

RUTTER GROUP PRACTICE GUIDE FEDERAL EMPLOYMENT LITIGATION 2026 UPDATE

This 2026 softbound Update completely replaces the 2025 Update.

These Highlights summarize the most significant developments over the past year. The paragraph numbers are keyed to the 2026 edition of the Practice Guide where the topics are discussed in greater detail. Our cut-off date for this Update was June 30, 2026. The update covers legislation, cases decided, as well as rules and regulations adopted as of that date.

It has again been a very busy year for employment law with many significant recent developments, including: the U.S. Supreme Court's June, 2026 decision in *Trump v. Slaughter* which overruled a 90-year old precedent and allows the president to remove Federal Trade Commission Commissioners at will; the EEOC's rescission of a major Employer Workplace Harassment Guidance; proposed revisions to Rehabilitation Act regulations and a decision by the Sixth Circuit requiring an employee to show, in non-employee hostile work environment cases, that an employer *intended* for harassment to occur, rather than the negligence standard utilized by a majority of the other circuits.

Thank You! We are grateful for your comments and suggestions. *Please keep them coming!*



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2026 UPDATE HIGHLIGHTS

CHAPTER 1 INTRODUCTION

Background

[1:6.1] **President’s power to fire NLRB officials:** [See *Trump v. Wilcox* (2025) — US —, 145 S.Ct. 1415 (suggesting provisions in the NLRB and MSPB requiring “cause” for removal of members are inconsistent with President’s powers over officers of executive branch); see also *Space Exploration Technologies Corp. v. NLRB* (5th Cir. 2025) 151 F4th 761, 766-767—NLRB’s “for cause” removal provisions unconstitutional and violate separation of powers; and *NLRB v. North Mountain Foothills Apartments* (9th Cir. 2025) 157 F4th 1089, 1095-1101 (rejecting constitutional challenges to the NLRB’s structure and function)]

[1:6.2] **Caution—2026 Supreme Court decision allowing President to remove Federal Trade Commission Commissioners at will:** In a 6-3 decision, the Supreme Court ruled that the President can remove Federal Trade Commissioners at will, explicitly overruling the 90-year old precedent of *Humphrey’s Executor*, expanding presidential power by invalidating statutes that protected heads of independent agencies from being fired without cause. [*Trump v. Slaughter* (2026) 609 US —, —, — S.Ct. —, — (2026 WL 1855612, *5-6, 15) (overruling *Humphrey’s Ex’r v. United States* (1935) 295 US 602, 55 S.Ct. 869)]

[1:11] **Preponderance of the evidence standard applicable when employer seeks to show employee is exempt from minimum wage and overtime pay provisions of FLSA:** [*E.M.D. Sales, Inc v. Carrera* (2025) 604 US 45, 47, 145 S.Ct. 34, 37]

[1:56.1b] **Deference to NLRB?** Post *Loper Bright*, it is still unclear to what extent pre-*Chevron* cases might apply to a court’s review of an NLRB decision. [See, e.g., *International Union of Operating Engineers, Stationary Engineers, Local 39 v. NLRB* (9th Cir. 2025) 155 F4th 1023, 1050-1053, 1071-1072 & fn. 14 (en banc) (relying on pre-*Chevron* authority, majority deferred to NLRB to uphold award of extensive and novel monetary penalties, with dissent contending that while courts must defer to NLRB findings if supported by substantial evidence, they have a duty to correct when agency made an error of law)]

CHAPTER 2 EMPLOYMENT DISCRIMINATION—IN GENERAL

Entities Subject to Title VII

[2:2.1] **State’s exhaustion of remedies requirement may be preempted:** Courts may not deny claims made under 42 USC §1983 on the ground that a state exhaustion requirement functionally immunizes state officials from such claims. A state law that immunizes government conduct otherwise subject to suit under §1983 is preempted. [*Williams v. Reed* (2025) 604 US 168, 174, 145 S.Ct. 465, 470]

