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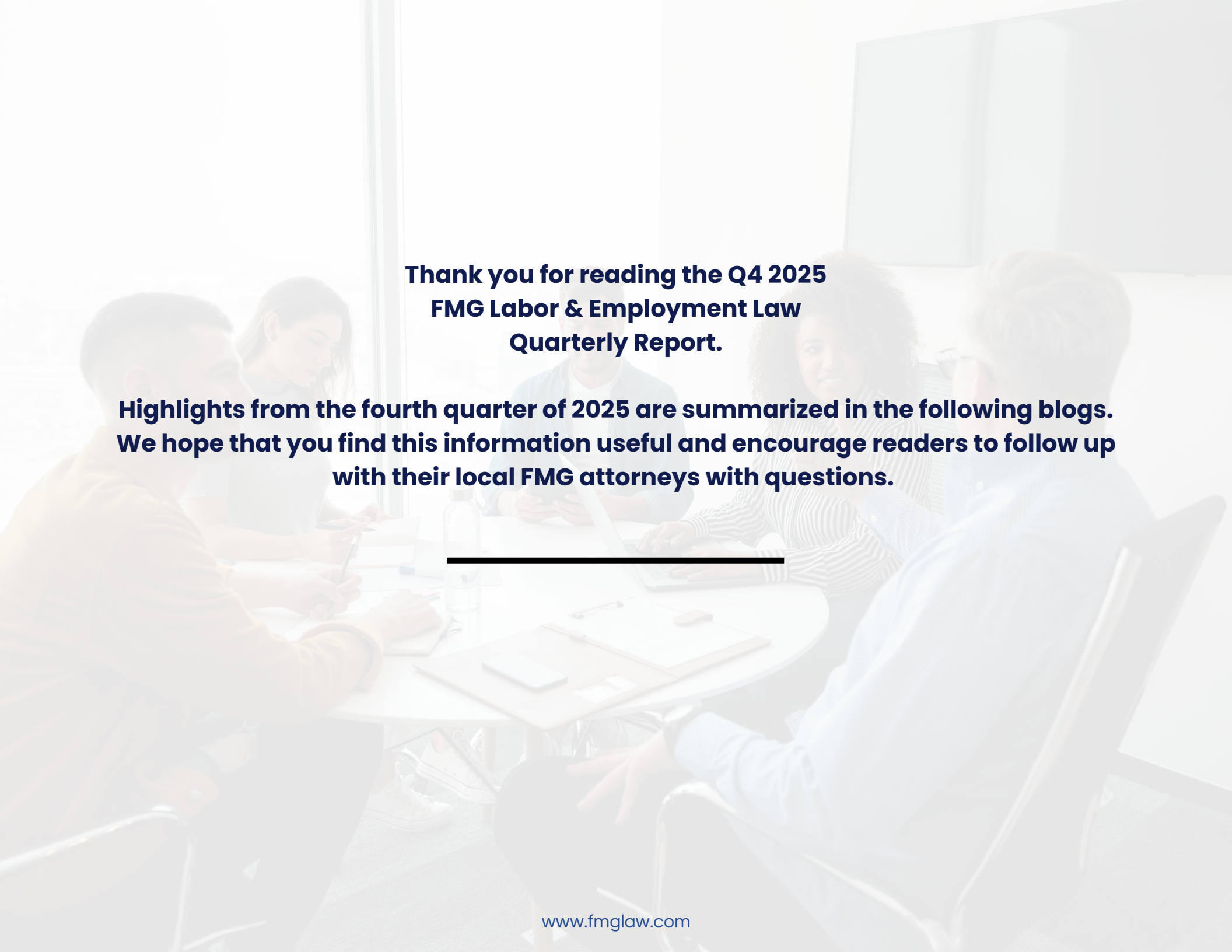
Q4 - 2025

FMG Labor & Employment Law Quarterly Report

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



Thank you for reading the Q4 2025 FMG Labor & Employment Law Quarterly Report.

Highlights from the fourth 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.

THIRD CIRCUIT CLARIFIES FLSA SETTLEMENTS: EMPLOYERS CAN INCLUDE FLSA RELEASES IN OPT-OUT CLASS ACTIONS

By: Sunshine R. Fellows

In a closely watched decision at the intersection of wage-and-hour law and class procedure, the U.S. Court of Appeals for the Third Circuit has resolved a question that had long divided district courts: can a Rule 23 opt-out class action settlement include a release of Fair Labor Standards Act (FLSA) claims for employees who never affirmatively "opt in" under § 216(b)? In *Lundeen v. 10 West Ferry Street Operations LLC*, the Third Circuit held that the FLSA's opt-in requirement governs how FLSA claims are litigated, not how they may be settled. The court's opinion, issued October 16, 2025, marks a significant development for employers facing hybrid FLSA/PMWA or other dual-track wage-and-hour claims.

