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Q1 - 2026

# FMG Labor & Employment Law Quarterly Report

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

# Thank you for reading the Q1 2026 FMG Labor & Employment Law Quarterly Report.

**The first quarter of 2026 underscored the rapid evolution of the employment law landscape. Federal policy changes have created new uncertainty for employers, particularly in the areas of immigration enforcement, DEI initiatives, NLRB activity, and the growing impact of artificial intelligence in the workplace. The articles below address several of these developments. The broader takeaway is straightforward: employment law is evolving rapidly, and employers who fail to adapt risk falling behind. Now more than ever, partnering with experienced employment counsel is essential.**

# SIXTH CIRCUIT EXPANDS REACH OF EFAA: SEXUAL HARASSMENT CLAIM MAY KEEP ENTIRE CASE IN COURT

**By: Madison Alvarez**

**March 26, 2026**

The Sixth Circuit recently issued a decision with significant implications for employers relying on arbitration agreements. In *Bruce v. Adams & Reese LLP*, the court held that when a lawsuit includes a sexual harassment allegation covered by the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA), the entire case may proceed in court rather than arbitration. This result applies even where the remaining claims would otherwise fall within a valid and enforceable arbitration agreement. For employers, the decision materially expands the risk that disputes will be litigated in a public forum.

The ruling turns on the court's interpretation of the term "case" in the EFAA. Many employers anticipated that the statute would apply only to the specific sexual harassment claim at issue. The Sixth Circuit rejected that narrower view and instead held that the presence of a qualifying claim removes the entire action from arbitration. In practical terms, a single covered allegation can alter the procedural posture of all claims asserted in the same lawsuit.

Notably, the Sixth Circuit is the first federal appellate court to address this issue. Other circuits may adopt a similar approach or reach a narrower interpretation. A split among the circuits would likely prompt review by the United States Supreme Court.

**Why this decision matters for employers**

The decision reflects a developing trend that employers with arbitration programs should monitor closely. While arbitration agreements remain an important risk management tool, the EFAA now introduces a meaningful limitation on their enforceability in cases involving sexual harassment allegations.

**Expanded procedural impact**

Under the Sixth Circuit's interpretation, the EFAA may have broader procedural consequences than many employers expected. Any lawsuit that includes a qualifying sexual harassment allegation may proceed entirely in court, even where other claims, such as discrimination, retaliation, or wage-related claims, would otherwise be subject to arbitration. This increases the likelihood of public litigation, broader discovery and higher defense costs.

**Strategic pleading considerations**

The decision also creates an incentive for plaintiffs to include sexual harassment allegations where the facts arguably support such a claim. By doing so, a plaintiff may avoid arbitration for all claims in the case. Employers may therefore see more complaints combining harassment allegations with other employment-related claims in a single action.

**Reevaluation of arbitration and response strategies**

In light of this development, employers should consider:

- Reviewing arbitration agreements to ensure clarity, enforceability, and alignment with current law;
- Evaluating internal reporting and investigation protocols for harassment allegations, given their expanded procedural significance;
- Training supervisors and HR personnel to respond promptly and appropriately to complaints that may implicate the EFAA; and
- Preparing for an increase in court-based litigation, including the associated costs and exposure.

Employers should also consult with employment counsel to assess whether updates to dispute resolution programs or broader risk management strategies are warranted.

To read the full blog post, click here.

For more information on this topic contact Madison Alvarez at madison.alvarez@fmglaw.com or your local FMG attorney.

# THIRD CIRCUIT SHIFTS NEW JERSEY ANTI-DISCRIMINATION LAW POST-AMES

**By: Nicholas Franos**

**March 17, 2026**

In *Massey v. Borough of Bergenfield*, the Third Circuit revived a white police officer's suit of racial discrimination in hiring, reversing the district court's grant of summary judgment and relying on the United States Supreme Court's 2025 decision in *Ames v. Ohio Department of Youth Services*. This decision serves as further evidence of the emphasis the federal government and judiciary continue to place upon instances of what are often described as 'reverse discrimination' claims.

**Factual background**

Christopher Massey ("Plaintiff") is a white male who served for decades in the Borough of Bergenfield's ("Defendant's") Police Department, rising to the rank of Deputy Chief and acting as the Department's Officer in Charge in mid-2019. Around this time, Defendant denied Plaintiff a promotion to the chief position in favor of Mustafa Rabboh, an Arab-Muslim male with the rank of Captain.

**Third Circuit's analysis**

Applying the New Jersey Law Against Discrimination framework, the district court granted summary judgment pursuant to its application of the background circumstances rule, which requires a Title VII plaintiff who is not in the minority to show that he has been victimized by an unusual employer who discriminates against the majority.

In 2025, however, the United States Supreme Court rejected the federal 'background circumstances' rule in *Ames*. Unanimously holding that the rule is not consistent with Title VII's text or case law construing the statute, the Court mandated that the standard for proving disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of a majority group.