Exclusions

- [2:135] **Religious organizations/ministerial exception—effect of using “primarily religious” standard to decide religious charity’s tax-exempt status:** In determining whether a religious nonprofit organization qualifies for exemption from state unemployment taxes for organizations “operated primarily for religious purposes,” the State must maintain neutrality. Distinguishing among religions based on theological differences in the provision of charitable services would impose an impermissible denominational preference. [*Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Comm’n* (2025) 605 US 238, 252-254, 145 S.Ct. 1583, 1593-1595]
- [2:136] **Who qualifies as “minister” for purposes of ministerial exception:** [See *McMahon v. World Vision Inc.* (9th Cir. 2025) 147 F4th 959, 966—exception applied to remote customer service agent whose duties included communicating employer’s religious mission, praying with donors and supporters by phone, and providing opportunity to join employer’s mission]

Bases for Unlawful Discrimination

[2:232] **Title VII protections not limited to minorities:** “Race” and “color” protections are not limited to groups traditionally perceived to be minorities. Title VII prohibits discrimination against Whites as well as Blacks, Hispanics or Asians and discrimination against males as well as females. [*Ames v. Ohio Dept. of Youth Services* (2025) 605 US 303, 305-306, 145 S.Ct. 1540, 1542-1543—“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”; see also *Peterakos v. City of Chicago* (7th Cir. 2025) 147 F4th 787, 796, fn. 1]

[2:263a] **Caution—EEOC rescinds Workplace Harassment Guidance:** In early 2026, the EEOC Commission voted to rescind its Enforcement Guidance on Harassment in the Workplace. [See <https://www.eeoc.gov/newsroom/eeoc-commission-votes-rescind-2024-harassment-guidance> and see ¶5:9 of these Highlights]

[2:283] **Discrimination based on gender identity/transgender status:** [See *United States v. Skrametti* (2025) 605 US 495, 510-516, 145 S.Ct. 1816, 1829-1831—state law prohibiting certain medical care for transgender minors constitutional under 14th Amendment’s Equal Protection Clause and subject to rational basis review as an age and medical use regulation]

Proving Discrimination

[2:375.2] **“Influence” by nonsupervisory subordinate:** A subordinate’s bias is imputed to the employer if the employee can prove that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or decisionmaking process. [*Lui v. DeJoy* (9th Cir. 2025) 129 F4th 770, 779-780; *Poland v. Chertoff* (9th Cir. 2007) 494 F3d 1174, 1182-1183]

Adverse employment action

- [2:393.14b-393.14c] **Examples:** The assignment of an employee to work above her pay grade by a former supervisor who took credit for her work and delayed in completing her performance evaluation were not adverse employment actions where they did not affect a term or condition of employment and did not result in termination, reduction of pay or benefits or have some other discriminatory effect. [*Martinez-Medina v. Rollins* (8th Cir. 2025) 144 F4th 1091, 1096-1097] Scheduling female employees' reviews more frequently than males was not an adverse employment action where the scheduling discrepancy never culminated in more frequent reviews or a change in the terms or conditions of employment. [*O'Horo v. Boston Med. Ctr. Corp.* (1st Cir. 2025) 131 F4th 1, 18]

Proving discrimination based on religion; failure to accommodate religious preferences

- [2:611] **Sincerely-held religious belief protected even if not reflected in biblical passage or scripture:** [See *Damiano v. Grants Pass School Dist. No. 7* (9th Cir. 2025) 140 F4th 1117, 1155-1156]
- [2:614-615; 2:621] **Purely secular preferences not protected:** [*Detwiler v. Mid-Columbia Med. Ctr.* (9th Cir. 2025) 156 F4th 886, 893-894—inquiry into the religious or secular nature of beliefs necessary to “prevent religious labels from becoming carte blanche to ignore any obligation” but overlapping secular and religious belief may be protected as long as “view is part of a comprehensive religious belief system and is not simply an isolated teaching”]

Proving discrimination based on retaliation

- [2:771.1] **Reassignment of duties within same job description may be actionable:** [*Smith v. City of Atlantic City* (3rd Cir. 2025) 138 F4th 759, 776—firefighter who worked primarily as air mask technician who had not fought fire for several years suffered adverse employment action when city sent him to perform fire suppression in tropical storm emergency without up-to-date training and suspended him when he refused; *Estate of Harris v. City of Milwaukee* (7th Cir. 2025) 141 F4th 858, 870—no adverse employment action when infrastructure repair worker was reassigned to trash duty which was not outside job description responsibilities; no guarantee employee will always remain in same job function]

