Sauk-Columbia SHRM

HR Legal Update



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BoardmanClark

Wage & Hour

New Opinion Letters

- Opinion letters are statements from the federal Department of Labor which explain how the Department *thinks* it would apply the law in a given circumstance.
- They help HR professionals and legal counsel “read the tea leaves” on a given issue.

FLSA2025-03 (Oyster Shuckers)

- Addressing whether a restaurant employer may include “front-of-house” oyster shuckers in a traditional tip pool with servers for whom the employer takes a tip credit under section 3(m)(2)(A) of the FLSA.

FLSA2026-1 (Learned Professional Exemption)

- FLSA uses three-part test for determining salary-exempt status under the white-collar exemptions, and each factor must be met for the exemption to apply.
- For the Learned Professional Exemption, the employee's "primary duty" must involve the performance of "work requiring advanced knowledge" "in a field of science or learning" which is "customarily acquired by a prolonged course of specialized intellectual instruction."
- Even if an employee meets this duties test, an employer may decide to unilaterally change an individual to hourly thus destroying the exemption.
  - There may be a multitude of reasons for doing this such as decreasing overhead when work slows down.

FLSA2026-2 (Bonus Payments)

- Non-discretionary bonus payments must be factored into a worker's regular rate of pay for purposes of calculating overtime.
- A bonus is generally deemed "non-discretionary" if the payment is triggered automatically by an employee meeting a certain benchmark.
  - Example: If you attend 12 HR Legal Updates put on by Storm, you get $10,000.
- Federal law looks to three factors to determine if a bonus is discretionary:
  (1) the fact and amount of the payment must be "determined at the sole discretion of the employer";
  (2) the employer's determination must occur "at or near the end of the period" when the employee's work was performed; and
  (3) the payment must not be made "pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly[.]"

FLSA2026-5 (Overtime for Exempt Employees

- To qualify as exempt from overtime, employees must meet a salary level test, a salary basis test, and a primary duties test. The salary level test requires that the employee receive a salary of at least $684 a week. The salary basis test requires that the employee receive a predetermined salary that is not reduced based on hours worked.
- The primary duties test requires the employee's "primary duty" to be the performance of exempt work. Relevant factors include the relative importance of the employee's duties, time spent on exempt work, level of discretion in the work, and comparison to non-exempt roles.
- An employer classified certain nursing specialists as exempt and paid them on a salary basis, while also allowing them to pick up shifts as hourly staff nurses. These additional shifts were extensive, sometimes approaching 40 percent of their total work hours.

FLSA2026-5 (Overtime for Exempt Employees, con't.

- Applying these tests, the DOL concluded the nursing specialists remained exempt from overtime pay. Central to that conclusion was the primary duties test. The DOL emphasized that the employees still spent the majority of their time—more than 50 percent—performing exempt specialist work.
- The nature of the duties was also important to the evaluation. The specialist role involved higher-level responsibilities, such as developing training programs, identifying learning gaps, and exercising independent judgment. By contrast, the staff nurse role focused on direct patient care. Even though there was some overlap in tasks, the DOL found the specialist duties were more significant to the role overall and therefore remained the employee's primary duties.
- On the compensation side, the DOL confirmed that paying hourly wages for the additional non-exempt work did not defeat the exemption. Because the employees continued to receive their full guaranteed salary, the extra pay qualified as permissible additional compensation. So long as the employees continued to receive a sufficient minimum salary and the employer didn't deduct from that minimum salary improperly, additional compensation for salaried employees does not eliminate their exempt status.
- Wisconsin law is more restrictive than federal law, generally limiting exempt employees to no more than 20 percent of their time on non-exempt work, or 40 percent in certain retail or service settings.

Proposed Independent Contractor Rule

- Proposed rule would impact the definition of “independent contractor” under the FLSA and FMLA.
- This is just a proposed rule. The time for the public to weigh in on this proposed change runs through April 28, 2026.
- The Proposed Rule states: “an individual is an independent contractor . . . if the individual is, as a matter of economic reality, in business for him or herself.”
  - By contrast, employees are “economically dependent on [the] employer for work.”