The question before the Third Circuit, therefore, was whether New Jersey's background circumstances rule was still viable after *Ames*. Answering in the negative, the Circuit Court began by noting that New Jersey state courts had not had an opportunity to weigh in. So, the Court was left to perform the delicate task of predicting how the Supreme Court of New Jersey would interpret and apply the New Jersey Law Against Discrimination ("NJLAD") in the aftermath of *Ames*.

Predicting that the Supreme Court would look to federal law as a key source of interpretive authority, as it did when adopting the background circumstances rule, the Circuit Court predicted that the New Jersey Court would find the analysis in Ames compelling when interpreting their own anti-discrimination law. This followed from the determination that the pertinent text from Title VII and the NJLAD is identical, prohibiting discrimination against *any person*.

**Key takeaways for employers**

The rejection of the background circumstances rule means that all employees, regardless of majority or minority status, are subject to the same standards under Title VII and state anti-discrimination laws like the NJALD which mirror Title VII. In light of this continued trend focusing attention on cases of reverse discrimination, employers should review their anti-discrimination policies and training programs to ensure compliance with the updated legal standards, with an emphasis on ensuring consistent and equitable treatment for all employees.

For more information, please contact Nicholas Franos at nicholas.franos@fmglaw.com or your local FMG attorney.

# SIXTH CIRCUIT PUSHES BACK ON NLRB'S CEMEX STRATEGY: KEY LIMITS ON BARGAINING ORDERS

**By: Lyndsey Almeida**

**March 12, 2026**

A recent decision from the U.S. Court of Appeals for the Sixth Circuit significantly limits the National Labor Relations Board's effort to expand the circumstances under which employers can be forced to recognize and bargain with a union. In *Brown-Forman Corp. d/b/a Woodford Reserve Distillery v. NLRB* (6th Cir. Mar. 6, 2026), the court held that the NLRB exceeded its authority when it attempted to rely on the Board's controversial Cemex framework as the default basis for imposing bargaining orders.

For employers facing union organizing campaigns, the ruling represents an important development that may curb one of the Board's most aggressive organizing-related enforcement tools.

**Background of the Brown-Forman dispute**

Employees at Brown-Forman's Woodford Reserve distillery began exploring union representation after raising concerns about compensation. As the organizing effort progressed and the union obtained authorization cards from a majority of employees, the company announced several workplace changes, including a significant wage increase, expanded compensation opportunities, greater vacation flexibility, and the distribution of free bottles of bourbon shortly before the scheduled election. Support for the union subsequently declined, and the union ultimately lost the election.

The NLRB concluded that the timing and scope of these benefits constituted unlawful attempts to influence employee support for the union and ordered the company to recognize and bargain with the union under the framework announced in the Board's 2023 *Cemex* decision.

**The Sixth Circuit rejects the Cemex bargaining-order remedy**

On appeal, the Sixth Circuit agreed that Brown-Forman committed unfair labor practices by implementing substantial and well-timed compensation and benefit changes during the organizing campaign. However, the court rejected the Board's attempt to impose a bargaining order under the *Cemex* framework. The court emphasized that the *Cemex* approach diverged sharply from the Supreme Court's established framework for when bargaining orders may be used and explained that only the long-standing standard established in *NLRB v. Gissel Packing Co.* could guide the Board's remedy analysis.

Under *Gissel*, bargaining orders are considered an extraordinary remedy appropriate only when employer misconduct is so severe that a fair election would be unlikely. The Sixth Circuit concluded that the Board had effectively attempted to create a new, broadly applicable rule through adjudication rather than rulemaking, and held that such a sweeping policy shift cannot serve as the basis for imposing bargaining orders. The court therefore vacated the bargaining order and remanded the case to the Board to reconsider the appropriate remedy under valid legal standards.

**Practical takeaways for employers**

For employers, the decision offers both reassurance and caution. The ruling limits the NLRB's ability, at least within the Sixth Circuit, to rely on the *Cemex* framework as an automatic pathway to bargaining orders when elections are set aside due to employer misconduct. At the same time, the court reaffirmed that significant wage increases, new benefits, or other workplace changes announced during an organizing campaign can still constitute unlawful interference with employee rights.

Employers should therefore exercise caution when making compensation or policy changes during union organizing efforts and ensure that any such decisions are consistent with established business practices and supported by legitimate operational reasons. Employers should also monitor developments in other federal appellate courts, as additional rulings could further define, or potentially revive, the scope of the Cemex framework in future labor disputes.

For more information, please contact Lyndsey Almeida at lyndsey.almeida@fmglaw.com or your local FMG attorney.

# THE EEOC'S NEW DEI ENFORCEMENT POSTURE: WHAT EMPLOYERS NEED TO KNOW (AND DO NOW)

**By: Sunshine Fellows**

**March 11, 2026**

In the last few weeks, the EEOC has sent a message that employers should not miss: DEI programs and initiatives that differentiate by protected class, or that are perceived to do so in design or effect, are now squarely in the agency's enforcement crosshairs. This is not just rhetoric. The EEOC has paired public-facing guidance and warning statements with concrete litigation moves, including its first DEI-focused Title VII lawsuit and a high-profile subpoena enforcement action seeking broad information about a company's DEI practices.

