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2026 Employment & Labor Relations Seminar

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Employment Class Actions

Strategies, Challenges, and Emerging Issues

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Wage-and-hour risk: the uninvited repeat guest

Employment class-action exposure remains concentrated in repeatable pay practices and systems.

- Labor and employment matters were 29.6% of surveyed class actions in 2025.
- Wage-and-hour claims represented 23.1% of all filings in the survey.
- Companies devoted 26% of surveyed class-action budgets to labor and employment matters.

Three group claims, three different playbooks

CLASS ACTION

Usually opt-out

Court must certify the group

Rule 23 or state procedure

FLSA COLLECTIVE

Workers opt in

Federal wage-and-hour claims

Each worker files consent

CALIFORNIA PAGA

Civil penalties for the State

Representative claim, no Rule 23 certification

Standing and notice rules apply

First 30 days: keep the data from vanishing

A fast, organized response preserves options and reduces avoidable cost.

- Preserve time, pay, scheduling, personnel, and work-message records.
- Stop routine deletion, including in vendor systems and mobile apps.
- Identify system owners and the people who can explain edits.
- Do not rewrite, backdate, or “clean up” historical records.

Removal: The 30-day clock has no snooze button

- **When a class action lands in state court, assess the federal-court option right away.**
- **Check for a path to federal court**
- **CAFA:** generally requires 100 or more proposed class members, more than $5 million in controversy, and minimal diversity.
- Federal claims may provide a separate basis to remove.
- CAFA exceptions and other jurisdictional limits may apply.
- **Protect the deadline:** The removal deadline is typically **30 days** from service or receipt of the initial pleading—or, in some cases, from a later paper that first shows the case is removable. Send to counsel right away.
- **Removal changes the forum; it does not make the claims disappear.**

PAGA: One employee, many pay periods

California's Private Attorneys General Act

What it is: PAGA lets an employee act on the State's behalf to seek civil penalties for alleged Labor Code violations affecting the employee and other current or former employees.

How it starts: The employee sends notice to both the LWDA and the employer. The LWDA generally has 65 days to say whether it will investigate; if it does not, the employee may file suit.

How it differs from a class action: A representative PAGA claim does not require traditional Rule 23 class certification. It can also be combined with separate wage or class claims.

What changed in 2024: For notices filed on or after June 19, 2024, the employee generally must have experienced each violation alleged. Reforms also expanded cure options and created an early-evaluation process; reasonable compliance steps can reduce potential penalties.

PAGA: reformed, not retired

California's 2024 reforms created new decision points for employers.

- Standing now focuses on violations the employee personally experienced.
- Penalty rules include reductions and limits in specified circumstances.
- Some violations may qualify for cure or early evaluation.
- Notice and filing dates determine which rules apply.

Arbitration: helpful umbrella, no force field

An agreement can change the route. It does not make every claim disappear.

- Confirm who signed, which version applies, and what claims it covers.
- Track opt-outs and keep accessible records of assent.
- Pay arbitration fees on time and document the process.
- Assess PAGA and FLSA exposure separately.

New tech, old question: when was work done?

Workplace systems can create both the risk and the evidence.

- Scheduling and messaging apps can capture work outside a shift.
- Automated timekeeping rules need review, testing, and audit trails.
- AI decisions require clear criteria, human review, and retained records.
- For FLSA exemptions, actual duties matter.

Exposure math: the complaint is not a calculator

Use a range and make the assumptions visible.

- Estimate the group size and relevant time period.
- Test how often the alleged issue actually occurred.
- Separate unpaid wages from penalties, fees, and interest.
- Compare low, middle, and high scenarios.

Settlement: buy clarity, not a mystery box

The best time to resolve a case depends on what the company knows.

- Identify the fact that would change the risk assessment most.
- Consider targeted review or mediation once the data is reliable.
- Compare settlement cost with defense, disruption, and uncertainty.
- Check release scope, notice, allocation, and approval requirements.

Prevention: cheaper than paying for the sequel

The most useful controls are the ones managers can follow every day.

- Audit timekeeping and pay rules against actual practice.
- Train managers to correct missed time and escalate repeat issues.
- Give employees a clear way to report pay or scheduling concerns.
- Fix recurring problems, document the change, and check again.

