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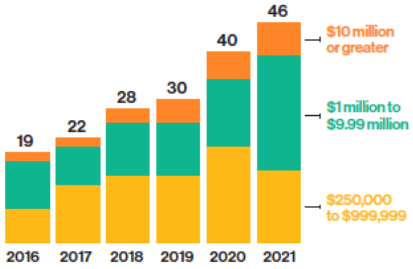
Employment Law Update

Trends From 2016-21

An analysis of Large Loss Reports from 2016 through 2021 shows troubling trends for K-12 schools and higher education institutions.

Damage Awards and Settlement Trends



The number of publicly reported awards or settlements of at least $250,000 has risen each year, from **19 in 2016 to 46 in 2021**.

When compiling this year's report, UE identified **31 awards or settlements of at least $1 million**. That's far more major damage awards and settlements than in prior years.

Of the 31 awards or settlements reported in 2021:

- 11 involved **sexual abuse and molestation**, with awards and settlements ranging from **$1.49 million to $73 million**
- Four involved **retirement plans** (**$5.8 million to $117.5 million**)
- Four involved **accidents or crimes resulting in death** (**$2 million to $8 million**)
- Four involved **false claims or grant-related issues** (**$1 million to $4.8 million**)
- Two involved **discrimination** (**$1 million to $1.46 million**)

This demonstrates that higher awards and settlements are becoming increasingly common.

Meta-Trends

1. Expectations: IHEs seemingly do not/cannot say "no"
2. Era of judicial & political deference is dead
3. Culture wars are intense & IHEs are not viewed as neutrals

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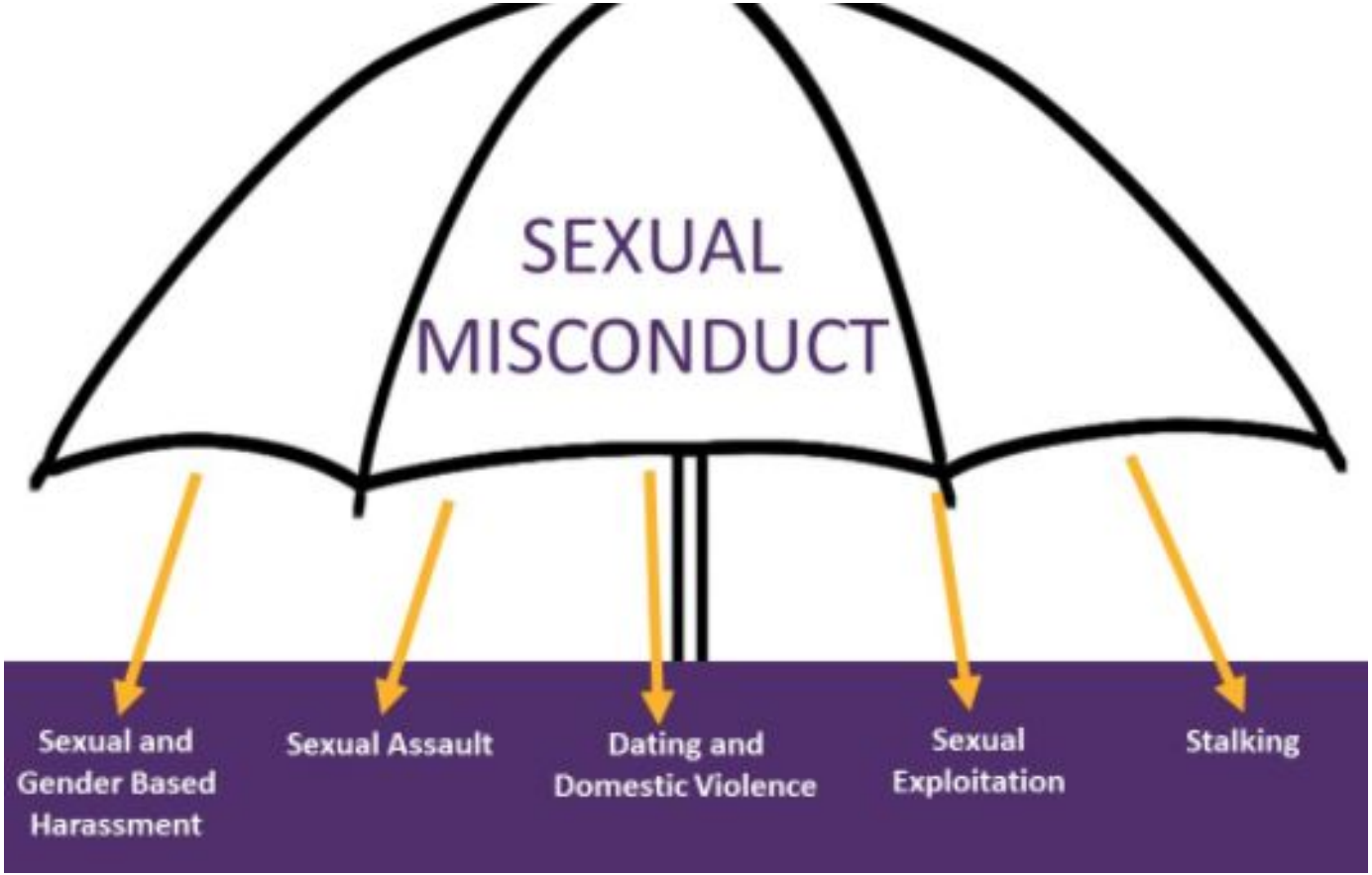


