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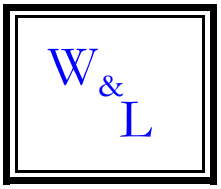
EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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DOL PROPOSES NEW INDEPENDENT CONTRACTOR RULE

The classification of workers as employees or independent contractors is incredibly important to businesses. Employment protection laws do not apply to independent contractors, nor do payroll taxes need to be paid on their work. Much of the recent litigation in this area has focused on app-connected transportation companies, but virtually every company uses independent contractors of some type.

There have been many changes to independent contractor rules over the years, with one rule issued by President Trump's first administration in 2021, and a second rule issued by President Biden's administration in 2024, and now the current proposed rule. The main differences are that President Trump's first administration rule prioritized the factors of control over work and opportunity for profit or loss in determining whether a worker was an employee or an independent contractor. In contrast, President Biden's rule seems to rely not on two core factors but six factors to be used as "tools or guides to conduct a totality-of-the-circumstances analysis:"

> Opportunity for Profit or Loss depending on managerial skill, investments by the worker and the potential employer, the degree of permanence of the work relationship, the nature and degree of control, the extent to which the work performed is an integral part of the potential employer's business, and skill and initiative.

The current proposed rule goes back to many of the concepts of the 2021 rule, particularly the nature and degree of control over the work, and the worker's opportunity for profit or loss based on initiative and/or investment. This would be deemed the two core factors, but the other factors would remain relevant.

The proposal states that in applying the test, actual practice matters more than what is merely contractual. In evaluating the control factor, the Department of Labor (DOL) rejects the previous guidance that a business's imposition of quality standards, and health, safety and insurance requirements upon the worker, is the type of control that is indicative of an employment relationship. The proposed rule also places greater emphasis on whether the worker can realize profits or losses through managerial skills. In evaluating the permanence factor, the current rule conditions a finding of independent contractor status on the worker "being in business for themself and marketing their services or labor to multiple entities," and discounts impermanence that is merely "intrinsic to particular businesses or industries." In evaluating the integral part factor, the standard examines whether the worker is located within the business's production process rather than providing an outside service.

Employers should note that, until a final rule is adopted, the 2024 rule remains operative. At the same time, DOL has already altered its enforcement posture. However, this posture expressly states that the 2024 remains in effect for purposes of private litigation not involving the DOL.

The proposed rule extends its application to the Family and Medical Leave Act (FMLA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

Traditionally, as well as currently, the standard of control relates to whether the company controls the manner and means of how workers perform, as opposed to only the result of the work. The second part of the core analysis pertains to a genuine opportunity for profit or loss based on the exercise of managerial skill.

UPDATES ON NLRB JOINT EMPLOYER RULE

An independent contractor and joint employer have technically different issues, but they have a lot of overlap. The independent contractor standard deals with whether a worker is an employee or independent contractor, while the joint employer standard deals with whether the companies share legal responsibility for the same group of workers. Both standards are in the current news. On February 26, 2026, the National Labor Relations Board (NLRB) formally reinstated its 2020 joint employer standard.

Just like the history under the independent contractor rule changes, the joint employer standard has changed from 2020, where the Trump-era standard found joint employment only when two companies exercised direct and substantial control over the same worker. In 2023, during the Biden era, the NLRB expanded joint employment finding it applied even when based only on "indirect" or "reserved" control. That rule was struck down by a Texas district court ruling, and the Biden-era rule was vacated, but the official regulations had not been updated to reflect the return of the previous rule.

The most immediate effect of the formal reinstatement of the 2020 joint employer rule is that a company is deemed to be a joint employer only if it exercises "substantial direct and immediate control" over the essential terms and conditions of another company's employees. Merely retaining the ability to influence the decisions of another company's decisions dealing with its employees, without actually doing so, is generally insufficient to create a joint employment relationship. Similarly, indirect influence on general operational expectations are not enough to trigger joint employment status.

Editor's Note: It should be noted that there is a fine line between "directing the work" of another entity's workers which is to be avoided, while an entity may set basic standards for a project without crossing the line to joint employment.

