Highlights to the 2026-3 Update

This release, issued in September 2026, continues the *Guide to Employment Law and Regulation, 2d's* coverage of federal and state employment laws for both human resource professionals and employment attorneys. New material in this update includes:

- **Civil Rights immunity issues:** The right question, in an analysis of the "clearly established" prong of qualified immunity in a § 1983 action, is whether the wrongfulness of an official's conduct was clearly established, not whether the rules of individual liability were settled. Whether a defendant is sure that he can be held civilly liable for his illegal conduct plays no part in the qualified immunity analysis in a § 1983 action. *Foster v. Echols County School District, 169 F.4th 1291 (11th Cir. 2026).* **See § 2:66.90.**
- **FLSA constructive knowledge:** The Fifth Circuit has clarified that an employer's failure to maintain a timekeeping system in itself does not constitute constructive knowledge of an employee's overtime work. Rather, constructive knowledge can be shown through how the business operates. Accordingly, the court held that an employee's failure to report his hours to employer precluded him from receiving overtime compensation, even if the employer permitted him to work as much as he pleased, and made no effort to record his hours. *Merritt v. Texas Farm Bureau, 166 F.4th 490 (5th Cir. 2026).* **See § 13:18.**
- **NLRA refusal to bargain:** The Sixth Circuit subsequently abrogated Cemex Construction Materials Pacific, which made a bargaining order the default for situations once the union election was set aside. The Cemex standard extended beyond the NLRB's remedial authority and therefore could not serve as a basis to impose a bargaining order in a subsequent case against a different employer that had committed unfair labor practices. The NLRB's error in relying on the improper adjudication that was not accompanied by an independently sufficient justification for its bargaining order was not harmless and therefore remand was proper. *Brown-Forman Corporation v. National Labor Relations Board, 169 F.4th 646 (6th Cir. 2026).* **See § 17:321.**
- **ERISA withdrawal liability:** The U.S. Supreme Court held that ERISA's requirement that liability for withdrawal from a multiemployer pension plan be calculated based on the value of a plan's unfunded vested benefits "as of" the measurement date allows plans to assess withdrawal liability based on actuarial assumptions adopted after the measurement date. The Court said that such assumptions are not observable facts about the plan that are "in effect" on a particular date, but are predictive judgments about the plan's anticipated future performance, and thus are part of the unfunded vested benefits calculation itself and can be selected after the measurement date in order to properly value the unfunded vested benefits as of the measurement date. *M & K Employee Solu-*

tions, LLC v. Trustees of IAM National Pension Fund, 146 S. Ct. 1224, 224 L. Ed. 2d 764 (2026). **See § 19:27.**

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