Introduction to the November 2026 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.

Among the materials updated in the November 2026 edition of *Labor and Employment Law: Compliance and Litigation 3d* are:

- **§ 1:48. Contract-law remedies by state—North Carolina:** A former employee's post-termination breach of contract actions against his former employer and its owner, seeking a declaratory judgment to enforce the provision of an employment agreement granting him 10% ownership interest in the company after five years of employment, was too vague to be enforced.
- **§ 1:66. Violation of state or federal constitutional rights—Federal cases:** Reputational injury cannot serve as the basis for irreparable harm that could result absent injunctive relief.
- **§ 1:67. Violation of state or federal constitutional rights—State cases:** A pretermination procedure functions as an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.
- **§ 1:76. Tort law remedies—Public policy—Public policy exceptions by state—Colorado:** Colorado law recognizes a public-policy exception to the at-will employment doctrine that allows an employee to bring a wrongful termination claim in the event the employee is terminated for actions taken in self-defense.
- **§ 1:180. Other tort-based causes of action—Common law remedies:** An employee who is not retained has suffered an action equivalent to a discharge, and if that occurred in retaliation for complaining about disparate treatment, this can give rise to a cause of action.
- **§ 1:217. Statutory remedies—State statutes—Cases under Montana statute:** An employee who can show the union breached its duty of fair representation is entitled to pursue a claim outside of the WDEA for violation of the CBA.

- **§ 1:245. Federal statutes, rules and regulations—The Employee Retirement Income Security Act of 1974 (ERISA)—Actions to recover benefits:** When an administrator fails to render a final decision, there is no valid exercise of discretion to which the court can defer and the court decides de novo whether the insured is entitled to benefits.
- **§ 1:245. Federal statutes, rules and regulations—The Employee Retirement Income Security Act of 1974 (ERISA)—Actions to recover benefits:** Five factors inform whether a plan administrator's interpretation is reasonable: (1) whether its interpretation is consistent with the plan's goals; (2) whether its interpretation renders any of the plan's language meaningless or internally inconsistent; (3) whether its interpretation conflicts with ERISA's substantive or procedural requirements; (4) whether it has interpreted the words at issue consistently; and (5) whether its interpretation is contrary to the plan's clear language.
- **§ 1:248. Federal statutes, rules and regulations—Family and Medical Leave Act of 1993 (FMLA):** A reasonable jury could conclude that reductions in bonuses and salary increases might well have dissuaded a reasonable worker from requesting FMLA leave or an accommodation.
- **§ 2:13. Introduction and overview of collective bargaining:** The preference for secret-ballot elections as the barometer of a union's support among employees stems from the fundamental goal of national labor policy to best respect workers' preferences on unionization.
- **§ 2:23. Suits to enforce arbitration awards:** An arbitrator's determination—that the hotel worker's conduct in briefly displaying a pocket knife to a co-worker justified suspension without pay, but did not supply just cause for discharge—could not be set aside on ground that the state's public policy condemned violence in workplace.
- **§ 2:42. Reinstatement:** Employers cannot fire those exercising their right to strike, though these economic strikers are not entitled to have their jobs back if their employer replaces them.
- **§ 2:44. National Labor Relations Board and proceedings:** The NLRB does not have broad authority to impose sanctions solely for the purpose of deterring future violations of the NLRA.
- **§ 2:51. Procedures in unfair labor practice cases—Violation of Section 8(a)(1):** The test for Section 8(a)(1) liability is whether an employer's conduct would tend to be coercive when considered within the totality of circumstances surrounding the occurrence at issue.
- **§ 2:51. Procedures in unfair labor practice cases—Violation of Section 8(a)(1):** Sharing salary information

among employees is a protected activity under the National Labor Relations Act.