DEVELOPMENTS IN USE OF INDEMNITY AGREEMENTS WITH STAFFING AGENCIES

In many situations, employers utilizing staffing companies or other independent contractors to provide workers, enter into contracts with these staffing entities with an indemnity provision. Indemnity provisions would provide, for example, should the entity be sued for a law violation in regards to the workers supplied by the staffing company, the staffing company would indemnify the entity for damages resulting from these situations. While it is not always possible to secure an indemnity provision with staffing companies, most assume that such indemnity provisions are enforceable.

In a recent federal court ruling by a federal district court in Alabama, a company utilizing a staffing company was sued for employment discrimination by the employees of the staffing company, and brought a third-party complaint against three staffing companies relying on the indemnification clauses. Under the circumstances of the case, however, the judge agreed with the plaintiff EEOC's argument that allowing the company to dodge

accountability under Title VII by invoking indemnification clauses with its staffing partners would be inconsistent with federal civil rights laws. The judge stated: "Federal public policy would be undermined if TCI had the ability to tell others to help TCI violate federal law and then pay TCI if TCI got caught." *EEOC v. TCI of Alabama LLC,* Case No. 4:25-cv-00089 (N.D. Ala. 2026).

Editor's Note: The fact pattern was that the defendant company had told the staffing companies to avoid hiring women. Under these facts, the judge accepted the Equal Employment Opportunity Commission's (EEOC) argument that the party seeking indemnification may not instruct a joint employer to violate federal law.

The court did not address a fact pattern that the company utilizing the staffing company's employees did not direct the discriminatory practices.

CARD CHECK BARGAINING ORDER THEORY REJECTED BY APPELLATE COURT

During the Biden administration, a new concept was adopted by the Biden-appointed NLRB in which employers were required to bargain with a union based on a card-check majority rather than having a secret ballot election conducted. In one of the two most controversial rulings during the Biden-era NLRB, the Board rendered a decision basically saying that if an employer committed any unlawful conduct prior to the election, it would prompt the Board to issue a mandatory "bargaining order" requiring union representation utilizing card-check concepts. Additionally, if the company after receiving an NLRB petition for an election did not within two weeks either accept the union or petition the NLRB to conduct an election, the Board would also automatically issue an order requiring the company to recognize and bargain with the union. This *Cemex* case doctrine in essence granted unions a "card-check" law similar to what they had been unsuccessfully seeking for many years in the PRO Act. *Cemex Construction*, 372 NLRB No. 130 (2023).

Ever since the *Cemex* decision was issued in August 2023, employers have hoped to see the NLRB precedent overturned, an issue now pending in the federal Ninth Circuit Court of Appeals. However, on March 6, 2026, the Sixth Circuit Court of Appeals found that the *Cemex* standard was invalid for a different reason, in that it was an improper exercise of the NLRB's adjudicatory authority, and therefore could not serve as a basis for a bargaining order. The Sixth Circuit found that the *Cemex* standard wasn't an adjudication, but instead was a rule of general applicability that the Board deemed necessary to carry out its preferred administration of the Act, not one derived from the facts of the case that was before the Board. The Sixth Circuit felt that this was the type of ruling that instead fits under the Board's rulemaking power, rather than its power to adjudicate cases. *Brown-Foreman Corp. v. NLRB*, Nos. 24-2107/25-1060 (Sixth Cir. 3/1/26).

Editor's Note: In spite of the Sixth Circuit ruling invalidating the *Cemex* case ruling, the result was based on procedural grounds rather than on the grounds of substantive law. Issues like those arising under *Cemex* can still be litigated before the NLRB, but the *Cemex* ruling will no longer be a binding precedent. It is likely that the Trump Administration will seek an NLRB ruling under its adjudicary authority to reverse the results of the *Cemex* ruling, even if it is no longer a binding precedent.