Substantial Recoveries

$13.5M settlement in Lauren McCluskey's case gets initial approval from Utah lawmakers

The amount makes it one of the largest legal settlements in Utah history.

A Dartmouth College student walks across the main campus February 28, 2001 in Hanover, NH.
Photo by Darren McCollester/Newsmakers

Dartmouth's $14 Million Student Harassment Pact Gets Final Nod

July 10, 2020, 4:05 PM

- Suit accused three professors of rampant sexual harassment
- Counsel to get $4.9 million in fees from class settlement fund

Patrick Dorrian
Reporter

Substantial Recoveries

University of Rochester and plaintiffs settle sexual harassment lawsuit for $9.4 million

Accusers alleged retaliation by university in case of linguist Florian Jaeger

27 MAR 2020 · BY MEREDITH WADMAN

CBS NEWS NEWS REMEMBERING 9/11 SHOWS LIVE Login

University of California agrees to $73 million settlement over sex abuse claims against former gynecologist

NOVEMBER 17, 2020 / 7:57 AM / AP

Suggestions

1. **Review**: take time to ask (difficult) questions and understand process and personnel
2. **Evaluate**: Given risk and complexity, are we appropriately staffed?
3. **Emphasize** creating climate where constituents are comfortable reporting
4. **Invest** in research-based* prevention education and programming

OSHA – Emergency Temporary Standard

Sweeping new vaccine mandates for 100 million Americans

By ZEKE MILLER September 9, 2021

A big job for small government agency. Enforce vaccine mandate for 80 million workers

October 3, 2021 · 7:10 AM ET
Heard on Weekend Edition Sunday

ANDREA HSU

3-Minute Listen + PLAYLIST

Not To Be Outdone . . .