This development matters regardless of anyone's personal viewpoint about DEI initiatives or the current Administration. Employers, particularly government contractors and recipients of federal funds, need to understand the government's stated enforcement position and assess litigation, investigation, and (where applicable) contracting risk accordingly.

**The government's stated view: "DEI" labels do not change Title VII rules**

The EEOC has emphasized that longstanding Title VII principles apply to employer policies and programs even when they are labeled or framed as "DEI." The agency has publicly reminded employers that employment decisions cannot be made based on protected characteristics such as race or sex.

According to the EEOC's current messaging, the same legal standards that apply to traditional employment decisions also apply to training opportunities, leadership programs, mentoring initiatives, and other workplace programs that may be described as diversity-focused.

**Recent enforcement examples employers should understand**

*Litigation challenging "women-only" professional development programs*

In February 2026, the EEOC filed a Title VII lawsuit alleging that a professional development opportunity restricted to female employees constituted sex discrimination. According to the allegations, the employer hosted a multi-day networking and professional development event for women employees that included paid time away from work and employer-funded travel and accommodations. The EEOC alleges that excluding male employees from these benefits constitutes discrimination with respect to the terms and conditions of employment.

The case signals that the agency may challenge workplace programs that provide tangible professional opportunities when those opportunities are limited to employees of a particular protected class.

*Investigations Targeting Broader Corporate DEI Practices*

The EEOC has also pursued subpoena enforcement in connection with an investigation into a large company's diversity initiatives, seeking information about mentoring programs, leadership development initiatives, internships, and internal diversity goals. These types of investigations demonstrate that the agency is willing to examine not just hiring or promotion decisions, but also the broader structure of corporate programs that influence career development opportunities.

In practical terms, this means that public statements about diversity initiatives, recruiting programs, and internal leadership pipelines may become part of an enforcement investigation.

**The broader context: a shift in federal enforcement priorities**

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.

# WORKPLACE WHIPLASH: NLRB RETURNS TO 2020 JOINT EMPLOYER RULE

**By: Cori Agnoni**

**March 6, 2026**

The National Labor Relations Board ("NLRB" or "the Board") recently announced the readoption of the narrower 2020 joint employer rule (29 C.F.R. § 103.40) for determining joint employer status. Returning to the stricter standard reduces potential exposure, particularly for employers that contract with staffing agencies, vendors, and franchisees.

Under the National Labor Relations Act ("NLRA" or "the Act"), a company that is deemed a "joint employer" shares responsibility for bargaining obligations and labor law compliance. The designation carries significant weight as it can expose employers to additional administrative burdens. Liability risk can increase even where a company's involvement in the underlying employment relationship is limited.

The Board's action effectively restores the pre-2023 regulatory framework following several years of rapid shifts in the joint employer standard, providing employers with greater clarity, at least for the time being, when structuring staffing, vendor, and franchise relationships.

**The Withdrawn 2023 Rule**

In October 2023, the NLRB issued a rule broadening the scope for determining joint employer status. Under this expansion, employers could be considered joint based on either direct or indirect control over essential terms or conditions of employment, including wages, benefits, hours, hiring, discharge, discipline, supervision, and direction. The rule expanded the circumstances under which additional entities could be held liable for unfair labor practices committed by another employer.

Less than six months after the rule was published, a federal district court in Texas vacated it, holding that the rule was inconsistent with the Act and arbitrary and capricious. Following that decision, the NLRB formally withdrew the 2023 rule on February 27, 2026.

**Readopting the 2020 Rule**

The recent publication reinstating the 2020 Rule again applies the stricter joint employer standard. Using the 2020 framework, an entity is considered a joint employer only if it possesses and exercises "substantial direct and immediate control over one or more essential terms or conditions…" relating to employment. Notably, the 2020 rule does not permit joint employer liability based solely on indirect or reserved control.

This stricter standard makes it more difficult for employers to be found as joint employers. The party alleging joint employer status bears the burden of proof. Mere assertions or broad allegations are insufficient.

**Moving Forward**

Though the narrow standard minimizes potential liability, employers must continue to evaluate contracting relationships with staffing agencies, vendors, and franchisees. Employers should also remember that joint employer determinations remain highly fact-specific and may still arise where a company exercises direct control over another entity's workforce. Best practice includes reviewing current contractual arrangements with vendors or staffing agencies and evaluating operational practices that could be interpreted as exercising direct control over another entity's workforce. Employers should also consider training managers and supervisors who interact with contract or staffing-agency personnel to avoid inadvertently exercising direct control over hiring, discipline, scheduling, or supervision decisions.

For more information about this development or its implications for your workplace, please contact Cori Agnoni at cori.agnoni@fmglaw.com or your local FMG attorney.

