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HR Network

2025

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HR Network: US Legal Update Part Two – Leaves and Accommodations, Whistleblower Protection, NLRA and RIFs/WARN

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Agenda

- Leaves of absence
- Accommodations
- Whistleblower protections
- NLRB/union matters
- Reductions in force and the WARN Act

Leaves of Absence

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Federal law: Family and Medical Leave Act (FMLA)

- 50+ employees in 20+ work weeks in the current or preceding calendar year
- Leave may be taken by an employee of a covered employer who:
  - Has worked for the employer for 12+ months
  - Has 1,250+ hours of service for the employer during the 12-month period immediately preceding the leave (this does not need to be consecutive)
  - Works at a location where the employer has 50+ employees within 75 miles

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Federal law: FMLA (cont.)

- Eligible employees can take **up to 12 weeks** (in any 12-month period) of **unpaid, job-protected leave** for specified family and medical reasons (e.g., birth of a child, serious health condition, sick family member or family member who is on military duty).
- Additional leave (**up to 26 weeks** in a 12-month period) may be available to care for a service member with a serious service-connected injury or illness.
- When medically necessary, leave may be taken **intermittently**.
- Employee has the **right to reinstatement** in the same position or, if not available, in a comparable position.

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Increased employee protections under the FMLA

- At both the state and federal level, courts are increasing employee protections related to family and medical leave.
- *Davis v. Illinois Department of Human Services* (7th Cir. 2025)
  - An employee's entitlement to FMLA leave is not strictly bound by the precise parameters laid out in a medical certification.
  - An employer is expected to ask employees to provide supplemental medical certification when they know of an employee's need for additional leave due to certain symptoms.

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Increased employee protections under the FMLA (cont.)

- *Kemp v. Regeneron Pharm., Inc.* (2nd Cir. 2024)
  - Employers can violate the FMLA merely by interfering with an employee's use of FMLA benefits, even if the FMLA leave is ultimately granted.
- *Schobert et al. v. CSX Transportation Inc., et. al* (S.D. OH 2024)
  - A company policy that forgives prior attendance infractions if an employee misses no workdays in a month violates the FMLA because an employee's accumulated benefits are not properly restored after taking FMLA leave when they are not considered to have perfect attendance.

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Other leave law updates

California	• Paid family and medical leave: Employers can no longer require employees to use accrued vacation time before accessing the state's Paid Family Leave (PFL) program.
	• Leaves for jury/witness duty and qualifying acts of violence:
	  • Employers must provide notices to employees.
	  • The California Civil Rights Department has sample notices.

Colorado	• Employees can now take an additional 12 weeks of paid family leave if their child is receiving NICU care (up to a total of 24 weeks of paid family leave).
Maryland	• Effective October 1, 2025, employers covered by the FMLA are no longer required to comply with Maryland's unpaid parental leave law. • Maryland's Family and Medical Leave Insurance program payroll deductions are delayed until January 1, 2027, and benefits will not be available until January 1, 2028.
Minnesota	• Starting January 1, 2026, paid family and medical leave coverage will be available to all eligible Minnesota employees. • Eligible employees can take up to 12 weeks of paid family and medical leave (up to 20 weeks of combined family and medical leave). • Law provides for job protections and partial wage replacement.
Washington	• Domestic leave law now protects victims of hate crimes.
DOL Opinion Letter 2024-01-A	• Eligible employees may take FMLA leave for clinical trial treatment of a serious health condition for themselves or their family members.

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Paid sick leave updates

Massachusetts	• Effective November 21, 2024, paid sick leave can now be used to address an employee's or their spouse's physical or mental health needs related to pregnancy loss or a failed assisted reproduction, adoption or surrogacy.