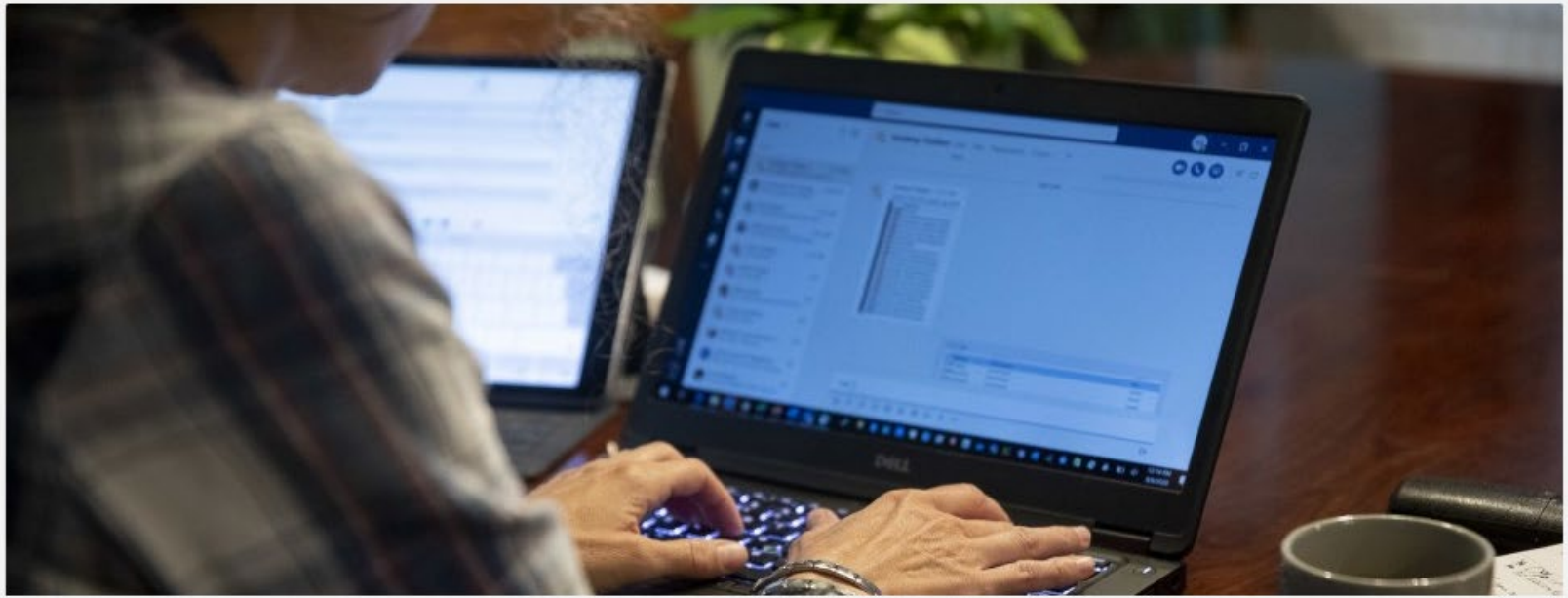
Texas Gov. Greg Abbott bans any COVID-19 vaccine mandates — including for private employers

Abbott also called on the Legislature to pass a law expanding the ban on vaccine mandates.

BY REBEKAH ALLEN OCT. 11, 2021 UPDATED: 9 PM CENTRAL

COPY LINK REPUBLISH

- Title VII and the ADA permit employees to receive exemptions based upon either sincerely held religious beliefs or medical conditions
- EO-40 seems to broaden the scope of permissible objections substantially. It forbids entities from compelling vaccination for individuals that object on three different bases:
  1. for any reason of **personal conscience**;
  2. based on a religious belief, or
  3. for medical reasons, **including prior recovery from Covid-19**.



A person works from home during the Covid-19 pandemic.

Photographer: Daniel Acker/Bloomberg via Getty Images

EEOC Brings Its First Covid-Telework Suit Under Disability Law

Sept. 8, 2021, 9:23 AM

Listen

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EEOC v. ISS Facility Services, Inc.

- In March 2020, requested an accommodation to work from home two days a week as an accommodation for her chronic obstructive lung disease and hypertension.
- ISS placed its staff on modified work schedules where employees worked from home four days per week.
- However, in June 2020, ISS required all staff to return to in-person work at its facility five days per week.
- Provided ISS with documentation indicating that her history of heart conditions increased her COVID-19 risk. The EEOC further alleges that her job duties generally required her to be in close contact with other employees and that other employees had been allowed to work from home following the June 2020 return-to-work.
- **EEOC attempts to use an employers' previous remote working arrangements during the COVID-19 pandemic as evidence that employees should have been permitted to continue to accomplish the essential functions of their employment in a remote capacity.**

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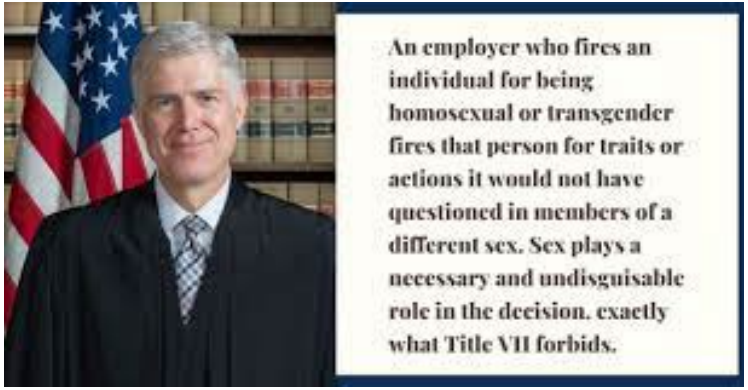

