Supp. 3d 673, 693 (E.D. Pa. 2020), *aff'd*, No. 20-2714, 2021 WL 6124314 (3d Cir. Dec. 28, 2021). Soon after, the supervisor's husband began harassing the employee, and the female supervisor began accusing the employee of things he adamantly denied. After he received a five-day suspension with no pay, the employee filed sex discrimination, retaliation and sexually hostile work environment claims. Though the court granted summary judgment for the employer, it held he satisfied three of the four elements of the *McDonnell-Douglas* test for his sex discrimination claim, only failing at the final element requiring evidence that other women received more favorable treatment than him.

In another recent case, a female probation officer had a four-year sexual relationship with a male judge. *Starnes v. Butler Cnty. Court of Common Pleas, 50th Judicial Dist.*, 971 F.3d 416, 422–23 (3d Cir. 2020). After their sexual relationship ended and she was hired to work in his office, the judge began cajoling her into sexual favors, flirting with her from the bench and asking her to film herself performing sexual acts. This continued until she switched offices.

When she requested to return to his office, the judge made her sign a waiver releasing his court of all claims against it, and upon her return, "she was denied her own office, overtime, training opportunities, and the right to serve on-call duty." Upon letting her supervisors (including the judge) know she intended to file an EEOC complaint, she was immediately placed on a performance improvement plan. Though she ended up filing an equal protection claim based on sex, the court applied the Title VII *McDonnell Douglas* standard in finding she sufficiently demonstrated actionable discrimination existed.

Ultimately, these opinions confirm that allowing workplace romances can be risky, but precautions can be taken to mitigate many of the risks by creating anti-fraternization or employment relationship policies. Examples include requiring that a relationship be cleared with HR to ensure no conflicts-of-interest exist, reallocating a supervisor's managerial and disciplinary responsibilities to another supervisor, or prohibiting relationships where it is clear the relationship has a negative impact on job performance. Though relationships cannot be completely eliminated, the potential negative legal implications can be minimized through these kinds of policies.

For more information, please contact Bob Chadwick at bob.chadwick@fmglaw.com or Emaan Ali Bangash at emaan.bangash@fmglaw.com.

EMPLOYERS RECEIVING FEDERAL FUNDS FACE RENEWED SCRUTINY OF DEI AND ANTI-BIAS PROGRAMS

By: Sunshine R. Fellows

On July 29, 2025, Attorney General Pam Bondi issued a memorandum to federal agencies accompanied by new guidance addressing how recipients of federal funding must comply with anti-discrimination laws. While the message is framed broadly, it carries pointed implications for employers operating under the umbrella of federal financial support – particularly those with diversity, equity, and inclusion ("DEI") programs in place.

The core directive is this: Legal compliance must take precedence over intent or branding. Regardless of how a program is described or what goals it aims to achieve, federal law prohibits differential treatment based on race, sex, religion or other protected classifications.

Guidance in focus: what employers need to know

The newly released guidance outlines the government's expectations for all entities that receive federal funds. Key elements include:

- Substance over optics: Programs that appear neutral on their face may still violate civil rights laws if they result in individuals being treated differently based on protected characteristics.
- Proactive review required: Federal funding recipients are advised to critically assess existing policies, partnerships and practices to ensure they are compliant with anti-discrimination obligations.
- Risk management emphasized: The guidance suggests that compliance is not only a legal imperative but also a practical strategy for avoiding litigation, reputational damage and disruptions to funding.

Why it matters now

This development comes at a time when the legality of DEI initiatives is under increased national scrutiny. The message from the federal government is clear: Well-intentioned policies can still cross the legal line if they result in preferential or adverse treatment based on protected status.

For employers, especially those in education, healthcare, research or industries with federal contracts, this guidance signals a need to reassess:

- Internal programs aimed at promoting diversity in hiring, promotions or training.
- External partnerships with advocacy groups, consultants or vendors focused on DEI.
- Language and framing used in policies, job postings and corporate communications.