# OHIO MINI-WARN ACT EXPANDS REQUIREMENTS EMPLOYERS MUST FOLLOW IN MASS LAYOFFS

**By: Kim Ullner**

**March 2, 2026**

As more layoffs are announced in the news, it's a good time for Ohio employers to be sure they are complying with federal ***and*** state notice requirements. While many human resource officers are familiar with the federal WARN requirements, they may not realize a new law went into effect in Ohio on September 29, 2025. This mini-WARN law supplements the obligations employers have under federal WARN.

The Worker Adjustment and Retraining Notification Act (WARN) was passed in 1988 and generally applies to employers with at least 100 employees. WARN requires covered employers to provide at least 60 days' notice of plant closures and mass layoffs. Employers who do not provide the requisite notice can be liable for back pay, benefits, and penalties. As a result, failing to follow the requirements set by both federal WARN and Ohio's mini-WARN can be costly.

**When it applies and who is covered**

Just as with federal WARN, Ohio's mini-WARN applies when a covered employer foresees a plant closing or mass layoff (affecting 50 or more employees within thirty days). An employer is covered if it has at least 100 employees (excluding certain part-time employees as defined by the Act), or if it has 100 or more employees in total whose combined weekly hours exceed 4,000, not counting overtime. Notice is required if the employer meets the 4,000-hour threshold and lays off 50 or more employees at a single site within 30 days. Ohio's statute omits the federal 33% workforce impact test, creating ambiguity despite language suggesting Ohio's mini-WARN has a standard that is no different from federal law. It remains to be seen how this ambiguity plays out.

**Expanded recipients – who must be notified**

Notices must go to all of the following: (1) Affected employees or their union representatives; (2) the Ohio Department of Job and Family Services Director; (3) the chief elected official of ***both*** the municipality ***and*** the county where the event occurs. Federal WARN does not require separate notice to both municipal and county officials, so this mandate is new for Ohio employers.

**Expanded content – what must be included**

Ohio law tailors the content requirements by recipient and expands mandatory details. Union employee notices must include the facility location, whether the action is permanent or temporary, timing, and numbers with job titles and departments. Non-union employee notices must include reasons, timing, bumping or reemployment rights and procedures, UI and assistance information, a contact, and available services. State and local official notices must include all employee and union information, mitigation efforts, labor organization details, and a copy of the employee notice. Unlike federal WARN, the Ohio statute does not permit a short-form notice to governmental recipients.

**Notice Timing and Exceptions**

Just as federal WARN, Ohio generally requires 60 days' advance written notice and adopts federal exceptions. There are recognized exceptions which include unforeseeable business circumstances, faltering business, natural disasters, and strikes or lockouts. However, shortened or delayed notice must be as soon as practicable and explain the reason for notice that is less than 60 days.

To read the full blog post, click here.

For more information, contact Kim Ullner at kimberlee.ullner@fmglaw.com or your local FMG attorney. Freeman Mathis and Gary's labor and employment attorneys are available to provide assistance to Ohio employers who are considering mass layoffs or plant closures. We can help employers structure their reductions in force to be compliant with both federal and state law requirements.

# PENNSYLVANIA EMPLOYERS CAN'T USE CRIMINAL HISTORY INFORMATION VOLUNTEERED BY JOB APPLICANTS IN MAKING HIRING DECISIONS ACCORDING TO RECENT THIRD CIRCUIT DECISION

**By: Cynthia O'Donnell**

**February 27, 2026**

It is well known that employers frequently run criminal background checks on job applicants as part of the hiring process. Pennsylvania's Criminal History Record Information Act ("CHRIA"), however, protects job applicants from being disqualified from employment by a prospective employer because of the applicant's criminal background except in limited circumstances. CHRIA only allows an employer which is "in receipt of information which is part of an employment applicant's criminal history record information file" to use this information in its hiring decision when: (1) the applicant has a felony and misdemeanor conviction on their record; and (2) the conviction relates to suitability for employment for the position.

An employer typically "receives" information which is part of an applicant's "criminal history record information file" through a criminal background check. But what if a job applicant ***volunteers*** that they have a criminal background after the employer informs them that a background check is going to be done? Does CHRIA provide the job applicant with the same protection from an employer's improper use of volunteered criminal history information as information received from a criminal background check? The Third Circuit Court of Appeals in *Phath v. Central Transport LLC* recently considered this issue and decided that employers must comply with the mandates of CHRIA where criminal history information is received directly from the job applicant.

In *Phath*, an applicant for a driver position directly divulged to Central Transport that he had a robbery conviction years ago, after he was told a pre-employment background check was going to be done. Central Transport declined to hire him on that basis. Phath sued Central Transport alleging that it violated CHRIA because his robbery conviction did not make him unsuitable for the driver job and because Central Transport failed to notify him in writing that the conviction was a factor in its refusal to hire him, as required by the Act.

