LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES



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NO TOLLING ON LINE 5: THE SUPREME COURT REJECTS A "WAIT AND SEE" APPROACH TO REMOVAL

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On April 22, 2026, the U.S. Supreme Court unanimously ruled that the mandatory 30-day statutory deadline, 28 U.S.C. § 1446(b)(1), to remove a state-court lawsuit to federal court cannot be extended by equitable tolling. Justice Sonia Sotomayor wrote for the Court that the 30-day statutory deadline is likely unmovable, even in the face of extenuating circumstances. *Enbridge Energy, LP v. Nessel on behalf of Michigan*, 146 S. Ct. 1074 (2026).

1.

In June 2019, Michigan Attorney General Dana Nessel filed suit in Michigan state court seeking to invalidate Enbridge's Line 5 easement under the Straits of Mackinac.

The removal statute permits a defendant to remove a state court lawsuit to the federal court that would have original jurisdiction over the lawsuit. 28 U.S.C. § 1446(b)(1) states that "notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter."

Enbridge did not remove the lawsuit within the 30-day window and continued litigation in the state court. Subsequently, in 2020, Governor Gretchen Whitmer brought a separate but similar lawsuit against Enbridge. Governor Whitmer's suit was timely removed by Enbridge and her later efforts to remand were unsuccessful. Following the District Court's ruling on Governor Whitmer's efforts to remand, she voluntarily dismissed her lawsuit. Shortly after the dismissal of Governor Whitmer's lawsuit, Enbridge removed the *Nessel* suit in December 2021.

Attorney General Nessel moved to remand the lawsuit back to state court because it was filed outside of the statute's 30-day deadline. Enbridge, acknowledging its missed deadline, argued that the deadline could and should be equitably tolled.

2.

After Enbridge removed Attorney General Nessel's lawsuit to federal court, she moved to remand it and argued that removal was untimely because Enbridge had received the complaint 887 days earlier, far exceeding § 1446(b)(1)'s 30-day deadline.

The federal district court denied Attorney General Nessel's motion to remand. Although Enbridge did not comply with the statutory deadline, the district court concluded that equitable principles justified excusing Enbridge's late removal. It therefore permitted the case to remain in federal court and certified its decision for interlocutory appeal.

On appeal, Enbridge argued that removal under § 1446(b)(1) is nonjurisdictional and therefore subject to equitable tolling. Federal courts have "no authority to create equitable exceptions to jurisdictional requirements." N*essel on behalf of People of Michigan v. Enbridge Energy, LP*, 104 F.4th 958, 968 (6th Cir. 2024). Enbridge suggested that because the 30-day deadline is nonjurisdictional it was presumptively subject to equitable tolling.

The Sixth Circuit rejected Enbridge's arguments and held that § 1446(b)'s deadline, while nonjurisdictional, is mandatory. The Sixth Circuit explained that strict construction of §1446 makes it clear that the 30-day limitations are mandatory and incompatible with equitable tolling. *Id.* at 971.

3.

"Enbridge's argument proceeds in three steps, each critical to prevailing here. First, it contends that §1446(b)(1)'s 30-day removal deadline is not jurisdictional. Second, because the deadline is nonjurisdictional, Enbridge argues that it is presumptively subject to equitable tolling. Third, according to Enbridge, nothing rebuts the presumption that this deadline can be equitably tolled." *Enbridge Energy, LP v. Nessel on behalf of Michigan*, 146 S. Ct. 1074, 1081 (2026).

Justice Sotomayor noted that at "the first step, there is rightly no dispute. No one contends that §1446(b)(1) is jurisdictional, given that it does not expressly refer to subject-matter jurisdiction or speak in jurisdictional terms." *Id.* (citations and quotations omitted).

The Court declined to decide whether § 1446(b)(1) creates a statute of limitations presumptively subject to equitable tolling. Instead, the Court assumed that the presumption applied and concluded that the statute's text, structure, and context rebutted it. *Id.* The Court explained that "an explicit listing of exceptions set forth in a detailed manner, strongly indicates that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *Id.* (citations and quotations omitted). The Court went on to note that §1446 identifies a number of exceptions to the 30-day deadline. Section 1446(b)(3) permits a defendant to remove a lawsuit if a subsequent pleading makes removability ascertainable. Section 1446(c)(1) provides for equitable tolling where a "plaintiff has acted in bad faith in order to prevent a defendant from removing the action." Similarly, the Court contrasted the civil removal statute with the

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STATEMENT OF EDITORIAL POLICY

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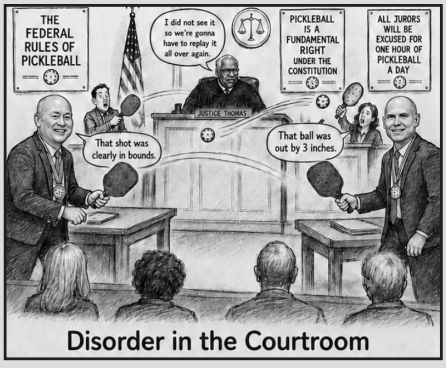
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procedure governing removal of criminal cases. Under 28 U.S.C. § 1455(b)(1), Congress expressly authorized courts, "for good cause shown," to permit a criminal defendant to file a notice of removal after the applicable deadline. Congress provided no comparable general exception for civil removal. According to the Court, this distinction further demonstrated that Congress knew how to authorize courts to excuse untimely removal. Congress therefore demonstrated both that it knew how to create exceptions and that it had already considered fairness concerns when drafting the statute.

The Court went on to explain that equitable tolling is inappropriate relative to removal because the "federal civil removal statutes have an obvious concern with efficiency and a general interest in avoiding prolonged litigation on threshold nonmerits questions. This is reflected not only in the short deadline for removal itself, but also in the strict 30-day deadline for seeking remand of a removed action, § 1447(c), and the default rule that remand orders are not appealable. *Id.* at 1083 (citations and quotations omitted).

A "wait and see" approach can sometimes be prudent in litigation. The Court's ruling in *Enbridge* underscores that removal is not one of those circumstances. To the contrary, *Enbridge* emphasizes the importance of quickly ascertaining an action's removability and treating § 1446(b)(1)'s 30-day deadline as firm. A defendant cannot litigate in state court, wait for subsequent developments to confirm the desirability of a federal forum, and then rely on equitable tolling to revive an expired removal deadline. The Court, however, expressly limited its decision to equitable tolling and left open the potential applicability of other doctrines, including waiver, forfeiture, and estoppel. ■



Disorder in the Courtroom

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ATTENTION-SPAN AND THE POWER OF SHORTH

Stuart M. Israel

Kids don't read books in school anymore; they read excerpts. This is addressed by Rose Horowitch in a November 2024 article in *The Atlantic* titled "The Elite College Students Who Can't Read Books." Fewer adults, too, are reading books in our "postliterate world." Horowitch's cover story in the August 2026 *Atlantic* is titled "The Age of Reading Is Over." It reports that people are "likely consuming more text than ever" on electronic platforms, but "have lost the desire" to read "book-length works" and "with that are losing the higher abilities of comprehension and synthesis."

This is part of the attention-span crisis which challenges writers, lawyers included. As Mercer Ellington put it, "things ain't what they used to be." Readers, judges included, now resist length; they want "shorth."

1. The attention-span crisis.

It's hard to keep readers' attention. Rueful explanations are plentiful. Here are some.

It's the schools. K-12 kids are coddled. Bad, hapless, or hopeless educators social-promote and send students into the world without adequate ability to read, do math, apply judgment, and critically think. Colleges follow fashion, reduce rigor, dilute course requirements, and inflate grades to keep their customers satisfied.

It's behavioral and cultural—the elevation of feelings over facts and reasoning, epidemic laziness, self-absorption, and self-entitlement, and the Dunning-Kruger effect.

It's the screen—the electronic-gateway to good stuff and bad, with trade-offs. The Internet and social media promote user-passivity and condition users to expect instant gratification. Books (even bad ones) stimulate critical thought and reward engagement, while much on the screen does not, offering—metaphorically—only the low-cost and convenience of tasty but nutritionally-bereft three-minute ramen noodles.

Horowitch's 2024 article cites a neuroscientist who says "deep-reading"—"sustained immersion" in books—"stimulates a number of valuable mental habits, including critical thinking and self-reflection, in ways that skimming or reading in short bursts does not."

It's the AI. Horowitch's 2026 article warns that "the ability to think for oneself" is "at risk," that if "people become overreliant on AI to write for them, they could lose the capacity to interrogate or even develop their own views," "quintessentially human capacities."

The attention-span crisis, whatever its causes, challenges writers—legal-writers included—who want their writing to be read.

2. An example of my limited attention-span.

I planned to read *Mark Twain*—the generally well-regarded 2025 biography written by Ron Chernow. Then I looked at it. It has 1,200 pages, weighs 3.5 pounds, and takes up 44 hours and 35 minutes of audiobook time. Too much. I went to the Internet to see what those who read or stopped reading the book say. The three-star reviews on Amazon (8%) are illuminating. They mostly praise Chernow's effort and past work but say, for example, the Twain biography is "too long," "exhaustive and exhausting," a "tough slog," "TMI," "poorly edited," "repetitive," "flabby," and has "twice as many pages" as necessary.

I learned elsewhere on the Internet that many biographers fall to the temptation to include *everything*. They set out to create comprehensive and insightful works, but end up with lengthy tomes fat with superfluous details that disappoint readers and drive away potential readers. I can't say this applies to *Mark Twain*; I didn't read it.

3. Lawyer writing.

Like too many biographers, too many lawyer-writers give in to the temptation to throw in the proverbial kitchen sink—to display everything they know. And—as Carl Sandburg wrote—lawyers "know too much." Too often lawyers write too much, even though judicial-readers advise against excessive length and detail.

Judges counsel that the most-effective legal arguments are those laser-focused on *the important stuff*. This advice disregards that it is often difficult to accurately predict what any particular judge *might* consider important. Still, the judges make a useful point: less may be more. Concise arguments are more likely to be carefully read (not skimmed or skipped), understood, and persuade black-robed readers and their influential law clerks.

Court rules also tell us what judges want. Fed. R. App. P. 28(a), for example, requires that an appellant's brief include a "concise" case-statement, the "relevant" facts and case-history, a "succinct, clear, and accurate" argument-statement, a "concise" review-standards statement, and a "short" conclusion asking for "precise" relief.

There it is: concise, relevant, succinct, clear, accurate, short, and precise. Legal-writing mavens say similar things, which I summarize for those with short attention spans:

> Brevity, clarity, and simplicity; *necessary* facts; *pertinent* authority, *succinctly* applied; short and plain words; short sentences; short paragraphs; short sections with signpost headings; readable formatting; editing (or rewriting); and refining until your papers are reader-friendly and do what they are supposed to do: persuade.

4. The power of shorth.

Or take the advice of Dr. Seuss (Theodore Geisel). He wrote "A Short Condensed Poem In Praise of Reader's Digest Condensed Books." It appeared in 1980 on the back of the dust jacket of a volume of the *Reader's Digest* condensed books series, next to a portrait of the smiling Cat in the Hat. The poem reads, in pertinent part:

ATTENTION-SPAN AND THE POWER OF SHORTH

(Continued from page 3)

So the writer who breeds
more words than he needs
is making a chore
for the reader who reads.

That's why my belief is
the briefer the brief is,
the greater the sigh
of the reader's relief is.

Dr. Seuss concluded that *Reader's Digest* condensed books have "power and strength" because they are published with "*shorth*"—which is "better than length."

5. The writer's challenge.

Mark Twain likely would *not* have approved of *anyone* condensing *his* books. Editors, he wrote, are "full of envy and malice," "conceited and troublesome, and don't pay enough."

Still, Twain advised, using "plain, simple language, short words and brief sentences" is "the way to write English—it is the modern way and the best way." He wrote: "Anybody can have ideas—the difficulty is to express them without squandering a quire of paper on an idea that ought to be reduced to one glittering paragraph."

That is the writer's challenge: to hone a quire (25 pages) of thoughts, legal or otherwise, into paragraphs of power and strength—and shorth, better than length. ■

BOSTON'S DEBUT—STILL MORE THAN A FEELING

In 1976, I was in high school at Livonia Franklin when Boston released its self-titled debut album. I thought it was great then, and 50 years later, I still do.

Boston combined powerful guitars, Brad Delp's soaring vocals and Tom Scholz's meticulous production. Across eight songs, the album hardly contained a weak moment.

The music later met the realities of the record business. As *Engel v. CBS, Inc.*, 145 F.3d 499 (2d Cir. 1998) and lower court opinions recount, CBS sued Boston and Scholz in 1983 for breach of contract, seeking $20 million. After nearly seven years of litigation, Scholz prevailed in 1990 and recovered approximately $6.5 million on his counterclaims.

The litigation did not alone explain Boston's limited output—Scholz's perfectionism had already delayed *Third Stage*. But contemporary accounts and later histories indicate that withheld royalties, years of litigation and the resulting breakup of the band compounded that delay and likely reduced Boston's opportunities to record additional albums.