NLRB EFFORTS TO INTERPRET EMPLOYER POLICIES IN A MORE REASONABLE MANNER

In a memo to the NLRB regional offices in late February, NLRB General Counsel Crystal Carey told regional NLRB officials to reduce efforts to police employer handbooks and workplace rules. She stated that the Agency's current priority is to reduce its large case load by being more discriminating in its challenges to employer handbook policies. The Agency will continue to challenge rules that clearly suppress workers' rights, such as bans on discussing pay, but may not go after rules on the margins of the Board's test for offending policies, nor will NLRB agents normally seek copies of employer's handbooks in cases where they are not relevant.

Coincidentally, the NLRB itself, in early March, spoke in a case for the first time about workplace rules since gaining a Republican majority, reversing a precedent set during the Biden NLRB era. The current Board found a contract provision requiring employees to keep the subject and materials of arbitration proceedings confidential, as lawful. The "gag" order in the company's arbitration agreement should be evaluated under a doctrine from President Trump's first administration, not a more-recent standard addressing handbook provisions during the Biden Administration. The Board also noted that the agreement in question contained a savings clause that said it shall not prohibit the discussion of workplace terms and conditions, thus making the provision "appropriately limited in scope," according to the March NLRB ruling. *Pfizer Inc.,* NLRB Case No. 10-CA-175850, 3/4/26.

TRANSGENDER WORKER BATHROOM ACCESS ADDRESSED BY EEOC

On February 26, 2026, the Equal Employment Opportunity Commission (EEOC) ruled that federal employers can lawfully block transgender workers from using bathrooms and changing facilities that align with their gender identity. The EEOC majority concluded that Title VII allows federal agency employers "to maintain single-sex bathrooms and similar intimate spaces," and permits them to "exclude employees, including trans-identifying employees, to opposite-sex facilities."

EEOC Chair Andrea Lucas issued a statement on the same day stating: "Today's opinion is consistent with the plain meaning of 'sex' as understood by Congress at the time Title VII was enacted, as well as long-standing civil rights principles: that similarly situated employees must be treated equally." The opinion noted that: "No federal court has yet authoritatively addressed" either whether Title VII allows workplaces to maintain single-sex bathrooms and intimate spaces, or whether the statute mandates that employers allow transgender employees access to bathrooms and locker rooms "otherwise reserved for the opposite sex."

The EEOC majority also defined "sex" as referring to "an individual's immutable biological classification as either male or female." Further, according to the majority, men and women are "not similarly situated when it comes to using bathrooms and other intimate spaces" at work, "because of their innate physical differences." The majority pointed to what they called bodily privacy interests.

Selina S. v. Driscoll, Appeal No. 2025003976 (U.S. Equal Employment Opportunity Commission, 2/26/26.)

Editor's Note: While this case applies Title VII as interpreted by the EEOC, the court system will make its own determination of what Title VII of the Civil Rights Act requires. Therefore, there is legal risk following the EEOC ruling in this case. One approach is to have either "single-sex" bathrooms or more private places for transgender workers to use.

TPS UPDATE (as of 3/18/2026)

The Trump Administration has acted to terminate TPS status for several countries. Of course, litigation has followed each notice of termination. However, if the Trump Administration continues to follow the law, these terminations will be upheld because the Secretary of Homeland Security has vast discretion to terminate TPS status and courts do not have authority to review the exercise of that discretion. Notably, a person may lose work authorization but still have TPS status.

Burma (Myanmar)

After reviewing country conditions and consulting with the appropriate U.S. government agencies, Secretary of Homeland Security Kristi Noem determined that Burma (Myanmar) no longer met the conditions for its designation for Temporary Protected Status (TPS). See *Termination of the Designation of Burma (Myanmar) for Temporary Protected Status*, 90 Fed. Reg 53378 (Nov. 25, 2025). Burma's TPS designation and related benefits terminated on Jan. 26, 2026. However, on Jan. 23, 2026, a single judge in the U.S. Northern District of Illinois issued an order postponing the Secretary's TPS termination decision, *Aung DOE et al. v. Noem et al.*, No. 25-cv-15483 (N.D. Ill.). The validity of Employment Authorization Documents (EADs) issued under the TPS designation of Burma (Myanmar) with an original expiration date of Nov. 25, 2025, May 25, 2024, or Nov. 25, 2022, is extended until further court action.