- **§ 2:53. Procedures in unfair labor practice cases—Violation of Section 8(a)(3):** While the Board has broad discretion to fashion an appropriate remedy for violations of the Act, the court must exercise independent judgment in deciding whether the Board acted within its statutory authority.
- **§ 2:55. Procedures in unfair labor practice cases—Violation of Section 8(a)(5):** Treating employee choice differently based on whether the union won or lost has no basis in the NLRA.
- **§ 2:70. Procedures in unfair labor practice cases—Particular cases:** While some extraordinary cases involve outrageous and pervasive unfair labor practices for which a bargaining order is the only available remedy (also known as Category I cases), in less extraordinary cases (also known as Category II cases), the Board needs to make the determination that a fair rerun election might not be possible.
- **§ 2:74. Procedure in representation cases—Permitted conduct by employers:** An employer cannot be put into an impossible bind, where pausing benefits means that they threatened employees, and, on the other hand, extending promised benefits results in a holding that the employer unlawfully interfered with the election.
- **§ 3:8. Construction and operation:** Unquestioning acceptance of one party's characterization of its claims is inconsistent with the court's duty to determine arbitrability, because it leaves the scope of the arbitration clause subject to the unilateral and unfettered discretion of the party seeking to arbitrate.
- **§ 3:28. Particular disputes—Work rules:** An employer breached the parties' CBA by not staffing the required number of registered nurses to the hospital's cardiothoracic intensive care unit according to an agreed-upon grid and issued a monetary award to the affected nurses.
- **§ 3:45. Particular disputes—Discharges—Remedies:** A hotel with the legal right to keep a worker on the payroll cannot complain when an arbitrator does exactly that.
- **§ 3:66. Award—Enforcement of award:** The general rule is that nonsignatories to an arbitration agreement are not bound by the resulting decision, but where a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter.
- **§ 4:18. Civil Rights Acts of 1866 to 1871—Burden of proof, defenses—Fourth Circuit:** A comparison between similar employees will never involve precisely the same

set of work-related offenses occurring over the same period of time and under the same sets of circumstances; instead, the analysis focuses on the similarity between the comparators and their conduct such that a jury could reach an inference of discrimination, so long as the comparison is meaningful.

- **§ 4:25. Civil Rights Acts of 1866 to 1871—Burden of proof, defenses—Eleventh Circuit:** Courts must decide at the earliest possible stage in litigation whether qualified immunity applies, which involves two questions that can be considered in either order: (1) whether the officials violated a federal statutory or constitutional right, and (2) whether the unlawfulness of their conduct was clearly established at the time they acted.
- **§ 4:33. Title VII of the Civil Rights Act of 1964—Prohibited acts:** The fact that the plaintiff was terminated after posting a facially religious statement, by a company (and cooperating union) that understood the religious basis for the post, provides the initial grounding for a genuine dispute of material fact regarding whether the defendant terminated the plaintiff because of her religious beliefs.
- **§ 4:35. Title VII of the Civil Rights Act of 1964—Procedure:** A plaintiff who seeks equitable tolling must satisfy two prerequisites; they must show both that: (1) they pursued their rights diligently, and (2) an extraordinary circumstance prevented timely filing.
- **§ 4:38. Title VII of the Civil Rights Act of 1964—Burden of proof, defenses—First Circuit:** An employee who had been discharged for refusing to take the COVID-19 vaccine stated a Title VII religious discrimination claim where she had alleged that her refusal to take the vaccine was based on: (1) her religiously grounded opposition to abortion, and (2) her understanding that the COVID-19 vaccine was developed using cells obtained from aborted fetuses.
- **§ 4:52. Title VII of the Civil Rights Act of 1964—Jury issues:** The inquiry when verdict form interrogatories are challenged is whether the jury was misled or whether the questions accurately reflect the law.
- **§ 4:83. Age Discrimination in Employment Act—Prohibited acts:** Sometimes, an employer may issue a PIP to warn an employee about performance deficiencies or assist an employee in developing a plan to achieve an identified opportunity for skill development; other times, a PIP may impose new job responsibilities, change the present terms of employment, or deprive an employee of potential advancement opportunities.
- **§ 4:113. Rehabilitation Act of 1973—Procedure:** Designed to protect the integrity of the judicial process

and to prevent litigants from playing fast and loose, judicial estoppel bars a litigant from taking (and prevailing) on one view of the facts and then asserting the opposite later.