Remedies

[2:1237] **Civil contempt sanction for failure to comply with injunction:** A civil contempt sanction requiring three of an employer's attorneys to attend religious liberty training was overbroad in scope, punitive in nature and exceeded the court's civil contempt authority because it neither compelled compliance with the injunction nor compensated the employee and attorneys had no role in the termination or shown religious animus. [*Carter v. Local 556, Transport Workers Union of America* (5th Cir. 2025) 156 F4th 459, 504-505]

CHAPTER 3

AGE DISCRIMINATION

Age Discrimination in Employment Act (ADEA)

Persons covered by ADEA

[3:112.3, 3:120] **Prima Facie Case under ADEA—Substantial Age Difference Presumption:** Evidence that the Employer made remarks that an older worker was “out of touch,” “too old for this business,” “should start thinking about retiring,” and that Employer “wanted only younger people with MBAs,” created a fact issue on whether the employer considered age in general to be significant in making its promotion decisions, and was sufficient to establish a prima facie case of age discrimination. [*Caldrone v. Circle K Stores Inc.* (9th Cir. 2025) 156 F4th 952, 958-959—10-year presumptive threshold was overcome by evidence of remarks made]

[3:215] **Plaintiff’s Burden to Show Employer’s Reasons Pretextual:** [See *Caldrone v. Circle K Stores Inc.* (9th Cir. 2025) 156 F4th 952, 958-961—triable issue on pretext where evidence showed employer deliberately did not advertise regional director opening, a deviation from its standard policy, in order to promote younger employee, and made ageist remarks; plaintiff excused from applying for position since employer did not advertise it]

CHAPTER 4

DISABILITY DISCRIMINATION

Americans With Disabilities Act (ADA)

ADA’s scope

- [4:37] **ADA’s confidentiality provisions incorporated into Rehabilitation Act:** A private right of action exists under the Rehabilitation Act for violating confidentiality irrespective of whether an employee is disabled since plaintiffs also have a private right of action for violation of the ADA’s confidentiality provisions. [*Mullin v. Secretary, U.S. Dept. of Veterans Affairs* (11th Cir. 2025) 162 F4th 1296, 1308-1310]

Essential elements of ADA claim

- [4:166] **Fibroids may be qualifying disability:** Fibroids resulting in severe pain and fatigue, and ultimately in an impairment of reproductive function, substantially limited major life activities, and meets the requirements of a “qualifying disability” under the ADA. [*Way v. City of Missouri City* (5th Cir. 2025) 133 F4th 509, 520-521]
- [4:385.5] **Pleading and proof—plaintiff’s testimony:** Plaintiff failed to explain what major life activities were limited by her shingles and PTSD; anxiety and depression did not show she was disabled under the ADA. [*Lohmeier v. Gottlieb Memorial Hosp.* (7th Cir. 2025) 147 F4th 817, 829]

- [4:637] **Doctor's report not conclusive evidence of disability:** An employer restricted employee's duties based upon physical changes identified by employer's medical examiner regarding the employee as *presently* disabled when the examiner stated the employee could experience seizures in the future; summary judgment precluded. [*Meza v. Union Pac. R.R. Co.* (8th Cir. 2025) 144 F4th 1115, 1117-1118]
- [4:814; 4:925.5] **ADA discrimination—requiring medical examination and inquiries:** The ADA's restrictions on medical examinations and inquiries applies to all employees, *even if they are not disabled* and an improper inquiry may qualify as discrimination. [*Nawara v. Cook County* (7th Cir. 2025) 132 F4th 1031, 1037-1038]
- [4:893] **Job assignment as discriminatory:** *Reassigning employee from a supervisory to a non-supervisory role*, even with no diminution in pay grade, salary, or benefits, may qualify as an adverse employment action. [*Herkert v. Bisignano* (4th Cir. 2025) 151 F4th 157, 164-165 (Rehabilitation Act case)]