What Happened in Lundeen

The case arose from a New Hope, Pennsylvania, restaurant's tip-pooling practices. A former bartender alleged that a salaried bar manager improperly received tip distributions in violation of both the FLSA and the Pennsylvania Minimum Wage Act (PMWA). The district court conditionally certified an FLSA collective action and later approved a proposed Rule 23 class for the PMWA claim. When the parties reached a $100,000 class settlement, they sought preliminary approval for a combined resolution: class members who did not opt out would release both their state-law and FLSA claims, even if they had never opted into the FLSA collective.

The district court denied preliminary approval, reasoning that § 216(b)'s opt-in requirement barred the release of FLSA claims through an opt-out mechanism. On interlocutory appeal, the Third Circuit disagreed.

The Third Circuit's Holding

Writing for a unanimous panel, Judge D. Brooks Smith held that the FLSA's opt-in language "establishes only the mechanism by which FLSA claims may be litigated, not the conditions under which they may be waived." The statute, the court emphasized, requires written consent for an employee to join an FLSA action but it says nothing about how unasserted claims may be released in a settlement. Courts may not "enlarge" the statute by adding restrictions Congress never wrote.

In reaching that conclusion, the Third Circuit aligned itself with district courts and the Fifth Circuit's reasoning in *Richardson v. Wells Fargo Bank*, recognizing that an FLSA release in a judicially supervised opt-out settlement is not prohibited by statute. The decision vacated the district court's order and remanded for a traditional fairness analysis under Rule 23(e).

Practical Implications for Employers

This decision gives employers and counsel in the Third Circuit (which covers Pennsylvania, New Jersey, and Delaware) a clearer path for resolving hybrid wage-and-hour cases. Employers may now, in appropriate circumstances, include a release of FLSA claims within a Rule 23 opt-out class settlement, provided that the settlement meets the procedural safeguards of Rule 23.

However, *Lundeen* does not give employers carte blanche. The court underscored that while § 216(b) does not forbid such releases, judges must still scrutinize whether any proposed settlement is "fair, reasonable and adequate." Notices must clearly explain that employees who do not opt out will waive their FLSA rights, and employees must have a meaningful opportunity to exclude themselves. Courts will also continue to weigh whether the consideration offered adequately compensates for the scope of the release.

Key Takeaways

- Hybrid Settlements Are Viable: Employers can now structure unified resolutions of FLSA and state wage claims in the Third Circuit without fear that the FLSA's opt-in provision alone will invalidate the release.

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.

PAY TRANSPARENCY ACT BECOMES EVEN MORE TRANSPARENT

By: Gaia T. Linehan

The 2023 Pay Transparency Act (the "Act") has recently been refined by Governor Newsom to provide additional protections and clarity for employees.

Previously, the Act required employers to provide a pay scale for a position, but it was unclear how broad that range could be. For example, a pay scale might span from the minimum salary to the highest possible compensation for the role, resulting in vague and unhelpful data for employees (e.g., "pay scale range $72,000–$141,000").

Starting January 1, 2026, employers must provide a good-faith estimate of the salary or hourly wage range they reasonably expect to pay upon hire, not the full potential range for the position.

Similarly, the definition of "wages" under the Act was previously ambiguous. It could include salary, bonuses, stock, life insurance, PTO, reimbursements and other benefits, or just a subset of those.

As of January 1, 2026, "wages" will be clearly defined to include all forms of pay.

Finally, the statute of limitations (SOL) under the Act was previously two years for non-willful violations and three years for willful ones, leaving room for disputes over intent.

Beginning January 1, 2026, the SOL will be standardized:

- Three years to bring a claim under the Act
- Six years to examine potential violations
- Each paycheck reflecting unequal pay may be treated as a new violation, resetting the clock for the three-year SOL

How can employers stay transparent and reduce liability? A few practical tips:

- Maintain detailed wage records (including all forms of pay) for three years to support accurate postings
- Retain those same records for six years to defend against potential claims

These records can be kept in a simple format, such as an Excel (.xlsx) file.

For more information, review Senate Bill 642 in full and contact Gaia T. Linehan at gaia.linehan@fmglaw.com or your local FMG attorney.

RETENTION BONUS DOES NOT CONSTITUTE WAGES UNDER THE MASSACHUSETTS WAGE ACT

By: Jennifer L. Markowski and Emily Mayfield

On October 22, 2025, the Supreme Judicial Court of Massachusetts ("SJC") ruled that an employee's agreed-to retention bonus did not constitute "wages" under the Wage Act, M.G.L. ch. 149, § 148. The Wage Act imposes severe penalties for noncompliance, including an award of reasonable attorney's fees and automatic treble damages to a successful employee, as well as potential individual and even criminal liability. The decision, *Nunez v. Syncsort Incorporated*, provides important guidance to employers on an issue of first impression for the SJC.