Michigan	• Paid sick leave was reinstated, and accruals began on February 21, 2025.
	• There is no annual **accrual** cap for employees.
	• Annual **usage** cap varies based on employer size:
	  • 10+ employees: 72-hour cap
	  • Smaller employers: 40-hour cap

Minnesota	• Effective July 1, 2025, employers may now require "reasonable notice" for the unforeseeable use of paid sick leave. • Employers can ask employees to provide reasonable documentation for more than two days of paid sick leave. • Employers may "advance" paid sick time.
New York City	• Effective July 2, 2025, employees may use accrued paid sick time to take prenatal leave. • Paid sick leave policies must include information about prenatal leave. • Time taken for prenatal leave and remaining prenatal leave balance must be reflected on an employee's paystub.
Washington	• Effective July 27, 2025, employees may use paid sick time for immigration proceedings for themselves or their family members.

Accommodations

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Federal nursing accommodations and pregnancy protections

- The Pregnant Workers Fairness Act (PWFA) provides for reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth or related medical conditions, unless providing the accommodation would impose an undue hardship.
- Additional protections exist under:
  - Title VII
  - Pregnancy Discrimination Act
  - Family and Medical Leave Act
  - Americans with Disabilities Act

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Growing threats to the PWFA

- *Louisiana v. EEOC* and *US Conference of Catholic Bishops v. EEOC* (W.D. La. 2025)
  - Vacating the Equal Employment Opportunity Commission's final rule under the PWFA providing accommodations to employees in connection with voluntary abortions because such procedures are not considered pregnancy-related medical conditions.
- *Herzog v. EEOC* (W.D. Mo. 2025)
  - Preliminary injunction granted to prevent enforcement of PWFA against Christian education group on the grounds that the rule violates the Religious Freedom Restoration Act.

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State and local nursing and pregnancy accommodation changes

Illinois	• As of January 1, 2026, all employees taking lactation breaks must be paid their regular rate of compensation, unless doing so creates an “undue hardship” under the Illinois Human Rights Act.
New York State	• As of January 1, 2025, employers are required to provide up to 20 hours of paid leave in a 52-week period for pregnant employees to attend prenatal medical appointments and procedures. • The 20 hours can be taken in hourly increments.
New York City	• Formally incorporates state law into NYC Earned Safe and Sick Time Act. • Adds policy and pay stub requirements.
Washington	• All eligible employees are entitled to pregnancy and post-partum workplace accommodations. • Employers must provide paid lactation breaks for nursing employees, and pay must include travel time to access lactation locations.

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Remote work accommodation requests

- *C.C. v. Google, LLC* (S.D.N.Y 2025)
  - Employee's requested remote work accommodation would not have imposed an undue burden considering Google's "soft policy" permitting hybrid work.
- *EEOC v. Total Systems Services* (N.D. Ga. 2024)
  - A customer service representative requested remote work accommodation due to a high risk of suffering severe effects of COVID-19 exposure as a pre-diabetic.
  - The district court denied the employer's motion for summary judgement, finding a genuine dispute of material fact as to whether the accommodation was unlawfully denied because the employer failed to assess the accommodation request based on her specific disability-related needs.

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Limits to remote work accommodations

- *Coffman v. Nexstar Media, Inc.* (4th Cir. 2025)
  - The plaintiff experienced postpartum complications that kept her on leave for months past her FMLA protected leave.
  - The court held that indefinite leave is not a reasonable accommodation when no return-to-work date is offered.
  - Remote work is not a reasonable accommodation if an employee has failed to demonstrate that they can work at all, whether in person or remote, after taking FMLA leave.
  - An employer is **not** obligated to extend an employee's leave beyond their FMLA entitlement indefinitely if the position is critical to the employer's business.

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Limits to remote work accommodations (cont.)

