Introduction to the November 2025 edition of *Labor and Employment Law: Compliance and Litigation 3d*

Labor and Employment Law: Compliance and Litigation 3d, written by Frederick T. Golder and David R. Golder, is designed to provide information about the most significant labor and employment issues. Attorneys and HR professionals alike will find useful guidance and practical tips on the most common fact patterns, based on cases and actual experience.

This November 2025 edition includes updated discussions of cases, statutes, and regulations. Among the materials update in this edition are:

- **§ 1:58 Contract-law remedies by state—Texas:** The right of control may be shown by explicit contractual assignment or actual exercise of control.
- **§ 1:65. Contract-law remedies by state—Wyoming:** The overriding consideration in distinguishing between master-servant relationships and employer-independent contractor relationships is the employer's right to control the means and manner of the work.
- **§ 1:67. Violation of state or federal constitutional rights—State cases:** Under the Alaska and the United States Constitutions, the state may not deprive individuals of property without due process of law.
- **§ 1:85. Tort law remedies—Public policy—Public policy exceptions by state—Indiana:** The rationale for the limited exception to the employee-at-will doctrine is that terminating an employee for filing a workers' compensation claim obviously has a deleterious effect on the exercise of this important statutory right.
- § 1:86. Tort law remedies—Public policy—Public policy exceptions by state—Iowa: Iowa is an at-will employment state.
- **§ 1:129. Whistleblowing—Whistleblowing by state—Alaska:** Because matters of public concern under the First Amendment and the Alaska Whistleblower Act are different, a plaintiff's whistleblower claim was not barred by issue preclusion.
- **§ 1:185. Other tort-based causes of action—Intentional interference with contractual relations:** To state a claim for intentional interference with advantageous relations, a plaintiff must plead sufficient facts to establish: (1) he or she had an advantageous relationship

with a third party; (2) the defendant knowingly induced a breaking of the relationship; (3) the defendant's interference with the relationship, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions.

- **§ 1:187. Drug testing:** When an employer fails to comply with Iowa Code Ann. § 730.5 dealing with drug testing requirements, the employee aggrieved by that failure is entitled to relief.
- **§ 1:244. Federal statutes, rules and regulations—The Employee Retirement Income Security Act of 1974 (ERISA)—Actions to enforce statutory or fiduciary duties:** The potential for a conflict, without more, is not synonymous with a plausible claim of fiduciary disloyalty.
- **§ 1:249. Federal statutes, rules and regulations—Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA):** A federal civilian employee called to active duty pursuant to any other provision of law during a national emergency is entitled to differential pay without having to prove that their service was substantively connected in some particular way to some particular emergency.
- **§ 2:14. The duty to bargain—Exclusivity and good-faith bargaining:** Because the existence of an impasse is a question of fact, the Board's determination is reviewed deferentially, evaluating only whether it was rational and supported by substantial evidence.
- **§ 2:44. National Labor Relations Board and proceedings:** The NLRB is allowed to find and remedy a violation even in the absence of a specified allegation in the complaint if two requirements are met: the issue is closely connected to the subject matter of the complaint, and the issue has been fully litigated.
- **§ 2:51. Procedures in unfair labor practice cases—Violation of Section 8(a)(1):** In analyzing an alleged Section 8(b)(1)(A) violation, the Board applies an objective standard that focuses on whether the union conduct would have a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights.
- **§ 2:55. Procedures in unfair labor practice cases—Violation of Section 8(a)(5):** To uphold the NLRB's determination that some part of the employer's message interfered with the employees' exercise of their labor rights in violation of Section 8(a)(1), the message must contain a threat of reprisal or force or promise of benefit.
- **§ 3:5. Enforcement of agreement to arbitrate:** An agreement to arbitrate may be compelled even after the termination of a CBA, where the parties agreed that certain benefits were to continue after the agreement's expiration.