The plaintiff was a former senior director of finance for a data management software company, Syncsort. A few months after accepting employment with Syncsort, plaintiff's role was reduced to part-time with a commensurate reduction in salary. To incentivize plaintiff to continue his efforts and employment with Syncsort, Syncsort and the plaintiff entered into a retention bonus agreement that provided plaintiff would be eligible to earn a retention bonus in two equal tranches so long as: (1) he remained employed on the date of payment; (2) there was no reduction in his regular work schedule and (3) he remained in good standing. Plaintiff's position was eliminated effective February 18, 2021 via a reduction in force. The date of his discharge was the day his second retention was to be paid if all conditions were met. Syncsort paid the bonus eight (8) days later.

The Wage Act requires that any employee discharged from employment shall be paid in full on the date of discharge. M.G.L. ch. 149, § 148. Not all compensation, however, constitutes "wages." Where compensation is not considered "wages," the specter of a Wage Act violation is not invoked and any claim for entitlement to such compensation is analyzed under contract principles.

Syncsort moved for summary judgment on the basis that the retention bonus was not a "wage," relying largely on the contingent nature of the bonus. Aside from commission payments that have been definitely determined and become due and payable to an employee, the Wage Act does not expressly recognize other types of contingent compensation. Accordingly, Syncsort's motion for summary judgment was allowed by the District Court and affirmed by the Appellate Division of the District Court Department. The SJC then granted plaintiff's application for direct appellate review.

In affirming the decision, the SJC noted that the retention bonus payment was contingent on the three components set forth above: (1) the plaintiff's continued employment; (2) no reduction in his work schedule; and (3) the plaintiff's good standing. Importantly, the retention bonus was not in exchange for labor or services but rather was conditional on those three contractual provisions, making it compensation not within the purview of the Wage Act.

For more information, please contact Jennifer L. Markowski at jennifer.markowski@fmglaw.com or your local FMG attorney.

NINTH CIRCUIT DEFINES THE "COSTS" ASSOCIATED WITH OFFERS OF JUDGMENT OR SETTLEMENT

By: Nicholas S. Franos

In *Alvarado v. Wal-Mart Associates, Inc.*, issued by the United States Court of Appeals for the Ninth Circuit on September 30, 2025, the court clarified the scope of awards under California Code of Civil Procedure Section 998. This decision, which mirrors Federal Rule of Civil Procedure 68 on Offers of Judgment, underscores the importance of precise drafting when making settlement offers.

What Happened in *Alvarado*

Claudia Alvarado brought individual, putative class and Private Attorneys General Act (PAGA) claims against Walmart for violations of California's Labor Code. After her motion for class certification was denied, she settled her individual claims for $22,000 under Section 998 and dismissed her PAGA claims without prejudice.

The settlement agreement stated it was "in full and complete settlement of the claims asserted," and allowed Alvarado's counsel to seek "reasonable fees and costs actually incurred as of the date of the offer in pursuit of Plaintiff's individual claims in this action and recoverable by law." If the parties couldn't agree on the amount, the court would decide.

The parties failed to agree, and the court awarded $312,429 in fees and costs.

On appeal, Walmart argued that the award violated the agreement because it included fees under *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

The Ninth Circuit's Ruling

Section 998 encourages pre-trial settlement by shifting litigation costs to a party that rejects a settlement offer but fails to achieve a better result at trial. Parties may expand or limit recoverable costs by express agreement. If silent, the prevailing party is entitled to costs and fees if authorized by statute or contract.

Here, the relevant statute is California's Labor Code, which entitles successful employees to reasonable attorney fees. When success is partial, courts apply the *Hensley* test: fees may be apportioned unless unsuccessful claims are "so intertwined" with successful ones that separation is impractical.

The Ninth Circuit held that Alvarado could seek fees for her individual claims and, under *Hensley*, for class and PAGA claims to the extent they were intertwined. The court emphasized that the agreement permitted recovery of fees "recoverable by law," which includes *Hensley* fees. Walmart's argument that the agreement excluded such fees was rejected because it was not raised in the district court and contradicted the agreement's plain language.

What This Means for Employers

Although grounded in California law, this decision has broader implications. Section 998 offers closely resemble Rule 68 offers under federal law, making this a cautionary tale for employer-defendants nationwide.

Key takeaways

- Offers of judgment are contracts. Their language governs what costs and fees are recoverable.
- Be explicit. If excluding *Hensley*-type fees is the goal, say so clearly.
- Consider the strategy. A higher offer that includes fees may be preferable to a lower one that leaves fee determination to the court.
- Draft carefully. Ambiguity can lead to costly surprises.

This case is a timely reminder that precision in settlement agreements can significantly impact litigation outcomes.

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

NLRB COMPENSATORY DAMAGE AWARDS STAND AT CROSSROADS AFTER FIFTH CIRCUIT FINDS STATUTORY AUTHORITY LACKING FOR SUCH AWARDS

By: Robert G. Chadwick, Jr.

On October 31, 2025, Judge Edith Jones wrote for the Fifth Circuit in *Hiran Management, Inc. v. NLRB*: "Ninety years after Congress created the National Labor Relations Board ("NLRB") the NLRB claimed for the first time the ability to award full compensatory damages in its enforcement proceedings." In the same paragraph, the Fifth Circuit denied this ability outright.

