The HR Software Loophole: How the Industry Has Escaped Liability for Employment-Related Harms

Elizabeth C. Tippett±

29 STAN. TECH. L. REV. 219 (2026)

ABSTRACT

Corporate employers rely on human resources ("HR") software for tasks like applicant selection, timekeeping, payroll, benefit management, and productivity monitoring. When that software causes or contributes to wage theft or employment discrimination, employers have been largely unsuccessful at obtaining indemnification or contribution from software companies. This article reveals how software-related actors have evaded liability under both state and federal law through (1) statutory coverage limitations under the Fair Labor Standards Act ("FLSA") and Title VII of the Civil Rights Act ("Title VII"); (2) case law precluding indemnification under FLSA and Title VII; (3) judicial enforcement of limitation of liability provisions in software contracts; and (4) judicial application of the economic loss doctrine to tort claims.

Because HR software companies rarely incur liability for their role in employment law violations, they have little incentive to invest in precautions that would reduce the likelihood of harm. Closing any of the loopholes described

---

± I am grateful for comments from Sachin Pandya, Keith Cunningham-Parmeter, Tolulope Odunsi-Nelson, Jordan Larias Cohen, Tim Glynn, and Noah Zatz. Thank you also to Hayley Cloyd and Christopher Kittilson for research assistance, as well as Varsha Nekkanti, Nancy An and the other editors at STLR.

above would force software companies to internalize the costs the software imposes on workers.

TABLE OF CONTENTS

INTRODUCTION

Companies use software to perform many HR tasks. They have used software to process payroll for decades, through companies like ADP.[1] Employee timekeeping and scheduling software have also been around for some time.[2] Employers use software to aggregate HR information, administer benefits, and monitor employee productivity.[3] As many commentators have observed,[4] companies increasingly use third-party software[5] to recruit, select, hire, and

---

[1] STATISTA, HR TECH: A STATISTA REPORT ON THE GLOBAL MARKET FOR DIGITALIZED HUMAN RESOURCES SOLUTIONS 2 (2023) https://www.statista.com/study/85007/hr-tech/ [https://perma.cc/K32C-DLQ3] (last visited Sept. 17, 2025) (the adoption of HR tech "began with payroll software and other accounting tasks but has expanded to include all aspects of HR."); *see also* Coffey v. OK Foods, Inc., 649 F. Supp. 3d 741, 742 (W.D. Ark. 2023) (describing software-enabled onboarding).

[2] *See, e.g.*, John F. Murphy Homes, Inc. v. Mgmt. Info. Tech. Corp., No. 22-2728, 2023 WL 6293648, at *1 (D. Md. Sept. 26, 2023) (itemizing different software vendors); Jones v. CareCentrix, Inc., No. 3:23-CV-1071, 2024 WL 3638240, at *3–4 (D. Conn. Aug. 2, 2024) (itemizing some thirteen programs that customer service representatives in the healthcare industry were required to open or log into at the start of their shifts); McHugh v. DLT Sols., Inc., 618 F.3d 1375, 1378 (Fed. Cir. 2010) (referring to a "software suite comprised of twenty-six software applications" at the armed services as of 2003 "for all its personnel management needs").

[3] Pauline Kim & Matthew Bodie, *Artificial Intelligence and the Challenges of Workplace Discrimination and Privacy*, 35 ABA J. LAB. & EMP. L. 289, 302 (2021) (discussing the privacy related implications of AI); Valerio De Stefano, *'Negotiating the Algorithm': Automation, Artificial Intelligence and Labour Protection*, 41 COMPAR. LAB. L. & POL'Y J. 15, 27 (2019) (discussing privacy related intrusion); Leora Eisenstadt, *#MeTooBots and the AI Workplace*, 24 U. PA. J. BUS. L. 350, 352 (2022) (automated surveillance of workplace communications for HR policy violations); Keith Sonderling & Aram Gavoor, *A New Approach to Measuring AI Bias in Human Resources Functions: Model Risk Management*, 54 SETON HALL L. REV. 965, 970 (2024) ("AI-powered tools seek to predict how a candidate might interact with their new co-workers, identify current employees' existing and potential skills, track productivity, assess workers, as well as pick who might receive valuable, career-changing, upskilling, and reskilling opportunities").