John G. Adam

THE DEATH OF DISPARATE IMPACT? WHAT RECENT DOJ GUIDANCE SIGNALS TO EMPLOYERS

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In June 2026, the U.S. Justice Department's Office of Legal Counsel (OLC) issued an Opinion calling into question the concept of disparate impact liability under federal law. Under Title VII of the Civil Rights Act of 1964 as amended in 1991, disparate impact liability is triggered if a neutral employment practice disproportionately harms a protected class. The Opinion concluded that certain guidelines maintained by the U.S. Equal Employment Opportunity Commission (EEOC) are unconstitutional because they are grounded in disparate impacts alone without sufficient regard to employer intent.

To be clear, the Opinion is merely an *opinion* by the OLC; it is neither a judicial finding nor a legislative change, and it binds only the EEOC, which asked for the opinion. Disparate impact is still a viable claim against employers under federal law and under many state laws. While the EEOC under Chair Andrea Lucas will not find merit to or bring such a claim, Plaintiffs' attorneys still can advance such cases, as can a multitude of state enforcement agencies where disparate impact liability remains alive and well.

A Timeline of Disparate Impact Theory's Rise and Fall

This past year, agencies across the federal government have taken steps to rein in disparate impact litigation targeted at employers. These efforts began in April 2025, as we previously reported, when President Trump signed Executive Order 14281 (the "EO") and directed all relevant federal agencies to "eliminate" disparate impact liability in civil rights law enforcement. The EO asserted that disparate impact, as a practice, is "wholly inconsistent" with the Constitution and "undermines our national values" of equal protection.

The EEOC, charged by Congress to enforce federal workplace discrimination laws, moved quickly to implement this mandate. One month after the issuance of the EO, the EEOC dropped any pending disparate impact cases it was pursuing and cut financial backing to any state regulatory agency that brought similar claims.

Late last year, the U.S. Department of Justice (DOJ) also took steps to curtail disparate impact liability enforcement. The DOJ issued updated regulations concerning Title VI of the Civil Rights Act of 1964, which generally applies to entities that receive federal funding. In a press release announcing the changes, then-Attorney General Pam Bondi declared that "decades" of disparate impact liability enforcement would end to prevent those receiving federal dollars from making race-based decisions.

Following suit, in June 2026, the EEOC announced a new National Enforcement Plan (NEP)—which supersedes a prior plan set to expire in 2028—that directs the agency to "prioritize" Title VII disparate *treatment* liability theories over disparate impact theories. According to the EEOC, disparate treatment—when the employer intentionally treats an employee differently because of

a suspect class—is "inherently . . . more egregious" than disparate impact, and, coupled with the EO, justified its determination to stop investigations based on disparate impact.

EEOC Commissioner Kalpana Kotagal, the body's sole Democratic appointee, denounced the NEP, emphasizing the rising use of "AI-related tools in employment decisions" that can contain "inherent biases."

In line with the NEP, however, EEOC Chair Andrea Lucas made a request to the OLC to determine the constitutionality of the EEOC's long-standing interpretations of Title VII disparate impact liability, which the agency has incorporated into its regulations, reference documents, and its "Uniform Guidelines on Employee Selection Procedures." The opinion found the interpretations unconstitutional.

The OLC Opinion: Not an Obituary

The opinion is not an obituary for disparate impact liability, as some have reported. It only discusses the EEOC's historical interpretations and application of disparate impact and declared those interpretations unconstitutional.

The Opinion states that the "fundamental problem is that disparate-impact liability tends to incentivize—and even coerce—employers to make race-based decisions to avoid liability or the threat of liability. Relying on *Ricci v. DeStefano*, 557 U.S. 557 (2009), a case involving an examination provided to firefighters where white firefighters outperformed other racial groups, the OLC notes that, by forcing employers to evaluate racial outcomes and make decisions dependent on those outcomes, disparate impact liability is causing employers to make race-based decisions. The EEOC interpretations, so the opinion concludes, create a "qualified racial-proportionality mandate" that requires employers to "engage in race-based decisionmaking [*sic*]."

The Opinion recommends the EEOC revise its interpretations to emphasize that: (1) the "business-necessity" defense is a low, passable bar and is simply met when an employer demonstrates that a challenged practice is "rational, convenient, or helpful" to the business; (2) plaintiffs must meet a "robust causality requirement" to prove that only the challenged practice itself, and not other external or internal factors, caused a disparate impact; and (3) plaintiffs must "establish with particular evidence" that the employer can enact an "available alternative practice" that reduces disparate impact while still being "equally effective" in meeting the employer's "valid business purpose."

To date, no court has grappled with the OLC's suggested modified interpretations, nor has Congress amended Title VII, where disparate impact liability against private employers is currently codified. That said, at least for the time being, employers will see an end or a sharp decrease in any disparate impact claims investigated by the EEOC. This will not be the end of disparate impact claims, though, as employees can still, on their own, bring disparate impact claims in federal court.

State-Level Disparate Impact Legislation

A multitude of states have civil rights laws on their books. Many of these state laws permit both employees and state agencies to bring civil actions challenging facially neutral employment practices with allegedly disparate, discriminatory effects.

For example, last December, citing the EO as justification, New York and New Jersey expanded disparate impact liability under their existing employment discrimination laws. Illinois and Maryland passed bills to codify disparate impact liability. And through statutory or decisional law, California, Colorado, Massachusetts, and Minnesota have already had disparate impact liability available to potential plaintiffs.[1]

Final Takeaway

To recap, while the opinion likely will end the EEOC's pursuit of disparate impact litigation, at least for the duration of Chair Lucas' term, employers should remember that the law itself has not changed. Indeed, it's possible that heightened attention to this aspect of civil rights law could trigger a potential uptick in disparate impact claims brought by employees in federal and state courts, as well as by state agencies that enforce disparate impact liability.

This is a nonexhaustive list of states that recognize disparate-impact liability.

EGB summer associate Grady Smith and EBG staff attorney Elizabeth A. Ledkovsky helped prepare this article. ■

MERC NEWS

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Rule Revision Process

The rule revision process of both the Commission's General Rules, as well as Act 312 Rules, remains ongoing in an effort to modernize agency procedures and improve the efficiency of case administration. The proposed revisions emphasize electronic filing and service, expanded use of virtual proceedings, enhanced mediation opportunities for all cases, streamlined fact-finding and representation procedures, modernization of election processes, and updated Act 312 arbitration procedures. The revisions also add alternative methods of recording hearings, create new definitions, codify existing agency practices, and incorporate recent statutory developments. The rule revision process remains ongoing, with continued stakeholder review and refinement anticipated as MERC staff work toward significant progress in FY 2027. A chart of proposed changes is posted on the agency's website at www.michigan.gov/merc.

Overall, the proposed rule revisions are intended to create a more efficient and technologically current framework for administering Michigan's labor relations laws. Our agency remains committed to improving service delivery, promoting timely case resolution, and providing clearer procedural guidance for all parties. ■

ERISA'S *HOTEL CALIFORNIA*: THE SUPREME COURT UPHOLDS RETROACTIVE ACTUARIAL CHANGES IN WITHDRAWAL LIABILITY CALCULATIONS

John G. Adam

1. Introduction

M & K Employee Solutions v. Trustees of the IAM National Pension Fund, 608 U.S. ___, 2026 WL 1423319 (2026) represents one of the most significant ERISA withdrawal-liability rulings in years. In a unanimous opinion authored by Justice Jackson, the Court held that ERISA does not prohibit pension fund actuaries from adopting revised actuarial assumptions after the applicable measurement date when calculating withdrawal liability. The ruling resolved a circuit split between the D.C. Circuit and the Second Circuit and strengthens the authority of pension fund actuaries and trustees in assessing withdrawal liability against employers leaving multiemployer pension plans.

This article discusses the history and purpose of ERISA withdrawal-liability law, how the withdrawal-liability process works in practice, the question presented to the Supreme Court, the Court's holding and reasoning, and the practical implications of the decision for employers, unions, pension funds, and retirees.

The article also examines the role of the federal government in the case, including the Solicitor General's and PBGC's support for the interpretation ultimately adopted by the unanimous Court.

2. Background: Withdrawal Liability Under ERISA and the MPPAA

Withdrawal liability under ERISA and the Multiemployer Pension Plan Amendments Act ("MPPAA") was designed to discourage employers from withdrawing from multiemployer pension plans and leaving unfunded pension obligations behind for remaining employers and retirees. Congress enacted the MPPAA in 1980 after concluding that employer withdrawals threatened the financial stability of union-sponsored multiemployer pension plans.

In practical terms, withdrawal liability requires a withdrawing employer to pay its allocable share of the plan's unfunded vested benefits. Actuaries determine the amount by estimating the plan's future obligations, plan assets, expected investment returns, mortality assumptions, discount rates, and related actuarial assumptions. Small changes in those assumptions can dramatically affect the size of the employer's withdrawal liability assessment. In this case, for example, the fund actuary lowered the discount rate from 7.5% to 6.5%—a one-percentage-point reduction that caused the fund's calculated unfunded vested benefits to jump from approximately $500 million to "just over $3 billion—six times the prior year's figure."

As to M & K Employee Solutions, it "was assessed withdrawal liability of around $6.2 million, whereas it would have owed only around $1.8 million using the prior assumptions." So the retroactive change costs M & K $4.4 million.

As a result, withdrawal liability often creates a significant economic disincentive to leave a multiemployer pension plan. For some employers, the projected withdrawal liability may be so substantial that remaining in the plan and continuing contributions appears financially preferable to triggering immediate withdrawal liability. Some practitioners have described the system as creating "Hotel California" dynamics—an employer can check out anytime, but can never truly leave without a substantial financial consequence.

The system also creates strategic tension for employers. If an employer remains in a distressed pension fund, the plan's financial condition may worsen over time, potentially increasing future withdrawal liability exposure. On the other hand, withdrawing immediately may trigger an enormous current liability assessment. Employers therefore may face the difficult choice between paying a large withdrawal liability today or risking even greater exposure in the future.

Withdrawal liability can also affect collective bargaining leverage. Because many employers may be economically constrained from withdrawing from a pension fund, unions and pension fund trustees may possess greater leverage in bargaining over contribution rates, rehabilitation plans, restructuring proposals, and successor agreements. This dynamic is particularly significant in industries with longstanding union-sponsored pension arrangements, including trucking, manufacturing, mining, food distribution, and construction.

3. Question Presented

The question presented was:

"Whether 29 U. S. C. §1391's instruction to compute withdrawal liability 'as of the end of the plan year' requires the plan to base the computation on the actuarial assumptions most recently adopted before the end of the year, or allows the plan to use different actuarial assumptions that were adopted after, but based on information available as of, the end of the year."

The case involved interpreting the interaction between:

29 U.S.C. § 1391 — withdrawal liability calculation methodology ("as of the end of the plan year"), and

29 U.S.C. § 1393 — actuarial assumptions and methods.

4. The Court's Holding

The Court answered the second option, ruling for the pension fund. It held:

"The provisions of ERISA governing the calculation of withdrawal liability—§§ 1391 and 1393—do not require the actuarial assumptions underlying that calculation to be selected on or before the measurement date."

Specifically, the Court focused on § 1393(a), which provides that withdrawal liability calculations must be based on:

"actuarial assumptions and methods which, in the aggregate, are reasonable … and which, in combination, offer the actuary's best estimate of anticipated experience under the plan."

The employers argued that the assumptions had to be fixed as of the "measurement date" because § 1391 says withdrawal liability is calculated "as of the end of the plan year."

The Court emphasized that the relevant statutory provision contains no express timing rule. That point drove the Court's textual analysis:

"Section 1393 provides no deadline at all."

The Court also relied on the familiar principle that courts should not add statutory restrictions Congress did not write: "The Court does not generally read limitations into statutes that do not appear in their text."

Nor did the phrase "as of" do the work the employers needed. The Court treated that language as fixing the valuation date for the plan's unfunded vested benefits, not as freezing the actuary's assumptions as of that date. "The term 'as of' is understood 'to assign an event to one time and the same event to another time for a different purpose.'"

5. The Decision Resolved a Circuit Split

The decision resolved a split between the D.C. Circuit and the Second Circuit. The D.C. Circuit had held that an actuary could adopt assumptions after the measurement date if the assumptions were based on information available as of that date. The Second Circuit, in *National Retirement Fund v. Metz Culinary Management*, had adopted a contrary rule requiring the use of assumptions in effect on the measurement date. The Supreme Court affirmed the D.C. Circuit and rejected the *Metz* rule.

6. The Solicitor General and PBGC Supported the Fund

The federal government also supported the Fund's position. At the certiorari stage, the Solicitor General filed a brief for the United States recommending that the Court grant review. The brief identified the split with *Metz* and urged the Court to reject that timing rule.

"In the view of the United States, this Court should grant certiorari to resolve that clear circuit conflict and reject the timing rule of Metz, which has no sound basis in ERISA."

On the merits, the United States' position was pro-plan and pro-actuary. The SG's cert-stage brief stated the point directly:

"A multiemployer pension plan may determine an employer's withdrawal liability under ERISA using actuarial assumptions adopted after the measurement date, at least if the assumptions are based on information available as of that date."

The government also stressed the practical importance of the issue, noting that the timing rule affected approximately 1,400 multiemployer plans covering roughly 11 million workers and that even relatively small changes in assumptions can affect withdrawal liability by millions of dollars.