Central Transport argued that CHRIA does not apply to criminal history information received directly from a job applicant. Instead, it asserted that the Act applies only where an employer receives criminal history information from a state agency which is part of the applicant's criminal history record information file maintained by the agency.

The Third Circuit rejected Central Transport's position, finding that criminal history information disclosed by a job applicant is part of the applicant's "criminal history record information file." The Court opined that the Act's protections afforded to job applicants do not hinge on the ***source*** of the criminal history information. What matters is the ***type*** of criminal history information received.

**How Pennsylvania employers can ensure compliance with CHRIA:**

1. Determine if the job applicant's criminal history is protected from being used in making a hiring decision:

- Has the applicant been convicted of a felony or misdemeanor?
  - If "NO" – The criminal history information cannot be used under any circumstances. It is a CHRIA violation to use it in a hiring decision.
  - If "YES"- The felony or misdemeanor conviction can be used in the hiring decision ***only*** if relates to the applicant's suitability for the employment position.
    - Consider the nature of the crime and the job duties for the position in determining suitability for the job. (For example, a job applicant's felony theft conviction may relate to their suitability to work as a bank teller.)

To read the full blog post, click here.

For more information, please contact Cynthia O'Donnell at cynthia.odonnell@fmglaw.com or your local FMG attorney.

# SIXTH CIRCUIT REITERATES EMPLOYER'S RESPONSIVE OBLIGATIONS TO EMPLOYEE'S COMPLAINT(S) OF CO-WORKER HARASSMENT

**By: Nicholas Franos**

**February 23, 2026**

In *Hamm v. Pullman SST*, the Sixth Circuit upheld summary judgment for Pullman SST against Kevin Hamm's complaints of harassment and claim of retaliation. This decision serves as a strong reminder for employers that the implementation and enforcement of anti-discrimination policies are evaluated under standards of good-faith and reasonableness, affording employers meaningful discretion where they act on an honest belief.

**Factual Background**

Kevin Hamm ("Plaintiff") reported to Pullman's ("Defendant's") Human Resources Department that coworkers had mocked him for months after learning he was bisexual. HR investigated by interviewing nine coworkers, none of whom confirmed the alleged harassment; instead, they reported concerns about Plaintiff's job performance. Even though the investigation did not substantiate Plaintiff's allegations, Defendant did not treat the matter as closed.

Despite finding no corroboration, Defendant took several preventive steps, including issuing a warning, requiring anti-harassment training, reminding all employees of its discrimination policies, offering Plaintiff a transfer, and granting extended medical leave. While on leave, Plaintiff objected to each alternative assignment offered and ultimately refused all available positions. Defendant then concluded that Plaintiff had voluntarily resigned and ended his employment.

Plaintiff sued under Title VII and Michigan's Elliott-Larsen Civil Rights Act, claiming he was subjected to a hostile work environment based on sexual orientation and was retaliated against for filing his complaint.

**The Sixth Circuit's Ruling**

The Sixth Circuit affirmed summary judgment for Defendant, finding no basis for liability for co-worker harassment or retaliation. The Court sidestepped the question of whether Plaintiff experienced a hostile work environment and instead focused on employer liability. Because the individuals alleged to have harassed Plaintiff were co-workers, not supervisors with authority to take tangible employment actions, Plaintiff was required to show Defendant acted negligently in responding to his complaint.

Unfortunately for Plaintiff, however, the Court held that he had not and could not do so. This is because Defendant promptly investigated the accusations, issued a warning, required anti-harassment training, reiterated its anti-discrimination policies, and offered Plaintiff an opportunity to transfer work assignments. These actions were deemed to be reasonably calculated to stop any potential harassment, even though the investigation did not corroborate the plaintiff's allegations.

The Court emphasized that employers are not required to credit uncorroborated allegations where they have conducted a prompt, good-faith, and reasonable investigation.

The Court also upheld dismissal of the retaliation claim under the "honest belief" rule. Even if Plaintiff disputed declining alternative assignments, Defendant reasonably believed he had refused them, which was enough to defeat the claim of wrongful termination.

**Lessons for Employers**

The Sixth Circuit's ruling offers employers several important reassurances, and practical guidance, on handling harassment complaints:

- Good-Faith Investigations Protect Employers: Employers are not required to substantiate every allegation, but they must be able to demonstrate that they responded promptly and conducted a fair, good-faith investigation into the complaint.

To read the full blog post, click here.

For more information, please contact Nicholas Franos at nicholas.franos@fmglaw.com or your local FMG attorney.

# PENNSYLVANIA COURT RULING FINDS HOME HEALTH NURSES WERE MISCLASSIFIED AS INDEPENDENT CONTRACTORS

**By: Sunshine Fellows**

**February 23, 2026**

A recent decision from a Pennsylvania federal court underscores the continued legal risk associated with classifying healthcare workers, particularly home health nurses, as independent contractors. In granting summary judgment on liability, the court in *Lori Chavez-Deremer, Sec'y of Lab., United States Dep't of Lab. v. Amazing Care Home Healthcare Services, LLC, et al.*, No. CV 24-190, 2026 WL 413312, at *1 (E.D. Pa. Feb. 13, 2026) concluded that a home healthcare provider misclassified its nurses and that, under federal wage-and-hour law, they should have been treated as employees. The ruling serves as another reminder that labels and tax forms alone will not control classification outcomes, especially in industries where operational control is difficult to avoid.