[4] Kim & Bodie, *supra* note 3, at 292 (recounting implementation of AI for HR-related tasks); Jeffrey Hirsch, *Future Work*, 2020 U. ILL. L. REV. 889, 891, 928–31 (2020) (discussing employer monitoring capabilities); Brishen Rogers, *The Law and Political Economy of Workplace Technological Change*, 55 HARV. C.R.-C.L. L. REV. 531, 532, 568 (2020) (noting the use of artificial intelligence "to monitor and manage workers in new ways"); Jenny R. Yang, *Adapting our Anti-Discrimination Laws to Protect Workers' Rights in the Age of Algorithmic Employment Assessments and Evolving Workplace Technology*, 35 ABA J. LAB. & EMP. L. 207, 211 (2021).

[5] Mobley v. Workday, Inc., 740 F. Supp. 3d 796, 802 (N.D. Cal. 2024) (recounting plaintiff's

onboard applicants,[6] often on an automated basis[7] and increasingly with the assistance of artificial intelligence.[8]

The global market for human resources software was estimated at around $60 billion in 2022, [9] and is expected to expand to more than $90 billion,[10] in part due to the integration of artificial-intelligence based features intended to both augment and displace HR employees.[11] The vast majority of companies in the HR software space—more than 90%—are well-established companies that

---

allegations that he applied for 80–100 jobs by first locating postings on third-party websites, such as LinkedIn, that redirected him to the Workday platform on employers' websites, and that numerous positions also required him to take a Workday-branded assessment or personality test).

[6] Bhoj v. OTG Mgmt. LLC, No. A-0628-21, 2022 WL 2794086, at *1 (N.J. Super. Ct. App. Div. July 18, 2022) (describing how the new employee "training schedule included a thirty-minute block for employees to complete HR paperwork in Dayforce, OTG's electronic onboarding program"); Tanner v. Tax Servs. of Am., Inc., No. 25-CV-01940, 2025 WL 1580737, at *1 (N.D. Cal. June 4, 2025) (describing how employees were "instructed to create an online account on TSA's personnel management system, Dayforce, in order to complete paperwork"); Sonderling & Gavoor, *supra* note 3, at 970 ("Companies are already using AI-powered tools to write job descriptions, screen resumes, chat with applicants, conduct job interviews, and even predict whether a candidate will accept an offer.")

[7] Ian Carroll & Sam Curry, *Would you like an IDOR with that?: Leaking 64 million McDonald's job applications*, IAN CARROLL, https://ian.sh/mcdonalds [https://perma.cc/7MES-BB49] (last visited Jan. 21, 2026) (screenshot of McDonald's personality test, which contained an avatar looking at abstract art and asked participants to indicate whether "Don't understand paintings" is "Me" or "Not Me").

[8] *See* Rogers, *supra* note 4, at 564 (discussing some early uses of "algorithmic assessments" of applicants); Carroll & Curry, *supra* note 7; Yang, *supra* note 4, at 211; Chris Chambers Goodman, *Algorithmic Bias and Accountability: the Double B(l)ind for Marginalized Job Applicants*, 96 U. COLO. L. REV. 501, 506 (2025); Bradford Kelly, *Wage Against the Machine: Artificial Intelligence and the Fair Labor Standards Act*, 34 STAN. L. & POL'Y REV. 261, 270 (2023) (describing the use of AI in wage and hour software); Veena Dubal, *Data Laws at Work*, 134 YALE L.J. FORUM 405, 436 (2025) (recounting the problem of dynamic wage setting through algorithmic management); Richard Bales & Katherine Stone, *The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance*, 41 BERKELEY J. LAB. & EMP. 1, 9 (2020). *See generally* Andy Greenberg, *McDonald's AI Hiring Bot Exposed Millions of Applicants' Data to Hackers who tried the Password '123456'*, WIRED (July 9, 2025), https://www.wired.com/story/mcdonalds-ai-hiring-chat-bot-paradoxai [https://perma.cc/Z6RR-M85U].