The "claim" referenced by Judge Jones was the 2022 NLRB decision in *Thryv. Inc.* For nine decades prior to *Thryv*, NLRB awards for unfair labor practices adhered to the language of the National Labor Relations Act ("NLRA"), which restricts monetary awards to equitable relief, such as "back pay." See 29 U.S.C. § 160(c). In *Thryv*, however, the Board claimed the authority to award "make-whole relief," which would include all "foreseeable pecuniary harms," such as damages for credit card debt, withdrawals from retirement accounts, car loans, mortgage payments, childcare, immigration expenses, and medical expenses.

Predictably, *Thryv* sparked challenges to this newly asserted authority across several circuits. In 2024, the Third Circuit in NLRB v. Starbucks, rebuffed the NLRB's expansion of remedies. However, earlier this year, the Ninth Circuit, in *Intl. Union of Operating Engineers*, Local 39 v. NLRB, approved the *Thryv* remedial scheme, thereby creating a split amongst the circuits. On October 20, 2025, the Ninth Circuit denied a petition for rehearing *en banc* of the earlier decision.

Not surprisingly, on October 31, 2025, the conservative Fifth Circuit in *Hiran* sided with the Third Circuit and held that "*Thryv* … exceeds the NLRB's authority under the NLRA." In rejecting the Ninth Circuit decision in Local 39, the Fifth Circuit stated: "…the Ninth Circuit glosses over the fact that the NLRB can only effectuate the purpose of the NLRA using authorized remedies." The Fifth Circuit reasoned that the NLRA affords a complainant only equitable damages, such as back pay, and not legal damages, such as "make-whole relief."

With *Hiran* deepening the split amongst the Circuits, and the NLRB being revamped by a new administration, the NLRB compensatory damage awards stand at a crossroads with many unanswered questions. Will the enforceability of such awards continue to depend upon geography? Will the U.S. Supreme Court be the final arbiter as to this issue? Will the new Trump General Counsel cease to seek compensatory damage awards before the NLRB? Will the new Trump NLRB overturn *Thryv*? Will other laws, such as the right to a jury trial enshrined in the Seventh Amendment, doom NLRB compensatory damage awards?

Unfortunately, employers may not receive clear answers to these questions anytime soon.

In the meantime, employers are encouraged to immediately seek legal counsel once an unfair labor practice charge is filed with the NLRB to assess the risk of an award of compensatory damages. With the current circuit split, the risks may wildly differ.

For more information, please contact Robert G. Chadwick Jr. at bob.chadwick@fmglaw.com or your local FMG attorney.

EIGHTH CIRCUIT HOLDING ON LMRA PREEMPTION OF STATE LAW EMPLOYMENT DISCRIMINATION CLAIMS: IT SUBSTANTIALLY DEPENDS

By: Nicholas S. Franos

In *King v. UPS*, decided on September 25, 2025, the United States Court of Appeals for the Eighth Circuit affirmed a district court's dismissal of a plaintiff's race and age discrimination claims, as well as his hostile work environment allegations. The case underscores that when employer-employee relations are governed by a collective bargaining agreement (CBA), federal law, specifically the Labor Management Relations Act (LMRA), may preempt state law claims.

What Happened in *King*

Brandon King was hired by UPS as a delivery driver, scheduled to work Tuesdays through Saturdays. Believing he would not have to work weekends, Mr. King took various steps to avoid Saturday shifts. UPS disciplined him for these repeated efforts. King alleged that younger, white employees similarly avoided Saturday shifts but were not disciplined.

He filed suit in Iowa state court under the Iowa Civil Rights Act. UPS removed the case to federal court, arguing that the LMRA completely preempted King's claims. The district court agreed, denied King's motion to remand and granted UPS's motion for judgment on the pleadings after King declined to pursue the matter under the LMRA.

The Eighth Circuit's Ruling

Federal question jurisdiction typically follows the well-pleaded complaint rule, which requires a federal issue to appear on the face of the complaint. However, under the doctrine of complete preemption, certain federal statutes, like Section 301 of the LMRA, can wholly displace state law claims if those claims are based on or substantially dependent on a CBA.

The Eighth Circuit held that King's claims were completely preempted because resolving them required interpreting specific provisions of the CBA. For example, the agreement distinguished between full-time package car drivers and 22.4 combination drivers regarding weekend work protections. Determining whether King was treated differently due to race or age, or whether UPS's discipline was excessive, necessitated analyzing the CBA.

Because King refused to litigate under the LMRA framework, the court affirmed the dismissal.

What This Means for Employers

For employers operating under a CBA, King offers a measure of predictability. If a plaintiff's claims "substantially depend on" the agreement's terms, a threshold the court suggests is not particularly high, those claims may be subject to federal jurisdiction and LMRA preemption. This can be advantageous for employers, as federal law may offer a more balanced framework compared to potentially broader protections under state civil rights statutes.