**Factual Background**

The case arose from a lawsuit brought by the U.S. Department of Labor against a home healthcare company operating in Pennsylvania. The company engaged licensed nurses to provide in-home patient care and treated many of those workers as independent contractors, issuing IRS Form 1099s rather than W-2s.

According to the record, the company recruited the nurses, set their pay rates, assigned patient visits, and retained authority over scheduling and job expectations. The nurses performed core services central to the company's business model and worked under policies and procedures established by the company. The Department of Labor alleged that, despite the independent-contractor designation, the nurses functioned as employees and were unlawfully denied overtime compensation under the Fair Labor Standards Act ("FLSA").

**What the Court Found and Why**

The court agreed with the Department of Labor and ruled that the nurses were employees as a matter of law. Applying the FLSA's "economic realities" test, the court focused on the substance of the working relationship rather than the contractual labels used by the company.

Key factors supporting employee status included the company's control over the nurses' work, the integral nature of the nurses' services to the business, the lack of meaningful opportunity for entrepreneurial profit or loss, and the relative permanence of the working relationships. The court also found that the nurses did not operate independent businesses of their own in any meaningful sense, despite being classified as contractors on paper.

While the court resolved the misclassification issue on summary judgment, questions concerning damages, including the amount of unpaid overtime and whether the violations were willful, were left for further proceedings.

**Employer Takeaways**

This decision offers several important lessons for employers, particularly in healthcare and other service-based industries:

- Control remains decisive: When a company controls scheduling, pay rates, assignments and work expectations, independent-contractor status becomes difficult to sustain.
- Core services matter: Workers who perform the central function of a business are more likely to be viewed as employees, regardless of how they are labeled.
- 1099s are not determinative: Tax treatment and contractual language will not override the economic realities of the relationship.
- Healthcare faces heightened scrutiny: Home health, staffing and caregiving models continue to draw enforcement attention due to recurring misclassification concerns.
- Proactive audits are critical: Employers should periodically review contractor relationships with counsel to assess risk before litigation or agency enforcement arises.

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.

# NLRB DECISION INVOLVING HARVARD HIGHLIGHTS TENSION BETWEEN UNION RIGHTS AND WORKPLACE INVESTIGATION CONFIDENTIALITY

**By: Sunshine Fellows**

**February 23, 2026**

A recent decision from the National Labor Relations Board involving Harvard University serves as a reminder that employers conducting sensitive workplace investigations, particularly those implicating harassment or discrimination concerns, must carefully navigate overlapping obligations under federal labor and employment laws. While the ruling arose under the National Labor Relations Act, the Board's reasoning underscores potential friction with confidentiality considerations that frequently arise in matters governed by Title VII.

**Factual Background**

The dispute stemmed from a workplace investigation involving members of Harvard's campus police department. After the University completed an internal investigation into alleged misconduct, disciplinary action was imposed against a bargaining-unit employee. The union representing Harvard's police officers, the Harvard University Police Association, requested access to the investigative report and related materials, asserting that the information was necessary to evaluate the discipline and determine whether to pursue a grievance.

Harvard declined to provide the requested materials in full, citing concerns about confidentiality and the sensitive nature of the underlying allegations. The union then filed an unfair labor practice charge, alleging that Harvard's refusal interfered with the union's statutory right to relevant information needed to fulfill its representational duties.

**What the Board Found**

An NLRB administrative law judge concluded that Harvard violated the NLRA by failing to provide information that was presumptively relevant to the union's role in representing the disciplined employee. The decision emphasized that, under long-standing Board precedent, employers generally must furnish investigative materials when they are reasonably necessary for a union to assess discipline or potential grievances.

Importantly, the Board rejected Harvard's argument that confidentiality concerns, standing alone, justified withholding the information. While acknowledging that investigations involving alleged misconduct can raise legitimate privacy and sensitivity issues, the decision noted that employers bear the burden of demonstrating a concrete and substantial confidentiality interest. According to the Board, generalized concerns, without a showing of specific risk, are insufficient to override the union's information rights. The Board further indicated that accommodations such as redactions, confidentiality agreements, or limited disclosures may be appropriate alternatives to outright refusal.

**Why This Matters Beyond the NLRA**

Although the decision was grounded in labor law, its implications extend beyond traditional union-management disputes. Workplace investigations involving allegations of harassment, discrimination, or retaliation often implicate Title VII obligations, including duties to conduct prompt, thorough, and fair investigations while protecting complainants and witnesses from retaliation. The Harvard decision highlights the practical tension employers may face when union information requests intersect with those investigative responsibilities.