"The dueling rules also open any determination of withdrawal liability to challenge, perhaps brought by different withdrawing employers in different circuits."

7. Practical Implications for Employers and Multiemployer Pension Plans

M & K Employee Solutions carries significant practical consequences for every party involved in the multiemployer pension system—withdrawing employers, remaining contributing employers, pension fund trustees and actuaries, unions, and the retirees whose benefits depend on fund solvency.

For Withdrawing Employers

The most immediate consequence falls on employers in the process of withdrawing—or contemplating withdrawal—from a multiemployer pension plan. Before this decision, an employer in the Second Circuit could rely on the actuarial assumptions in effect on the measurement date as a ceiling on its exposure. That certainty is gone. Under the rule the Supreme Court has now adopted nationally, the fund's actuary may adopt revised assumptions after the measurement date, so long as those assumptions are grounded in information available as of that date. The withdrawal-liability demand an employer receives may therefore reflect assumptions the employer had no way to anticipate when it made its withdrawal decision.

This uncertainty has direct implications for due diligence. Employers considering withdrawal, asset sales, corporate transactions, or restructuring that could trigger a complete or partial withdrawal must now account for the possibility that the actuarial assumptions underlying any preliminary liability estimate may change before the final assessment is issued. Counsel and financial advisors working on transactions with multiemployer pension exposure should treat preliminary withdrawal-liability estimates as subject to upward revision, and should consider seeking contractual protections—indemnities, escrow arrangements, or price adjustments—to address that risk.

The decision also affects employers who have already received a withdrawal-liability demand and are in the process of arbitrating or litigating the amount. A fund actuary who adopted revised assumptions after the measurement date but before the demand was issued can now defend those assumptions on the merits, without the threshold timing objection that succeeded in the Second Circuit under *Metz*.

For Remaining Contributing Employers

Withdrawal liability is not only a concern for departing employers. Remaining employers in a multiemployer pension plan have a direct stake in how withdrawal liability is calculated because the financial health of the plan affects their ongoing contribution obligations. When a withdrawing employer pays a larger withdrawal-liability assessment—as may result from post-measurement-date actuarial revisions—the fund receives more assets, which can reduce the unfunded vested benefit burden allocated to remaining employers. In that sense, the *M & K Employee Solutions* ruling benefits employers who stay in the plan by strengthening the fund's ability to collect from those who leave.

For Pension Fund Trustees and Actuaries

For pension fund trustees and their actuaries, the decision is a significant vindication of professional and fiduciary authority. Trustees have a duty to act in the interest of plan participants and beneficiaries. Actuaries have a professional obligation to provide their best estimate of anticipated experience under the plan. The Court's holding that § 1393(a) governs the quality and reasonableness of actuarial assumptions—not their timing—allows actuaries to fulfill that obligation without being frozen into potentially outdated assumptions simply because a measurement date has passed.

The practical effect is that actuaries now have confirmed authority to update assumptions between the measurement date and the issuance of a withdrawal-liability demand, provided the updated assumptions reflect information available as of the measurement date. This is particularly significant in periods of economic volatility, when investment return expectations, interest rates, and mortality experience may shift materially in the months following a plan year's close.

Fund trustees should nevertheless document carefully the basis for any post-measurement-date assumption changes. Although the Court removed the timing objection, withdrawing employers retain the right to challenge whether revised assumptions are reasonable under § 1393(a). Clear contemporaneous records demonstrating that revised assumptions are grounded in measurement-date information will be important in arbitration and litigation.

For Unions

Unions have an interest in fund solvency because their members' retirement security depends on it. To the extent the *M & K Employee Solutions* ruling enables funds to assess more accurate—and potentially larger—withdrawal-liability amounts, it supports the long-term financial stability of those plans. It also reinforces unions' negotiating position: employers who might have hoped to minimize withdrawal liability by challenging post-measurement-date actuarial revisions now face a less hospitable legal landscape for that strategy.

If withdrawal liability is perceived as a moving target—with exposure potentially increasing after the measurement date—some employers may demand greater certainty in collective bargaining, or may resist joining a plan in the first place. These concerns are not new, but *M & K Employee Solutions* may amplify them in negotiations involving distressed funds.

For Retirees

The decision's most indirect—but perhaps most significant—beneficiary is the retiree population whose benefits depend on the financial soundness of pension plans. Accurate withdrawal-liability assessments that reflect up-to-date actuarial assumptions help ensure that departing employers pay their fair share of unfunded obligations, rather than shifting that burden to remaining contributors and ultimately to PBGC's insurance program. The Solicitor General's brief highlighted that approximately 1,400 multiemployer plans cover roughly 11 million workers. For the retirees and near-retirees among them, the Court's ruling supports the financial integrity of the system on which they rely. ■

HELEN KELLER AND THE LAW

John G. Adam

When Helen Keller was born in Alabama in 1880, American law offered little protection to people with disabilities. There was no Americans with Disabilities Act, Rehabilitation Act, or broad federal guarantee of equal access to employment, education, transportation, and public accommodations. Disability was commonly treated as a matter of charity or dependence rather than civil rights. Keller helped change that way of thinking.

At nineteen months, Keller lost both sight and hearing following an illness. She was not the first deafblind American to receive an education. Laura Bridgman had been educated decades earlier at the Perkins Institution for the Blind. Bridgman's experience eventually helped lead the Keller family to Perkins and to Anne Sullivan, who began teaching six-year-old Helen in 1887.

Sullivan spelled words into Keller's hand. The famous breakthrough came at a water pump, when Sullivan spelled "water" while water flowed over Keller's other hand. Keller understood that the movements represented the thing she was touching. Language opened to her.

Keller learned to read and write and entered Radcliffe College in 1900. In 1904, she graduated cum laude, becoming the first deafblind person to earn a Bachelor of Arts degree. She became an author, lecturer, and internationally recognized advocate for blind and disabled people. Her autobiography, *The Story of My Life*, written while she was still a student, remains her best-known book.

Keller's importance to the law lies less in any particular lawsuit than in what her life demonstrated: disability does not determine a person's capacity to learn, work, communicate, or participate in society. Sometimes the greater obstacle is the barrier society places in the person's way.

American law gradually moved toward that principle. Section 504 of the Rehabilitation Act of 1973 prohibited disability discrimination in federally funded programs and helped establish disability discrimination as a civil-rights issue. The disability-rights movement pushed further, demanding accessible buildings and transportation, employment opportunities, and full participation in public life.

Congress enacted the Americans with Disabilities Act in 1990. The ADA extended protections to employment, state and local government services, public accommodations, transportation, and telecommunications, declaring a "clear and comprehensive national mandate" against disability discrimination.

Keller had died in 1968 and was not an architect of the ADA. The statute grew from decades of activism, legislation, litigation, and experience under Section 504. Yet Keller belongs in the history preceding it. Long before Congress required the removal of discriminatory barriers, her life demonstrated what could happen when barriers to communication and education were removed. ■

A ROADMAP FOR ADDRESSING IDENTITY-BASED HARASSMENT IN THE WORKPLACE

Deedee Bitran
StandWithUs Saidoff Law

Since the October 7, 2023 Hamas terrorist attacks, employers across the United States have confronted an unprecedented increase in workplace disputes involving Israel, Zionism, and Jewish identity. The Anti-Defamation League has reported record-breaking levels of antisemitic incidents in recent years, with harassment occurring not only on college campuses and in public spaces, but also in workplaces across nearly every industry. *See* Anti-Defamation League, *Audit of Antisemitic Incidents 2024* (Apr. 22, 2025), https://www.adl.org/resources/report/audit-antisemitic-incidents-2024 (reporting 9,354 antisemitic incidents in 2024—the highest annual total since ADL began tracking such incidents in 1979—and noting increases in incidents at business establishments, public areas, and college campuses). As these issues increasingly enter the workplace, employers, unions, employees, and their counsel face important questions about the intersection of political expression, protected identity, and workplace discrimination.

Although many of these disputes arise from conversations about current events or foreign affairs, they frequently implicate long-standing principles of employment anti-discrimination law. Employers often hesitate to intervene when workplace conflict involves politically charged language, believing that doing so may infringe upon free speech rights. That hesitation, however, can create significant legal risk when political rhetoric becomes a vehicle for targeting an employee because of a protected characteristic such as religion, race, or national origin.

A recent matter involving City College of San Francisco ("CCSF") illustrates this distinction. StandWithUs Saidoff Law and the Louis D. Brandeis Center represented Jewish professor Abigail Bornstein in a workplace harassment matter after a union leader publicly berated her, repeatedly calling her a "colonizer" while mocking her Jewish surname. Following an independent investigation, CCSF adopted the investigator's findings that the union leader had verbally assaulted Professor Bornstein based on her Jewish identity and violated the college's policies prohibiting discrimination, harassment, and workplace violence.

The significance of the case extends well beyond California. It illustrates an increasingly important principle for workplaces nationwide: identity-based harassment is not protected simply because it is framed as political advocacy. When speech targets an employee because of a protected characteristic, employers must evaluate it through the lens of workplace anti-discrimination law—not merely through the lens of political discourse.

1. Political Speech and Identity-Based Harassment

Many employers instinctively analyze complaints involving terms such as ‘colonizer’ and ‘Zionist,’ or rhetoric surrounding the Israel-Hamas conflict, solely through a free-speech framework. That approach, however, often overlooks the legal principles governing workplace harassment.

Private employers generally are not constrained by the First Amendment and possess broad discretion to regulate workplace speech consistent with federal, state, and local anti-discrimination laws. Public employers face additional constitutional considerations because they must balance employees' First Amendment rights against their obligations to maintain workplaces free from unlawful discrimination and harassment. Yet even in the public employment context, courts have long recognized that the Constitution does not require employers to tolerate workplace speech that undermines equal employment opportunity or creates a hostile work environment.

In Florida, for example, nearly fifty years ago the Third District Court of Appeal recognized this principle in *Cowell v. Fuller*, 362 So. 2d 124 (Fla. 3d DCA 1978). There, a government employer disciplined an employee who directed antisemitic remarks toward a Jewish coworker. Upholding the discipline, the court explained that "[t]he government as an employer has a legitimate interest in limiting certain employee speech on the job for the purpose of promoting harmonious relationships between its employees." *Id.* at 130.

Although *Cowell* arose under Florida law, its reasoning reflects a broader principle recognized throughout employment law: the First Amendment does not prevent employers from addressing workplace conduct that interferes with employees' equal opportunity to work free from discrimination.

2. When Political Expression Becomes Workplace Harassment

The distinction between protected political expression and unlawful workplace harassment is highly fact-specific. General discussions about world events, foreign policy, or international conflicts ordinarily remain protected. However, when political rhetoric is directed at an individual because of a protected characteristic, the legal analysis changes.

That distinction proved critical in Professor Bornstein's case. The independent investigator concluded that the repeated use of the term "colonizer," coupled with mocking Professor Bornstein's Jewish surname, transformed what might otherwise have been characterized as political rhetoric into identity-based harassment directed at a Jewish employee.

The lesson extends beyond antisemitism. Similar principles apply whenever workplace speech targets employees because of their race, religion, national origin, sex, or other protected characteristics. Whether the underlying political issue involves immigration, international conflicts, race relations, or other controversial topics, employers should carefully evaluate whether the speech has become personal, targeted, and discriminatory. Importantly, the analysis does not turn on hostile or harmful intent; rather, the question is simply whether the treatment is directed toward a person or group because of a particular protected characteristic. Thus, even where the perpetrator is ignorant of the harmful impact of his words, rhetoric that targets protected identity can create a hostile environment.

As one federal court recently observed in *Garrett v. City University of New York*, No. 24-CV-9710, 2025 WL 3096550 (S.D.N.Y. Oct. 10, 2025), Title VII requires courts to distinguish between protected political expression and targeted personal harassment. That distinction becomes especially important

A ROADMAP FOR ADDRESSING IDENTITY-BASED HARASSMENT IN THE WORKPLACE

(Continued from page 9)

when evaluating claims involving contemporary manifestations of antisemitism.

3. Understanding Modern Antisemitism

One reason employers sometimes struggle to recognize antisemitic harassment is that contemporary antisemitism often differs from more traditional forms of anti-Jewish discrimination.

Historically, antisemitism frequently appeared through overt slurs, stereotypes, or explicit references to Jews or Judaism. Today, however, hostility may instead be expressed through rhetoric concerning Zionism or Israel, particularly when directed toward Jewish employees regardless of their own political beliefs.

This does not mean that criticism of Israel constitutes antisemitism. Political criticism of any government, including Israel's, is generally protected expression. The legal concern arises when political language becomes a proxy for targeting Jewish employees because of their religious or ethno-national identity.

Employers therefore should avoid making categorical assumptions that workplace disputes involving Israel are merely political disagreements. Instead, they should evaluate the context, including whether comments are directed at particular employees, whether Jewish identity is being invoked or mocked, whether stereotypes are employed, and whether the conduct contributes to a hostile work environment.