2026 Class Action Trends

- **Wage-and-hour claims remain a repeat offender**
  Off-the-clock work, break practices, overtime calculations, and worker classification still create exposure when the same practice reaches many employees. Federal contractor-classification rules are also in flux: DOL proposed a new rule in February 2026; it is not final.
- **AI hiring is moving from theory to discovery**
  In *Mobley v. Workday*, an age-discrimination collective action is proceeding, and class certification is being briefed in 2026. Employers should understand what their hiring tools screen, how they are configured, and what decision records are retained.
- **HR tech creates new privacy questions—and a data trail**
  Recruiting, monitoring, and tracking tools raise evolving questions about notice, consent, and data use. The CCPA's private right of action is generally tied to specified security incidents; tracking claims may rely on separate laws, such as CIPA. **Common proof can outweigh individual differences**
- In September 2026, a Colorado federal court certified a wage class based on common pay practices, despite differences in individual damages. Certification did not decide whether the employer violated the law.

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Building a Safer Workplace

Pat Miller

Partner / Taft



Statistics

- Workplace violence is the *third* leading cause of fatal occupational injuries.
- In 2024 there were 5,070 workplace fatalities in the United States.
  - 733 were due to “violent acts.”
    - 470 (64.1%) were homicides (8.7% of all workplace fatalities).
    - 263 (35.9%) were suicides.
  - Although women accounted for 8.1% of all workplace fatalities, they accounted for 15.3% of all workplace homicides.
  - Every year there are over 50,000 non-fatal instances of workplace violence.

Statistics

- Healthcare and social assistance industries have a rate of workplace violence that is five times higher than other industries.
- Other industries with high incidence of workplace violence include convenience stores, construction, and education.

Statistics

Major causes of workplace violence:

- Escalation of a dispute.
- Retaliation.
- Robbery.
- Mental Health.

Legal Framework

Occupational Safety and Health Administration ("OSHA")

- Does not have a standard addressing workplace violence.
- The issue is covered by OSHA's "General Duty Clause" (Section 5(a)(1) of the OSH Act).
  - Requires that employers provide a place of employment that is free from "recognized hazards" that are likely to cause "death or serious harm."
- "Recognized hazards" can be those recognized by the industry or by the actual employer.
- OSHA must also prove feasible measures of abatement.
- Only applies to the employees of the cited employer (not subcontractors).

Legal Framework

Occupational Safety and Health Administration ("OSHA")

- OSHA considers workplace violence to be "any act or threat of physical violence, harassment, intimidation, or other threatening behavior that occurs at the worksite."
  - Includes threats, verbal abuse, assault, and homicide.
  - Although OSHA does not investigate such incidents, workplace violence also encompasses violence toward customer, vendors, and others on an employer's property.

Case Studies

Occupational Safety and Health Administration ("OSHA")

- *Integra Health Management, Inc.*, 2019 WL 1142920 (OSHRC 2019).
  - Employer required its case workers to meet in person with individuals with known mental illness.
  - The Review Commission established a standard that there should be a "general nexus" between the hazard and the nature of the employment.
  - In this case, the hazard arose from the employment itself.

Case Studies

Occupational Safety and Health Administration ("OSHA")

- *UHS of Centennial Peaks,* No 19-1579 (ALJ 2022)
- The ALJ found that OSHA's proposed abatement measures were feasible.
  - Demonstrates that OSHA does have to prove that there is a reasonable way to solve the problem.

Case Studies

Occupational Safety and Health Administration ("OSHA")

- *Perez v. Seaworld,* No. 12-1375 (D.C. Cir. 2014).
  - Trainer was killed by orca.
  - The D.C. Circuit, over Kavanaugh dissent, affirmed.
  - Has led to OSHA under Trump attempting to redefine the General Duty Clause.
    - Proposal would require that the hazard be "inherent and inseparable" from the work at issue.

Case Studies

Occupational Safety and Health Administration ("OSHA")

- *Professional Security Consultants*, No. 22-0597 (ALJ 2024)
  - Mall shooting in Boise, Idaho. Unarmed security guard killed.
  - The employer had extensive training and, more importantly, was tasked with enforcing mall policies in general.
  - ALJ vacated the citation.
    - Hazards were "idiosyncratic and unforeseeable."

Other Legal Frameworks

California

- Senate Bill 553 requires most CA employers to implement a written Workplace Violence Prevention Program, which includes:
  - Hazard assessments;
  - Incident logs;
  - Employee training;
  - Procedures for reporting and responding to workplace violence.

