

**Introduction to the May 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 this May 2026 edition of *Labor and Employment Law: Compliance and Litigation 3d* are:

- **§ 1:37. Contract-law remedies by state—Michigan:** A non-negotiated boilerplate employment agreement that shortens the three-year statute of limitations applicable to civil rights claims to 180 days is an adhesion contract between an employer and an employee and must be examined for reasonableness.
- **§ 1:66. Violation of state or federal constitutional rights—Federal cases:** In Indiana, county police officers have a property interest in continued employment, as they may be fired only for cause.
- **§ 1:116. Tort law remedies—Public policy—Public policy exceptions by state—Vermont:** A refusal by a doctor to violate the codified ethical standards of his profession solely for the financial benefit of his employers, which led to the doctor's discharge, can give rise to a claim for violation of public policy.
- **§ 1:251. Affirmative defenses—Preemption:** The HHS regulation establishing a COVID-19 vaccine mandate for providers of rehabilitation programs receiving money from Medicare and Medicaid did not expressly preempt state law providing that employers shall grant a vaccine exemption based on sincerely held religious beliefs without inquiring into the sincerity of the request.
- **§ 2:10. Supervisors:** Supervisory status is an affirmative defense that must be raised in the employer's answer to an unfair labor practice complaint, and the employer bears the burden of showing substantial evidence of supervisory status.
- **§ 2:19. The grievance and arbitration process—Arbitrability:** To make an arbitrability determination, the court considers: (1) whether this dispute comes within the scope of the arbitration clause; (2) whether any other provision of the contract expressly excludes the dispute from arbitration; and (3) whether there is any other force-

ful evidence indicating that the parties intended such an exclusion.

- **§ 2:28. Rights, duties, and obligations of members in general:** A union local representing public school teachers has no private right of action against a non-profit organization whose goal was to limit the power of teacher unions by contributing money to recruit and promote candidates in a union election under the LMRDA and Illinois law.
- **§ 2:42. Reinstatement:** An employer who refuses to reinstate strikers is guilty of a ULP unless it can show legitimate and substantial business justifications for its lockout, and bears the burden of proof.
- **§ 2:43. Shutdowns and lockouts:** For a lockout to be deemed lawful, the union must be informed on a timely basis of the employer's demands so that the union can evaluate whether to accept them and prevent the lockout.
- **§ 2:44. National Labor Relations Board and proceedings:** Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct.
- **§ 2:51. Procedures in unfair labor practice cases—Violation of Section 8(a)(1):** To determine whether an employer violated Section 8(a)(1), the General Counsel must make a showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision.
- **§ 2:53. Procedures in unfair labor practice cases—Violation of Section 8(a)(3):** To establish a Section 8(a)(3) violation, the Board must make three showings: (1) the employee engaged in protected activity; (2) the employer knew of that protected activity; and (3) the employer acted on the basis of anti-union animus.
- **§ 2:55. Procedures in unfair labor practice cases—Violation of Section 8(a)(5):** The union bears the burden of establishing that it sought relevant information because it was seeking information about non-union employees.
- **§ 3:9. Function of the courts:** When a labor arbitrator first decides liability questions and reserves jurisdiction to decide remedial questions at a later time, the arbitrator's decision is not final, which requires a district court to dismiss the case.
- **§ 3:63. Rules of evidence:** The arbitrator did not exceed his authority by drawing an adverse inference against the employer for failing to call the employee's direct supervisors as witnesses.
- **§ 3:71. Section 301 of the Taft-Hartley Act and preemption:** The mere need to look to the CBA for damages computation is no reason to hold the state-law claim defeated by Section 301.
- **§ 4:2. Administrative agencies and proceedings:** The EEOC's broad public interest and role in combating

employment discrimination gives the EEOC authority to investigate a charge that extends beyond the issuance of a right-to-sue letter.

- **§ 4:10. Civil Rights Acts of 1866 to 1871—Prohibited acts:** The police commissioner's termination of a dispatcher and imposing disciplinary sanctions following her reinstatement—demotion and resulting pay cut, unpaid suspension, and two years' ineligibility for promotion—constituted adverse actions required to support the dispatcher's First Amendment retaliation claim under Section 1983.
- **§ 4:31. Title VII of the Civil Rights Act of 1964—Covered parties:** Title VII prohibits unions from causing or attempting to cause an employer to discriminate against an individual.
- **§ 4:33. Title VII of the Civil Rights Act of 1964—Prohibited acts:** Any loss of supervisory authority does suffice, as a matter of law, to show an actionable disadvantageous change in employment status.
- **§ 4:35. Title VII of the Civil Rights Act of 1964—Procedure:** The relation-back doctrine requires a factual nexus between the amendment and the original complaint, and new claims do not relate back to original claims if they arise from separate occurrences of both time and type.
- **§ 4:39. Title VII of the Civil Rights Act of 1964—Burden of proof, defenses—Second Circuit:** A constructive discharge can be supported by a showing of an aggravated case of a hostile work environment.
- **§ 4:42. Title VII of the Civil Rights Act of 1964—Burden of proof, defenses—Fifth Circuit:** Plaintiffs can show their employer discriminated against them through three types of claims: first, intentional discrimination claims based on belief; second, intentional discrimination claims based on practice; and third, failure-to-accommodate practice claims.
- **§ 4:59. Equal Pay Act of 1963—Prohibited acts:** While salary history does not satisfy an employer's affirmative defense when evidence indicates the salary history itself was discriminatory, this is something to be proved rather than assumed.
- **§ 4:79. Equal Pay Act of 1963—Remedies:** If the employer does not meet its burden by showing good faith and a reasonable belief that it was not violating the law, the court has no discretion to limit or deny liquidated damages.
- **§ 4:96. Age Discrimination in Employment Act—Burden of proof, defenses—Seventh Circuit:** Even where a plaintiff in a discrimination case alleges that the company's investigation was imprudent, ill-informed, and inaccurate, summary judgment is appropriate unless the