Prohibited Discrimination

Adverse Employment Action

- [4:1024] **ADA's anti-retaliation provision protects employees who aid other employee in exercise of statutory ADA rights:** [*Gray v. State Farm Mutual Automobile Ins. Co.* (6th Cir. 2025) 159 F4th 1024, 1033]

Failure to Accommodate

- [4:1270.1] **Delay in providing accommodation may show lack of good faith and qualify as failure to accommodate:** [*Strife v. Aldine Independent School Dist.* (5th Cir. 2025) 138 F4th 237, 246-247 (collecting cases)—employer delayed 6 months in providing the requested accommodation and granted it only after employee initiated litigation and court had scheduled an injunction hearing]

Rehabilitation Act

- [4:1547.1] **Caution—proposed revisions to Rehabilitation Act regulations:** The Department of Labor has proposed significant revisions to its implementing regulations for Section 503 of the Rehabilitation Act, including eliminating utilization goal requirements. [90 Fed.Reg. 28494 (7/1/25)]

CHAPTER 5

HARASSMENT

Forms of Harassment

- [5:9] **EEOC 2024 Guidance on Harassment in the Workplace Rescinded:** In January of 2026, the EEOC rescinded its 2024 Guidance on Harassment in the Workplace. [See <https://www.eeoc.gov/newsroom/eeoc-commission-votes-rescind-2024-harassment-guidance>] (See also ¶12:263a.)

Caution: The U.S. Supreme Court has granted certiorari to consider whether Title IX sex discrimination safeguards should be extended to federally-funded university employees (e.g., college coaches and professors), an issue that divides lower circuits (*Crowther v. Board of Regents of Univ. System of Ga.* (11th Cir. 2024) 121 F4th 855, 860, cert.grntd. 5/18/26, — S.Ct. — (2026 WL 1377024) (Case No. 25-183)).

- [5:16] **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) claims:** Although the Supreme Court has not yet opined on the scope of the EFAA, the prevailing view is that when an employee plausibly alleges sexual harassment, the EFAA blocks the *entire* lawsuit from being sent to arbitration, not just the harassment claim. [See *Bruce v. Adams & Reese, LLP* (6th Cir. 2026) 168 F4th 367, 381; see *Rix v. Polsinelli PC* (D DC 2025) 2025 WL 2674767, *7 (collecting cases)]

Hostile Environment Actions

- [5:119; 5:400] **Actions of non-employees:** Although six circuits (the First, Second, Eighth, Ninth, Tenth & Eleventh) have held, and the EEOC agrees, that a negligence standard applies to determine liability by nonemployees, the Sixth Circuit recently held that to hold an employer liable for hostile work environment harassment by a non-employee, the employee must show that the employer *intended* for the harassment to occur. [*Bivens v. Zep, Inc.* (6th Cir. 2025) 147 F4th 635, 654, cert.denied, 2026 WL 1052175, 4/20/26 (Case No. 25-932)]

CHAPTER 6

WAGES AND HOURS

Coverage and Exemptions Under the FLSA

Protected activity

- [6:84.1] **Intracompany complaints protected:** An employee's email seeking payment for overtime worked during the COVID-19 pandemic was an expression of discontent or disagreement, not a complaint of illegality. [*Rodriguez v. City of Corpus Christi* (5th Cir. 2025) 129 F4th 890, 898]

Other federal statutes regulating compensation: Portal-to Portal Act

- [6:100] **Ordinary commute times and preliminary/postliminary activities occurring before or after workday not compensable under FLSA:** [*Johnson v. Amazon.com Services LLC* (7th Cir. 2025) 142 F4th 932, 938]

Specific FLSA Exemptions—salaried executive, administrative and professional employees

- [6:167] **Employee paid on weekly basis:** An employee who is paid on a weekly basis is not necessarily paid on a "salary basis" under section 29 CFR §541.602(a). "The fact that the payment is weekly must not be merely incidental to the payment; the week must serve as the fundamental unit

around which the payment is structured.” [*Pickens v. Hamilton-Ryker IT Solutions, LLC* (6th Cir. 2025) 133 F4th 575, 581, 584]