[9] STATISTA, *supra* note 1, at 13.

[10] *Id*. at 2.

[11] Belle Lin, *IBM CEO says AI Has Replaced Hundreds of Workers but Created New Programming, Sales Jobs,* WALL ST. J. (May 6, 2025 at 13:34 ET), https://www.wsj.com/articles/ibm-ceo-says-ai-has-replaced-hundreds-of-workers-but-created-new-programming-sales-jobs-54ea6b58 [https://perma.cc/VVU5-EEMH]; Pia Singh, *How some of the biggest U.S. companies are using AI to cut workers*, CNBC (Aug. 13, 2025 at 12:58 ET), https://www.cnbc.com/2025/08/13/how-some-of-the-biggest-us-companies-are-using-ai-to-cut-workers.html [https://perma.cc/XJW2-GMY7].

have been in business more than ten years.[12] These include large companies like Workday (32 billion market cap),[13] ServiceNow (94 billion market cap),[14] UKG, formerly known as Kronos (privately held, annual revenue $4.3 billion),[15] and ADP (83 billion market cap).[16] The market also includes a variety of related businesses and specialists that provide software-related consulting, implementation services, integration, and product support. I refer to HR software companies and these related service providers collectively as "software-related" actors or companies.

Software-related actors can cause and contribute to employment harms in a variety of ways. The most prominent example of software-related HR failure arose from a 2021 ransomware attack on UKG, valued at an estimated $22 billion.[17] During the six-week ransomware outage,[18] thousands of corporate clients lost access to employee hours information necessary to generate payroll, as well as the ability to continue to track employee hours.[19] These employers were forced to use a variety of stopgap measures to estimate employee pay, such as paying everyone overtime,[20] repeating old paychecks,[21] paying workers

---

[12] STATISTA, *supra* note 1, at 9.

[13] *Workday, Inc.,* YAHOO! FINANCE, https://finance.yahoo.com/quote/WDAY/ [https://perma.cc/JR78-VTGN] (last visited May 18, 2026).

[14] *ServiceNow, Inc.,* YAHOO! FINANCE, https://finance.yahoo.com/quote/NOW/ [https://perma.cc/K2VZ-BLSB] (last visited May 18, 2026).

[15] *PAYROLL SERVICES*, UKG (Sep. 2024), https://www.ukg.com/sites/default/files/2024-09/UKG-Payroll%20Services-NEAT%20report-Sept24.pdf [https://perma.cc/PU36-N9B4].

[16] *Automatic Data Processing, Inc.,* YAHOO! FINANCE, https://finance.yahoo.com/quote/ADP/ [https://perma.cc/LE7F-TMUF] (last visited May 18, 2026).

[17] Amended Complaint at 6, *In re* UKG Inc. Cybersecurity Litig., No. 3:22-CV-00346 (N.D. Cal. Mar. 10, 2022), ECF No. 33; Aegis Senior Cmtys. LLC. v. UKG Inc., No. 23-CV-01076, 2024 WL 4093912, at *1 (N.D. Cal. Sep. 4, 2024).

[18] *Aegis Senior Cmtys.,* 2024 WL 4093912, at *6.

[19] Complaint at 1, *In re* UKG Inc. Cybersecurity Litig., No. 3:22-CV-00346 (N.D. Cal. Jan. 18, 2022).

[20] Albert v. Honda Dev. & Mfg. of Am., 792 F. Supp. 3d 855, 858 (S.D. Ohio 2025) (involving automaker Honda paying all employees 40 hours of regular wages plus 3 hours of overtime when they lost access to their data due to the Kronos outage).