El Salvador

See the table below.

Ethiopia

After reviewing country conditions and consulting with the appropriate U.S. government agencies, Secretary of Homeland Security Kristi Noem determined that Ethiopia no longer met the conditions for its designation for Temporary Protected Status (TPS). See *Termination of the Designation of Ethiopia for Temporary Protected Status*, 90 Fed. Reg 58028 (Dec. 15, 2025). Ethiopia's TPS designation and related benefits were slated to terminate on Feb. 13, 2026. However, on Jan. 30, 2026, a single judge in the U.S. District of Massachusetts stayed the Secretary's TPS termination decision. *African Communities Together et al. v. Noem et al.,* No. 26-cv-10278-BEM (D. Mass.). This means that an employer can continue to hire and employ Ethiopians with EADs with June 12, 2024 or December 12, 2025 expiration dates until further court action.

Haiti

Federal courts have ruled that Haitians in TPS status can stay and work beyond the February 3, 2026, date set by the Trump administration. The validity of Employment Authorization Documents (EADs) issued under the TPS designation of Haiti with an original expiration date of February 3, 2026, August 3, 2025, August 3, 2024, June 30, 2024, February 3, 2023, December 31, 2022, October 4, 2021, January 4, 2021, January 2, 2020, July 22, 2019, January 22, 2018, or July 22, 2017 is extended per court order. *Miot et al. v. Trump et al.*, No. 25-cv-02471-ACR (D.D.C.). This means that an employer can continue to hire and employ TPS Haitians with EADs with these expiration dates until further court action. *This case is scheduled for oral argument before the United States Supreme Court in April 2026 with a decision expected by June 2026.*

Honduras
The validity of EADs issued under the TPS designation of Honduras with an original expiration date of Jan. 5, 2018, July 5, 2018, Jan. 5, 2020, Jan. 4, 2021, Oct. 4, 2021, Dec. 31, 2022, June 30, 2024, and July 5, 2025, was extended per district court order. *National TPS Alliance et al. v. Noem et al.*, No. 25-cv-05687-TLT (N.D. Cal.). The Ninth Circuit ruled that the district court was wrong. This means that an employer **cannot** continue to hire and employ TPS Hondurans with EADs with these expiration dates.

Lebanon
See the table below.

Nepal
The validity of EADs issued under the TPS designation of Nepal with an original expiration date of June 24, 2018, June 24, 2019, March 24, 2020, Jan. 4, 2021, Oct. 4, 2021, Dec. 31, 2022, June 30, 2024, and June 24, 2025, was extended per district court order. *National TPS Alliance et al. v. Noem et al.*, No. 25-cv-05687-TLT (N.D. Cal.). The Ninth Circuit ruled that the district court was wrong. This means that an employer **cannot** continue to hire and employ TPS Nepalese with EADs with these expiration dates until further court action.

Nicaragua
The validity of EADs issued under the TPS designation of Nicaragua with an original expiration date of Jan. 5, 2018, Jan. 5, 2019, April 2, 2019, Jan. 2, 2020, Jan. 4, 2021, Oct. 4, 2021, Dec. 31, 2022, June 30, 2024, and July 5, 2025, was extended per district court order. *National TPS Alliance et al. v. Noem et al.*, No. 25-cv-05687-TLT (N.D. Cal.). The Ninth Circuit ruled that the district court was wrong. This means that an employer **cannot** continue to hire and employ TPS Nicaraguans with EADs with these expiration dates.