Next steps for employers

To align with this guidance and mitigate potential exposure, employers should consider the following action plan:

- Conduct a legal audit of all DEI-related initiatives, particularly those affecting employment decisions.
- Update policies and training materials to ensure compliance with civil rights statutes, such as Title VI, Title VII and Title IX.
- Engage employment counsel to review practices and provide practical recommendations tailored to your organization's structure and risk profile.
- Educate leaders and stakeholders about the new guidance and the importance of lawful implementation of inclusion efforts.

To read the full blog post, click here.

For more information, please contact Sunshine Fellows at sunshine.fellows@fmglaw.com or your local FMG attorney.

2025: A YEAR OF TUMULT FOR THE NATIONAL LABOR RELATIONS BOARD

By: Robert Chadwick

For an agency which has existed for 90 years, it is safe to say that the year 2025 has been the most tumultuous for the National Labor Relations Board ("NLRB"). With four months remaining on the calendar, the NLRB has already experienced: (1) the termination of a Board member without cause; (2) a lack of quorum which has stymied internal appeals for seven months; and (3) a Federal Court of Appeals opinion finding the structure of the NLRB to likely be unconstitutional.

A Primer on the NLRB

The NLRB was formed as part of the National Labor Relations Act ("NLRA") to enforce the rights of non-supervisory employees to join together to improve their wages and working conditions, with or without a union. The NLRB is a bifurcated agency governed on one side by a five-person Board and on the other side by a General Counsel. Board Members and the General Counsel are appointed by the President with the consent of the Senate.

Although one of the functions of the NLRB is the administration of issues related to union representation, it is its role regarding alleged violations of the NLRA, otherwise known as unfair labor practices, which has been most affected in 2025. As to this role, the General Counsel investigates and prosecutes unfair labor practice cases. Administrative Law Judges ("ALJs") hear and decide such cases, subject to review on appeal to the Board. Board decisions are not self-enforcing and the final word on such decisions is often left to federal appellate courts.

Trump Dismisses Board Member Gwynne Wilcox

The NLRA says that the President can remove a NLRB Board Member only for "neglect of duty or malfeasance." This provision did not stop President Trump from dismissing Board Member Gwynne Wilcox on January 27, 2025, without cause, more than three years prior to the end of her scheduled term in 2028.

Although Ms. Wilcox's dismissal has been challenged in federal court, it has not been overturned. Indeed, the U.S. Supreme Court signaled in a May 22, 2025 Order that the dismissal may never be overturned. In that Order, Chief Justice Roberts cited the executive power vested in the President by Article II of the U.S. Constitution to remove executive officers who exercise that power on his behalf. In granting an application to stay an order compelling Ms. Wilcox's reinstatement, Chief Justice Roberts opined: "[T]he Government faces a greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty."

Wilcox's Dismissal Leaves NLRB Without a Quorum

Ms. Wilcox's dismissal left the Board with only two members, one shy of that needed for a quorum. The U.S. Supreme Court in *New Process Steel v. NLRB* previously held that the NLRB cannot act without a quorum. The absence of a quorum has thus stalled internal appeals of ALJ decisions in unfair labor practice cases.

Last month, President Trump nominated Scott Mayer and James Murray to be members of the NLRB, but these nominations await Senate approval. Also, the term of Board Chair Marvin Kaplan is scheduled to expire on August 27, 2025. President Trump has not announced whether Mr. Kaplan will be renominated to another term. After seven months, there is thus no timetable for when the NLRB will achieve a quorum.

To read the full blog post, click here.

For any questions or further clarification, please contact Robert Chadwick at bob.chadwick@fmglaw.com or your local FMG attorney.

DUAL LIABILITY: THE STICKY BUSINESS OF ANSWERING FOR EMPLOYEES' INTENTIONAL CONDUCT IN THE STATE OF NEW JERSEY

By: Margaret D. Kartsonis

When called upon to answer for the actions of their employees, may employers be subject to both direct and indirect liability arising out of the same intentional conduct of an employee? In the State of New Jersey, the answer can be "yes." Indeed, in New Jersey, liability to employers for an employee's conduct may come both directly, under a theory of negligent hiring, retention or supervision or indirectly, under a theory of vicarious liability, even in instances where an employee's conduct is intentional in nature.