**Employer Takeaways**

Employers, particularly those with unionized workforces, should consider the following lessons from this decision:

- Assume relevance in discipline cases: When discipline is imposed on a bargaining-unit employee, investigative materials will often be deemed relevant to the union's representational role.

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.

# HISTORIC PITTSBURGH POST-GAZETTE CLOSURE HIGHLIGHTS LABOR LAW STAKES FOR EMPLOYERS

**By: Sunshine Fellows**

**January 9, 2026**

In a development that has reverberated across the Pittsburgh region and beyond, the Pittsburgh Post-Gazette, one of America's oldest continuously published newspapers, has announced it will cease publication on May 3, 2026, after nearly 240 years in operation. The parent company, Block Communications Inc., made the announcement shortly after the U.S. Supreme Court refused to reinstate a temporary stay of an appellate federal court order that would require the company to comply with a labor law-related injunction. This decision came in the context of a longstanding, highly contentious labor dispute with the Newspaper Guild of Pittsburgh and federal labor boards.

**Legal background: Labor dispute and court orders**

The Post-Gazette's operational and legal woes stem from a multi-year struggle with its unionized newsroom employees, who were on strike for more than three years. The dispute began after the company unilaterally declared an impasse in contract negotiations, altered employees' healthcare and other terms of employment, and was ultimately found to have engaged in unfair labor practices under the National Labor Relations Act.

In November 2025, a three-judge panel of the U.S. Court of Appeals for the Third Circuit upheld a decision requiring the publishing company to restore health insurance and other terms from a previously negotiated union contract, a remedy grounded in decades of NLRB precedent holding that employers cannot bypass collective bargaining obligations or dismantle agreed-upon employment benefits without lawful negotiation.

Seeking to block enforcement of the Third Circuit injunction, Block Communications filed an emergency application with the U.S. Supreme Court. The high court denied that request, effectively reinstating enforcement of the appellate order and leaving in place a requirement that the company honor the earlier remedy. Hours after the Supreme Court's decision, Block Communications announced its intent to shutter the Post-Gazette rather than comply with the labor-law related remedy.

**Regional and industry impact**

For the Pittsburgh region, this closure is a seismic development. The Post-Gazette traces its roots to 1786 and has served as a primary source of news, civic reporting, and accountability journalism for generations. Its shutdown will leave Pittsburgh with only one remaining daily newspaper, narrowing the local news ecosystem and raising concerns about the future of regional reporting.

The effects extend beyond print journalism. The announcement underscores the financial pressures facing traditional media and the interplay between labor relations, court enforcement of labor rights and broader business sustainability, a dynamic that employers in many sectors will want to understand.

**What employers should take away**

The Post-Gazette closure is a stark reminder that labor law compliance, particularly in the context of collective bargaining and remedial orders, can have material business consequences. Employers should consider the following practical implications:

1. *Don't underestimate remedies ordered under the NLRA*. Federal injunctions and board remedies can require restoration of benefits, wages, or working conditions. Even if an employer disagrees with such a remedy, courts generally expect compliance while appeals proceed. Refusal to comply, aside from potential appellate review, can escalate business risk and, in extreme cases as here, contribute to untenable operational pressures.

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.

# NLRB QUORUM RESTORED: WHAT EMPLOYERS NEED TO KNOW

**By: Sunshine Fellows**

**January 9, 2026**

After nearly a year of operational uncertainty, the National Labor Relations Board (NLRB) is once again fully empowered to act. On December 18, 2025, the U.S. Senate voted to confirm Scott Mayer and James Murphy to the Board, restoring the personnel necessary for a quorum. The two new members were sworn in on January 7, 2026, at which point the Board formally regained authority to issue binding decisions. For employers, this marks a critical turning point, ending a prolonged period during which labor law disputes accumulated without resolution and signaling a return to an active federal labor enforcement environment.

**How the quorum was lost**

The disruption traces back to January 2025, when the Board fell below the three-member minimum required under the National Labor Relations Act (NLRA). As Board members' terms expired and one sitting member was removed, the NLRB was left without the statutory quorum necessary to decide cases or establish precedent. While the agency continued to accept and investigate unfair labor practice charges and conduct elections through its regional offices, it could not issue final Board decisions. Hundreds of matters were effectively placed on hold, creating significant uncertainty for employers, unions and employees alike.

The absence of a quorum did not pause enforcement activity entirely, but it did halt the Board's adjudicatory function, the mechanism through which labor law standards are clarified, refined and enforced nationwide. As a result, many contested legal issues remained unresolved, and parties were left without guidance on how the Board might ultimately rule.

**The newly confirmed board members**

That logjam cleared with the Senate's December 18 confirmations. James Murphy brings decades of experience within the NLRB, having served in a variety of senior legal roles, including as chief counsel to Board members. His background reflects deep institutional knowledge of the NLRA and Board procedure. Scott Mayer, by contrast, comes from the management side of the labor bar, most recently serving as chief labor counsel for a large national employer, where he advised on collective bargaining, labor strategy, and unfair labor practice litigation.