Minimum Wage

Calculating minimum wages—credits/deductions

- [6:652] **Transportation costs may be deducted:** An employer may deduct optional transportation costs provided for an *employee’s* benefit from workers’ minimum wages; expenses may not be shifted for the *employer’s* benefit. [*Villarino v. Pacesetter Personnel Service, Inc.* (11th Cir. 2025) 161 F4th 1270, 1275-1276]

Payment of Overtime Compensation

Determining whether overtime compensation due

- [6:852.2c] **Integral and indispensable travel time:** The time spent traveling prior to or following an off-duty rest period was integral and indispensable to employees whose principal activities at work involved providing *at-home* health services. Because the services had to be rendered in clients’ homes, employees necessarily spent time traveling during the workday to and from multiple clients. [*Secretary United States Dept. of Labor v. Nursing Home Care Mgmt. Inc.* (3rd Cir. 2025) 128 F4th 146, 157]

CHAPTER 7

LEAVES OF ABSENCE

Family and Medical Leave Act (FMLA)

[7:103.1] **CAUTION—Department of Labor Proposed Rule re how to assess “Joint Employer Status under Fair Labor Standards Act (FLSA), Family & Medical Leave Act (FMLA), and Migrant & Seasonal Agricultural Act (MSPA):** The proposal seeks to set a unified standard for when two or more entities share responsibility for the same employee, distinguishing between “vertical joint employment” and “horizontal joint employment” and sets distinct standards for determining the status under each scenario. [See 91 FR 21878-01, 2026 WL 1092769 (April 23, 2026)]

Intermittent and reduced schedule leaves

- [7:448; 7:620; 7:714] **Effect of medical certificate specifying number of leave days is an estimate, not hard bar/cap on unforeseeable leave:** Where intermittent leave is *foreseeable*, a medical certificate can limit, or cap, the number of FMLA leave days. However, if intermittent leave is *unforeseeable* (because the nature of the condition is unpredictable), a medical certification form cannot create an exact limitation, or hard cap on the total number of FMLA days an employee can take. [*Jackson v. United States Postal Service* (6th Cir. 2025) 149 F4th 656, 668-669, 670-674—given random and unpredictable nature of sickle cell anemia, medical certifi-

cation did not bar additional FMLA leave days and flare-ups fall under unforeseeable leave]

- [7:625] **Effect of employee's noncompliance with employer's internal leave policies:** Where employee did not report absences on the day they occurred as required by the employer's policy, employee failed to provide sufficient notice of intent to take FMLA leave, precluding liability for interference claim following termination. [*Chitwood v. Ascension Health Alliance* (7th Cir. 2026) 168 F4th 493, 498-500; compare *Jackson v. United States Postal Service* (6th Cir. 2025) 149 F4th 656, 667—employee need not adhere to official written policy regarding notice when different *unwritten* custom is typically followed]
- [7:1223, 7:1276.4] **Interference claims—discouraging employee's use of leave:** Criticism of an employee's substantive job performance is not enough to support a claim for interference under a discouragement theory even if the employee feels pressure due to criticism and decides to take less leave than otherwise would. [*Haran v. Orange Business Services, Inc.* (2nd Cir. 2025) 160 F4th 51, 57-60]
- [7:1266.3] **Retaliation claim—causal connection requirement:** No causal connection found for termination one day after employee's FMLA request where the employee was already suspended and terminated upon investigation for suspected narcotics theft and unsafe patient care. [*Lohmeier v. Gottlieb Memorial Hosp.* (7th Cir. 2025) 147 F4th 817, 830-831]

Because causation “moves forward, not backwards,” protected conduct after an adverse employment action cannot serve as the “predicate” for a retaliation claim. [*Harris v. National Grid USA Service Co., Inc.* (1st Cir. 2026) 171 F4th 118, 121; *Huber v. Westar Foods, Inc.* (8th Cir. 2025) 139 F4th 615, 623—when violation of company policy problematic before employee engaged in protected activity, it undercuts significance of temporal proximity and provides explanation other than retaliatory motive]