- **§ 4:136. Americans with Disabilities Act—Essential functions of the job:** Exemptions from vaccination requirements are a type of accommodation and are not an essential job function.
- **§ 4:166. Americans with Disabilities Act—Reasonable accommodation—Second Circuit:** A normally unreasonable accommodation can be found to be reasonable, on a case-by-case basis, where the employee's desired accommodation aligns with company practice.
- **§ 4:218. Promotion, demotion, and transfer:** The plaintiff's work schedule change from flextime to a fixed schedule of hours constitutes an adverse employment action sufficient to sustain a claim for retaliation.
- **§ 4:231. Sexual harassment—Sixth Circuit:** Where a plaintiff brings multiple claims in a single suit against a party with whom she has an otherwise-valid arbitration agreement, and one of those claims alleges a sexual assault dispute or a sexual harassment dispute, the EFAA renders the arbitration agreement unenforceable with respect to each of the claims that comprise her case.
- **§ 4:234. Sexual harassment—Ninth Circuit:** As matter of first impression, the term "dispute," as used in the EFAA, specifying that it applied only to disputes that arose on or after date of its enactment, did not apply to preclude an employer's motion to compel arbitration of her sexual harassment complaint.
- **§ 4:279. Religious discrimination—District of Columbia Circuit:** A Muslim woman of Pakistani origin pled a plausible religious discrimination claim in her pro se Title VII action against a federal agency by alleging that her supervisor denied her request for her a flexible work schedule to accommodate her religious observance during Ramadan, stating that the agency was not a religious institution and he did not believe in Islamic religious extremism.
- **§ 4:303. Attorney's fees—ntroduction:** After calculating the lodestar amount, the district court may adjust the amount upward or downward if circumstances warrant, including, for example, to reflect the results obtained and the time and labor actually required for the efficacious handling of the matter.
- **§ 5:8. Definition of "employer"—Individual liability—First Circuit:** The First Circuit considers whether the alleged employer: (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the

rate and method of payment; and (4) maintained employment records.

- **§ 5:23. Workweek defined:** The plaintiff's claim that his workweek started at 8:45 p.m. on Sunday and ended at 8:44 p.m. the following Sunday does not change the definition of workweek under the FLSA.
- **§ 5:25. Minimum wages and overtime pay:** A worker is not required to cross state lines or to interact with a vehicle that does to come within the FAA exemption.
- **§ 5:25. Minimum wages and overtime pay:** Plaintiffs cannot rely on the FLSA for their rights and proceed to invoke state law only as the source of remedies for the alleged FLSA violations.
- **§ 5:38. Burden of proof—Defenses—Third Circuit:** The district court found that the employer miscalculated its employees' overtime rates by both failing to pay the required one-and-one-half times the employee's regular rate and miscalculating the regular rate in the first instance by failing to include shift differentials, bonuses, and other types of additional pay as required under the FLSA.
- **§ 5:39. Burden of proof—Defenses—Fourth Circuit:** The employer gave these plaintiffs "hybrid" pay that was part salary and part day rate and did not violate the FLSA.
- **§ 5:49. Evidence:** An employee may prove a violation of the FLSA by producing sufficient evidence to show the amount and extent of uncompensated work as a matter of just and reasonable inference.
- **§ 5:51. Remedies:** The FLSA does not afford a remedy for overtime gap time.
- **§ 5:56. Remedies—Costs and attorney's fees:** A fee request in a class action raises interests of class counsel that are opposed to interests of the class members.
- **§ 5:64. State wage and hour laws—Connecticut:** Because Amazon required the plaintiffs to remain on its premises during the mandatory security screenings, this time was compensable under Connecticut's wage laws.
- **§ 5:88. State wage and hour laws—New Jersey:** For his services as a superintendent, the undocumented worker was considered an employee under the broad scope of the Wage Payment Law and the Wage and Hour Law, and thus he was therefore entitled to appropriate wages for work he had already performed.
- **§ 5:115. Exemptions—Executives—Salary basis:** An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis.

- **§ 5:123. Exemptions—Motor Carrier Act:** Th FMLA exemption from its overtime provisions employees covered by the MCA covers truck drivers who do only intrastate driving as long as it is a part of a continuous interstate journey and this continuity is not broken by routine interruptions that are no more than the normal stops or stages that are common in interstate sales.
- **§ 5:127. Suits by the department:** The system through which employees would punch in and out of work recorded employees' punches inaccurately or failed to record them at all, even if the employee had used the system correctly, and this failure led the employer to miscalculate the wages its employees were due by: (1) paying employees for their scheduled hours instead of the hours they actually worked, and (2) failing to pay employees for working through their meal breaks.
- **§ 5:149. Joint employer liability:** Where the uncontroverted facts show that this defendant did not possess the authority to hire and fire the employees or to control their work schedules and working conditions, this defendant could not be held liable as a joint employer under the FLSA.

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