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

THIRD CIRCUIT RULES THAT AN EMPLOYER'S PASSWORDS ARE NOT "TRADE SECRETS"

By: Shane Miller

Key takeaway

An employer's passwords may protect valuable information, but the passwords themselves lack independent economic value and thus fail to qualify as "trade secrets" under the Defend Trade Secrets Act.

Understanding trade secrets

Trade secret misappropriation claims often turn on whether the disputed information qualifies as a "trade secret." A trade secret is generally defined as information with independent economic value that the owner has taken reasonable measures to keep secret. The definition sounds simple enough, but it is often difficult to determine what qualifies. Courts in the Third Circuit have previously ruled that marketing strategies, financial projections, business plans and terms of specific customer accounts can constitute trade secrets. On the other hand, an employee's general know-how, common industry knowledge, public knowledge and information that can readily be obtained from another source (like prices charged or information marketed to the public) usually do not qualify.

Case background: *NRA Group, LLC v. Durenleau*

In *NRA Group, LLC v. Durenleau*, No. 24-1123, 2025 WL 2835754 (3d Cir. Oct. 7, 2025), the U.S. Court of Appeals for the Third Circuit provided additional guidance on this fact-intensive inquiry.

Here's what happened: An employee was out sick when an urgent business problem arose. She lacked access to her work computer, but her boss instructed her to fix the issue immediately. To do so, she shared her computer login credentials with a coworker, who accessed an Excel spreadsheet the employee had created. That spreadsheet contained passwords for the employer's systems and accounts.

The coworker retrieved the necessary information, and the problem was resolved. The next day, still out sick, the employee received the password spreadsheet via email from the coworker.

The legal dispute

The company later sued both employees for trade secret misappropriation, among other claims. The employer argued that the passwords in the spreadsheet were "trade secrets" and that the employees violated the Defend Trade Secrets Act by creating and emailing the document.

The Court's ruling

Both the district court and the Third Circuit rejected the employer's argument. The Third Circuit held that while the passwords may protect valuable information, such as company databases, the passwords themselves lacked independent economic value.

Additionally, the company had promptly changed the passwords after the incident, eliminating any potential harm. Ultimately, the Third Circuit concluded that the passwords were merely "numbers and letters" without independent economic value and therefore were not trade secrets.

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THE $100,000.00 QUESTION: THE USCIS'S CLARIFICATION ON THE PRESIDENTIAL PROCLAMATION, RESTRICTION ON ENTRY OF CERTAIN NON-IMMIGRANT WORKERS

By: Christopher M. Lewis

In late September of 2025, the Trump administration issued the "Presidential Proclamation on Restriction on Entry of Certain Nonimmigrant Workers" (hereinafter the "Proclamation"). Pursuant to the Proclamation, "the entry into the United States of aliens as nonimmigrants to perform services in a specialty occupation… is restricted, except for those aliens whose petitions are accompanied or supplemented by a payment of $100,000.00…" Under the Proclamation, the Department of Homeland Security and the Department of State retain the authority to deny entry to the United States to H-1B nonimmigrant applicants for whom the prospective employer has not paid the $100,000.00 fee. Initially, the Proclamation was understood to apply to all new H-1B visa petitions filed at or after 12:01 a.m. eastern daylight time on September 21, 2025. However, on October 20, 2025, the United States Citizenship and Immigration Services (hereinafter "USCIS") provided further guidance to employers regarding the new fees associated with H-1B visa petitions.

The H-1B is a non-immigrant visa that allows American employers to temporarily hire foreign workers in specialized occupations that require a bachelor's degree or higher. Employers are required to file the H-1B visa petition on behalf of the prospective employee with the USCIS. Employers are also generally responsible for paying the fees associated with H-1B visa petitions on behalf of the prospective employee. Employers must also complete the H1-B electronic registration process to the extent the employer is subject to the annual H-1B visa cap. The current number of H-1B visas issued each fiscal year is capped at 65,000, with an additional 20,000 available for individuals who have earned a master's degree or higher from a U.S. educational institution.

The USCIS has now provided clarification regarding the $100,000.00 H-1B visa fee. The Proclamation applies to H-1B petitions filed at or after 12:01 a.m. eastern daylight time on September 21, 2025, on behalf of beneficiaries who are outside of the United States and do not have a valid H-1B visa. In addition, if an employer's petition seeks a change of status, amendment or extension of stay and the USCIS determines that the individual is ineligible for the change of status, amendment or extension, then the Proclamation will also apply. However, the Proclamation will not apply in instances where an employer's petition filed after September 21, 2025 seeks a change of status, amendment or extension of stay and the USCIS determines that the individual inside the United States is eligible for such a request. Furthermore, the Proclamation does not apply to H-1B visa issues before September 21, 2025 or current H-1B visa holders (including those traveling internationally).