The International Holocaust Remembrance Alliance ("IHRA") Working Definition of Antisemitism can serve as a useful educational resource for understanding contemporary manifestations of antisemitism. While not itself a legal standard, the IHRA Working Definition has been adopted or endorsed by more than 1,300 governmental bodies, educational institutions, and other organizations worldwide and provides illustrative examples that can assist employers in recognizing when anti-Israel rhetoric may cross into antisemitic conduct. *See* https://ihra.combatantisemitism.org/

4. Practical Guidance for Employers

The Bornstein matter offers several practical lessons applicable to employers in both the public and private sectors.

First, employers should train supervisors, human resources professionals, and investigators to recognize modern forms of identity-based harassment, including contemporary manifestations of antisemitism. Training should emphasize that unlawful harassment may occur even when discriminatory conduct is framed as political advocacy.

Second, employers should enforce workplace policies consistently. Selectively responding to certain forms of bias while minimizing complaints involving antisemitism or other protected identities can potentially create liability and form the basis for a disparate treatment claim. Consistent enforcement demonstrates institutional neutrality while protecting all employees equally.

Third, complaints involving politically charged speech should be investigated using the same objective procedures applied to every other harassment complaint. Investigators should examine the totality of the circumstances, including context, audience, frequency, intent, and impact on the targeted employee.

Fourth, employers should avoid assuming that labeling speech as "political" ends the inquiry. The relevant question is not whether the underlying topic involves politics but whether the conduct contributes to a hostile work environment because of a protected characteristic.

Finally, organizations should recognize that these issues often present novel and evolving legal questions. Employers and practitioners confronting allegations involving antisemitism or other forms of identity-based harassment may benefit from consulting organizations with expertise in these issues. StandWithUs Saidoff Law, for example, provides educational resources concerning workplace antisemitism, legal developments, and best practices for addressing identity-based discrimination.

Conclusion

The Bornstein matter demonstrates that identity-based harassment cannot be immunized simply by characterizing it as political speech. Courts and employers alike have long recognized that anti-discrimination laws require more than neutrality in the face of discriminatory conduct. They require action.

As workplaces continue to grapple with increasingly polarized public discourse, employers must distinguish between robust political debate, which often deserves protection, and conduct that targets employees because of their protected class status. Identity-based harassment can no longer be dismissed simply because it is expressed through politically charged rhetoric. As workplaces increasingly become forums for discussions about global events, the legal principles governing workplace harassment remain unchanged. When speech targets an employee because of a protected characteristic, employers have both the authority and the responsibility to take prompt, effective action that is reasonably calculated to end the harassment, prevent its recurrence, and ensure that every employee can work in an environment free from unlawful discrimination. ■

NLRB GC RETREATS ON NONCOMPETE AGREEMENTS

The NLRB General Counsel has reversed the agency's recent approach to employee noncompete agreements. In *Biotricity*, Case 08-CA-326334 (Advice Memorandum released June 26, 2026), the Division of Advice recommended dismissal of charges challenging six-month noncompete provisions signed by former employees who subsequently went to work for a competitor.

The memorandum states that General Counsel Crystal Carey "is of the view that non-compete agreements do not as a general matter impact employees' rights under Section 7." The memorandum reflects the General Counsel's current enforcement position, however, and is not a precedential Board decision. ■

SIXTH CIRCUIT ON DISABILITY LEAVE, WORKPLACE RETALIATION, AND PUBLIC-EMPLOYEE DUE PROCESS

Ahmad A. Chehab and Ashley N. Higginson
Miller Canfield

1. Unpaid Leave May Satisfy the ADA Even When an Employee Requests Paid Leave

In *Tumbleson v. Lakota Local School District*, 175 F.4th 773 (6th Cir. May 13, 2026), the Sixth Circuit affirmed summary judgment for an Ohio school district on a teacher's disability-discrimination, failure-to-accommodate, and FMLA claims.

Andrea Tumbleson, a longtime art teacher, suffered from Usher syndrome, a progressive condition that caused significant hearing and vision loss. After she was approved for a guide dog, she was required to attend a three-week training program. Tumbleson asked to use 13 days of accrued paid sick leave for the training. The district concluded that the training did not qualify as a "personal illness" under its sick-leave policy, Ohio law, or the collective bargaining agreement. It nevertheless permitted Tumbleson to attend the training by using paid personal days and unpaid leave as an ADA accommodation.

Tumbleson first alleged that denying her paid sick leave amounted to disparate treatment under the ADA. The Sixth Circuit rejected the claim because she did not identify any similarly situated, nondisabled employee who received paid sick leave for an absence that did not qualify under the district's policy. The record instead showed that the district generally allowed principals to approve absences lasting fewer than 10 days, while human resources reviewed longer requests. Consistent with that practice, the district had previously approved paid sick leave for Tumbleson's five-day guide-dog orientation but reviewed her later request for 13 days.

The court did not decide whether the denial of paid leave constituted an adverse employment action under the Supreme Court's more recent decision in *Muldrow v. City of St. Louis*. It recognized that going without pay may cause the "some harm" necessary to support a discrimination claim, but resolved Tumbleson's claim based on the absence of comparator or pretext evidence.

The Sixth Circuit also rejected Tumbleson's failure-to-accommodate claim. Even assuming that attending the guide-dog training was a work-related accommodation, the unpaid leave allowed her to complete the training and obtain the guide dog. The ADA did not entitle her to her preferred accommodation—paid leave—when the district offered another effective and reasonable accommodation. Tumbleson's financial difficulties resulting from the unpaid leave did not make the accommodation unreasonable because she did not establish that receiving pay, rather than simply receiving time away from work, was necessary for her to perform her job.

The court further held that the district did not need to prove that providing paid leave would have caused an undue hardship. The undue-hardship inquiry becomes relevant when the requested accommodation is the only reasonable accommodation. Here, because the district had already provided a reasonable accommodation through unpaid leave, it had discretion to choose that option.

The Sixth Circuit rejected Tumbleson's FMLA claim. The FMLA generally guarantees eligible employees unpaid leave; it does not independently require employers to provide paid leave. An employee may substitute accrued paid sick leave only if the absence qualifies under the employer's normal paid-leave policy. Tumbleson did not sufficiently challenge the district court's conclusion that guide-dog training fell outside the policy's coverage for absences "due to personal illness."

Importantly, the court did not decide whether guide-dog training could qualify as FMLA leave or paid sick leave in another case. It expressly left open whether an employee's medical condition could be considered the legal cause of an absence necessary to obtain disability-related training. The court noted that Tumbleson might have argued that she attended the training "due to" her Usher syndrome, but she forfeited that argument by failing to develop it.

2. Protected Harassment Complaints Do Not Shield Separate Workplace Misconduct

In *Crisp v. Scioto Ambulance District*, 182 F.4th 490 (6th Cir. July 17, 2026), the Sixth Circuit affirmed summary judgment for an employer on federal and state retaliation claims brought by an emergency medical technician who was discharged for showing nude photographs of coworkers while on duty.

Gertrude Crisp alleged that a male coworker had made sexual comments, touched her breasts, and attempted to push her into a trash can during a 2018 shift. Crisp reported the incident to a supervisor and showed the supervisor a copy of the coworker's profile from an adult website. The employer responded by separating the two employees and ensuring that they did not work the same shifts, but it did not otherwise discipline the coworker.

Approximately four years later, Crisp met with two newer employees at the workplace to discuss workplace culture and men she considered predatory. During that conversation, she showed the employees nude photographs of the coworker and his wife, who also worked for the ambulance district. After investigating, the employer's board unanimously terminated Crisp for showing nude photographs of employees to other employees while on duty and on the employer's property.

Crisp alleged that the termination constituted unlawful retaliation under Title VII and the Ohio Civil Rights Act. The Sixth Circuit disagreed. Although Title VII broadly protects employees who oppose perceived discrimination or harassment, that protection has limits. An employee is not protected when the manner of opposition violates legitimate workplace rules, disrupts the workplace, or interferes with the employer's legitimate goals.

The court distinguished between Crisp's protected and unprotected conduct. Crisp generally had the right to tell coworkers or management about the alleged harassment. She did not, however, need to show nude or sexually explicit photographs to communicate her concerns. The court also emphasized that the photographs included the coworker's wife, who was not alleged to have participated in the harassment. Even if the images were publicly available online, employees were not required to tolerate their display at work.

The Sixth Circuit recognized that displaying explicit material may be protected in other circumstances. For example, an employee who receives an unsolicited nude photograph from a

SIXTH CIRCUIT ON DISABILITY LEAVE, WORKPLACE RETALIATION, AND PUBLIC-EMPLOYEE DUE PROCESS

(Continued from page 11)

coworker may need to show it to human resources to substantiate a harassment complaint. Here, however, the court found no similar need to show the photographs to coworkers several years after the alleged harassment.

The court also rejected the argument that Crisp's broader protected complaints insulated her from discipline for the unprotected conduct. When an employee engages in both protected and unprotected activity, the employee cannot use the protected portion to avoid discipline based on separate misconduct. Because the employer terminated Crisp for displaying the photographs—not merely for discussing or reporting the alleged harassment—her retaliation claim failed.

Crisp had also asserted a hostile-work-environment claim but abandoned it at summary judgment. She did not bring a disparate-treatment claim or identify similarly situated employees who displayed nude photographs at work without being discharged.

Sixth Circuit Denies Qualified Immunity Where City Fired Police Chief Without a Pretermination Hearing

In *Washington v. City of Cincinnati*, 2026 WL 2350091 (6th Cir.), a divided Sixth Circuit affirmed the denial of qualified immunity to a city manager who terminated Cincinnati's fire chief without first providing him notice and an opportunity to respond.

Michael Washington became fire chief in 2021. Although the Cincinnati City Charter classified the position as "unclassified," it also expressly provided that, after six months of service, the fire chief could be removed only for cause. When Washington accepted the position, however, he signed an acknowledgment stating that unclassified employees served at the pleasure of the appointing authority and could be dismissed without cause at any time.

Approximately two years later, the city manager terminated Washington effective immediately and identified several performance-related reasons for the decision. Washington did not receive advance notice of the charges, an explanation of the City's evidence, or an opportunity to respond before the termination. The city manager later acknowledged that the City's legal department had advised her that Washington would need a hearing, but she chose not to provide one before terminating him.

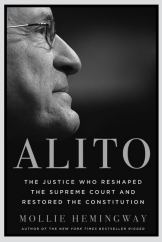
The Sixth Circuit held that the Charter's for-cause provision gave Washington a constitutionally protected property interest in continued employment after he completed the six-month probationary period. Under clearly established due process law, a public employee with for-cause protection generally must receive, before termination: (1) oral or written notice of the charges; (2) an explanation of the employer's evidence; and (3) an opportunity to present the employee's side of the story.

The court rejected the argument that Washington's acknowledgment clearly waived those protections. The document did not mention the City Charter, the Fourteenth Amendment, or Washington's constitutional due process rights. The majority concluded that the acknowledgment could reasonably be read as addressing Washington's unclassified status during the initial probationary period. Because a waiver of procedural due process rights must be "clear and unmistakable," the document did not provide a reasonable basis to disregard the Charter's express for-cause protection.

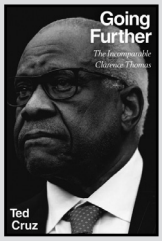
The court also allowed Washington's state-law defamation claim to proceed. A jury could find that the city manager acted with malice or bad faith when she publicly described Washington's alleged failures, particularly because there was conflicting evidence about whether some of those statements were true. The court further held that evidence showing that the city manager knowingly disregarded Washington's due process rights could serve as circumstantial evidence of malice or bad faith. ■

FALL "JUSTICE" READINGS

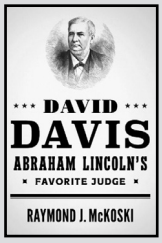
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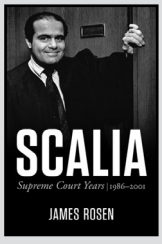
Mollie Hemingway — ***Alito: The Justice Who Reshaped the Supreme Court and Restored the Constitution*** (2026). A sympathetic biography tracing Justice Samuel Alito's career and emergence as a leading voice on the Court's conservative majority. Hemingway presents his jurisprudence as practical originalism shaped by prosecutorial experience and constitutional restraint.



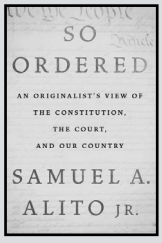
Ted Cruz — ***Going Further: The Incomparable Clarence Thomas*** (2026). Drawing on extended interviews, Cruz offers an admiring portrait of Justice Clarence Thomas's life, faith, independence, and originalist philosophy—and the convictions that shaped his long Supreme Court tenure.



Raymond J. McKoski — ***David Davis, Abraham Lincoln's Favorite Judge*** (2025). McKoski profiles the judge and political organizer who helped secure Lincoln's 1860 nomination and later joined the Supreme Court. The biography emphasizes Davis's impartiality and independence in major Civil War-era cases.



James Rosen — ***Scalia: Supreme Court Years, 1986-2001*** (2026). The second volume of Rosen's biography follows Antonin Scalia through the first half of his Supreme Court service, exploring his advancement of originalism and textualism, his judicial relationships, and the cases culminating in *Bush v. Gore*.