employee could point to facts suggesting that the company investigated them differently because they were an older employee.

- **§ 4:111. Rehabilitation Act of 1973—Prohibited acts:** An employee's disclosure of confidential medical information in an FMLA leave form constitutes an inquiry by the employer within the meaning of the Rehabilitation Act.
- **§ 4:115. Rehabilitation Act of 1973—Burden of proof, defenses:** The Rehabilitation Act's sole-causation requirement does not apply to retaliation claims or failure-to-accommodate claims.
- **§ 4:135. Americans with Disabilities Act—Substantially limits:** Driving at night could be considered major life activity for an employee with night blindness that substantially limited her ability to see at night.
- **§ 4:153. Americans with Disabilities Act—Burden of proof, defenses—Sixth Circuit:** A plaintiff engaged in protected activity by helping another employee reinstate and secure her ADA accommodation despite the supervisor's opposition.
- **§ 4:170. Americans with Disabilities Act—Reasonable accommodation—Sixth Circuit:** A duration of five minutes of sitting after standing for 10 minutes is a facially unreasonable accommodation request.
- **§ 4:271. Religious discrimination—Fourth Circuit:** The plaintiff's opposition to the use of aborted fetal cell lines to produce the COVID-19 vaccine because of her Christian upbringing that would betray her conscience and faith if she complied with the mandate, citing Catholic teachings, was sufficient to state a claim under Title VII for her need for a religious accommodation.
- **§ 4:272. Religious discrimination—Fifth Circuit:** An employee's allegedly mixed motive for refusing to obtain COVID-19 vaccine—consisting of a religious belief alongside political beliefs and personal preference—did not preclude a finding that the employee's religious belief was more than a mere preferred practice.
- **§ 4:281. Discriminatory termination—Discharge or lay off:** Reporting another doctor working at the hospital was sexually harassing nurses was a protected act, and terminating the doctor for that reason violates Title VII.
- **§ 4:283. Retaliatory discharge:** Where a plaintiff supported a co-worker throughout the ADA process, actively pushing back against the supervisor's denial of the co-worker's accommodation, those efforts qualify as protected activity.
- **§ 5:21. Covered employees:** To determine whether a worker qualifies as an employee entitled to overtime wage protection under the FLSA, the court applies the economic reality of the relationship and whether the worker is

economically dependent on the alleged employer under the totality of the circumstances.

- **§ 5:24. Preliminary or postliminary activities:** Even activities required by the employer and for the employer's benefit remain outside the bounds of the employee's principal activity if they are not integral and indispensable to the productive work that the employee is employed to perform.
- **§ 5:25. Minimum wages and overtime pay:** The employer failed to pay the employee his minimum wages and overtime during pay periods in which his pay was diverted to scammers, thereby violating the FLSA.
- **§ 5:33. Retaliation:** The defendant in an FLSA retaliation action need not be the actual employer and the plaintiff need not have been employed by the actual employer when the retaliation occurred.
- **§ 5:44. Burden of proof—Defenses—Ninth Circuit:** Section 301 preemption is not mandated simply because the defendant refers to the CBA in mounting a defense.
- **§ 5:46. Burden of proof—Defenses—Eleventh Circuit:** Under the FLSA, an employer cannot shift business expenses to its employees if that shift would reduce employees' wages below the statutory minimum.
- **§ 5:56. Remedies—Costs and attorney's fees:** The First Circuit has recognized two methods of calculating appropriate attorney's fees: the lodestar method, which involves determining the number of hours productively spent on the litigation and multiplying those hours by reasonable hourly rates, and the percentage of funds method, in which the court shapes the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefited by the litigation.
- **§ 5:131. Class/collective actions—First Circuit:** Class counsel's simultaneous representation of three individual employees in their FLSA wage-and-hour cases and a class of employees claiming violation of the Massachusetts wage-and-hour laws against the same employer did not preclude the district court from approving a class action settlement.

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