- *Castelino v. Whitman, Breed, Abbott & Morgan, LLC* (Ct. App. Ct. 2025)
  - An administrative assistant requested remote work accommodation due to COVID-19 concerns because of her asthma and diabetes diagnoses.
  - Her law firm employer granted an accommodation to work remotely on specific days, but she was still required to come into the office to carry out certain job functions.
  - The Connecticut Appeals Court affirmed the trial court's dismissal of her claims, finding that her accommodation request was not reasonable because it would eliminate an essential job function of her position required by being in-person.
- **Action item**: Review job postings and descriptions for all onsite positions to ensure they include the essential functions that require the employee to be onsite.

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ADA failure to accommodate

- *EEOC v. William Beaumont Hospital* (E.D. Mi. 2025)
  - Motion for summary judgment denied for employer.
  - Hospital had a duty to reassign employee to a vacant position that she was qualified for, and the employee should have been placed in the requested role, not just given a chance to compete for it.
- *Giambrone v. Hillsborough County* (Fla. 2024)
  - Employer violated Florida Civil Rights Act for failing to consider an accommodation.
  - Employers are required to consider accommodations for off-duty use of medical marijuana, if it does not impair job performance, compromise workplace safety or involve onsite use.

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ADA failure to accommodate (cont.)

- *Tudor v. Whitehall Central School District* (2nd Cir. 2025)
  - Reversing summary judgment in favor of an employee because "an employee may qualify for a reasonable accommodation even if she can perform the essential functions of her job without the accommodation."
  - The employee's ability to perform the essential functions of the job without an accommodation was **relevant** to her claim but **not** dispositive.

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Limits on **unreasonable** accommodations

- *Won v. Amazon.com Servs* (E.D.N.Y. 2025)
  - New York City's Human Rights Law does not provide for reasonable accommodations to caregivers, even though caregiving status is a protected class under NYC law.
- *Zienni v. Mercedes Benz U.S. Int'l* (N.D. Al. 2024)
  - A district court granted the employer's motion for summary judgment on the grounds that the denied prayer accommodation did not result in any harm to the terms and conditions of employment because the employee could confine his prayers to his scheduled break times.

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COVID-19 vaccine accommodations

- Title VII and the ADA require an employer to provide reasonable accommodations (absent undue hardship) for employees who do not want to get vaccinated because of either a sincerely held religious belief or a disability.
  - EEOC's Acting Chair Andrea Lucas has recently emphasized the agency's focus on religious accommodation cases.
  - Supreme Court held in *Groff* in 2023 undue hardship must be a substantial burden
  - EEOC recently ruled against the Federal Reserve Board criticizing the employer for not engaging in a thorough interactive process and not offering actual evidence of undue hardship (*Andy B. v. Federal Reserve Board of Governors* (EEOC 2025)).
- An employee's religious beliefs must be "broader than disconnected moral teachings" (*Kennedy v. Pei-Genesis* (3rd Cir. 2025)) and cannot be based in "opposition to government policies or company mandates" (*Gatto v. Johnson and Johnson* (3rd Cir. 2025)).

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COVID-19 vaccine accommodations

- An employee objecting to a vaccine on **both** religious and nonreligious grounds does not necessarily invalidate a request for accommodation on religious grounds *(McCormick v. Chicago Transit Auth.* (N.D. Ill. 2025)).
  - An employee requested an accommodation to the employer's vaccine mandate on religious grounds.
  - The employee alleged the employer denied his accommodation request based on arbitrary judgments about the sincerity of his religious beliefs and because the employee also had medical and scientific concerns about the vaccine.
  - The jury found evidence of religious discrimination and awarded the employee $425,000.

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Accommodation law key takeaways

- Ensure you have an accommodations review policy and interactive process in place.
- Carefully document the interactive process.
- Carefully consider how prior accommodation requests were handled.
- Contact your legal counsel before denying any accommodation request.

Whistleblower Protections

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Whistleblower protections continue to grow

- Continued action by federal agencies to aid whistleblowers by:
  - Punishing suppression of whistleblower activity.
  - Rewarding whistleblowers.
- In January 2025, the DOJ Antitrust Division and OSHA emphasized that contractual provisions that obstruct an investigation can be federal criminal violations and negatively affect sentencing in the event of a charge.
- Numerous federal agencies have taken recent steps to protect and incentivize whistleblowers.