Together, Murphy and Mayer joined David M. Prouty, who had been the Board's sole sitting member during much of the inquorate period. With their January 7, 2026 swearing-in, the Board immediately regained authority to issue decisions, address its backlog and resume its central role in shaping federal labor policy.

**A confirmed general counsel returns stability**

At the same time, the Senate also acted on the agency's enforcement leadership. Crystal Carey was confirmed by the Senate on December 18, 2025 to serve as the NLRB's General Counsel and was sworn in on January 7, 2026. The General Counsel oversees the investigation and prosecution of unfair labor practice charges and plays a pivotal role in setting enforcement priorities and litigation strategy nationwide.

Carey's background includes prior service within the NLRB as well as experience in private practice, giving her both institutional familiarity and practical perspective. Her confirmation ends an extended period in which the agency operated under an acting General Counsel and brings added predictability to how cases will be charged, litigated and resolved going forward.

**What this means for employers**

With a confirmed Board and General Counsel in place, the NLRB is now positioned to move quickly. Employers should expect:

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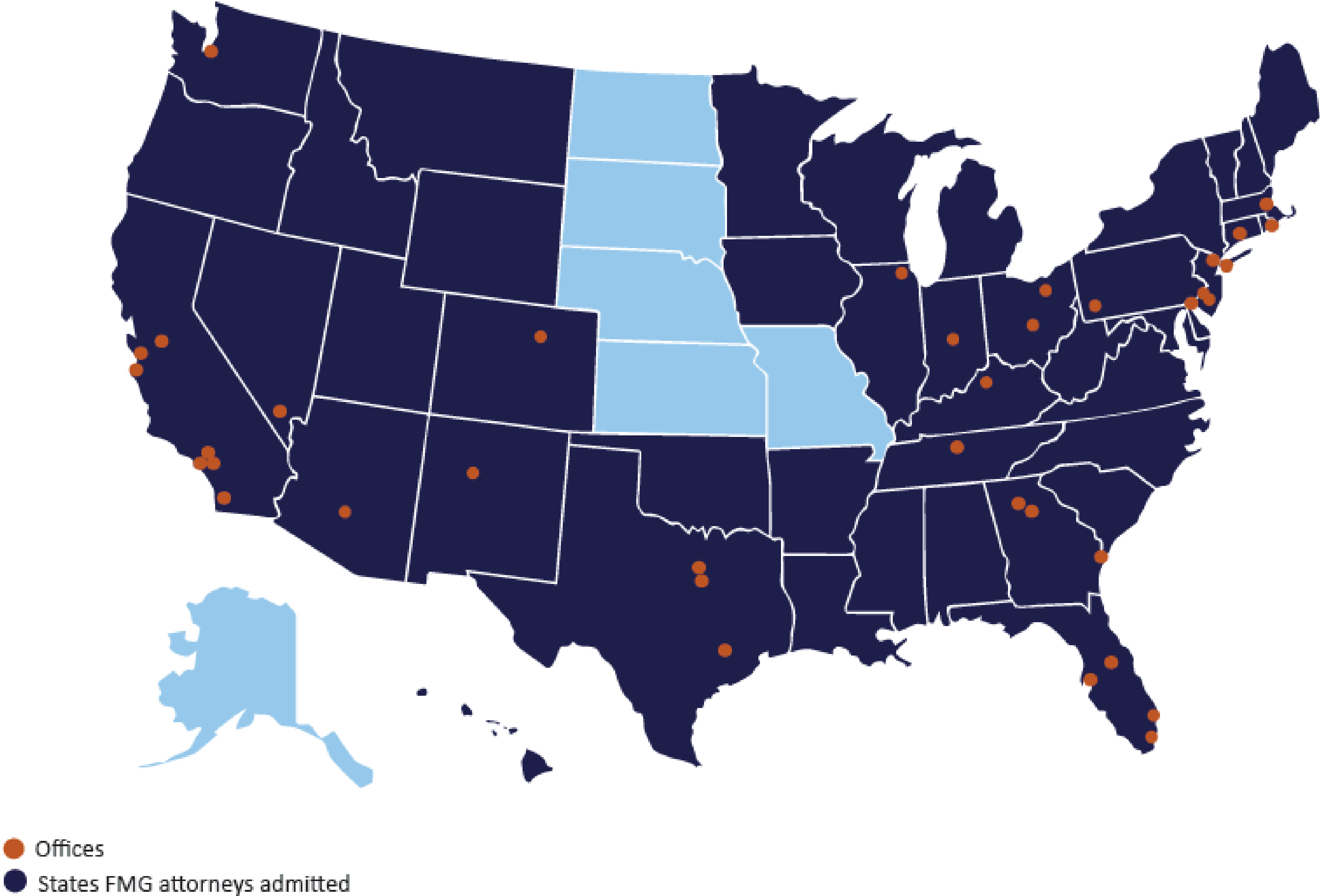
# FMG's National Reach



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