Sexual Orientation and Gender Identity (SOGI) Discrimination

In *Bostock v. Clayton County, Georgia,* No. 17-1618 (S. Ct. June 15, 2020),[1] the Supreme Court held that firing individuals because of their sexual orientation or transgender status violates Title VII's prohibition on discrimination because of sex. The Court reached its holding by focusing on the plain text of Title VII. As the Court explained, "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." For example, if an employer fires an employee because she is a woman who is married to a woman, but would not do the same to a man married to a woman, the employer is taking an action because of the employee's sex because the action would not have taken place but for the employee being a woman. Similarly, if an employer fires an employee because that person was identified as male at birth but uses feminine pronouns and identifies as a female, the employer is taking action against the individual because of sex since the action would not have been taken but for the fact the employee was originally identified as male.

The Court also noted that its decision did not address various religious liberty issues, such as the First Amendment, Religious Freedom Restoration Act, and exemptions Title VII provides for religious employers.

Key Takeaways

- No harassment based on sexual orientation or gender identity, **including** harassment by customers or clients. **This may include intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee.**
- Cannot use customer preference to fire, refuse to hire, or assign work.
- Cannot discriminate because an individual does not conform to a sex-based stereotype about feminine or masculine behavior.
- **Cannot require a transgender employee to dress or use a bathroom in accordance with the employee's sex assigned at birth.**

Texas sues Biden administration over guidance saying transgender workers can use bathroom of their choice

> A federal document also says that misusing a person's preferred pronouns could be considered harassment in some instances. Texas Republican officials have tried to pass state laws targeting transgender people's access to bathrooms and school sports teams.

BY ALLYSON WALLER SEPT. 20, 2021 4 PM CENTRAL

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NEWS

Shawnee State professor's lawsuit could have ramifications for preferred pronoun use and more

Megan Henry The Columbus Dispatch

Published 6:02 a.m. ET April 12, 2021 | **Updated 10:27 a.m. ET April 12, 2021**

View Comments

A lawsuit filed by a Shawnee State University professor could potentially have consequences for students' preferred pronouns on college campuses.

Nicholas Meriwether, a philosophy professor at Shawnee State University reprimanded for calling a student "sir" instead of her preferred pronoun, has won a ruling from U.S. 6th Circuit Court of Appeals that the college's decision infringed on his First Amendment rights. *Shawnee State University*

And it could potentially lead to discrimination in the classroom beyond preferred pronoun use, according to a constitutional law expert and the head of a nonprofit group that advocates for equality for the LGBTQ community.

"If this case were to come out poorly, the implications are devastating, honestly, for young people on college campuses," said Siobhan Boyd-Nelson, Equality Ohio's director of development and external relations.

Meriwether v. Shawnee State Univ. (6th Cir. 2021)

- Philosophy professor and a devout Christian who believes that sex assigned at birth by God cannot be changed, brought 1st Amendment after he received a warning for refusing to address students by their preferred gender pronouns in accordance with the University's nondiscrimination policy.
- Finding that the matter concerned classroom speech, thus foreclosing defendant's *Garcetti* defense ("the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not"), the court determined that speech related to "race, gender, and power conflicts" addresses matters of public concern and that plaintiff's interests in academic freedom, coupled with his core religious and philosophical beliefs, outweighed the University's interest in stopping discrimination against transgender students.
- The court characterized the University's interests as comparatively "weak" in-part because the University had rejected a proposed compromise where plaintiff would refer to transgender students without any identifying pronoun. Plaintiff also prevailed on his free exercise claim based on allegations that the University's application of its gender identity policy was not neutral.