Ceron Bran v. Zubha Pop Foods, LLC (N.D. Ill. 2025)

- The court struck an arbitration agreement down because the agreement required the parties to pay their own attorneys' fees.
- The court found the agreement to be unconscionable because the FLSA mandates fee shifting if the employee prevails.

Lutz v. Froedtert Health Inc., (7th Cir. 2026).

- A Froedtert employee brought a class action alleging the hospital system improperly calculated overtime under the FLSA and Wisconsin law by excluding holiday pay.
- The plaintiffs argued Froedtert underpaid overtime by excluding holiday premium pay from the regular rate calculation.
- Froedtert calculated employees' regular rates by using base pay, shift differentials, weekend differentials, and other premium pay, but excluded holiday premium pay.
- The Seventh Circuit held that Froedtert's overtime methodology complied with both the FLSA and Wisconsin law, and that holiday premium pay was properly excluded from the regular rate.
- The FLSA allows employers to exclude holiday premiums from the regular rate calculation so long as employees are paid at 1.5 times the employee's hourly rate for non-overtime work.
- Key takeaway: Holiday premium pay that meets the statutory requirements may be excluded from regular rate and overtime calculations. Wisconsin law tracks federal law on this issue.

Mandeville v. Clinity Talent, LLC (W.D. Wis. 2026).

- A former vice president of a healthcare recruiting firm sued after the company refused to pay him commissions he earned for staffing placement before he was terminated.
- The employer argued that the commissions were not owed because the placements were finalized after termination and the employee had engaged in disloyal conduct by pursuing a business opportunity for himself while still employed with Clinity.
- The court held that the employee had already earned the commission under the employment agreement because he was responsible only for the placements, and later unrelated misconduct did not eliminate his right to those commissions.
- The court awarded the employee his unpaid commissions and doubled the amount as a statutory remedy under Wisconsin wage law.
- Key takeaway: In Wisconsin, employers cannot withhold earned commissions based on alleged misconduct or business losses unrelated to the commissions. Employees who earn commissions before termination remain entitled to them, and wrongful withholding can result in double damages.

Wage and Hour Hypothetical

- You have an employee who is an absolute go-getter. She is always early to work and always the last to leave.
- You notice, however, that she punches in and out exactly at her scheduled times each day.
- You ask the employee about it, and she says that she doesn't mind going the extra mile and it is her choice to work a little extra. She doesn't expect overtime pay.
- Do you have a legal problem?

FMLA

FMLA2026-2

- Employers must permit employees to use their approved FMLA time to travel between appointments.
  - This is true even if the appointments are a significant distance away.
- This will ordinarily arise when an individual is on intermittent or reduced schedule leave, including to care for a qualifying family member.
- Key: Employees must still have a serious health condition that qualifies for them to have the travel time count, and abuse of leave is never protected.
  - The information contained in the certification form will usually help you figure out how much travel time will be necessary and how often, but the certification is not required to contain information about travel time to be valid.

Chitwood v. Ascension Health Alliance (7th Cir. 2026)

- Elizabeth Chitwood worked as an HR Specialist as Ascension Health and requested FMLA in 2021. She was approved for intermittent FMLA and continuous leave which was set to expire on November 3, 2021.
- When her leave expired, she didn't return to work and didn't respond to several messages from Ascension about returning. Ascension demanded she return on November 15, 2021. She applied for a personal leave of absence on November 4 which would run through December 1, 2021, but Ascension denied that request.
- She tried logging onto her computer on November 15 but couldn't get in, so she sent a vague voicemail implying she assumed she had been terminated. Ascension terminated her the same day after getting the message.
- The day after she was terminated, she tried to apply for her missed days as retroactive FMLA leave, but Ascension denied those too since she had been terminated already.
- The court granted judgment to Ascension on all claims, and the dismissal was affirmed on appeal.
- Key takeaway: Retroactive FMLA designations are not required after an employee has been terminated for reasons unrelated to FMLA usage. Failing to return to work is a valid basis for termination. However, be very careful about offering additional leave beyond FMLA as it may be required as an accommodation.