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SEC whistleblower awards

- Whistleblowers may be eligible for a monetary award if they voluntarily provide the Securities and Exchange Commission (SEC) with original, timely and credible information that leads to a successful enforcement action.
- Whistleblower awards can range from 10% – 30% of the money collected, so long as the monetary sanctions exceed $1 million.
- The awards come from an investor protection fund, which is funded through sanctions paid by securities law violators.
- In October 2024, the SEC announced that three whistleblowers would be splitting a $12 million award for providing “critical information and assistance” in an enforcement action.

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SEC continues to enforce whistleblower protections

- SEC announced settlements with seven companies for using employment agreements and separation agreements that deterred whistleblowers from reporting potential securities law violations to the SEC. Civil penalties ranged from $19,500 to $1,386,000 (and totaled more than **$3 million**).
  - The agreements required employees to waive their right to potential whistleblower monetary awards
- SEC announced $500,000 settlement with a registered investment adviser (GQG Partners LLC).
  - GQG restricted the ability of employment candidates and a departing employee to disclose information about GQG to the SEC.
  - GQG included some carve outs to allow reporting to the SEC, but those were insufficient because the individual was still restricted in what disclosure was permitted.
- **Key takeaway: Always include appropriate carve outs when limiting employee speech in ALL employment contracts (including separation agreements).**

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Additional whistleblower incentives within the DOJ

- Whistleblowers are also being incentivized to disclose information in exchange for protection against prosecution by the Department of Justice (DOJ).
- Numerous US attorney's offices have rolled out whistleblower nonprosecution pilot programs.
- Pilot programs seek information about criminal conduct by or through public or private entities.
- The programs generally incentivize whistleblowing in areas of white-collar crime:
  - Healthcare fraud
  - Financial fraud
  - Securities violations
  - Public corruption
- Whistleblowers may be eligible for a nonprosecution agreement if they voluntarily disclose new information, provide substantial assistance in the investigation and prosecution, and agree to forfeit any criminal proceeds.

NLRB/Union Matters

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NLRA and NLRB

- The National Labor Relations Act (NLRA) provides the following rights and guarantees to employees (Section 7 rights):
  - Self-organize or form, join and assist labor unions.
  - Join together to advance their interests as employees.
  - Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection (protected, concerted activity is broadly construed).
  - Refrain from such activities.
- The National Labor Relations Board (NLRB) is an independent federal agency that enforces the NLRA.

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Application to nonunion workplaces

- The common perception is that the NLRA/NLRB applies to unionized workplaces. This means that most employers are not informed of or focused on decisions made by the NLRB.
- **BUT** the NLRA applies broadly to **all employers**.
  - A few exceptions:
    - Public sector employees
    - Agricultural and domestic workers
    - Independent contractors
    - Employees of air and raise carriers covered by the Railway Labor Act

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Transition and lack of quorum in the NLRB

- Removal of member Gwynne Wilcox left the NLRB without a quorum to decide new cases.
  - NLRB currently has one board member, with two nominations pending
  - Wilcox has challenged her termination. SCOTUS stayed the DC Circuit's order reinstating Wilcox while the DC Circuit's review of Wilcox's removal is pending.
- Former NLRB General Counsel (GC) Abruzzo was also removed, replaced by Acting General Counsel (AGC)William Cowen.
  - The nomination of Crystal Carey for GC is pending confirmation.

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State ‘trigger’ laws

- New and proposed state laws allowing the state to oversee labor matters unless the NLRB successfully asserts jurisdiction.
  - New York S8034 (signed on September 5, 2025)
    - The NLRB “must successfully assert jurisdiction” or state board will “certify the exclusive bargaining representative of any bargaining unit previously certified by another state or federal agency” upon “application and verification.”
  - California and Massachusetts are considering similar legislation.
- AGC Cowen issued a statement that such state legislation is likely preempted by the NLRA.