[21] Robinson v. Maricopa Cnty. Special Health Care Dist., 696 F. Supp. 3d 769, 771 (D. Ariz. 2023); Smith v. Sodexo, Inc., No. CV PX-22-00984, 2024 WL 446258, at *1 (D. Md. Feb. 6, 2024).

based on scheduled hours,[22] or using spreadsheets[23] or paper[24] to track employee hours. These companies were then sued by their employees for failing to timely pay earned wages and overtime.[25]

However, UKG faced only minimal liability for the cascade of harms that flowed from the outage. A multidistrict lawsuit brought by affected workers against UKG settled for only $5 million—a modest sum given that "thousands of companies and millions of workers" were likely affected by the breach.[26] The settlement did not cover wage and hour claims by these workers, and only compensated class members for "out-of-pocket expenses" incurred as a result of the privacy breach, like bank fees or credit monitoring, as well as "up to four hours of lost personal time" "spent responding to the…cyberattack."[27] Follow up claims by employees and UKG clients against the company to recover wage-related losses and penalties have been almost uniformly unsuccessful.[28]

Software can also contribute to wage and hour violations in other ways. For example, the software settings may not properly conform to state law such as by failing to properly compensate workers for meal and rest breaks.[29] Although

---

[22] Futrell v. Cargill, Inc., 661 F. Supp. 3d 903, 907 (D. Minn. 2023).
[23] Gaul v. Accura Health Ventures, 651 F. Supp. 3d 1054, 1058 (S.D. Iowa 2023) (assisted living facility affected by Kronos outage switched to using spreadsheets to calculate pay and was later sued on a collective basis for its miscalculated payments).
[24] Surles v. Wexford Health Sources, Inc., No. 2:22CV1376, 2024 WL 885075, at *1 (W.D. Pa. Mar. 1, 2024) (used paper timesheets and filled in the informational gap by repeating hours calculations for two pay periods).
[25] *See also* Taylor v. UKG, Inc., 693 F. Supp. 3d 87 (D. Mass. 2023) (nurse's union filed a claim against Kronos for data breach and related wages owed pursuant to a collective bargaining agreement); Wash. State Nurses Ass'n UFCW 3000 v. MultiCare Health Sys., 28 Wash. App. 2d 288 (2023) (wage and hour lawsuit based on efforts to recoup overpayments); Rodriguez v. PPG Indus., No. CV 22-838, 2023 WL 2435476, at *1 (W.D. Pa. Jan. 27, 2023), *report and recommendation adopted in part, rejected in part*, No. CV 22-838, 2023 WL 2422189 (W.D. Pa. Mar. 9, 2023), ECF No. 23 (alleging that employer "failed to accurately pay its non-exempt employees during the outage period").
[26] Complaint at 1, *In re* UKG Inc. Cybersecurity Litig., No. 3:22-CV-00346 (N.D. Cal. Jan. 18, 2022) (alleging that the outage "affect[ed] thousands of employers and millions of employees").
[27] Unopposed Mot. for Preliminary Approval of Class Action Settlement at 3, *In re* UKG Inc. Cybersecurity Litig., No. 3:22-cv-00346 (N.D. Cal. 2022), ECF No. 68-2, Ex. 1 (filed Apr. 28, 2023) (the settlement fund also compensated up to "$7,500" for losses due to fraud or identity theft that are "more likely than not caused by and fairly traceable to the . . . cyberattack.").
[28] *See* discussion *infra* at Parts III-V.
[29] Mercury Air Grp., Inc. v. Kronos Inc., No. CV 18-04139, 2019 WL 6721596, at *4 (C.D. Cal. Oct. 16, 2019); Wilder v. Kroger Co., No. 1:22-CV-681, 2025 WL 3292305, at *1 (S.D. Ohio Nov. 26, 2025).