Shirk v. Trustees of Indiana University (7th Cir. 2026)

- Jennifer Shirk worked for Indiana University in its elearning department.
- She was fired two years after being hired for sending emails to high-level university officials needlessly alerting them to temporary problems in her unit and accusing her managers of mismanagement.
- She sued and said her termination was based on FMLA leave she had taken and her request for accommodations related to her OCD and PTSD.
- Shirk pointed to statements made expressing frustration about the lack of notice that Shirk was giving ahead of her leave requests and that her proposed accommodations made it look like she was requesting a demotion.
- Key takeaway: Messaging is critical in dealing with problem employees who have mental health concerns and are taking leave. Isolated statements from supervisors usually aren't enough to create legal liability at the end of the day, but they provoke employees to file lawsuits. Clear messaging to managers about the need for compassion in handling leave requests is imperative. You can always discipline for reasons unrelated to FMLA.

Leave As An Accommodation

- Whether you are covered by the FMLA or not, every employer has a duty to explore a leave of absence for an employee who has a disability.
- State and federal disability laws require that an employer at least consider whether a finite amount of leave can be offered as a reasonable accommodation.
- Practical point: indefinite leaves of absence are never a reasonable accommodation, but you need to stay on top of how long an employee is out and get that documentation from the doctor ASAP.

Creason v. Elanco US Inc. (7th Cir. 2026).

- An Elanco engineer challenged the company's voluntary "vacation buy" program under which employees could "purchase" an additional week of paid vacation by agreeing to a corresponding reduction in salary.
- The engineer participated in the program, and after resigning, claimed Elanco unlawfully reduced his wages by $84 per week.
- The Seventh Circuit rejected the claim, finding that Elanco did not deduct wages from his pay, instead, the engineer voluntarily agreed to accept a lower salary in exchange for more paid time off, effectively working fewer weeks each year.
- Key takeaway: Employers may offer voluntary vacation-purchase programs when employees knowingly agree to reduced compensation in exchange for additional paid leave.

FMLA Hypothetical

- Steve's performance has been declining for several months. You meet with him for a performance evaluation. Your evaluation is professional but critical at times.
- Steve begins to cry and says that he is struggling a lot at home right now. He thought that it wasn't affecting his work, but clearly it is.
- How do you respond?
- Eventually, Steve reveals that his "struggles at home" are actually caring for his husband who was diagnosed with Alzheimer's a few months ago.
- How do you respond?
- Finally, Steve asks that you remove this evaluation from his file because of his personal circumstances.
- How do you respond?

Paid Leave Updates

New Laws in Our Neighboring States

- Minnesota's Paid Family Leave law went into effect on January 1, 2026.
  - This law covers nearly every worker in Minnesota regardless of full-time or part-time status.
  - Leave may be taken to care for your own serious health condition, or to care for someone else.
  - This law is administered through the State of Minnesota.
- Illinois passed a new NICU leave law which applies to individuals taking time to care for a newborn in the NICU.

Discrimination Issues

EEOC Rescinds Harassment Guidance

- On January 22, 2026, the EEOC voted 2-1 to rescind new harassment guidance which had been issued in 2024.
- The reasons for revoking the guidance include its discussion of gender identity as a protected class.
  - Gender identity remains a protected class under state and federal laws.
- In its statement rescinding the guidance, the EEOC made clear that anti-discrimination protections remain in place.