Justice Samuel A. Alito Jr. — ***So Ordered: An Originalist's View of the Constitution, the Court, and Our Country*** (2026). In this forthcoming first-person account, Justice Alito explains his originalist approach and reflects on law, faith, liberty, and American culture, including the courts' role in disputes over free speech and religious freedom. ■

NON-SIGNATORY IS NOT COMPELLED TO ARBITRATE

Lee Hornberger

Demerse v. Helen Newberry Joy Hospital, ___ Mich. App. ___ (COA 373567, June 29, 2026), arose from a pharmacy services agreement between a pharmacy and a hospital. *Demerse* discussed compelling arbitration against a non-signatory of an agreement to arbitrate. *Demerse* supports the principle that arbitration is a matter of consent. *Demerse* discusses determining who may be compelled to arbitrate when individuals sign contracts in representative capacities.

Can Non-Signatory Corporate Officer Be Compelled to Arbitrate?

Demerse concerned the question of when a corporate officer signs a contract only on behalf of an LLC, can that officer be compelled to arbitrate disputes arising from the contract? The Circuit Court said yes. The Michigan Court of Appeals said no. The Court of Appeals answer rested on the principle that arbitration is a matter of contract, and a party cannot be forced to arbitrate absent clear evidence of consent.

Clarifying Who Is "Party" to Arbitration Agreement

Demerse held that the signature capacity controls the obligation to arbitrate. Demerse signed the services agreement solely as the member-manager of Newton Hometown Pharmacy LLC. The signature block to the underlying contract reflected this representative capacity. The contract did not contain language binding Demerse individually. The arbitration clause referenced "officers, directors, and employees." The Court of Appeals held that this language did not transform those individuals into contracting parties.

This distinction was important. The arbitration clause can contain broad language describing the scope of arbitrable disputes. *Demerse* indicated that defining the scope of arbitrable disputes is not necessarily the same as defining who is bound to arbitrate.

Michigan courts have occasionally compelled non-signatories to arbitrate. This can occur when (1) the non-signatory seeks to enforce the contract, (2) the non-signatory directly benefits from the contract, or (3) the claims against the non-signatory are tightly intertwined with the contract. Gilbride and Cobane, "Extending Arbitration Agreements to Bind Non-signatories," *Michigan Bar Journal* (February 2019), p. 20. These include circumstances such as incorporation by reference, assumption, agency, piercing the corporate veil, and estoppel. *Id*.

The Hospital argued that Demerse's managerial role and involvement in the relationship justified compelling him to arbitrate under these doctrines. The Court of Appeals disagreed.

Managerial Involvement Not Enough

The Hospital further argued that the broad arbitration provision rendered its claims against Demerse subject to arbitration. The Court of Appeals rejected this argument, holding that involvement alone does not create an arbitration obligation. This prevented the arbitration clause from being used to bring Demerse into the arbitration proceeding simply because he was involved in the underlying business dealings.

Protecting Corporate Separateness

The Court of Appeals decision was consistent with the principle that LLCs are separate legal entities. Even when an individual is the sole owner or manager, the entity's obligations do not automatically become the individual's obligations.

Distinguishing Prior Michigan Precedent

The Hospital relied on prior Michigan cases involving non-signatories. The Court of Appeals distinguished those cases.

Cases Where Non-Signatories Compelled to Arbitrate

In some earlier cases, non-signatories were compelled to arbitrate because (1) they sought to enforce the contract, (2) they were third-party beneficiaries, (3) they directly benefitted from the contract, or (4) they were alter egos of the contracting entity.

None of those circumstances applied to Demerse.

***Demerse* Clarifies Limits of These Doctrines**

Demerse clarified that:

1. Non-signatories cannot be compelled to arbitrate just because they are closely involved in the business relationship;

2. Managerial status alone does not create arbitration obligations;

3. Broad arbitration clauses do not automatically bind individuals referenced in the clause; and

4. Courts must carefully distinguish between the scope of arbitrable disputes and the identity of the parties bound to arbitrate.

Reaffirmation of Consent-Based Arbitration

In *Altobelli v. Hartmann*, 499 Mich. 284 (2016), the Supreme Court ruled that plaintiff's tort claims against the individual principals of a law firm fell within the scope of an agreement to arbitrate that required arbitration for any dispute between the law firm and a former principal. The plaintiff, a former principal of the firm, challenged actions that the individual defendants had performed in their capacities as agents carrying out the business of the firm. The plaintiff was attempting to bypass the agreement to arbitrate by suing the individual principals in a court proceeding rather than the law firm in an arbitration proceeding. The Supreme Court ruled that this was a dispute between the firm and a former principal that fell within the scope of the agreement to arbitrate and was subject to arbitration. The Supreme Court reversed those portions of the Court of Appeals opinion, *Altobelli v Hartmann*, 307 Mich. App. 612 (2014), which had held the matter was not subject to arbitration. *Altobelli* demonstrates that the wording of the agreement to arbitrate is vitally important and, regardless of how much work goes into the drafting of the agreement to arbitrate, there are risks of unintended consequences. According to the Court of Appeals in *Demerse,* in *Altobelli*, the claims fell under an arbitration requirement where all the parties to the claims

were signatories to the arbitration agreement in their individual capacities as members of the firm.

In *Steward v Flint Sch Dist*, 346 Mich. App. 700 (2023), plaintiff was hired to be the superintendent of schools. She worked under a written employment agreement that had a broad arbitration clause. The signatories to the contract were Plaintiff and the "Board of Education of the School District of the City of Flint." Plaintiff complained that the board members created a hostile work environment. This dispute resulted in plaintiff's removal. After plaintiff filed suit against the board members, they moved for summary disposition based on the arbitration provision. The Circuit Court granted relief to the entity defendants but not to the board members because they were not parties to agreement that contained arbitration provision. The Court of Appeals reversed the denial of summary disposition because the obligation to arbitrate disputes extended to the board members as well as the school district.

According to the Court of Appeals, none of the *Altobelli* or *Steward* circumstances applied in *Demerse*.

This was because Demerse did not personally agree to arbitrate and the arbitration clause did not bind him individually. The Court of Appeals held in *Demerse* that although Demerse acted as the Pharmacy's agent, agency principles cannot be applied to compel Demerse, a non-signatory of the Agreement, to arbitrate the claims that the Hospital has brought against him in his individual capacity. Demerse's role in the agreement was that of agent to the Pharmacy, leaving him, in his individual capacity, a nonparty to the Agreement.

Demerse reinforces the principle that arbitration is consensual and contractual.

Demerse Has Several Implications

Contract drafters must be explicit concerning agreements to arbitrate. If the parties intend to bind individuals, such as corporate officers, LLC members, or employees, to arbitration, the parties must say so explicitly. This may require (1) clear signature blocks indicating individual capacity, (2) explicit language binding individuals, or (3) separate individual arbitration agreements.

Because arbitration clauses are pervasive, *Demerse* may have an impact on future disputes involving (1) corporate officers, (2) employees, (3) agents, (4) subcontractors, and (5) affiliated entities.

Conclusion

Demerse discusses the limits of compelling non-signatories to arbitrate. *Demerse* reinforces the principle that arbitration is a matter of consent. *Demerse* shows the importance of clarity in drafting agreements to arbitrate. ■

MICHIGAN MODERNIZES YOUTH EMPLOYMENT PERMITS THROUGH ONLINE PORTAL

Andrew Niedzinski
Director, Bureau of Employment Relations

On October 2, 2026, the Michigan Wage and Hour Division will launch the Youth Employment Permit Portal (YEPP), a statewide online system for issuing youth employment permits under the Youth Employment Standards Act (YESA), MCL 409.101 et seq.

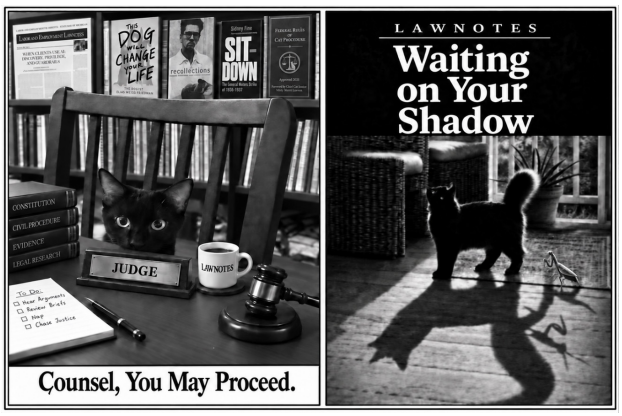
YEPP implements the 2024 amendments to YESA, which transferred responsibility for issuing youth employment permits from local school districts to the Wage and Hour Division. The system replaces Michigan's long-standing tedious paper permit process with a secure, web-based application.

Through the portal, employers initiate permit requests by identifying the proposed employment and work schedule, youth workers complete the application, the Department reviews and issues the permit. If an hour deviation is requested, a parent or guardian provides the required authorization. Once approved, permits are issued electronically and maintained within the system for future reference. The local public school will continue to have a role in the revocation of a work permit.

While the permitting process has been modernized, protections afforded to minors by YESA remain unchanged. Employers continue to be responsible for complying with statutory limitations on occupations, hours of work, and times of day minors may be employed. The issuance of a work permit does not relieve an employer of its obligation to comply with all applicable provisions of the Act and its administrative rules.

Centralizing the permitting process provides several benefits beyond replacing paper forms. A uniform statewide system promotes consistency in permit administration, improves record retention, provides a more efficient process for employers and families, and enhances the Department's ability to monitor compliance and provide targeted outreach and education for employers.

The launch of YEPP represents the most significant modernization of Michigan's youth employment permitting process in decades. By implementing the statutory changes enacted by the Legislature, the Wage and Hour Division has established a centralized, electronic permitting system that improves accessibility while continuing to protect the health, safety, and educational interests of Michigan's young workers. ■



LAW-RELATED NEWS AND VIEWS YOU MAY HAVE MISSED IN *THE WALL STREET JOURNAL*

Stuart M. Israel

1. On aspiring-lawyer "wellness."

"More aspiring lawyers are asking for—and getting—extra time to finish the bar exam." In California, "14% of the nearly 8,000" takers of the July 2025 bar exam received testing "accommodations." This development "follows one coursing through high schools and colleges" based on "diagnoses" of anxiety, ADHD, and learning disabilities. A study covering 60 law schools between 2021 and 2023 reports that "more than 20% of students had testing accommodations." ***WSJ* article, April 6, 2026, pp. A1 and A6.** *WWPKS*—what would Professor Kingsfield say?

2. On, maybe, the Warren Court's 1953-1969 "constitutional revolution."

The "20th century" Supreme Court was "dominated" by "results-before-law jurisprudence." ***WSJ* editorial, May 4, 2026, p. A16.** How, say, do "*Miranda* warnings" fit into the "rule of law" debate? Discuss and decide. Or exercise your right to remain silent.

3. The ABA, DEI, and law schools.

"Diversity, equity and inclusion programs are supposed to be on their way out of higher education" but, the *WSJ* says, the American Bar Association "is still mandating DEI standards that law schools must meet to be accredited." The standards "require diversity training as a prerequisite for graduation" even though then-Attorney General Pam Bondi "warned" the ABA in 2025 that "race preferences" violate "civil rights laws" and that ABA-mandated "education" on "bias, cross cultural competency and racism" may pursue "diversity commitment" by "unlawful means."

The *WSJ* reports on a study finding, as of April 2026—years after *Students For Fair Admissions v. Harvard* (2023)—that "72 law schools in 24 states" had current DEI programs or "rebranded" equivalents. The University of Michigan, for example, reportedly was "still promoting 'Diversity, Equity and Inclusion'" while American University reportedly renamed its "DEI shop" as the "Office of Inclusive Excellence and Leadership Development."

WWSS—what would Shakespeare say? You will recall Juliet's remark about smelling roses. Does a "rebranded" DEI program violate the constitution?

The *WSJ* reminds the ABA that it "lost its privileged status approving judicial nominees because it couldn't get the political bias out of its ratings." It warns the ABA that its "near monopoly" on accrediting law schools is under review and at risk for similar reasons. ***WSJ* editorial, April 17, 2026, p. A14.** *Nota bene*: there have been pertinent discussions and developments within the ABA since the *WSJ* editorial.

The Education Department announced in August that it is "taking the first step toward removing the ABA's authority to accredit law schools," after releasing "a nearly 500-page report, more than a year in the making" which finds that the ABA "isn't sufficiently independent" of the legal profession. The Department says the ABA operates "without competition," allowing it to "inject" its "own political preferences" and "ideologies" into the accreditation process. The ABA responds it "is confident that it complies" with "federal laws" and Education Department "requirements" and that the "outcomes produced" by ABA-accredited law schools are "unmatched." ***WSJ* article, August 22-23, 2026, p.A5.**

4. America's creed.

The Declaration of Independence "contains three ideas that shocked the world in 1776," Justice Gorsuch writes. We are "created equal." We are "endowed" with "unalienable rights" to "life, liberty and the pursuit of happiness." Legitimate government must "secure these rights" and have "the consent of the governed." This is "America's creed": "Equality, liberty, and self-government."

"Our nation will always be a work in progress, but the Declaration stands as a constant reminder of who we aspire to be." Fostering the creed's principles "depends on each passing generation learning about them anew, engaging with the history that gave rise to them, and choosing them all over again." During this year's celebration of the "founding of the longest-living republic in the world," Justice Gorsuch hopes that "all Americans will spend some time reflecting on the Declaration and recommitting to its creed."