Direct liability arises out of an employer's *own* negligence if it knew, or should have known, that its decision-making as to hiring, retaining or supervising the employee in question could result in harm to the injured party. *See* Di Cosala v. Kay, 91 N.J. 159 (1982).

To the contrary, vicarious liability, often called "respondeat superior," refers to the liability of an employer for the conduct of employees which are carried out within the scope of their employment. *See* Vosough v. Kierce, 437 N.J.Super. 218 (2014). Broadly speaking, the doctrine is derived from the principle that any party that benefits from conduct should also bear responsibility caused by the same. *See* Pantano v. New York Shipping Association, 254 N.J. 101 (2023).

To determine whether an employee was acting within the scope of his employment, New Jersey juries are tasked with evaluating the evidence presented at trial before answering the following questions:

- First, is the conduct at issue the type which the employee is employed to perform?
- Second, did the conduct occur within the time of employment?
- Third, was the conduct intended to serve the employer?
- And finally, if force is intentionally used by the employee against another, was the use of that force anticipated by the employer?

Ivan Tymiv, et al v. Lowe's Home Centers, LLC, et al., No. A-1380-22 (App. Div. August 22, 2025). Critically, when an employee's conduct, however intentional or wrongful, "originated in his effort to fulfill an assigned task," that employee may have acted within the scope of his employment. *Id.* Thus, at the time of the incident that the employee was attempting to serve his employer in committing an intentional tort, his employer may be deemed negligent for their wrongdoing to the same extent. *Id.*

Most recently, in a decision rendered on August 22, 2025, in the matter of Ivan Tymiv, et al v. Lowe's Home Centers, LLC, et al., the Superior Court of New Jersey, Appellate Division, affirmed that employers may be subjected to dual liability at trial as a result of the intentional conduct of their employees. Specifically, though it refused to vacate a previous decision on the issue, the Appellate Court acknowledged the trial court's error in instructing a jury in a way that allowed either an employer's direct or vicarious liability, but not both. Thus, if conducting business in the State of New Jersey, employers should appreciate the risk that they can be held dually responsible for the acts of their employees, regardless of their employees' affirmative intent.

For information on how we can assist you in defending a claim of liability arising out of your employees' conduct, either intentional or otherwise, please contact Margaret D. Kartsonis at maggie.kartsonis@fmglaw.com or your local FMG attorney.

INTENT OVER NEGLIGENCE: SIXTH CIRCUIT REDEFINES EMPLOYER LIABILITY FOR CUSTOMER HARASSMENT

By: Sunshine R. Fellows

In a decision that could reshape how employers respond to harassment by non-employees, the Sixth Circuit in *Bivens v. Zep, Inc.* held that liability under Title VII requires more than negligence—it demands intent or near-certainty. This ruling diverges sharply from long-standing EEOC guidance and the approach taken by most other federal appellate courts.

What happened in *Bivens*

Dorothy Bivens worked as a sales representative for Zep, Inc. During a visit to a client site, she experienced inappropriate behavior from a motel manager. She reported the incident, and Zep reassigned the account to prevent further contact. Later, her position was eliminated as part of a company-wide reduction in force. Bivens sued, alleging a hostile work environment, retaliation and racial discrimination. The trial court ruled in favor of Zep, and the Sixth Circuit affirmed.

The Sixth Circuit's standard: Intent or certainty

The court emphasized that Title VII is designed to address *intentional* discrimination. Since the motel manager was not employed by Zep, his conduct could not be automatically attributed to the company. Instead, the court held that Zep could only be liable if it either intended the harassment to occur or made decisions that made harassment virtually inevitable.

This marks a significant departure from the more common "knew or should have known" negligence standard. The court found no evidence that Zep acted with intent or substantial certainty, especially since the company reassigned the account after the incident and the executive responsible for the workforce reduction was unaware of Bivens's complaint.