EEOC Brings Sex Discrimination Lawsuit

- On February 17, 2026, the EEOC sued Coca-Cola Beverages Northeast, Inc. for excluding male employees from an employer-sponsored event.
- The event was a two-day retreat at a resort/casino for women only.
- A group of male employees complained and the EEOC agreed to file suit on their behalf.
- This case is pending, and Coca-Cola is due to answer on April 21, 2026.
- Practical takeaway: opportunities afforded exclusively to underrepresented classes are receiving increased scrutiny.

EEOC Chair Issues Letter to Major Companies

- On February 26, 2026, the EEOC's chairperson sent an open letter to several hundred Fortune 500 employers reminding them of their obligations to comply with anti-discrimination laws.
- The letter reminded employes that DE&I programs may constitute unlawful discrimination regardless of whether they are designed to help underrepresented populations.

New Wisconsin Antisemitism Law

- 2025 Wis. Act 143.
- This law requires all levels of government to consider the definition of antisemitism adopted by the International Holocaust Remembrance Alliance on May 26, 2016, including its examples, when evaluating evidence of discriminatory intent for any law, ordinance, or policy in this state that prohibits discrimination based on race, religion, color, or national origin.
- That definition is that “Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”

Lane v. Stericycle, Inc. (7th Cir 2025)

- Stericycle reorganized its sales department in 2021, and as a result, several women were paid less than male counterparts in the same role.
- After being promoted, some of the men received pay increases immediately while some of the women did not.
- It was only after the women complained about unequal pay that the company boosted their salaries to the level of their male counterparts.
- This created a factual dispute which a jury was required to resolve.
- Key takeaway: Employers do not violate the law when they introduce a reason other than gender for paying a person more such as tenure with the company, education, and prior salary levels.

Chehade v. Foley & Lardner LLP

- Jinan Chehade sued a law firm under Title VII alleging race and religion discrimination after the law firm rescinded her job offer.
- Chehade is Muslim and completed her summer associate position in 2022 and a year later the tragic terrorist attack in Israel happened on October 7, 2023.
- Chehade shared multiple messages on social media condemning colonization and in support of Palestine.
- She also spoke out at a Chicago City Council meeting where she opposed a resolution condemning the attack.
- The law firm's HR Department found the statements she made online and she was interviewed by very senior level members of the firm.
- As a result of the investigation, Chehade's employment offer was rescinded but Foley did not discipline other individuals at the firm who made pro-Israel posts.
- Foley cited violations of its core values, but there was no clear explanation of what "core values" were being addressed.
- Key takeaway: A policy or practice must be consistently applied and clearly defined before you rely on it to terminate/discipline an individual.

Paterakos v. City of Chicago

- Stella Paterakos (a White woman) got a new supervisor named Crystal Warren, who is Black.
- After Warren was assigned to supervise Paterakos, she began issuing discipline against Paterakos for the first time in her career, including three suspensions and transfer to a new location temporarily.
    - Warren cited multiple performance deficiencies which Paterakos did not dispute, but still believed she was being singled out.
- Paterakos sued and alleged race discrimination and FMLA retaliation/interference.
- The court rejected all claims and ruled in favor of the employer.
- Key takeaway: Clear documentation was a huge help because the employee agreed with the reasons cited for the discipline. Even though it's a low bar to show an adverse employment action, that bar still exists, and not every single thing an employee does not like will qualify as an adverse action.
    - "The assignment did not diminish Paterakos's job responsibilities, compensation, or benefits or make her otherwise worse off. While it shifted Paterakos's working hours by half an hour and required her to report to a different location, Paterakos has not identified any way that either of these minor changes in her working conditions objectively harmed her."

Stanley v. City of Sanford, Florida

- The U.S. Supreme Court ruled that retirees were not covered by the Americans with Disabilities Act because the ADA does not cover post-employment acts. It did not limit retirees' ADA suits for decisions made while they were still employed that would affect them in retirement.
- State law might not adopt this interpretation.