NCAA v. Alston SCOTUS Decision

June 21, 2021 – Upheld certain NCAA rules violated Section 1 of the Sherman Antitrust Act

- Limited issue related to NCAA rules limiting "education-related benefits" with huge implications
- NCAA can no longer rely on NCAA v. Board of Regents of the University of Oklahoma (1984) dicta to support antitrust protection
- Judge Kavanaugh concurring opinion suggests all NCAA compensation rules (e.g., scholarship limits) "raise serious questions under antitrust laws

Alston: Practical Impact

- Contractual agreements with student athletes
- Budgetary Issues – most significant impact of Alston may be re-distribution of economic benefits of athletics from administrators/coaches to athletes – in a changing economic landscape, be wary of long-term commitments
- Tax/Employment Issues – Are student athletes beginning to look more and more like employees?
- Title IX Implications
- Litigation Damages
- International Student Visas – would compensation impact student visa

Classifying college athletes as employees, NLRB memo sets stage for further NCAA destabilization

The NCAA's power continues to diminish as athletes earn more rights and opportunities

By Dennis Dodd Sep 29, 2021 at 5:52 pm ET • 6 min read

- Begins by explicitly stating that university students playing sports should not be misclassified as "mere student athletes" but instead as employees. Such misclassification, leading the students to believe that they do not have statutory protections, is a violation of Section 8(a)(1) of the Act according to the NLRB's General Counsel.
- Citing "contemporaneous societal shifts" and "a dramatic increase in collective action among players," the General Counsel opines that "certain Players at Academic Institutions are employees under the Act and are entitled to be protected from retaliation when exercising their Section 7 rights."
- Because these players "perform services" for their schools "in return for compensation," and because their services are largely subject to their school's control, the players are employees. Specifically, the opinion applies to "the scholarship football players at issue in Northwestern University, and similarly situated players."

A Villanova Wildcats wide receiver catches a pass in a Sept. 9, 2017, game against the Temple Owls.

Photo by Mitchell Leff/Getty Images

NCAA Hit With Another Lawsuit Seeking Pay for Athlete's Play (3)

Johnson v. NCAA (E.D. Pa. Aug.2021)

- Memorandum Decision denying Defendants' Motion to Dismiss.
- Plaintiffs, student athletes at 5 Division 1 colleges and universities, brought a class action lawsuit against the NCAA and 25 colleges and universities, alleging that defendants violated their rights under the Fair Labor Standards Act and attendant state laws by refusing to categorize them as employees for wage and compensation purposes.
- Department of Labor regulations did not foreclose the possibility that student athletes might be employees because the complaint plausibly alleged that (1) Division 1 sports were not conducted primarily for the benefit of student athletes but rather for defendants' monetary benefit; (2) interscholastic athletics are distinct from the educational opportunities and interfered with student athletes' ability to derive maximum benefit from their education; and (3) interscholastic athletics are not among the types of activities that the Department of Labor expressly exempted from the employer-employee relationship.

President Joe Biden rescinds Donald Trump ban on diversity training about systemic racism

Jessica Guynn USA TODAY

Published 6:34 p.m. ET Jan. 20, 2021 | **Updated 4:10 p.m. ET Jan. 26, 2021**

Biden signs new executive orders, says 'now's the time to act' on racial equity

President Joe Biden signed four new executive orders, building on steps taken as part of his campaign promise to create a more equitable society. *Associated Press, USA TODAY*

Legislating Against Critical Race Theory

More than a dozen states considered or passed legislation targeting critical race theory this year. How has this academic concept become so politicized?

By Colleen Flaherty // June 9, 2021

GETTY IMAGES PLUS/HYEJIN KANG

Supreme Court defers decision on reviewing admissions case

High court asks U.S. solicitor general to weigh in on appeal of lower court rulings in Harvard's favor

Harvard says defense costs top $25 million in affirmative action case

3 minute read

By Nate Raymond

Another Slap on the Wrist?

> U New Mexico says it's reopening an investigation into a professor suspended over sexual harassment findings and who was about to return to his duties -- after new reports emerge about the professor's conduct.

By Colleen Flaherty // August 9, 2016

The University of New Mexico will reopen its investigation into a professor who was sanctioned previously for sexual harassment -- after it initially agreed to welcome him back to campus following a suspension.

Cristobal Valencia

"Following recent media reports about a university investigation into claims of sexual harassment in [the] anthropology department, new information has surfaced that we feel must be considered," President Robert Frank said in an emailed statement. "In light of these additional reports, we will thoroughly review the full case again along with any new material that we obtain. As we carefully consider all of the evidence, we promise to take appropriate actions as warranted. ... Let me assure you this issue has our full attention."