the mistake may have been attributable to a negligent employer, it also could be attributable to the software's design, a third party responsible for software implementation, or the software support services responsible for troubleshooting.[30]

Software design can also function as a kind of public nuisance,[31] enabling harmful wage and hour practices such as rounding, automatic break deductions, allowing managers to decline to authorize payment for overtime already worked, or by making it excessively easy for managers to alter an employee's timecard without notification to the affected employee.[32] In one recent case, 33,000 healthcare workers won a $230 million jury verdict against their non-profit employer, Providence Health, for wage and hour violations due to rounding and automatic break deductions available through UKG's timekeeping software.[33]

As a district court in Ohio observed in a class action against grocery chain, Kroger, "when small problems arise in the payroll systems used to compensate [workers at large companies], those small problems can become larger, have widespread effect, and far-reaching impact on innumerable employees across

---

[30] Veritas Pers. Servs., Inc. v. ADP Totalsource, Inc., No. 1:19-cv-22435, 2019 WL 11506033, at *6 (S.D. Fla. Oct. 21, 2019); *see also* Bahshoota v. Metro. Cmty. Coll. Fort Campus, No. 8:23-CV-450, 2025 WL 1412485, at *1 (D. Neb. May 15, 2025) (plaintiff alleged that "employer's timekeeping software inaccurately recorded the time that the plaintiff clocked in" and she was consequently fired for being late); Bennett v. Providence Health & Servs., No. 86321-5-I, 2025 WL 3003723, at *1 (Wash. Ct. App. Oct. 27, 2025); Kelly, *supra* note 8, at 270, 280–82 (describing how "AI is being used for automated timekeeping in which software 'tracks when workers sign in and out of work' and then determines their total pay for a set period" and how AI can expose employers to FLSA liability).

[31] Public nuisance is an intentional tort arising from a "substantial and unreasonable interference with a right held in common by the general public, in use of public facilities, in health, safety and convenience." DAN DOBBS, PAUL HAYDEN, & ELLEN BUBLICK, THE LAW OF TORTS § 403 (2d ed. 2016). Nuisance arises from misuse of real property that interferes with the enjoyment of others. Here, I use the concept of public nuisance to refer to the third-party harms that problematic software imposes on affected employees.

[32] Elizabeth Tippett et al., *When Timekeeping Software Undermines Compliance*, 19 YALE J. L. & TECH. 1 (2017); Elizabeth Tippett, *How Employers Profit from Digital Wage Theft Under the FLSA*, 55 AM. BUS. L. J. 315, 394-95 (2018) (discussing case law relating to rounding, automatic break deductions, and time shaving).

[33] Bennett v. Providence Health & Servs., 2025 WL 3003723, at *1. *See also* Thomas v. Mitsubishi Elec. Auto. Am., Inc., No. 1:24-CV-422, 2025 WL 2959527, at *1 (S.D. Ohio Oct. 20, 2025) (class action based on software-enabled rounding practices); Martinez v. Elegante Servs., Inc., No. 24-CV-2058, 2025 WL 3281405 (S.D.N.Y. Nov. 25, 2025) (class action based on automatic break deductions).

multiple states."[34] In that case, a "glitch" in "a new timekeeping and payroll system called MyTime . . . resulted in a significant number of employees being underpaid (and some being overpaid)."[35] Kroger voluntarily paid workers $10.5 million to fix the problem, and settled subsequent litigation for $5 million to class members and $5 million in legal fees.[36]

Software also plays an increasingly central role in recruiting, selecting, hiring, and evaluating workers.[37] Many scholars have noted the growing risk that the software does not comply with antidiscrimination law.[38] These commentators caution that artificial intelligence can "reproduce human biases or introduce new forms of bias" depending on both the implementation and the data used to train the model.[39] AI models can behave in discriminatory ways even when the "protected attributes like race or gender" are stripped from the dataset by "relying on proxies for a protected characteristic."[40] The increasing use of AI to evaluate and select applicants is particularly troubling, as the AI's selection mechanism is opaque and possibly unknowable to the primary employer.[41] However, software companies have not been successfully sued for