Somalia
After reviewing country conditions and consulting with the appropriate U.S. government agencies, Secretary of Homeland Security Kristi Noem determined that Somalia no longer meets the conditions for its designation for Temporary Protected Status (TPS). See *Termination of the Designation of Somalia for Temporary Protected Status, 91 Fed. Reg 1547 (Jan. 14, 2026).* Somalia's TPS designation and related benefits were slated to terminate on March 17, 2026. However, on March 13, 2026, a single judge in the District of Massachusetts issued an order staying the Somalia TPS termination. *African Communities Together et al. v. Noem et al.*, No. 26-cv-11201(D. Mass.). This means that an employer can continue to hire and employ Somalia TPS workers with EADs that have the notation A-12 or C-19 under Category and a "Card Expires" date of March 17, 2023, September 17, 2024, and March 17, 2026 until further court action.

South Sudan
After reviewing country conditions and consulting with the appropriate U.S. government agencies, Secretary of Homeland Security Kristi Noem determined that South Sudan no longer meets the conditions for its designation for Temporary Protected Status (TPS). See *Termination of the Designation of South Sudan for Temporary Protected Status, 90 Fed. Reg 50484 (Nov. 6, 2025).* South Sudan's TPS designation and related benefits were slated to terminate on Jan. 5, 2026. However, on Dec. 30, 2025, a single judge in the District of Massachusetts issued an order staying the South Sudan TPS termination. *African Communities Together et al. v. Noem et al.,* No. 25-cv-13939-PBS (D. Mass.). The validity of Employment Authorization Documents (EADs) issued under the TPS designation of South Sudan with an original

expiration date of Nov. 3, 2023, May 3, 2025, or Nov. 3, 2025, is extended per court order. This means that an employer can continue to hire and employ South Sudan TPS workers with EADs with these expiration dates until further court action.

Sudan
See the table below.

Syria
After reviewing country conditions and consulting with the appropriate U.S. government agencies, Secretary of Homeland Security Kristi Noem determined that Syria no longer meets the conditions for its designation for Temporary Protected Status (TPS). *See Termination of the Designation of Syria for Temporary Protected Status, 90 Fed. Reg 45398 (September 22, 2025).* Syria's TPS designation and related benefits were slated to terminate on Nov. 21, 2025. However, on Nov. 19, 2025, a single judge in the Southern District of New York issued an order staying the Syria TPS termination. *Dahlia Doe v. Noem,* 25-cv-8686 (S.D.N.Y.). The validity of EADs issued under the TPS designation of Syria with an original expiration date of Sept. 30, 2025, March 31, 2024, Sept. 30, 2022, or March 31, 2021 is extended per court order. *Dahlia Doe v. Noem*, 25-cv-8686 (S.D.N.Y.). This means that an employer can continue to hire and employ Syrian TPS workers with EADs with these expiration dates until further court action. *This case is scheduled for oral argument before the United States Supreme Court in April 2026 with a decision expected by June 2026.*

Ukraine
See the table below.

Venezuela
After reviewing country conditions and consulting with the appropriate U.S. government agencies, Secretary of Homeland Security Kristi Noem determined that Venezuela no longer meets the conditions for its designation for Temporary Protected Status (TPS), and that the termination of the 2023 Venezuela TPS designation is required as it is contrary to the national interest. On October 3, 2025, the Supreme Court allowed the termination to take immediate effect. TPS beneficiaries who received TPS-related employment authorization documents (EADs), Forms I-797, Notices of Action, and Forms I-94 issued with October 2, 2026, expiration dates on or before February 5, 2025 will maintain work authorization and their documentation will remain valid until October 2, 2026, pursuant to the U.S. District Court for the Northern District of California's order dated May 30, 2025.

Yemen
See the table below.

See table below for other countries:

Country	EAD Auto-Extended Through:	Status Designated Through:
El Salvador*	March 9, 2026	September 9, 2026
Lebanon*	N/A	May 27, 2026
Sudan*	April 19, 2026	October 19, 2026
Ukraine*	April 19, 2026	October 19, 2026

Yemen	May 4, 2026	May 4, 2026

*Employees from these countries may not have work authorization unless they have completed registration and application requirements by certain deadlines. Visit www.uscis.gov/humanitarian/temporary-protected-status for more information.

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