- **§ 3:67. Award—Grounds for impeachment or enforcement:** An arbitration award deciding a question the parties did not submit for resolution must be vacated.
- **§ 4:2. Administrative agencies and proceedings:** The commencement of a class action suspends the applicable statute of limitations for all putative class members, while a denial of class certification or decertification typically starts the clock again.
- **§ 4:8. Civil Rights Acts of 1866 to 1871—Covered parties:** Discrimination based on alienage is indeed different from racial discrimination, but it is not different in any way that is relevant to the text of Section 1981.
- **§ 4:33. Title VII of the Civil Rights Act of 1964—Prohibited acts:** A plaintiff suffers an adverse employment action when their employment was terminated by the failure to renew their contract.
- **§ 4:34. Title VII of the Civil Rights Act of 1964—Retaliation:** The "cat's paw" theory of liability under Title VII refers to a situation in which an employee is fired or subjected to some other adverse employment action by a supervisor who himself has no discriminatory motive, but who has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action.
- **§ 4:42. Title VII of the Civil Rights Act of 1964—Burden of proof, defenses—Fifth Circuit:** Attempting to cause an adverse employment action is sufficient to establish Title VII liability against a union.
- **§ 4:47. Title VII of the Civil Rights Act of 1964—Burden of proof, defenses—Tenth Circuit:** A district court may consider interested witness evidence from the movant at the summary judgment stage, so long as a jury would be required to believe such evidence because it is uncontradicted and unimpeached.
- **§ 4:84. Age Discrimination in Employment Act—Retaliation:** A jury could find that the city's waiting to allow the plaintiff back while promoting his colleagues and securing raises for every other officer was not just a delay, but a deliberate one meant to punish the plaintiff for complaining.
- **§ 4:116. Rehabilitation Act of 1973—Evidence:** A plaintiff does not have to show pretext plus additional evidence of discrimination.
- **§ 4:135. Americans with Disabilities Act—Substantially limits:** Medical evidence is not always necessary to prove that an impairment constitutes a "substantial limitation" on a major life activity.
- **§ 4:143. Americans with Disabilities Act—Prohibited acts:** A plaintiff no longer has to show that the adverse employment action is one that constitutes a significant

change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits, but it is enough to show that they experienced some harm respecting an identifiable term or condition of employment as a result of that action.

- **§ 4:160. Americans with Disabilities Act—Direct threat defense:** Specific factors to be considered include: (1) the duration of risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm.
- **§ 4:162. Americans with Disabilities Act—Jury issues:** While stray remarks, standing alone, may not give rise to an inference of discrimination, such remarks are not irrelevant.
- **§ 4:163. Americans with Disabilities Act—Remedies:** The decision whether to award prejudgment interest is within the district court's discretion and that decision will be reversed only for an abuse of discretion.
- **§ 4:241. Harassment—Nonsexual harassment claims—Second Circuit:** Racially offensive comments by a co-worker can create a hostile work environment, as can offensive comments based on a person's ancestry or national origin.
- **§ 5:18. Definition of "employer"—Individual liability—Eleventh Circuit:** To determine whether an entity qualifies as a joint employer under the FLSA, courts consider the following inexhaustive factors: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates or the methods of payment of the workers; (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; (5) preparation of payroll and the payment of wages; (6) ownership of facilities where work occurred; (7) performance of a specialty job integral to the business; and (8) investment in equipment and facilities.
- **§ 5:22. Working time:** Once the workday has commenced, an employee is entitled to compensation even if they are not working at every moment of the day.
- **§ 5:28. Salary basis regulation:** An employee is not salaried if they are paid based on a fixed hourly rate for hours worked within the normal workweek.
- **§ 5:42. Burden of proof—Defenses—Seventh Circuit:** A plaintiff has the initial burden of showing a violation of the FLSA by proving the amount and extent of her work as a matter of just and reasonable inference.
- **§ 5:48. Burden of proof—Defenses—Federal Circuit:** Under OPM regulations, hours of work does not include time spent in apprenticeship or other entry level training,

or internship or other career-related work-study training outside regular working hours, provided no productive work is performed during such periods, and this provision bars overtime compensation for entry level training hours unless specific criteria are met.

- § **5:49. Evidence:** Conclusory evidence offered without a factual foundation is insufficient to support a claim for unpaid overtime under the FLSA.
- § **5:78. State wage and hour laws—Maryland:** The de minimis doctrine applies to claims brought under the Maryland Wage and Hour Law and the Maryland Wage Payment and Collection Law.
- § **5:118. Exemptions—Administrators—Exercise of discretion and independent judgment:** Employees of federal agencies are presumed to be FLSA nonexempt unless the employing agency correctly determines that the employee clearly meets the requirements of one or more of the exemptions and such supplemental interpretations or instructions issued by OPM.
- § **5:131. Class/collective actions—First Circuit:** The FLSA's provision for representative actions does not impliedly suggest that an opt-in plaintiff has any right to participate in the named plaintiff's action before the named plaintiff has at least filed a complaint that does plausibly allege facts that can support the certification of the putative class.
- § **5:149. Joint employer liability:** The ultimate question when determining whether an entity qualifies as a joint employer under the FLSA is whether, as a matter of economic reality, the hired individual is economically dependent upon the hiring entity.

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