[34] Wilder v. The Kroger Co., 2025 WL 3292305, at *1.
[35] Id.
[36] Id. at *2.
[37] STATISTA, *supra* note 12, at 8 (the adoption of HR tech "began with payroll software and other accounting tasks but has expanded to include all aspects of HR."); *see also* Charlotte Alexander & Elizabeth Tippett, *The Hacking of Employment Law,* 82 MISSOURI L. REV. 973 (2017); Charlotte Alexander, Anna Haley-Lock & Nantiya Ruan, *Stabilizing Low-Wage Work*, 50 HARV. C.R.-C.L.L. REV. 1, 8 (2015) (describing the growth of just-in-time scheduling); Lisa Bernt, *Workplace Transparency Beyond Disclosure: What's Blocking the View?*, 105 MARQ. L. REV. 73, 74 (2021).
[38] Hirsch, *supra* note 4, at 893-94; Rogers, *supra* note 4, at 564; Ifeoma Ajunwa, *An Auditing Imperative for Automated Hiring Systems*, 34 HARV. J. L. & Tech. 622, 635 (2021) (describing the "potential for misuse" of "automated hiring" systems); Kim & Bodie, *supra* note 3, at 294; Michael LeRoy, *Algorithmic Bias in Hiring: Amending Title VII to Prohibit AI Discrimination*, 51 J. LEGIS. 261, 269 (2025); Lori Andrews & Hannah Bucher, *Automating Discrimination: AI Hiring Practices and Gender Inequality*, 44 CARDOZO L. REV. 145, 168, 174, 184 (2022) (discussing the "gendered impacts" of resume scanning technology, one-way video interviews, and the use of video games in employee selection); Kristen Egger, *Artificial Intelligence in the Workplace: Exploring Liability under the Americans with Disabilities Act*, 60 WASHBURN L. J. 527, 533 (2021) (focusing on the risks AI poses to ADA compliance in employee selection and hiring).
[39] Kim & Bodie, *supra* note 3, at 294.
[40] *Id.*
[41] Ajunwa, *supra* note 38, at 629; Goodman, *supra* note 8, at 509; Hirsch, *supra* note 4, at 939-41; Rogers, *supra* note 4, at 564 (discussing some early uses of "algorithmic assessments" of

their role in discriminatory employment practices, with one exception: the ongoing *Mobley v. Workday* case,[42] discussed in Part I, *infra*.

This article contributes to the growing literature of employment law commentary on the role of software[43] and AI[44] in employment practices by examining the case law that applies to the HR software context.[45] This jurisprudence is hiding in plain sight, in the form of unsuccessful claims brought by corporate employers—and in rare cases, employees—against HR software companies.[46] To date, the HR software industry has escaped liability for almost all legal harms to employees that were caused in whole or in part by design flaws, security problems, implementation errors, false advertising, and other negligent acts.

Part I of this article itemizes the challenges associated with holding software companies directly liable under federal employment statutes, particularly the

---

applicants); Keith Sonderling, Bradford Kelley & Lance Casimir, *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 UNIV. OF MIAMI L. REV. 3, 5 (2022) (assessing the use of "AI in employment decision-making [which] triggers foreseeable risks concerning discrimination throughout the employment lifecycle"); Valerio De Stefano, s*upra* note 3, at 28; Darrell Gay & Abigail Kagan, *Big Data and Employment Law: What Employers and Their Legal Counsel Need to Know*, 33 ABA J. LAB. & EMP. L. 191, 206 (2018); Bales & Stone, *supra* note 8, at 27; Charles Sullivan, *Employing AI*, 63 VILL. L. REV. 395, 404 (2018) (noting the additional problem of proving intent under Title VII when an algorithm can't be said to possess motives).