How this differs from other jurisdictions

The EEOC and most federal circuits, including the First, Second, Eighth, Ninth, Tenth and Eleventh, have long applied a negligence-based rule. Under that framework, employers can be held liable if they fail to take reasonable steps to prevent or correct harassment by third parties. The Sixth Circuit rejected this approach, arguing that Title VII's language and underlying principles require a higher threshold.

Practical guidance for employers

- *Higher threshold in the Sixth Circui*t: Employers in Kentucky, Michigan, Ohio and Tennessee now face a more favorable standard in third-party harassment cases.
- *Proactive steps still matter*: Reassigning clients, documenting complaints and taking swift action remain essential to showing lack of intent.
- *Multi-state compliance is key*: Employers operating in multiple jurisdictions must continue to meet the lower negligence standard outside the Sixth Circuit.
- *Retaliation claims require clarity*: Keeping detailed records of who made employment decisions and when can help defeat retaliation allegations.

What this means for EPLI claims professionals

For employment practices liability insurers, the *Bivens* decision may reduce exposure in the Sixth Circuit. Claims involving customer harassment should now be evaluated through the lens of employer intent or certainty, which may justify lower reserves. However, because most jurisdictions still apply the negligence standard, multi-state claims should be assessed conservatively to avoid under-reserving.

To read the full blog post, click here.

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NEW CALIFORNIA REGULATIONS TARGET DISCRIMINATION RESULTING FROM USE OF ARTIFICIAL INTELLIGENCE IN RECRUITING, HIRING AND EMPLOYMENT DECISIONS

By: Mariam E. Grace and Daniel Parker Jett

On June 27, 2025, the California Civil Rights Council ("Council"), supported by California Civil Rights Department ("CRD") staff, secured final approval for revisions to Title 2 of the California Code of Regulations. The new regulations, which go in effect on October 1, 2025, intend to protect against employment discrimination arising out of employers' use of artificial intelligence in making employment decisions. The Council amended its regulations to define terms such as "agent," "employment agency," "proxy," "automated-decision system," "algorithm," "artificial intelligence," "automated-decision system data" and "machine learning."

Key definitions

As defined in the regulations, an "agent" of an employer is considered an employer under the Fair Employment and Housing Act ("FEHA") and includes "any person acting on behalf of an employer, directly or indirectly, to exercise a function traditionally exercised by the employer or any other FEHA-regulated activity, which may include *applicant recruitment, applicant screening, hiring, promotion, or decisions regarding pay, benefits* or *leave*, including when such activities and decisions are conducted in whole or in part through the use of an automated decision system." [Emphasis added].

Under the regulations, any "computational process that makes a decision or facilitates human decision making regarding an employment benefit" is now called an "**Automated-Decision System**" ("ADS"). ADSs which may discriminate against individual employees or applicants based on any legally protected status include:

- Questions, puzzles, games or other challenges to make a predictive assessment of an applicant or employee or measure their abilities, characteristics, personality trait, aptitude, attitude or cultural fit, or screen, evaluate, categorize or recommend the applicant or employee;
- Directing job advertisements towards targeted groups;
- Screening resumes for particular terms or patterns;
- Analyzing voice, word choice or facial expression during online interviews; or
- Analyzing employee or applicant data from third parties.

Effect of new regulations

Neither employers nor their agents may use an ADS that discriminates against employees or applicants on any basis legally protected under FEHA in practices relating to employment, pre-employment or selection for employment. Use of an ADS pertaining to medical and psychological examinations and inquiries is also likely to elicit unlawful information regarding the individual's disability status.

California employers are already required to maintain employment records, including, but not limited to, all applications, personnel records, membership records, employment referral records and selection criteria, for a period of at least four (4) years. Starting October 1, 2025, employers and other covered entities must retain all *ADS data* for at least four (4) years as well.

We strongly advise that employers thoroughly vet any ADS used in recruitment, hiring or promotion of employees, including those used by third parties, such as headhunters, employment agencies or temporary labor services, to ensure that they will not inadvertently discriminate on the basis of any characteristic that is legally protected by FEHA.