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GC memos rescinded

- On February 14, 2025, AGC Cowen issued GC 25-05, rescinding 30+ general counsel memoranda.
  - 29 of these memos were issued by Abruzzo.
- Noteworthy rescissions:
  - 21-06 and 21-07: Remedies to be sought
  - 23-08 and 25-01: Noncompete agreements
  - 23-05: Severance agreements

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New GC memos

- 25-06: Guidance on seeking remedial relief in settlement agreements
- 25-07: Secret recordings of collective-bargaining sessions are per se violations of the duty to bargain in good faith
- 25-08: Guidance on “salting” cases, when union organizers apply for jobs for purposes of organizing employees
- 25-09: Guidance for referring jurisdictional disputes to the National Mediation Board
- 25-10: Guidance for deferring unfair labor practice cases to the parties’ collectively bargained grievance and arbitration process

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Legal challenges to the NLRB

- Around 25 lawsuits were filed in 2024 challenging NLRB's structure as unconstitutional.
- Only three similar suits based on constitutionality were filed against the NLRB in 2025.
- Constitutionality arguments:
  - Board members' removal protection
  - Administrative law judges' job protection
  - Seventh Amendment's right to a jury trial
  - Due process rights and separation of powers

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Legal challenges to the NLRB (cont.)

- On August 19, 2025, the Fifth Circuit affirmed three employers' preliminary injunctions against the NLRB.
  - Employers were facing unfair labor practice cases.
  - Fifth Circuit agreed that board members' and administrative law judges' removal protections were likely unconstitutional.
  - Being subject to unconstitutional proceedings constitutes irreparable harm to these employers.

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Relief that may be awarded

- Section 10(c) of the NLRA:
  - NLRB can order employers to cease and desist from unfair labor practices and to "take such affirmative action including reinstatement of employees with or without backpay."
- Former NLRB GC supported requests to award full range of damages and remedies.
- *NLRB v. Starbucks Corp.*, No. 23-1953 (3rd Cir. 2024)
  - Finding wrongful termination, an administrative law judge ordered reinstatement, as well as damages for both "direct and foreseeable" harms (including loss of earnings or benefits, search-for-work expenses and interim employment expenses).
  - The court found that Congress allowed the board to order equitable and monetary relief, but not "legal" relief.
  - The board exceeded its authority in ordering all "direct or foreseeable pecuniary harms" resulting from unfair labor practices.

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No-poach provisions

- *Planned Companies d/b/a Planned Building Services et al. (*22-CA-321532*)*
  - Planned has maintained contractual provisions that restrict its client buildings from soliciting or hiring Planned's employees to work for them.
  - NLRB Region 22 issued a complaint, alleging that such prohibition interferes with, restrains and coerces employees in the exercise of the rights guaranteed in Section 7 of the NLRA.
  - A settlement was approved in December 2024 requiring:
    - Posting of a notice informing employees of their rights.
    - Notifying client buildings that Planned has rescinded the applicable covenant in their client service agreements and will not enforce them.
  - NLRB and the Federal Trade Commission (FTC) collaborated pursuant to their memorandum of understanding forming a partnership to "promote fair competition and advance workers' rights."
  - **Key takeaway: Business-to-business no-poach agreements are problematic with both the NLRB and the FTC.**

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Nondisclosure/confidentiality provisions

- *Apple Inc.* (32-CA-284428)
  - Region 32 issued a complaint against Apple, alleging Apple unlawfully blocked discussion among workers by enforcing overly broad confidentiality rules and unlawfully restricted activities on social media.
  - As part of the settlement, a revised definition of "confidential information" clarifies that the nondisclosure provision does not restrict an employee's protected rights to discuss or disclose information about wages, hours or working conditions, among other carve outs.