Other Legal Frameworks

Civil Negligence

- Would apply in cases where the victim is not an employee.
  - Duty of care;
  - Breach of that duty;
  - Damages.
- *Pace-O-Matic Case* (Philadelphia County)
  - $15.3 million verdict against gaming company.

What Should Employers Do?

Have workplace violence programs *IN WRITING!!!*

- Zero tolerance:
  - You threaten violence, you're fired.
  - You have a prohibited weapon in the workplace, you're fired.
  - You fight in the workplace, you're fired.

What Should Employers Do?

Have workplace violence programs *IN WRITING!!!*

- Evaluate the workplace for potential workplace violence hazards:
  - Do employees work alone?
  - Do employees work with clients or members of the public who may present a problem?
  - Do employees have to make home visits?
  - Depending on the severity of the risk, different measures may be necessary.
    - Physical requirements (ADA issues)?
    - Have armed employees (Yikes!).
    - Physical barriers/engineering controls.

What Should Employers Do?

Have workplace violence programs *IN WRITING!!!*

- Provide clear instructions for reporting instances:
  - 911 always an option;
  - Evacuation plans;
  - Security measures.

AI and the Self-Represented Employee

John Melcon

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Trends in pro se litigation

***Nippon Life Insurance v. OpenAI*, 1:26-cv-02448 (N.D. Ill, Mar. 2026)**

- Non-prisoner pro se filings in federal court jumped from a long-term pre-AI average of 23,210 (2005 to 2022) to 27,370 in 2023, then 31,478 in 2024, and 41,490 in 2025*
- Another source found the number of unrepresented plaintiffs in federal employment law cases more than doubled between 2021 and 2025, from 2,052 to 4,388 cases†
- Is this good or bad?

**Access to Justice in the Age of AI: Evidence from U.S. Federal Courts*, Anand Shah and Joshua Levy, March 2026

†Lex Machina *2026 Employment Litigation Report* (LexisNexis)

12 Tips for Dealing with Self-Represented Employees Using AI

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Tip #1 – Remember that relying on AI can get *you* into trouble

***Jackson Federation of Teachers v. Fitch*, No. 25-60496 (5th Cir., Oct 22, 2026)**

- "The district court—or perhaps, being charitable, its AI agent—ignored and manipulated governing law, apparently to satisfy a policy agenda"

Tip #2 – Assume AI review of your communications

Don’t be surprised when this happens

Tip #3 – Avoid accusing people of using AI

- Generally, this doesn't accomplish anything helpful
- There are limited exceptions, like breach of a confidentiality policy

Tip #4 – Verify everything

- AI work product comes with a veneer of merit
- AI sycophancy: the tendency of LLMs to validate users
- If facts are stated, confirm them
- If laws and cases are cited, research them
- Don’t just use AI to check AI

Tip #5 – Narrow the issues

- Stay disciplined; separate legal issues from noise
- Keep responses short and focused
- Ask: What really requires a response?
- Don’t be afraid to repeat yourself

Tip #6 – Set and enforce procedural standards

- Consider page or word limits
- Establish a designated point of contact
- Control the schedule and pace

Tip #7 – Use tech-free interactions

- In-person meetings
- Mediation

Tip #8 – Plan for higher litigation costs

- Expect inflated settlement demands
- Prepare for extensive motions practice
- Evaluate insurance coverage

Tip #9 – Demonstrate willingness to go to trial

- Use a different strategy compared to represented parties
- Keep the scheduling order tight; get to discovery quickly
- If there are grounds for dismissal, consider seeking limited discovery those issues

Tip #10 – Build a record

- Keep track of all AI filings and correspondence
- Document mistakes, hallucinations, procedural violations, etc.
- Tabulate all related fees and costs

Tip #11 – Explore discovery into AI usage and prompts

- Remember that AI can create discoverable evidence
- Understand what is privileged: confidential communications made between a client and their attorney for the purpose of securing or providing legal advice
  - Warner v. Gilbarco, 2:24-cv-12333 (E.D. Mich. Feb. 2026)
    - Court: Defendant doesn't get the AI information
  - United States v. Heppner, 25 Cr. 503 (S.D.N.Y. Feb. 2026)
    - Court: Defendant does get the AI information

Tip #12 – Petition the court for cost containment measures

- Courts may require permission for pro se litigants to file pleadings
- Ask to be relieved from the requirement to respond, absent a court order
- Move for sanctions as a last resort

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