Valencia v. University of New Mexico (10th Cir. April 2021)

- Plaintiff, an untenured professor at the University of New Mexico, brought due process, discrimination, and retaliation claims against the Board of Regents and several individual defendants, after he was terminated for cause based on internal findings that he had sexually harassed students, drunkenly assaulted 2 employees, and engaged in other misconduct.
- In disposing of plaintiff's procedural due process claim, the court found that plaintiff's pretermination proceedings satisfied constitutional due process requirements insofar as plaintiff received adequate notice, an explanation of the employer's evidence, and an opportunity to present his side of the story, during which he as accompanied by an attorney.
- The court also affirmed judgment for the defendant on plaintiff's Title VII discrimination and retaliation claims, finding that plaintiff neither satisfied his burden of showing pretext nor demonstrated a causal nexus between a protected activity and an adverse employment action.

Freyd v. Univ. of Or. (9th Cir. 2021)

- Plaintiff alleged that the University discriminated against her based on her sex by paying her less than her male colleagues in violation of EPA, Title VII, and Title IX.
- Specifically, plaintiff alleged that **"retention raises"** for faculty considering moving to a different institution are less likely to go to female professors than male professors.
- Regarding plaintiff's EPA claim, the court held that a reasonable jury could find that plaintiff's proffered comparators performed substantially equal work because they all perform "common core of tasks" such as research, teaching, advising, and committee service.
- There also remained an issue of material fact regarding plaintiff's Title VII disparate impact claim because plaintiff alleged statistical evidence that, when viewed in the light most favorable to plaintiff, shows that there is gender bias in the availability of retention raises.

UO settles equal pay case with retired professor Jennifer Freyd for $450,000

Jordyn Brown Register-Guard

Published 4:18 p.m. PT July 16, 2021 | Updated 10:20 a.m. PT July 17, 2021

View Comments

The University of Oregon and Pioneer Cemetery seen on July 12. *Jeremy Williams/The Register-Guard*

The campus of Northwestern University in Evanston, Ill.

Photographer: Chris Walker/Chicago Tribune/TNS via Getty Images

Certainty Sought From Justices in Northwestern Retirement Fight

Coming Soon?

BRIEF

Despite bank exec's alleged ageist comments, teller's termination wasn't based on age, 6th Cir. says

Published Jan. 22, 2021

By Lisa Burden
Contributor

Fayerollinson

Fired High School Football Coach Appeals Prayer Case to Supreme Court

Nicole Russell / @russell_nm / September 21, 2021

Significant?

- Under the new standard, an employer commits an "unlawful employment practice," if sexual harassment has taken place and "the employer or the employer's agents or supervisors: (1) know or should have known that the conduct constituting sexual harassment was occurring; and (2) fail to take immediate and appropriate corrective action."
- Previously, an employer was entitled to a defense if the employer took "prompt remedial action" in response to the sexual harassment complaint.

Waste Management of Texas, Inc. v. Stevenson (April 2021)

Injured contract worker is employee and can't sue: Court

Louise Esola
May 03, 2021

SHARE REPRINTS

Workers Comp Coverage

A contract worker with a temporary staffing agency can't sue an agency client over his injury because he is considered an employee and therefore the exclusive remedy provision of the Texas Workers' Compensation Act applies, the state Supreme Court ruled Friday.

Robert Stevenson was hired by Taylor Smith Consulting LLC, which was contracted to provide staff on a temporary basis for Waste Management of Texas Inc. In May 2014, Mr. Stevenson was assigned to a Waste Management garbage truck when another employee accidentally backed the truck over Mr. Stevenson's leg and foot, causing a serious injury, according to documents in *Waste Management of Texas, Inc. and Rigoberto Zelaya v. Robert Stevenson*, filed in Austin.

Most Read in Workers Comp

1. OSHA sends draft of vaccine mandate to White House
2. Employers urged to prepare for shot mandate
3. Exclusive remedy for COVID-19 claims hangs in the balance in California case
4. Workplace safety law expands Cal/OSHA reach
5. Student-athlete employment status memo

- Workers compensation tradeoff/Exclusive remedy
- MSA

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