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Nondisclosure/confidentiality provisions (cont.)

- *Costco Wholesale Corp.* (10-CA-316194)
  - Employees were involved in an investigation relating to sexual harassment.
  - The employees were required to sign an acknowledgement of confidentiality that included, among others, a provision prohibiting the employee from recording their interviews during the investigation and a provision requiring the employee to maintain the confidentiality of the ongoing investigation.
  - Upon conclusion of the investigation, Costco sent the complaining employee a letter about the outcome and the expectation that the employee treat such information confidential.
  - An administrative law judge found that Costco violated the NLRA with overly broad agreements and by directing workers indefinitely not to discuss workplace investigations.

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Confidentiality and nondisparagement provisions

- Prior NLRB decisions (*Baylor University Medical Center* and *IGT d/b/a International Game Technology)* broadly permitted confidentiality and nondisparagement provisions in severance agreements.
- The NLRB's 2023 *McLaren Macomb* decision reversed course, finding that certain confidentiality and nondisparagement provisions contained in employee severance agreements have a "chilling effect" on employees' Section 7 rights, and that the mere proffer of such provisions in a severance agreement is unlawful.

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Confidentiality and nondisparagement provisions

- On appeal of *McLaren Macomb*, the Sixth Circuit agreed with the NLRB's conclusions that the employer violated the NLRA by failing to bargain with the union about employee furloughs and by directly dealing with those employees instead of the union.
- Because of McLaren's demonstrated proclivity to violate the NLRA, the Sixth Circuit did not address the lawfulness of confidentiality and nondisparagement provisions in severance agreements.
  - "we do not address [the NLRB's] decision to reverse *Baylor* and *IGT*, or whether it correctly interpreted the NLRA in doing so"
- **Key takeaway: Employers must be careful to include appropriate carve outs.**

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Captive audience developments

- Captive audience meetings = Mandatory, employer-sponsored, working hours meetings to educate employees on certain topics, particularly the employer's views on unionization.
- Captive audience meetings were previously considered lawful under *Babcock & Wilcox,* 77 NLRB 577 (1948).
- Long-standing precedent found that an employer's free speech rights were protected when there were no threats or promises.
  - Section 8(c) of the NLRA:
    - "The expressing of any views, argument, or opinion, or the dissemination thereof … shall not constitute or be evidence of an unfair labor practice … if such expression contains no threat of reprisal or force or promise of benefit."

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Captive audience developments (cont.)

- *Amazon.com Services LLC*, 373 NLRB No. 136 (2024), overruled *Babcock* and shifted the legality of captive audience meetings.
  - Captive audience meetings interfere with an employee's right to freely decide whether, when and how to participate in a debate concerning union representation, or refrain from doing so.
  - Captive audience meetings provide a mechanism for an employer to observe and surveil employees as it addresses the exercise of employees' Section 7 rights.
  - An employer's ability to compel attendance at such meetings under threat of discipline or discharge adds a coercive undertone to the message regarding unionization that employees are forced to receive.

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State laws on captive audience

- States have passed bans on captive audience meetings.
  - California SB 399 (effective January 1, 2025)
  - Alaska Ballot Measure 1 (effective July 1, 2025)
  - Rhode Island House Bill No. 5506 SUB A (effective July 2, 2025)
- New state laws generally prohibit employers from requiring workers to attend meetings or listen to communications about religious or political matters, including unionization.
- Subject to certain carve outs for legally required or necessary communication, higher education institutions and/or religious organizations.

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Employer campaign statements

- *Tri-Cast, Inc.*, 274 NLRB 377 (1985)
  - Employer statements that unionization would eliminate employees' ability to address workplace issues directly with the employer are categorically lawful.
- *Siren Retail Corp. d/b/a Starbucks*, 373 NLRB No. 135 (2024), overruled *Tri-Cast*
  - Employer statements about a changed relationship with management will now be reviewed on a case-by-case basis.
  - Employer predictions of negative impacts from unionization "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [its] control."