Kedas v. Illinois Dep't of Transportation

- An employee failed to establish constructive discharge based on gender by his employer.
  - There were no reports of violence or harassment so severe that it created a work environment more egregious than a hostile work environment.
  - Working conditions were not objectively intolerable, and no reasonable employee would have felt compelled to quit.
- This case reiterates that the bar for constructive discharge remains high.

Discrimination Hypothetical

- You post a job for an office manager. You receive 24 applications from women and 1 from a man.
- The man has 5 years of experience as an office manager in a different industry.
- One of the women has no experience as an office manager, but has experience in the industry.
- Following the interviews with both of them, you want to hire the woman. How do you do so without getting sued by the man you did not hire?

Trends & Refreshers

Safe Place Statute Applies to Contractors

- Plaintiff was a steamfitter who replaced pipes at a variety of businesses in Wisconsin. In the late 1970's, he worked for an outside contractor hired by Pabst to replace pipes in its brewing facilities which were covered with asbestos insulation. Pabst knew that the insulation contained asbestos and that exposure was dangerous. Pabst was found liable for failing to take the proper precautions to keep the contractor safe.
- Pabst was found liable under Wisconsin's Safe Place Statute. The Safe Place Statute contains broad protections for individuals who are present at a "place of employment," including employees of other contractors or independent contractors. Under the statute, all businesses owe an "ongoing duty to keep premises safe." Pabst owed this contractor this duty of care to keep him safe while he was replacing the pipes.
- The jury found that Pabst violated this duty by not sufficiently protecting the contractor as he replaced the dangerous pipes despite Pabst's knowledge of the danger.
- This is a tragic case. Employers should make sure their premises are safe for contractors. Employers should be aware that unlike employees, contractor injuries are not covered by workers compensation.
- If engaging contractors to do potentially dangerous work, carefully review the contracts to make sure all parties are aware of appropriate safety measures.

Record Lawsuit Filings

- According to a legal research engine, over 20,000 employment discrimination lawsuits were filed in 2025 which is the first time since 2009 we have crossed that threshold
- Employment lawsuits alleging failure to provide a reasonable accommodation also surged to a record number in 2025 (6,796)
  - The research report attributed the increased number to higher damages awards and conditions such as Long Covid.
- Retaliation remains the most frequent basis for these suits.

Employee Record Requests

- Current and former employees have the right to inspect certain records you've kept on them. Wis. Stat. s. 103.13.
- Only records **"which are used or which have been used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, termination or other disciplinary action, and medical records"** have to be turned over.
- This statute is both broader and narrower than "the personnel file."

Exceptions

- There are numerous exceptions to this rule:
  - Records relating to the investigation of possible criminal offenses committed by that employee.
  - Letters of reference for that employee.
  - Certain competency testing documents.
  - Materials used by the employer for staff management planning, including judgments or recommendations concerning future salary increases and other wage treatments, management bonus plans, promotions and job assignments or other comments or ratings used for the employer's planning purposes.
  - Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.
  - An employer who does not maintain any personnel records.
  - Records relevant to any other pending claim between the employer and the employee which may be discovered in a judicial proceeding.

Retaliation Hypothetical

- You recently had a messy termination. The employee did not expect to be terminated and had been making vague complaints about mistreatment and unfair working assignments in the weeks leading up to the termination. You terminated her based on her negative attitude in the workplace and tendency to spread gossip which has been affecting others.
- After the employee was terminated, she has been copying you, the CEO, and other high-level executives on emails advising that she's retained a lawyer and that they want to see her complete personnel file and that her complaints "better be documented because I've been recording you the whole time."
- How do you respond to this complaint? Do you even have to respond?

AI and Discrimination Concerns

- We are monitoring cases around the country dealing with third party recruitment agencies that use AI to recruit candidates.
- Lawsuits have been brought by employees who claim the software being used discriminates against them based on protected class status.
- A common theory of liability is disparate impact which does not require proof of discriminatory intent if the overall effect of the policy/software/practice is discriminatory.

Questions?

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