

HIGHLIGHTS CHECKLIST

EMPLOYMENT COORDINATOR

Release #2; February 2026

ROUTE TO: _____

Here are the highlights of this issue of your *Employment Coordinator*. Circulate this Checklist throughout your office as a convenient summary of recent developments in the law. Consult the *Employment Coordinator* at the topic, chapter, and section indicated for details.

BENEFITS _____

ACCESS Innovation for CMS

CMS announced in 2025 an innovation, the ACCESS (Advancing Chronic Care with Effective, Scalable Solutions) Model, a voluntary value-based payment model in Original Medicare (a/k/a fee-for-service Medicare) designed to expand access to technology-supported care for chronic conditions.

<https://www.cms.gov/priorities/innovation/innovation-models/access>

Ben § 5:60.70

FMLA Retaliation Claim Denied

The Second Circuit found that there was no objective evidence that supervisor's criticism of employee related to employee's FMLA-eligible absences where supervisor encouraged employee to "just take the time" she needed to care for her daughter, granted her requests to take paid time off, and never made negative comments about her taking days off. Instead, the supervisor's scrutiny and

criticism of employee, a senior account manager, were specific to her job performance in managing one of employer's largest customer accounts, and never mentioned employee's time off or her daughter's illness.

Haran v. Orange Business Services, Inc., 160 F.4th 51 (2d Cir. 2025)

Ben § 12:70.30

COMPENSATION _____

Who Is An "Employer" For Retaliation Claims Under FLSA

The Ninth Circuit has held that for retaliation claims under the FLSA the term "employer" includes "any person acting directly or indirectly in the interest of the employer in relation to an employee." The district court dismissed the claim finding that a club dancer was an independent contractor and thus not covered under the FLSA. The appeals court found that the plaintiff was able to state a claim the adverse action was at taken by a person acting in the interest of the employer, and finding that the lower court should have made a determina-

tion of employee status on the claim using the economic realities test.

Hollis v. R&R Restaurants, Inc, 159 F.4th 677 (9th Cir. 2025)

Comp § 38:136

EMPLOYMENT PRACTICES _____

No Private Cause of Action for Retaliation Under Section 504 of Rehabilitation Act

The Sixth Circuit has held that § 504 of the Rehabilitation Act does not provide a private cause of action for retaliation.

Smith v. Michigan Department of Corrections, 159 F.4th 1067 (6th Cir. 2025).....

Emp P § 10:4

EFAA’s Invalidation of Arbitration Agreements Extends to Entirety of Case

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act’s invalidation of an arbitration agreement extends to the entirety of the case relating to the sexual harassment dispute.

Usai v. Club Management Miami II, LLC, 801 F. Supp. 3d 1295 (S.D. Fla. 2025)

Emp P § 51:5.50

LABOR RELATIONS _____

NLRB’s Damages Order Exceeded Its Authority

The Fifth Circuit held that the NLRB’s order awarding restaurant employees discharged for going on strike full compensatory damages for all foreseeable harms arising from the employer’s unfair labor practices exceeded the NLRB’s statutory authority under the NLRA. The NLRB only has authority to order an equitable remedy, and an award of full compensatory damages is a form of legal damages.

Hiran Management, Incorporated v. National Labor Relations Board, 157 F.4th 719 (5th Cir. 2025)

Labor § 43:121

Employer Precluded from Obtaining Retrospective Relief

Even if for-cause removal protections for NLRB administrative law judges are invalid on the basis that they violate Article II of the U.S. Constitution, which vests in the President the sole removal power over agency “officers” like administrative law judges, an employer was precluded from obtaining retrospective relief from the decision of the NLRB administrative law judge that it had committed unfair labor practices, since the employer failed to show the slightest harm from the removal protections. So long as an agency’s officers are validly appointed pursuant to the Appointments Clause, retrospective relief based on an unconstitutional provision governing the removal of the officers is available only where the provision inflicts compensable harm.

National Labor Relations Board v. North Mountain Foothills Apartments, 157 F.4th 1089 (9th Cir. 2025)

Labor §§ 26:188, 41:7, 42:233, 52:64