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Protected concerted activity

- The NLRA protects concerted activity for mutual aid and protection.
- When do an employee's solo actions constitute protected **concerted** activity?
- Five-factor analysis under *Alstate Maintenance LLC,* 367 NLRB No. 68 (2019):
  1) Statement made in an employee meeting called by the employer to announce a decision affecting a term or condition of employment.
  2) The decision affects multiple employees.
  3) Did so to protest or complain about the decision, not merely to ask questions about how it will be implemented.
  4) Protested or complained about the decision's effect on the workforce generally and not solely about its effect on him or herself.
  5) No opportunity to discuss it with other employees beforehand.

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Protected concerted activity (cont.)

- *Miller Plastic Products* (3rd Cir. 2025)
  - An employee was allegedly terminated after raising concerns about the employer's COVID protocols and the employer's decision to remain open in early 2020.
  - Analysis was whether he engaged in protected concerted activity.
  - Board overruled *Alstate Maintenance* as "unduly restrictive" and held that the "totality of the record evidence" shall determine if an employee engaged in concerted activity.
  - The Third Circuit found the board did not err in finding the employee's conduct was protected concerted activity.

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Threat or interrogation

- Employers are prohibited from threatening or interrogating employees under the NLRA.
- *Starbucks v. NLRB* (8th Cir. 2025)
  - Supervisor conducted one-on-one meetings with employees, where she expressed union opposition and discussed benefits potentially being affected.
  - An administrative law judge/NLRB found that the supervisor's statements threatened economic retaliation and coercively interrogated an employee.
  - The 8th Circuit found that:
    - An employer's conduct must be viewed considering the totality of the circumstances, which may include subjective impression by listener and how a reasonable person would hear it, when deciding if there was coercion.
    - The administrative law judge erroneously dismissed the supervisor's actual intent and the effect on the listener as "immaterial."

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NLRA preemption

- *Davis v. Benihana, Inc. et al.*, (D.N.J. 2025)
  - Employee alleged he was terminated for discussing wages with a coworker and for refusing to comply with a demand to stop doing so.
  - Employee filed a lawsuit in New Jersey state court alleging claims of retaliation under New Jersey's whistleblower protection law and anti-discrimination law.
  - Benihana removed the case to federal court and moved to dismiss on the grounds that the employee's claims were preempted by the NLRA and must be heard by the NLRB.
  - The court found that the employee's state law claims were preempted.

Reductions in Force and the WARN Act

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Considerations for reductions in force (RIFs)

- Numerous considerations for employers when planning a RIF:
  - Contractual severance obligations
  - Selection process/potential discrimination issues
  - Compliance with the Worker Adjustment and Retraining Notification Act of 1988 (WARN Act) or other notice provisions
  - Getting the necessary paperwork (e.g., state notices, separation, agreements/releases)
  - Age Discrimination in Employment Act (ADEA) compliance
  - State law compliance for final paycheck and vacation payout

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Careful planning and documentation is critical for RIFs

Raymond et al. v. Spirit AeroSystems Holdings et al. (10th Cir. 2025)

- Employer conducted a RIF of 10% of its workforce.
- Terminated employees brought a class action for age discrimination under the ADEA.
- The terminated employees presented numerous categories of evidence to attempt to show age discrimination: RIF planning documents, policies, statements by executives, statements by employees, training materials and public filings.
- The court found that there was no evidence of an unlawful pattern, even though evidence collectively could suggest that the employer was "concerned about its aging workforce."

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Careful planning and documentation is critical for RIFs (cont.)

Key takeaways:

- When conducting a RIF, document the business case, carefully assess selections and document the reasons for selection.
- Using a proxy for age (such as tenure) is risky.
- Assume that employees will dig deep in trying to prove that a decision was discriminatory, so be careful to avoid statements or actions targeting a certain demographic.