The USCIS's clarification provides some guidance for employers to follow when submitting H-1B visa petitions on behalf of their current and prospective employees. However, it is imperative for employers to stay informed as this dialogue around H-1B visa petitions continues to progress.

For more information, please contact Christopher M. Lewis at chris.lewis@fmglaw.com or your local FMG attorney.

WITH GREAT INNOVATION COMES GREAT RESPONSIBILITY: AI, DIGITAL WORKFORCES, AND EMERGING EMPLOYMENT RISKS

By: Sunshine R. Fellows

Imagine hiring a new manager who never sleeps, never takes a vacation and never complains. Sounds perfect, right? But what if that manager is an algorithm? In today's workplace, that's not science fiction. It's reality. AI systems now conduct interviews, monitor performance and even recommend terminations. They promise efficiency, but they also introduce risks that could make defense counsel, claims professionals and HR teams feel like they're navigating a legal asteroid field.

Recent headlines underscore the stakes. AI-generated deepfakes have fooled foreign ministers into thinking they were speaking with U.S. officials, and synthetic influencers rack up millions of followers without anyone realizing they're not real humans. If bots can convincingly impersonate world leaders and celebrities, just imagine the risks they pose within an HR department or as a digital employee embedded in a company. The question isn't whether AI will change employment practices; it already has. The question is whether your compliance strategy can keep up.

Think of AI in the workplace like Data, the non-human android from *Star Trek: The Next Generation*: brilliant, tireless and capable of outperforming any human, but still learning what it means to make judgment calls and navigate emotions. When *Data* misinterprets human nuance, it's a plot twist. When AI misinterprets an accommodation request, it's a lawsuit.

When the Boss Is a Bot: Supervisory Liability in the Digital Age

Employers increasingly deploy digital employees like virtual assistants and automated systems who perform and assign tasks, monitor progress and even deliver performance feedback. While these tools promise speed and consistency, they also create liability similar to human employees and supervisors.

We already know that algorithms can embed bias, potentially triggering discrimination claims. But what many don't realize is that digital employees have officially entered the stage of Corporate America, complete with employee ID cards, access credentials and the tools needed to perform their roles. What happens to the human employee who is replaced by a digital counterpart? Could that scenario create new liabilities? We're told that digital employees will support their human colleagues by taking over routine tasks, freeing up time for strategic thinking and innovation. But is that truly what will happen, or just a convenient narrative?

Now consider digital managers, algorithms tasked with evaluating human performance. What happens when they misinterpret limitations as underperformance? That misjudgment could trigger ADA accommodation issues. And what about vendors? They're not shields. Employers remain fully accountable for the actions of their systems. Add reputational risk and increasing regulatory scrutiny, and the stakes for early adopters become clear: oversight isn't optional, it's essential. Will this bubble up to the boardroom at some point?

The defense playbook starts with inventorying all digital decision-making systems, demanding contractual warranties for algorithmic fairness and requiring human review for adverse actions. Regular audits (e.g., bias and otherwise) and transparency checks should become standard practice.

AI in Hiring: The "Glitch" Liability

AI-driven screening and interviewing tools are now commonplace, but even minor technical glitches can lead to major legal consequences. You may have heard of the AI screener conducting initial interviews.

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.

WHAT EMPLOYERS SHOULD EXPECT WHEN THE GOVERNMENT REOPENS: KEY CONSIDERATIONS FOR THE DAYS AHEAD

By: Sunshine R. Fellows

After more than 40 days of disruption, the longest U.S. government shutdown in history is nearing its end. Triggered by a lapse in appropriations on October 1, 2025, the shutdown has deeply impacted federal agencies, contractors and regulatory enforcement. As of November 12, Congress is poised to pass a bipartisan funding bill that would reopen the government through January 30, 2026. The legislation includes retroactive pay for furloughed employees, reverses recent layoffs and restores funding for critical programs like SNAP. With the House expected to vote imminently and President Trump signaling support, employers and defense counsel should begin preparing for the operational and legal ripple effects of the reopening process.

Agency Backlogs and Delays

When agencies resume full operations, stakeholders should expect a surge in backlogged activity. During the shutdown, many non-essential functions, such as investigations, audits, contractual reviews and approvals, were suspended or significantly curtailed. As a result, employers should anticipate longer processing times for pending matters (for example, charge investigations at the Equal Employment Opportunity Commission (EEOC) or contractor deliverables under agency review). That backlog can affect the scheduling of enforcement actions, mediation or litigation calendars and contract procurements. Employers with federal contracts or investigations in progress should monitor status updates, preserve communications and records and plan for potential delays in resolution. Counsel should also track whether agencies issue guidance or prioritize certain categories of work, such as those tied to life-safety, national security or major procurement programs.