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THIRD CIRCUIT REVERSES CLASS CERTIFICATION IN INSURANCE UNDERPAYMENT SUIT

By: Sean R. Riley

The Third Circuit Court of Appeals recently reversed the District Court for the Eastern District of Pennsylvania's decision to certify two classes against an insurance carrier, holding that individualized issues predominated over common ones. *See Drummond v. Progressive Specialty Ins. Co*, 142 F.4th 149 (3d Cir. July 7, 2025). Therein, the plaintiffs asserted breach of contract claims against the carrier, arguing that the carrier's method of valuing totaled vehicles resulted in systematic underpayments to insureds. The plaintiffs moved for class certification, arguing that the common issue of the legitimacy of the carrier's valuation method predominated.

The trial court agreed, finding that proving whether the allegedly improper method of valuation was applied to the class's vehicle valuations was easily supported by common elements. The Insurance carrier filed a petition for leave to file an interlocutory appeal, which was granted. On appeal, the Third Circuit reversed, finding that common proof of the allegedly improper method of valuation alone was insufficient to prove each class member was actually underpaid. In so holding, the Court emphasized that while the carrier had not presented evidence that any putative class members were paid in excess of the amount contractually due, the fact that it was possible that some class members may have received a settlement payment equal to or greater than their vehicle's actual cash value required individualized proof of damages.

This decision demonstrates that appellate courts are closely scrutinizing Rule 23(b)(3)'s predominance requirement to ensure that matters involving individualized evidentiary showings are not improperly permitted to proceed to trial as class actions.

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EASTERN DISTRICT OF PENNSYLVANIA CLARIFIES LIMITS OF WORKPLACE HARASSMENT AND RETALIATION CLAIMS

By: Nick Franos

In Nyamu v. Merck & Co., the U.S. District Court for the Eastern District of Pennsylvania granted summary judgment to the employer, dismissing claims of retaliation and hostile work environment sexual harassment. The decision illustrates both the high standard plaintiffs must meet in harassment cases and the continued viability of summary judgment for employers under the right circumstances.

Background

Peter Nyamu, a biotechnician at Merck, alleged misconduct after a staff meeting where his supervisor, upon realizing he had forgotten to hand Nyamu a schedule, leaned in and whispered: "I don't know how I missed giving you a schedule because I use your voice to know where you are standing. You have a voice that is very specific to me." Two months later, Nyamu claimed he experienced retaliation in the form of reduced overtime and reassignment after filing a grievance.

The Court's Analysis: Retaliation Claim

To prevail on retaliation, a plaintiff must show they engaged in protected activity, i.e., conduct that reflects an objectively reasonable belief of unlawful discrimination. The court concluded no reasonable person could interpret the supervisor's remark as unlawful under Title VII. Because the incident amounted to, at most, an isolated comment without derogatory or sexual content, Nyamu's grievance was not protected activity. Summary judgment was therefore granted on retaliation.

Hostile Work Environment Claim

A hostile work environment requires intentional discrimination based on sex that is severe or pervasive. Evaluating the totality of the circumstances (frequency, severity, whether physically threatening or humiliating, and impact on work) the court found the single whisper neither severe nor pervasive. There was no evidence of sexual content or intent, and thus no basis to infer discrimination "because of sex." Summary judgment was also granted on this claim.

Significance for Employers

Although summary judgment remains rare in employment discrimination cases in the Third Circuit, Nyamu underscores two important points:

1. Protected Activity Has Limits. Not every complaint about workplace conduct qualifies. To be protected, the underlying belief of illegality must be objectively reasonable.
2. "Severe or Pervasive" Still Matters. Courts will not stretch Title VII to cover isolated, non-sexual remarks lacking genuine discriminatory content.

Employers should not expect a surge of favorable summary judgments, but this case demonstrates that with a well-documented defense and clear legal standards, early dismissal is possible. It also reinforces that courts remain willing to apply the "severe or pervasive" standard rigorously, protecting employers from claims grounded in minor or isolated incidents.