We owe a "debt beyond repayment" to those "who challenged the nation to live up to the Declaration's promises throughout our history," "who in every generation have given their lives for the cause of liberty, equality, and self-government," and who have given us "the opportunity to continue the work of forming 'a more perfect union.'" **Justice Neil Gorsuch, opinion, *WSJ*, May 9-10, 2026, p. A15.**

5. On law reviews.

"There are many law review journals in the U.S., some of which publish three or more times annually. The overabundance of virtually incomprehensible gibberish in most law reviews seems to serve no purpose except to perpetuate more of the same." **Excerpt from Emeritus Professor Kenneth Lasson, University of Baltimore School of Law, letter to the editor, *WSJ*, June 12, 2026, p. A14.**

6. On the Supreme Court at the end of its term.

"Read the Justices, and it becomes clear they are focused on the Constitution and the law. They are protecting ordered liberty, correcting deviations from the Founders' design, and taking the Bill of Rights seriously. The Court isn't partisan,

LAW-RELATED NEWS AND VIEWS YOU MAY HAVE MISSED IN *THE WALL STREET JOURNAL*

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much less MAGA, and its constitutional cleanup is a tremendous accomplishment for the country."

"This term, 44% of the Court's decisions were unanimous, close to the two-decade average….In 24% of cases all three liberal Justices were in dissent…But 15% [of cases] had three or more conservatives on the losing side…including the tariff and birthright citizenship rulings….No, today's Court isn't partisan, and its restoration of venerable constitutional principles is a project worthy of America's 250th." ***WSJ*** **editorial, July 3, 2026, p. A14.**

The *WSJ*'s James Taranto quotes Justice Elena Kagan, one of the "liberal" justices: "Is this court…[a] puppet for the current administration? I think definitely not." Taranto questions the reliability of some criticism directed at the justices: "Much of today's commentary about the Supreme Court, from the right as well as the left, is partisan and legally shallow. Those of us who regard the court as an essential institution find it particularly distressing how personal it often gets." ***WSJ*** **opinion, August 8-9, 2026, p. A11.**

7. On Michigan democracy and the "political class."

Michiganders vote "on tax hikes and other critical local questions—all in off-cycle elections in which low turnout makes them likelier to pass." "It isn't uncommon for off-cycle elections to see a third, a quarter or even less than a fifth as many people to show up and vote" than on "the typical November Election Day." "For local politicos with big spending plans, this provides an opportunity to tilt the playing field."

It is "illegal to electioneer with public money" in Michigan, but officials "can use taxpayer money to grease the skids" by publishing "guides and materials that 'inform' voters about how tax-hike revenue will be spent. So long as they don't say 'vote yes,' they are fine."

The "combination of these 'educational materials' and low turnout can get the votes to pass such ballot measures." "The political class almost always wins." "Off-cycle elections heavily advantage politicians and special interest groups to the detriment of taxpayers."

"It is one thing for primaries to be held off-cycle, so a smaller number of voters can decide each party's candidate before the big day in November. It is another matter entirely for a relatively tiny slice of the electorate to foist tax hikes and spending decisions on everyone else." "The solution is simple: Move meaningful local ballot questions to Election Day in November." **Michael J. Reitz, opinion excerpts,** ***WSJ,*** **August 1-2, 2026, p. A11.** ■

DUE PROCESS AS AN ELEMENT OF JUST CAUSE IN LABOR ARBITRATION

Lee Hornberger
Arbitrator

This article reviews how arbitrators, treatises, and courts have reviewed employer use of due process before imposing discipline on an employee under a collective bargaining agreement (CBA). The consensus is that employers should provide notice, conduct a fair and thorough investigation, and allow employees a meaningful opportunity to respond before imposing discipline. The pertinent due process questions include: Was the employee given a meaningful opportunity to tell the employee's side of the story before discipline was imposed? Was there an adequate check against the possibility of an incorrect decision? Are the due process principles imbedded in the CBA?

1. St. Antoine, ***The Common Law of the Workplace*** **(2d ed. 2005)**

Concerning due process, St. Antoine, pp. 206 and 217-219, states:

> **§ 6.13 Notice of Charges and Hearing**
>
> **Just cause requires that an employee being disciplined or discharged be given notice of the charges against him or her and a meaningful opportunity to be heard. …**
>
> **§ 6.19 Remedies for Due Process Violations in General**
>
> **When a due process guarantee of the contract (either one that is an inherent part of just cause, or one arising out of a specific contract provision) has been violated in a significant way, most arbitrators conclude that the violation will affect the degree of the penalty or other adverse employer action, and some arbitrators conclude that the violation will nullify the penalty entirely.** [Emphasis in original]

2. Elkouri & Elkouri, ***How Arbitration Works*** **(8th ed. 2016)**

Elkouri & Elkouri, p. 15-49, states, "Industrial due process … requires management to conduct a reasonable inquiry or investigation before assessing punishment." The issue of due process and following correct procedures can impact on just cause and the amount of discipline, if any, that should be approved or imposed. *Id*. at 15-47 to 15-50. Arbitrators will, in many cases, refuse to uphold the employer's action where the employer failed to fulfill some procedural requirement specified by the CBA. *Id*.

Abrams, ***Inside Arbitration*** **(2013)**

Abrams, p. 211, states:

> … [T]he concept of "due process" is inherent in the just cause provision.
>
> … [a]arbitrators prefer seeing evidence that management … offered the accused employee the opportunity to contribute before the investigation hardened into a decision. A discharge followed by an investigation obviously puts the cart before the horse. An employer need not keep an employee at work, but there is no obvious reason why it cannot suspend the employee pending investigation.

3. Nolan, *Labor and Employment Arbitration* (1999)

Arbitrators "often overturn otherwise valid discharges where the employer has denied the employee those [due process] protections." Nolan, pp. 205 to 206.

4. Federal Courts of Appeal

Federal courts have held that due process applies to "just cause" discharge cases. *Federated Dep't Stores v. United Food & Commercial Workers Union, Local 1442*, 901 F.2d 1494, 1496 (9th Cir. 1990), held that the arbitrator appropriately determined due process to be a component of good cause for discharge. *Federated Dep't Stores* said,

> In *Chauffeurs, Local Union No. 878 v. Coca-Cola Bottling Co*., 613 F.2d 716 (8th Cir.), cert. denied, 446 U.S. 988 … (1980), the Eighth Circuit … noted that "arbitrators have long been applying notions of 'industrial due process' to 'just cause' discharge cases." *Id*. at 719. In *Coca-Cola Bottling Co*., the arbitrator found that despite the employee's dishonesty, the lack of procedural fairness afforded to him by the company fell short of the just cause standard. … Coca-Cola Bottling Co. did not provide the employee an opportunity to tell his side of the story prior to termination. Drawing upon scholarly articles which studied arbitration awards, the court found that an arbitration award that interpreted just cause to include due process "drew its essence" from the agreement. *Id*. at 719-20. See also *Super Tire Eng'r Co. v. Teamsters Local Union No. 676*, 721 F.2d 121 (3rd Cir.1983) (enforcing an arbitrator's award where employee was reinstated because he was not given a warning before his discharge for drinking alcoholic beverages during working hours), cert. denied, 469 U.S. 817 … (1984). We agree with the Third Circuit that because it is not unusual for an arbitrator to apply due process notions to just cause, the arbitrator derived his decision from the essence of the collective bargaining agreement.

Chauffeurs, Local Union No. 878 v. Coca-Cola Bottling Co., 613 F.2d 716 (8th Cir.), cert. denied, 446 U.S. 988 (1980), said,

> arbitrators have long been applying notions of "industrial due process" to "just cause" discharge cases. As Professor Summers noted, "[o]n the bare words `just cause' arbitrators have built a comprehensive and relatively stable body of both substantive and procedural law." Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 Va. L. Rev. 481, 500 (1976) (footnote deleted). Professor Summers also commented that the retention of the bare "just cause" language in newly negotiated agreements is an indication of the widespread acceptance of arbitrators' due process interpretations. *Id.* at 505. To a similar effect are the comments of Professor Getman: To enhance its chances of winning at arbitration, a company needs to establish careful disciplinary procedures consistent with arbitration awards defining the concept of just cause. Arbitrators generally insist on equal punishment for the same offense, and they require that employees be given advance notice of company rules and a chance to explain their behavior before they are disciplined. Getman, *Labor Arbitration and Dispute Resolution,* 88 Yale L.J. 916, 921 (1979) … .

5. Michigan Court of Appeals

An employer's procedural violations can justify the arbitrator modifying discipline even when the underlying misconduct is proven. *Michigan Association of Police v. Pontiac*, 177 Mich. App. 752, 759-760 (1989), states:

> It is accepted that an arbitrator, if not specifically limited by the terms of the collective bargaining agreement, is free to fashion a remedy which considers the relative faults of the parties. See *Zeviar v. Local No 2747, Airline, Aerospace Allied Employees,* 733 F.2d 556 (CA 8, 1984) (employee reinstated but with only half of lost wages because she was also at fault), and *Air Line Pilots Ass'n, International v. Eastern Air Lines, Inc,* 632 F.2d 132 (CA 5, 1980) (reinstatement without full benefits upheld). In *Brotherhood of Railway, Airline Steamship Clerks v. Kansas City Terminal Railway Co,* 587 F.2d 903, 906-907 (CA 8, 1978), cert den 441 U.S. 907 … (1979), the court, quoting *Diamond v. Terminal Railway Alabama State Docks,* 421 F.2d 228, 233 (CA 5, 1970), stated the test as "not whether the reviewing court agrees with the Board's interpretation of the bargaining contract, but whether the remedy fashioned by the Board is rationally explainable as a logical means of furthering the aims of that contract." … .

6. Labor Arbitration Awards

Arbitrators have found that notice of charges, a fair investigation, and an opportunity to be heard are procedural due process protections inherent in the just cause standard.

Arbitrator Creo stated at *Washington Penn Plastics*, *Performance Products Division*, 2025 LA 19 (2025),

> … the issue of notice of charges, a fair investigation of the alleged infractions, and the opportunity to be heard as due process and procedural protections inherent in the just cause standard or as mandated by the collective bargaining agreement or law. …
>
> Although the investigation may have been accurate in its factual findings and conclusions, and the Employer otherwise making a sound determination that just cause existed for the conduct of Grievant, the procedural requirements of the Agreement still must be followed. The Arbitrator does not find that a violation of procedural rights is harmless error or otherwise constitutes a de minimis violation. A due process violation of this nature that de minimis violation an express clause of the negotiated collective bargaining agreement requires remedial action.

Arbitrator Goldstein indicated at *State of Illinois*, 136 LA 122, 129-130 (2015):

> [A]n employer's obligation to a predisciplinary investigation is determined by context. … [T]he level of discipline involved is an important consideration … in determining whether the underlying investigation by the employer was fair and reasonable.

United Parcel Service, 118 LA 1127, 1136 (Landau, 2003), sustained a grievance based on untimely notice where the CBA stated that the employer waived its right to discharge an employee if notice was not provided within 10 days.

Shaefer's Ambulance Serv., 104 LA 481, 486 (Calhoun, 1995), indicates,

> Procedural fairness requires an employer to conduct a full and fair investigation of the circumstances surrounding an employee's conduct and to provide an opportunity for him to offer denials, explanations, or justifications that are relevant before the employer makes its final decision, before its position becomes polarized.

Arbitrators have declined to set aside discipline when a grievant suffers no prejudice following an employer's non-compliance with procedural requirements. *Jackson Memorial Hospital*, 126 LA 723 (Abrams, 2009) (declining to set aside discipline despite the employer's failure to satisfy CBA deadlines because "there was no prejudice to the Grievant or the Union by the modest delay"); *Argosy Gaming Co.*, 110 LA 540 (Fowler, 1998) (declining to overturn discharge where there was no showing of prejudice to the union or to the grievant by the absence of timely notice).

Remedy

The arbitrator has the authority to grant an appropriate remedy when due process safeguards have been violated. Elkouri & Elkouri, pp. 18-1 to 18-14. Abrams, pp. 169 to 184.

St. Antoine states at pp. 218-220:

> **§ 6.20 Alternative Sanctions Against Employers for Due Process Violations**
>
> **(1) When a specific due process guarantee of the contract has been violated in a significant way, but the relevant law or the contract does not permit an otherwise appropriate make-whole remedy for the employee, an alternative sanction will be imposed on the employer.**
>
> **(2) When a specific due process guarantee of the contract has been violated, but the violation is insufficient to affect the substantive rights of the employee in a significant way, an alternative sanction may be imposed on the employer.**
>
> **Comment:**
>
> This section recognizes that positive contractual obligations are not to be ignored, even when their direct enforcement is blocked by a relevant law, or when a make-whole remedy is inappropriate because the due process violation was not sufficient to deny the employee substantial justice, or when there is a limitation on the arbitrator's powers. The theory is that when the parties provide for a positive obligation, rather than hortatory or aspirational language, they intend to have that obligation enforceable through sanctions. In some instances, the violation is de minimis and does not require an alternative employer sanction. [Emphasis in original]

A split decision such as reinstatement with less than full back pay or some "back pay" without reinstatement, "… is not a compromise, but a clear reflection of the competing interests of the parties in the context of the case." Abrams, p. 181.