Contracting and Procurement Impacts

For employers in the federal contracting arena, the shutdown and the subsequent restart will bring specific operational risks. Funding gaps may have triggered suspension of contract work, pausing of invoices or delays in new awards. Upon reopening, contractors should anticipate a wave of catch-up in acquisitions, stronger oversight of funding streams and closer scrutiny of performance metrics and eligibility. Employers should review contract terms (including clauses triggered by funding lapses), ensure prompt submission of invoices and compliance documentation and prepare for audits of work performed (or suspended) during the funding gap. Defense counsel should advise clients to maintain contemporaneous records of shutdown-related delays, furloughs or reductions in force that may affect deliverables or performance metrics.

Enforcement and Oversight Priorities

Reopening of the government does not simply mean a return to "business as usual." Agencies are likely to prioritize enforcement and oversight of areas where delay and disruption may have accumulated exposure. For example, employers should expect renewed focus on wage and hour compliance in the federal sector, contractor labor issues, affirmative action and subcontractor obligations under federal contracts, immigration and onboarding practices and regulatory obligations. Some guidance suggests that investigations paused during the shutdown may now be resumed with added urgency. Employers and their counsel should proactively review internal compliance programs, catch up on delayed filings or self-audits and consider whether previously postponed actions (e.g., internal investigations, training updates, vendor audits) should be brought forward now.

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.

ANTI-AMERICAN BIAS IN THE SPOTLIGHT: EEOC TARGETS IMMIGRATION RELATED EMPLOYMENT PRACTICES

By: Sunshine R. Fellows

The Equal Employment Opportunity Commission has issued new materials highlighting unlawful anti-American bias under Title VII of the Civil Rights Act of 1964. While national origin discrimination has long been prohibited, the EEOC's refreshed technical assistance and updated national origin landing page signal a renewed enforcement priority, particularly where employment decisions interact with immigration-related processes. For employers and business leaders, the message is clear: employment practices that explicitly or implicitly favor foreign workers or visa holders over American workers may trigger scrutiny, even when rooted in seemingly neutral business rationales.

EEOC's Focus on Anti-American Bias: Key Developments

On November 20, 2025, the EEOC published a new one-page technical assistance document, *Discrimination Against American Workers Is Against the Law*, and simultaneously updated its national origin discrimination landing page. These updates, issued amid a broader administration-wide focus on immigration-related employment practices, emphasize that Title VII protects all workers against national origin discrimination, including American workers. The agency expressly notes that "business reasons" such as customer preference, cost efficiencies, or perceptions regarding skill or work ethic do not justify differential treatment based on visa status or national origin.

The materials identify several enforcement flashpoints:

- Recruitment and job advertising that prefer or limit opportunities to H-1B or other visa holders.
- Disparate treatment in hiring, compensation, promotion, or job assignments that disadvantages American workers.
- Harassment or retaliation based on national origin, including conduct by supervisors, coworkers, or customers.
- Pay disparities between visa guest workers and similarly situated American employees without legitimate nondiscriminatory justification.

The documents also preview a multi-agency enforcement posture, noting likely coordination between the EEOC, DOJ, and DOL.

Practical Implications and Employer Takeaways

1. Review Recruiting and Advertising Practices: HR teams should evaluate job postings, search firm instructions, and recruiting platforms to ensure they do not express preferences tied to visa status or national origin.
2. Audit Hiring, Advancement, and Compensation Processes: Where American workers appear to be disadvantaged, whether by more burdensome application processes, inconsistent selection criteria, or unexplained pay differences, employers may face heightened risk.
3. Revisit Manager and Recruiter Training: Train those involved in hiring, promotion, and assignment decisions on Title VII's requirements and this evolving enforcement focus.
4. Coordinate Immigration-Related Decisions Thoughtfully: Ensure that immigration processes do not create unintended disparate treatment.
5. Strengthen Harassment and Retaliation Safeguards: Reinforce that harassment based on national origin is prohibited and that retaliation for reporting concerns will not be tolerated.

Looking Ahead

The EEOC's updated materials make clear that national origin discrimination enforcement, including anti-American bias, will remain a priority.

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.

A MEASURED SHIFT IN TITLE VI ENFORCEMENT: WHAT EMPLOYERS AND HR LEADERS SHOULD KNOW

By: Sunshine R. Fellows

On December 9, 2025, the U.S. Department of Justice finalized revisions to its Title VI regulations under the Civil Rights Act of 1964. The updated rule narrows DOJ enforcement exclusively to cases involving intentional discrimination, eliminating regulatory language that had previously supported disparate-impact theories and certain forms of affirmative-action measures under Title VI. These regulations took effect on December 10, 2025.

Background

Title VI prohibits discrimination based on race, color, or national origin by recipients of federal financial assistance. Historically, federal agencies interpreted Title VI to allow enforcement not only for intentional acts but also for neutral policies that produced statistically disproportionate outcomes, what is known as disparate impact. The new DOJ rule rescinds those provisions, restricting enforcement to conduct that reflects discriminatory intent only.

Compliance Implications

From a compliance perspective, DOJ's revisions align enforcement more closely with the statutory text of Title VI. Practically, this means the department will now pursue enforcement only where there is evidence of intent, rather than based solely on outcome-based statistical disparities.