For more information, please contact our FMG Labor & Employment Law team.

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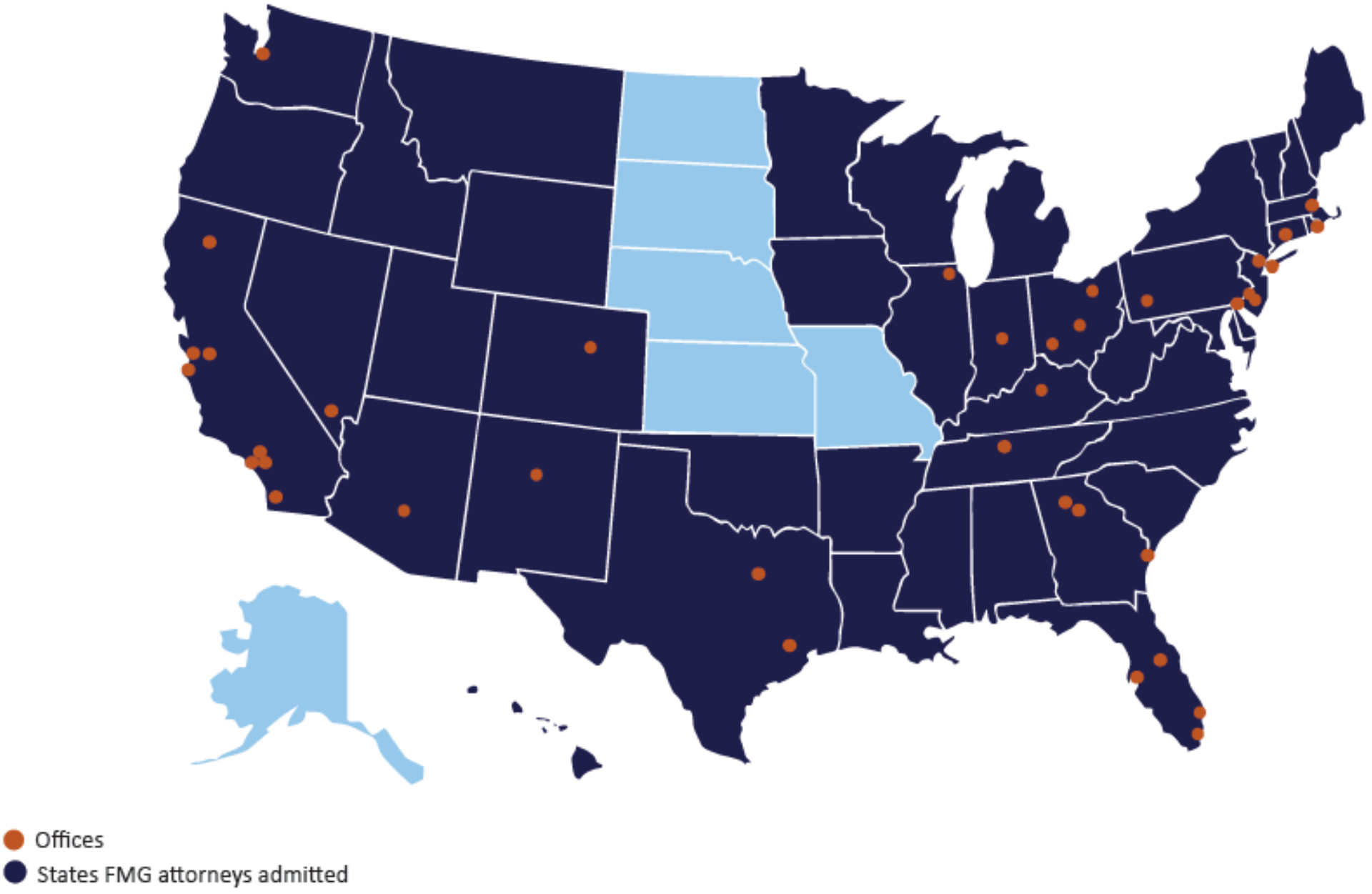
FMG's National Reach



When It Counts