When the parties agree to submit a matter to arbitration, they invest the arbitrator with discretion to resolve their dispute in a manner which is appropriate under the circumstances.

Conclusion

Arbitral authority, judicial precedent, and treatises discuss the principle that due process is part of the just cause standard. To meet the just cause standard, employers should provide notice, conduct a thorough investigation, and allow employees a meaningful opportunity to tell their side of the story before imposing discipline. Depending on the CBA language, when procedural safeguards are ignored, arbitrators can reduce or overturn the discipline. ■

ABA ETHICS OPINION 518 AND ITS EFFECT ON MEDIATORS, MEDIATION, AND MEDIATOR PROPOSALS

Paul F. Monicatti

I. Introduction

Last fall the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 518 **(**https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-518.pdf). While it was based on the ABA Model Rules of Professional Conduct for lawyers, nevertheless it impacts mediations conducted by non-lawyers and non-ABA attorneys who act as third-party neutral mediators. The extent of its impact remains to be seen. This article discusses the Ethics Opinion's holdings and the Ethics Committee's comments, their application to mediations with unrepresented parties, and their effect if any on the trend of mediator proposals. First, however, some context for the discussion is offered.

II. Possible Reasons for the Ethics Opinion

There is no legislative history or extrinsic background information for ABA ethics opinions. Presumably, this is to protect the Ethics Committee's confidential and candid deliberations on ethical issues, to insulate the Committee from outside influences, and to make the Opinions self-contained so that they stand on their own. Therefore, we can make only educated guesses on reasons why this particular opinion was issued, including the following:

A. Drawing a line between permissible suggestion and prohibited recommendation by lawyer-mediators.

B. Protecting the fundamental mediation principles of party self-empowerment and self-determination.

C. Growing trend of evaluative mediators such as retired judges and subject matter experts who are accustomed to giving their subjective opinions.

D. Encouraging affordable access to "justice" and our "legal system", including use of:

   1. Mediation without legal representation, and
   2. Limited scope representation whereby parties engage a lawyer to handle only certain designated aspects of a legal matter and the client remains responsible for all other aspects on their own or with the lawyer's advice.

E. Escalating cost of legal representation and litigation, which makes mediation without legal representation an attractive alternative.

F. Prevalence of unrepresented parties in family and probate mediations.

   The growth of artificial intelligence use presents its own set of challenges to mediation, a sort of "the Good, the Bad, and the Ugly" of AI. The Good of AI is that it facilitates direct engagement by unrepresented parties in mediation by giving them confidence that they can submit professional-looking written pre-mediation materials and can competently

participate during mediation without the assistance of lawyers. The Bad of AI is that it frequently misinterprets procedural and substantive law. And the Ugly of AI is its citation of fabricated, inapplicable, or unsupported legal authority as well as faulty legal reasoning.

III. The Ethics Opinion's Three Essential Holdings Regarding A Lawyer's Duties to Avoid Misleading Communications When Acting as a Third-Party Neutral Mediator

A. Under Rule 2.4(b) of the ABA Model Rules of Professional Conduct, a lawyer acting as a third-party neutral *must inform unrepresented parties* that the lawyer-mediator does not represent them (emphasis added).

B. Under Rule 2.4(b), a lawyer-mediator *is required to explain the difference* between the lawyer-mediator's role as a third-party neutral and the role of a lawyer representing a client in a mediation *when the mediator knows or reasonably should know that the parties do not understand the mediation process* (emphasis added).

C. Under Rule 8.4(c), a lawyer-mediator *is prohibited from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation,* or giving credence to statements the lawyer-mediator knows to be false, or personally making statements the mediator knows to be false (emphasis added).

IV. The Ethics Committee's Comments on Its Opinion

A. A lawyer-mediator has a duty to avoid statements that imply that the lawyer-mediator is not neutral but rather is seeking to achieve a party's best interests. A lawyer-mediator's role is to assist the parties in resolving their dispute, regardless of where the interest of the parties may lie.

B. A lawyer-mediator's duty to avoid dishonesty, fraud, deceit, and misrepresentation when communicating with the parties includes avoidance of standard negotiation conventions such as:

1. "Puffery",
2. Statements regarding a party's goals or willingness to compromise,
3. Overstatements or understatements as to value, or
4. Bottom lines.

The rationale behind this is, given the lawyer-mediator's neutrality, parties are likely to trust the lawyer-mediator to play it straight and to not exaggerate or make false statements designed to lead the parties to an agreement.

C. Therefore, it follows that a lawyer-mediator must be both thoughtful and cautious in communicating information from one party to the other and in answering questions that may be asked about the information communicated or about the lawyer-mediator's views of the information.

V. Key Takeaways and Best Practices

A. Lawyer-mediators must be circumspect about what they say because their neutrality increases reliance whereby parties may be inclined to over-rely on mediator authority. After all, a mediator's stock in trade is making personal connections, building rapport, and earning trust and confidence from the parties.

B. Lawyer-mediators must remain totally neutral and act in the interest of process integrity while pursuing a mutually acceptable resolution and not act as lawyer-advocates who serve their client's best interest.

C. The danger to avoid is role confusion by unrepresented or unsophisticated parties, and possibly by mediators themselves who unwittingly can't resist the temptation to eagerly help the parties and give advice so that they can settle their differences and reach closure, move on, and buy their peace.

D. Best practice for lawyer-mediators in every mediation involving unrepresented parties should be to routinely add to their standard written mediation agreement for the parties to acknowledge the caveat that they do not represent any mediation participant and cannot under any circumstance give them any legal advice.

E. Best practice for lawyer-mediators in every mediation involving unrepresented parties should be to routinely add to their standard written mediation agreement for the parties to acknowledge, a detailed explanation of the difference between the lawyer-mediator's role as a third-party neutral and the role of a lawyer representing a client in a mediation. This caveat should be implemented routinely regardless of whether the lawyer-mediator knows or should know that a party doesn't understand the role distinction or the mediation process.

F. Best practice for lawyer-mediators in every mediation should be to always avoid vouching for the veracity of **any information** given by a party or counsel during mediation, not just puffery, statements about their goals or willingness to compromise, value, or best offers.

VI. The Ethics Opinion's Effect on Mediators Who Are Not ABA Members or Are Not Lawyers

According to David Hoffman, former chair of the ABA Section of Dispute Resolution, Harvard Law School lecturer in various ADR courses, and distinguished ADR professional, in his recent article entitled "The ABA's New Ethics Opinion on Mediation: FAQs" (https://mediate.com/the-abas-new-ethics-opinion-on-mediation-frequently-asked-questions/) written after Formal Opinion 518, he discussed these two questions as follows:

A. Regarding non-ABA member lawyers, although most states tend to adhere to the ABA's formal opinions, Opinion 518 is not self-enforcing and therefore serves only as an advisory opinion unless and until it is adopted by a state as a valid application of the legal ethics rules enacted in that state.

B. Regarding non-lawyers, the ABA ethics opinion does not affect them directly. But because of the large numbers of lawyers serving as mediators and the influence of the ABA's ethics opinions on lawyers' conduct, the Opinion could have at least a ripple effect on the interpretation of ethical standards in the mediation community.

ABA ETHICS OPINION 518 AND ITS EFFECT ON MEDIATORS, MEDIATION, AND MEDIATOR PROPOSALS

(Continued from page 19)

VII. The Ethics Opinion's Effect, If Any, On Mediator Proposals - - If Done Right, Mediator Proposals Should Not Violate It So Long as They're:

A. Presented strictly for settlement purposes only as a practical compromise on terms for which the dispute might be settled but not as advice, a recommendation, or prediction of the outcome should the case eventually go to trial. It is an educated guess, based on what the mediator has read, seen, or heard as part of the mediation process, of what might be an acceptable settlement which perhaps disappoints both sides yet it's something they both might be able to live with given the risky alternatives in court.

B. Not evaluating the relative merits or value of a case, which would undermine mediator neutrality - a core value of mediation.

C. Not suggesting that the proposed settlement is in a party's best interest.

D. Conveying only truthful information which helps the parties to conclude for themselves, or even makes it obvious to them, whether a proposed resolution is in their best interest.

E. Relegated to an option of last resort after all other mediator techniques have been exhausted and failed to yield a settlement, again because they potentially undermine mediator neutrality, and only if requested by counsel and/or parties.

F. Not standard operating procedure (SOP) in mediation due to:

   1. At best they could have a chilling effect not only on the parties' candor with the mediator in acknowledging the downsides of their case but also on their problem-solving efforts and generation of their own solutions which are essential principles of mediation.

   2. At worst, savvy negotiators could attempt to manipulate the negotiation process to set up a favorable mediator proposal by withholding information and limiting their offers made during mediation in order to create their desired impasse gap.

   3. Either way, if mediator proposals are SOP, the process is not mediation, it is case evaluation.

VIII. Additional Thoughts on Mediator Proposals

In his article entitled "The Limitations of Mediator Proposals"(https://legalnews.com/Home/Articles?DataId=1588260) written before Formal Opinion 518, this author points out that use of mediator proposals is somewhat controversial within the professional mediation community. For some practitioners, they can be a relatively easy and effective way to break a perceived impasse yet, for others, they undermine core values of mediation, especially party self-determination and mediation neutrality.

This article discusses several other options available to the parties, before resorting to mediator proposals, for them to attempt first which would allow them to retain exclusive control over the outcome instead of deferring to an outside third party. Nevertheless, a limited number of situations for which mediator proposals have been found particularly suitable are noted. Ultimately, the question is whether mediator proposals strengthen or weaken the integrity of mediation and its core values, especially when unrepresented or unsophisticated parties are involved.

In his article entitled "Mediator's Proposals - Done Right" (www.dailyjournal.com/article/390337-mediator-s-proposals-done-right), written after Formal Opinion 518, prominent California mediator Jeff Kitchaven noted that there is a third option to settle a dispute in mediation besides the traditional methods of either the parties reaching a mutually acceptable figure themselves by negotiation or receiving a number from their mediator in the form of a proposal. He calls this third method the vetted mediator proposal, a different kind of partnership between mediator and legal counsel, in which each person plays a vital, active role. As Jeff describes it:

> "In this third paradigm, mediators create the crucible in which lawyers fight for their clients' interests. They negotiate. They test limits. They bluff when they can and compromise when they must. The mediator stewards the negotiation and ensures it reaches its logical end – a number each lawyer can recommend. That logical end can then be put into the form of a mediator's proposal, one which validates, and does not replace, the lawyers' independent judgment about the best available deal."

Obviously, his analysis doesn't contemplate mediation involving unrepresented parties without lawyers to advocate for their best interest. However, it does address the Ethics Committee's concern about lawyer-mediators creating the impression that they will be protecting the parties' interests because that is left for their retained counsel to fight for.

IX. Additional Thoughts on ABA Formal Opinion 518

In another excellent article entitled: "Don't Mislead Mediation Participants: What ABA Formal Opinion 518 Teaches Attorney-Mediators" (https://premiadr.com/2026/02/25/dont-mislead-mediation-participants-what-aba-formal-opinion-518-teaches-attorney-mediators) analyzing ABA Formal Opinion 518, Robert Wright emphasized among other things the added dimension of unrepresented parties participating in court-connected mediations. In such instances, lawyer-mediators must take extra care to explain what neutrality means in practice and then conduct their mediations accordingly. When their participation in mediation is court-ordered, unrepresented parties may feel that they are being guided in mediation by the judicial system itself.

X. Conclusion

The ABA's Formal Opinion 518 protects unrepresented and unsophisticated parties in mediation from getting the mistaken impression that the lawyer-mediator is acting to protect their best interests. It also heightens the awareness of lawyer-mediators to be mindful and pay careful attention to what they say and do in every mediation. And it indirectly affects the use and formulation of mediator proposals. ■

SIXTH CIRCUIT TOP NINE

John G. Adam

1. *NLRB v. Starbucks Corp.*, 159 F.4th 455 (6th Cir. 2025) (Batchelder, Stranch, Readler, JJ.) (NLRB exceeded its authority by awarding expansive "direct or foreseeable" consequential damages in unfair labor practice proceedings).

2. *Brown-Forman Corp. v. NLRB*, 169 F.4th 646 (6th Cir. 2026) (McKeague, Griffin, Mathis, JJ.) (rejecting the NLRB's application of the *Cemex* bargaining-order framework and emphasizing the importance of secret-ballot elections).

3. *Kerwin v. Trinity Health Grand Haven Hosp.*, 174 F.4th 942 (6th Cir. 2026) (Readler, Bush, Boggs, JJ.) (reversing a § 10(j) injunction because the Board failed to establish irreparable harm under the Supreme Court's *Starbucks* standard).

4. *Bruce v. Adams & Reese, LLP*, 168 F.4th 367 (6th Cir. 2026) (Moore, Thapar, Ritz, JJ.) (holding the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act barred arbitration of the plaintiff's entire case, not merely the harassment counts).

5. *DOL v. Americare Healthcare Servs.*, 171 F.4th 838 (6th Cir. 2026) (Stranch, Bush, Davis, JJ.) (upholding Department of Labor overtime regulations affecting home-healthcare workers).