Why Employers Should Care

Although Title VI applies only to recipients of federal funding, this change is far from abstract:

- Title VII remains in full effect. Disparate-impact claims continue to be litigated under Title VII.
- State and local laws often impose broader anti-discrimination obligations that are unaffected by DOJ's federal rulemaking.

Recommended Actions for Employers

Employers and HR leaders should:

- Revisit Title VI-related training and policies, particularly in organizations receiving federal funds;
- Document legitimate, non-discriminatory business reasons for employment decisions;
- Train managers and decisionmakers to avoid conduct that could be perceived as intentional discrimination; and
- Monitor Title VI developments, especially as DOJ's reinterpretation may influence future enforcement priorities or jurisprudence.

Conclusion

These DOJ revisions represent a recalibration, not a retreat, from civil rights enforcement. The emphasis remains on disciplined, neutral decision-making and continued compliance with Title VII and applicable state and local anti-discrimination laws.

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

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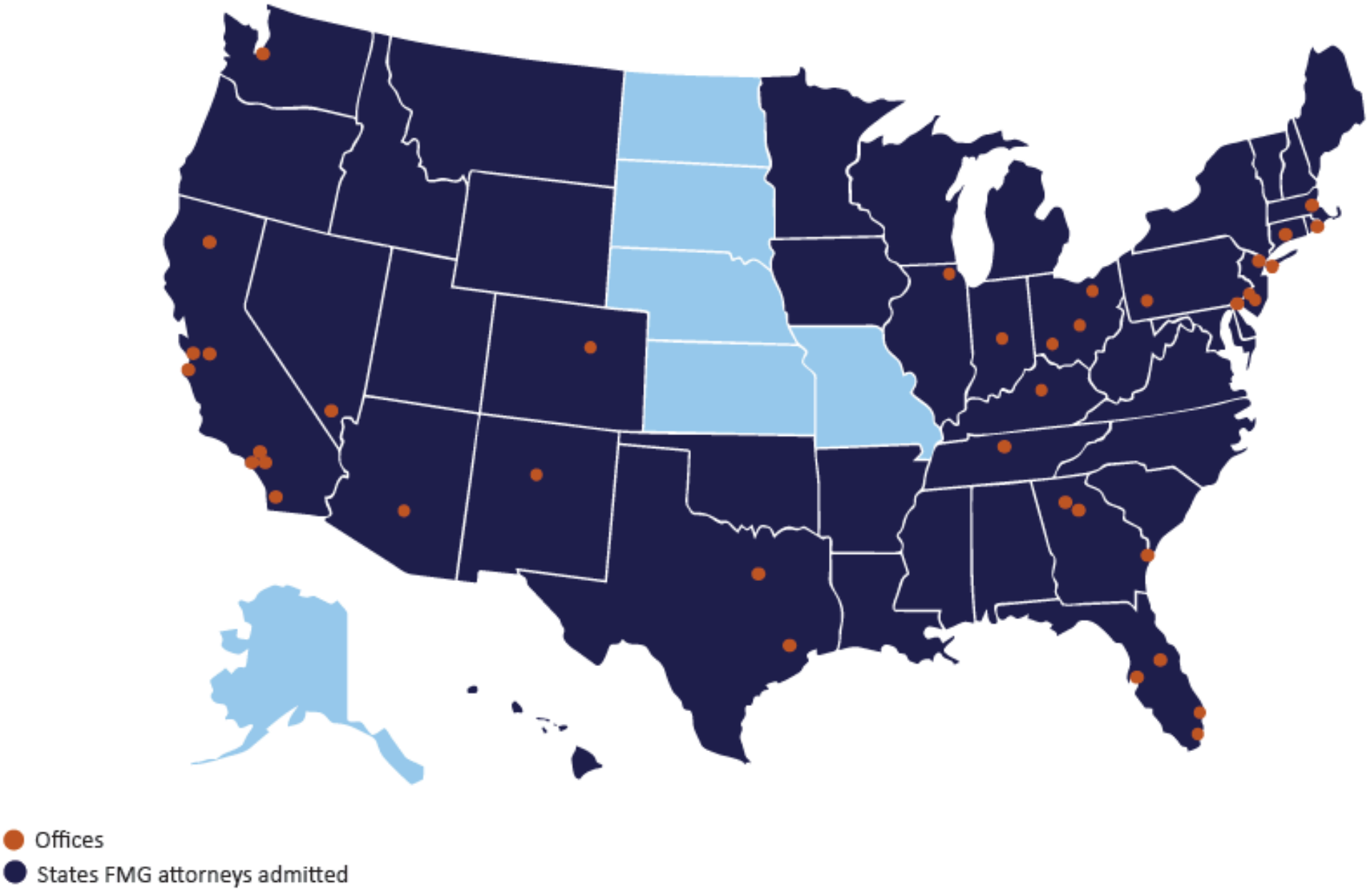
FMG's National Reach



When It Counts