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Federal Worker Adjustment and Retraining Notification (WARN) Act

- The purpose of the WARN Act is to provide employees with advance notice of layoffs along with continued pay and benefits through the notice period and also provide notice to various government agencies that the company is undergoing a plant closing or mass layoff.
- An employer is covered under the federal WARN Act if it employs **either** 100 or more employees (excluding part-time employees), **or** 100 or more employees (including part-time employees) who in the aggregate work 4,000 hours per week (excluding overtime).

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WARN Act (cont.)

- Requires giving notice to “affected employees” and certain government officials when there will be a “mass layoff” or “plant closing.”
- Must determine whether there is a triggering event:
  - Mass layoff: If 33% or more of the employees (excluding part-time employees) **at a single site of employment** are laid off and at least 50 employees are affected, or if at least 500 employees (excluding part-time employees) at a single site of employment are affected.
  - Plant closure: A plant closing is the permanent or temporary shutdown **of a single site of employment** or one or more facilities within a single site. An employment action that results in the effective cessation of production or the work performed by a unit constitutes a shutdown, even if a few employees remain. The shutdown must cause employment losses during any 30-day period adding up to 50 or more employees.
- “Affected employees” means “employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff.”

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WARN Act (cont.)

Single site of employment:

- The triggering event must be tied to employment action at a “single site of employment.”
- A single site of employment can be either a single location or group of contiguous locations. The federal regulations indicate that a campus or industrial park, or separate facilities of a company across the street from one another, may be considered a single site of employment for WARN Act purposes.
- Key factors to consider when determining whether certain facilities are a single site are the geographic proximity of the sites, similar uses or purposes of the sites, and the shared staff or equipment of the sites.

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WARN Act (cont.)

What about employees not physically working at a company site?

- The law is clear for “outstationed” employees that the site of employment for WARN purposes is:
  - The site to which they are assigned as their home base
  - The site from which their work is assigned
  - The site to which they report
- The law is ambiguous as to whether remote workers should be treated as “outstationed” employees, but recent case law supports they should be.

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WARN Act (cont.)

Can remote workers be “affected employees” entitled to notice?

- *Jittania Smith et al. v. Zulily LLC et al.* (W.D. Wash. 2025)
  - The defendant was terminating all employees and gave 60-day notice under WARN to employees working **in person** at the defendant’s facilities, but not to **remote employees**.
  - The remote employees filed class action, alleging that they should have received notice under WARN.
  - The court allowed the employees’ claims to survive motion to dismiss, noting that there is authority to support treating remote employees as “affected employees.”
- **Key takeaway: When conducting a RIF, it is important to slice the data multiple ways, including factoring in remote workers, so that it can be determined if WARN will be triggered.**

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State “Mini-WARN” Act Developments

Maryland proposed regulations to clarify how its mini-WARN would apply to remote workers (proposed regulations issued June 2025).

- The proposed regulations would make the entire state of Maryland a “single workplace” for any remote worker.
- Under the proposed regulations, all remote workers in Maryland would seemingly need to be counted for purposes of determining whether Maryland’s mini-WARN is triggered.
- Maryland’s mini-WARN applies to employers with 50+ employees in Maryland and has a lower threshold than federal law for employment losses to require notice.

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State ‘mini’ WARN Act developments

- Washington State (WA SB 5525):
  - Effective July 27, 2025
  - Requires employers with 50 or more full-time employees in Washington to provide at least 60 days’ notice to the state, any union and/or employees affected by a business site closing or mass reduction in force.
  - Allows for a private right of action and civil penalties of up to $500 per day for failure to notify the state (in addition to up to 60 days of back pay and the value of lost benefits).
- Ohio (OH HB 96):
  - Effective September 29, 2025
  - Largely tracks federal WARN but enhances notice requirements.

Thank you!

Cooley HR Network 2025

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