6. *Clippinger v. State Farm*, 173 F.4th 817 (6th Cir. 2026) (*en banc*) (addressing whether insurers may depreciate labor costs when calculating actual cash value in class-action insurance litigation).

7. *U.S. v. Farris*, 171 F.4th 920 (6th Cir. 2026) (Clay, Gibbons, Hermandorfer, JJ.) (affirming sanctions and discussing risks associated with AI-generated legal filings containing fabricated authority).

8. *PCC Airfoils, LLC v. Daugherty*, 2026 WL 1396626 (6th Cir. 2026) (Sutton, Davis, Ritz, JJ.) (reversing denial of a preliminary injunction in a trade-secret and restrictive-covenant dispute).

9. *Rieth-Riley Constr. v. NLRB*, 173 F.4th 269 (6th Cir. 2026) (Moore, Cole, Mathis, JJ.) (enforcing portions of an NLRB order arising from a long-running labor dispute involving Operating Engineers Local 324). ■

Editor's Note: AI-Created Illustrations

Unless identified, individuals, characters, or figures depicted in these AI-created illustrations are fictional and are not intended to represent a real person. The only exception is the Supreme Court Justices.

I WANT TO UPGRADE MY DIET: WHAT TO STUDY

Dr. Joel Kahn

At my preventive cardiology clinic, we present scientific studies to patients on optimal health, and no topic is more contentious than patterns of nutrition. Despite the enthusiasm for meat-based diets, the overwhelming body of data on human and planetary health favors plant diets. However, educating patients is challenging to say the least. When I see a new patient, they get this list of resources. Maybe a lawyer needs to study this too?

EDUCATION TO STUDY AND SHARE WITH FAMILY

Please watch this short video on YouTube:
www.youtube.com/watch?v=9_4vCTekJ4c

Please review these documentaries on YouTube and Netflix:
Forks Over Knives (the classic)
What The Health (many doctors interviewed)
Game Changers Movie (athlete's perspective)
You Are What You Eat (Netflix) (newest and powerful)

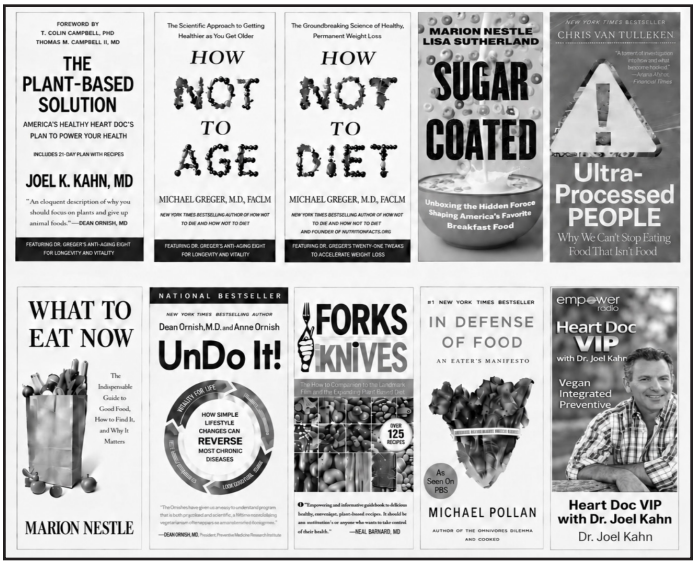
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www.pcrm.org/vegankickstart/getting-started
www.happycow.net

I hope you spend time studying this list, sharing this list, and using it as a platform to upgrade your health. The No. 1 cause of death worldwide is poor diet quality and we have more than enough data to know which dietary patterns are healthy. ■



FAMILY MATTERS: HOW ARTIFICIAL INTELLIGENCE IS IMPACTING THE FAMILY DYNAMIC—AND WHAT MICHIGAN FAMILIES SHOULD KNOW

Amy A. Stawski
Kemp Klein

As a family law attorney, I've seen more than my share of the ways the family dynamic can be impacted by outside forces. The latest impactful outside force is artificial intelligence ("AI"). AI in general, and chatbots specifically, are increasingly taking the place of human interaction and conversation. In fact, in a recent *Harvard Business Review* article, researchers reported that the top use cases of AI today in the U.S. and other similar contexts are no longer just automation or productivity—but companionship and therapy.

In my more than 35 years of practice in family law, I've often seen parents arrange for therapy for children who experience difficulty handling their parents' divorce and the conflict it can engender. Chatbots and AI, however, can sometimes take conflict that is already present within a family and amplify it rather than tamp it down. Most families will not face legal consequences as a result of AI use, but awareness now of the many forms AI can take may help prevent problems later.

There are certain steps you can take if you feel that an AI companion is beginning to interfere with your marriage or family relationships.

1. Do a Little Homework.

Step back and take a fresh look at your family dynamic. Has there been a major change at school or work? Today, you, your spouse, and your children have virtually unlimited online places they can go for resources, answers to difficult questions… and companionship. Although AI can be a valuable complement to human interaction, problems can arise when it becomes a replacement.

2. Discover What's Missing.

According to a recent Brookings report, chatbots are increasingly being used for relationships for one overriding reason: loneliness. Rates of social isolation in the U.S.—especially among young people—are at record highs. Only 13% of U.S. adults now report having ten or more close friends, down from 33% in 1990.

3. Consider How to Solve the Problems You Discover.

In a recent article in *The Atlantic*, Jonathan Haidt, author of *The Anxious Generation*, noted that one technology-related rule he most regrets not enforcing with his children was a strict "no screens in the bedroom—ever." Do all families need to go that far? It depends on what you discover and your ability or willingness to enforce change. From a legal perspective, Michigan courts evaluate parenting decisions through the lens of a child's best interests, including emotional health, structure, and a parent's judgment—not whether a particular technology is used, but how it is used.

4. Kids Aren't the Only Ones Being Negatively Impacted by AI.

Michigan courts have not yet squarely addressed whether a spouse's involvement with an AI companion has any legally relevant impact on a divorce. While Michigan is a no-fault divorce state, conduct may still be considered in certain contexts, such as property division or spousal support. Courts may increasingly be asked to consider what effect, if any, an AI-driven relationship has on the marital relationship or on the financial and emotional stability of the household.

Family courts are not concerned with technology itself, but with how behavior affects emotional well-being, family relationships, and, where children are involved, a child's best interests. Questions may arise as to whether such behavior has meaningfully interfered with parenting time or parental involvement. Courts may also examine financial decisions influenced by AI use. For example, has one spouse made purchases they would historically have discussed with the other? Michigan courts may examine whether significant, unilateral financial decisions—regardless of whether AI was involved—were consistent with how spouses historically managed marital assets or whether one party unilaterally altered the parties' financial status quo.

5. Look for Guidance from a Human You Can Trust.

AI is a new frontier and a rapidly evolving tool. Navigating the impact AI is having in the workplace is challenging enough for most people. What it can do to the family dynamic, however, may hit closer to home. Whether the issue involves family dynamics, child custody, an impending divorce, or another family law concern, scheduling an initial, no-obligation, fact-finding discussion to help individuals and families better understand what they can reasonably expect in terms of options, outcomes, process, and cost is the sensible thing to do.

As new technologies emerge, courts will continue to apply these established standards to new factual scenarios, including those involving artificial intelligence.

My priority as a family law attorney has always been to help clients understand how today's decisions may affect their future—and, where children are involved, their children's best interests. Because family law matters are highly fact-specific, general information—whether from AI or other sources—can never substitute for advice tailored to your particular circumstances. ■



THE EEOC MOVES TO END EEO REPORTING

Peter M. Stein and Marissa Vitolo
Epstein Becker & Green, P.C.

On July 22, 2026, the U.S. Equal Employment Opportunity Commission (EEOC) circulated a proposed rule to formally proceed with rescinding workforce demographic data reporting requirements ("EEO reports"). While this move by the EEOC is not surprising, it represents a major break with the agency's history: the creation of workforce demographic data reporting requirements was one of the first actions the EEOC took after it began operations.

Many employers are likely familiar with the annual data collection mandated by the EEOC. The first of these – EEO-1 reports – requires all private sector employers with 100 or more employees and federal contractors with 50 or more employees (if they meet certain fiscal criteria) to submit workforce demographic data, specifying job category, sex and race or ethnicity. Such reports have been mandatory since 1966.

The proposed rule will rescind the requirement to file EEO-1, as well as EEO-2, EEO-3, EEO-4, EEO-5, and EEO-6 reports. In its reasons explaining the proposed elimination of a 60-year-old process of information gathering, the EEOC makes some big claims, going as far as to assert that such data collection might be unconstitutional.

The Proposed Rule, In Short

To quote the Proposed Rule, the EEOC "has concluded that the collections are overly burdensome, offer insufficient utility, and may be misused." According to the EEOC, some 110,000 employers, 6,000 labor organizations, and more than 17,000 public entities (including state and local governments and public school systems) would benefit from the cost savings associated with a reduced regulatory burden, valued at an estimated aggregate total nearing $275 million in annual savings for these reporting entities. Additionally, the EEOC estimates that administering EEO-1 and other EEO reports costs the agency $5 million per year.

The rule's explanation section asserts that generic data collection is not helpful to effective enforcement of the anti-discrimination laws under the EEOC's jurisdiction. To the contrary, the EEOC has taken the position that EEO reports may actually encourage employment discrimination "against employees who are not considered 'minorities,' may promote racial stereotyping, and may encourage employers to engage in discrimination to avoid potential EEOC enforcement actions or to address perceived inequitable outcomes."

The EEOC argues that targeted, narrowly tailored information requests are better suited to investigating charges of discrimination than routine mass collection of demographic information. Moreover, citing the recent Supreme Court decision in *Ames v. Ohio Dept. of Youth Services*, the EEOC argues that categorizing employees into racial or ethnic categories is "contrary to the *Ames* principle that Title VII prohibits discrimination against 'individuals,' 42 U.S.C. § 2000e-2(a)(1), and that the same protections apply regardless of the particular group to which someone belongs." The EEOC further concludes that reporting race-based classifications may conflict with the U.S. Constitution's Equal Protection clause.

EEO Requirements Remain – and May Change – in Some Jurisdictions

Even though the EEOC is poised to eliminate this annual data collection, employers operating in certain jurisdictions must be mindful that they may still be subject to employment data reporting requirements, and the list of jurisdictions demanding information is growing.

Currently California, Illinois, and Massachusetts collect employment data from covered employers. Last year, in anticipation of the EEOC eliminating EEO reporting, lawmakers in California and Illinois amended their laws to remove any reliance on federal reporting, even though both states have developed their own distinct data collection requirements. However, Massachusetts law as written expressly relies on EEO-1 reports; unless Commonwealth legislators amend the "Act Relative to Salary Range Transparency", employers currently subject to that law may have nothing to file on the February 1 deadline.

Meanwhile, pursuant to a law passed late last year, New York City will soon begin requiring covered employers to report employment data.

Likewise, some Colorado employers will also need to file workforce data, starting next year. In June 2026, Colorado enacted HB 26-1207, which requires private employers with at least 100 workers to file reports with the Colorado Secretary of State. Covered employers will be required to submit "EEO-1 Data" in the same form as federal EEO-1 reports in the form that existed on March 1, 2026, starting on or after July 1, 2027. The statute does not specify whether employers must report Colorado-only employees, Colorado establishments, or enterprise-wide workforce data, and provides rolling deadlines. Importantly, the new law explicitly notes that state reporting will be required even if federal EEO-1 reporting is eliminated.

What's Next?

In light of the EEOC now asserting that its previously required data collection is unconstitutional, state and local laws mandating demographic data reporting may eventually face legal challenges. For now, however, many employers will still need to comply with the growing number of administrative mandates in certain locations.

Meanwhile, the EEOC is expected to publish a final rule after it reviews comments, including those submitted via the federal portal and presented at the August 11, 2026 public hearing held concerning the proposed rule. The EEOC collected more than 2,850 comments about the plan to rescind EEO reporting requirements during the month-long comment period. The final rule will need to address those comments.

Epstein Becker Green Staff Attorney Elizabeth A. Ledkovsky contributed to this report. ■

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- John Adam examines the Supreme Court's ruling permitting pension-plan actuaries to adopt revised actuarial assumptions after the withdrawal-liability measurement date.
- Lee Hornberger contributes two articles: one discussing *Demerse* and the Michigan Court of Appeals' reaffirmation that arbitration rests on consent and ordinarily cannot bind a nonsignatory corporate officer, and another surveying arbitration authorities supporting notice, a fair investigation, and an opportunity to respond as components of contractual 'just cause.'
- Stuart Israel (1) considers legal writing, reader attention span, and the power of "shorth"; and (2) reports on recent law-related news and views you may have missed in *The Wall Street Journal*.
- Paul Monicatti examines ABA Formal Opinion 518's restrictions on lawyer-mediators and considers its implications for neutrality, unrepresented parties, and mediator proposals.

Authors: John G. Adam, Deedee Bitran, Ahmad Chehab, Ashley N. Higginson, Lee Hornberger, Stuart M. Israel, Dr. Joel Kahn, Benjamin L. King, Paul Monicatti, Andrew Niedzinski, Ashley Rahrig, Lauri F. Rasnick, Amy A. Stawski, Peter M. Stein, and Marissa Vitolo