Remedies & Damages

- [7:1354.1] **Applicable interest rate:** When a judgment is based equally on both state and federal claims, a district court has discretion to select the proper prejudgment interest rate based on all relevant considerations, including the nature of the case, plaintiff's choice of forum, whether the plaintiff primarily relied on federal or state law for their substantive claims, and the impact of the rate on the award. [*Mooney v. Roller Bearing Co. of America Inc.* (9th Cir. 2025) 138 F4th 1349, 1352-1353, fn. 4]

Americans with Disabilities Act (ADA)

[7:1707; 7:1710; 7:1712; 7:1765] **Ability to perform essential job functions does not preclude entitlement to reasonable accommodation:** The fact that an accommodation is not necessary is not dispositive of, or fatal to, the employee's failure-

to-accommodate claim. An employee with a disability who *can* perform the essential functions of the job without accommodation remains eligible under the ADA to request and receive a reasonable accommodation. [*Tudor v. Whitehall Central School Dist.* (2nd Cir. 2025) 132 F4th 242, 246-248 & fn. 2 (collecting cases)]

CHAPTER 10

DEFENSES

Failure to Comply with Contractual Arbitration Requirement

[7:377.35] **Employer cannot unilaterally modify ERISA plan to add arbitration provision:** An employer cannot create a valid arbitration agreement by unilaterally modifying its ERISA plan to add an arbitration provision after the employee has joined the plan. Instead, “the employer must obtain consent from the relevant party to form a valid arbitration agreement.” [*Platt v. Sodexo, S.A.* (9th Cir. 2025) 148 F4th 709, 714-715]

CHAPTER 11

REMEDIES

Equitable Relief

Equitable relief remedying past unlawful practices

- [11:137] **Purging of personnel records:** Where the court could have reasonably concluded there was little or no risk that a document might be used against the plaintiff in the future, it was not clearly erroneous to deny a request to expunge. [*Garcia v. State Ins. Fund Corp.* (1st Cir. 2026) 169 F4th 13, 26]

Contract Damages—Items Recoverable

[11:151] **Pension benefits:** Pension benefits dependent on an employee’s continued employment require a “forward-looking determination” at the time of termination, involving a judgment call similar to the equitable decision to award front pay. [*Harmon v. Collier* (5th Cir. 2025) 158 F4th 595, 624]

Extracontractual Compensatory Damages (Tort and Statutory)

Nominal damages

- [11:316] Plaintiff can prove “intentional discrimination” for ADA claims by providing that the defendant acted with deliberate indifference. [See *S.H. ex rel. Durrell v. Lower Merion School Dist.* (3rd Cir. 2013) 729 F3d 248, 262-263; see also *Culp v. Caudill* (7th Cir. 2025) 140 F4th 938, 942 (applying a two-part test to establish deliberate indifference under the ADA and requiring both: (1) knowledge that harm to federally-protected right is substantially likely, and (2) failure to act upon that likelihood)]

The Supreme Court held that ADA and Rehabilitation Act claims

based on educational services should be subject to the same standards that apply in other disability discrimination contexts. The substantive provisions of both Title II and Section 504, by their plain terms, apply to “qualified individual[s]” with disabilities. [29 USC §94(a); 42 USC §12132; see *A.J.T. by & through A.T. v. Osseo Area Schools, Independent School Dist. No. 279* (2025) 605 US 335, 345, 145 S.Ct. 1647, 1655]

CHAPTER 12

PRACTICE AND PROCEDURE

Pre-Trial Procedures

[12:795.18.1] **Effect of arbitration agreement on requirement of giving opt-in notice to prospective FLSA class plaintiffs:** Prospective FLSA plaintiffs bound by valid arbitration agreements must arbitrate their claims. If there are triable issues with respect to the *validity* of their agreements, notice of the right to opt-in may be given to prospective plaintiffs even if they *might* be subject to arbitration under those agreements. However, if the validity of the arbitration agreement is *not in dispute*, the district court abuses its discretion by authorizing notice to prospective plaintiffs who are subject to arbitration. [*Harrington v. Cracker Barrel Old Country Store, Inc.* (9th Cir. 2025) 142 F4th 678, 683-686]