[42] Order Granting Preliminary Collective Certification, Mobley v. Workday, Inc., No. 23-cv-00770, 2025 WL 1424347 (N.D. Cal. May 16, 2025).

[43] Timothy Glynn, *Apployment*, 61 HOUS. L. REV. 1, 18 (2023) (describing technology enabled disaggregation that may produce a "generation of 'employeeless employers."); Samantha Prince, *The Shoe is About to Drop for the Platform Economy: Understanding the Current Worker Classification Landscape in Preparation for a Changed World*, 52 U. MEM. L. REV. 627, 647 (2022) (describing the global challenge of regulating app-based work); Kenneth Dau-Schmidt, *The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law*, 69 UNIV. CHICAGO L. F. 63, 69 (2017) (discussing the "impact of IT on the organization of production"); Rogers, *supra* note 4; Ron Brown, *Robots, New Technology, and Industry 4.0 in Changing Workplaces: Impacts on Labor and Employment Laws*, 7 AM. U. BUS. L. REV. 349, 358 (2018) (assessing implications of new technology across different areas of labor and employment law).

[44] Jeremias Adams-Prassl, *Automation, Artificial Intelligence, and Labor Law*, 41 COMP. LAB. L. & POL'Y 123, 132 (2019) (discussing algorithmic management).

[45] For articles exploring related questions of software-related liability outside the employment context, *see* Farshad Ghodoosi, *Crypto Litigation: An Empirical View*, 40 YALE J. ON REG. BULL. 87, 97 (2022-2023) (empirical assessment of different theories and volume of crypto-related litigation from 2018-2022); Mihailis Diamantis, *Employed Algorithms: A Labor Model of Corporate Liability for AI*, 72 DUKE L.J. 797, 797 (2023) (arguing that "some algorithms should be treated, for liability purposes, as corporate employees").

[46] Prior literature has examined direct suits by employees. *See* LeRoy, *supra* note 38, at 285 (discussing *Mobley v. Workday*).

FLSA and Title VII. Part II examines the additional obstacles that employers face when they attempt to pursue third-party claims for indemnification or contribution against software-related actors in employment claims.

Part III considers contract claims asserted by employers seeking reimbursement from software-related actors for settlements or judgments in lawsuits brought by employees. Although breach of contract claims brought by employers against software companies are often doctrinally sound, they are ineffective at reallocating losses due to limitation of liability provisions commonly present in such contracts, which courts routinely enforce.

Part IV addresses tort remedies, such as negligence and fraud. Courts commonly dismiss these claims under the "economic loss" doctrine. This loosely defined doctrine alternately stands for the proposition that parties may not assert a negligence claim based on economic damages alone, and that parties cannot sue in tort for harms arising from a contract. While some lawsuits have succeeded on fraud theories, they tend to be asserted against software integrators rather than the underlying software makers.

Part V turns to broader questions of policy. First, it outlines the incentives produced by a system where software-related parties almost always avoid liability for employment-related harms. It then considers potential policy reforms, informed by the jurisprudence summarized in Parts I through IV. While much of the extant scholarly commentary proposes amendments to existing statutes, new legislation, or voluntary measures,[47] a more doctrinally grounded approach suggests that the problem could be addressed through corrections to the application of existing law.

---

[47] Scholars have proposed a variety of legal reforms to address the problem of algorithmic or AI-based discrimination. *See e.g.*, Anjunwa, *supra* note 38, at 661 (recommending an audit-based approach); Andrews & Bucher, *supra* note 38, at 200 (arguing that "Given the limits of AI-assisted hiring technologies, a ban is an appropriate approach and would avoid the need to challenge the practices one by one in front of the FTC"); LeRoy, *supra* note 38, at 286 (recommending amendments to Title VII); Sonderling and Gavoor, *supra* note 3, at 970 (proposing a model validation approach, possibly through voluntary compliance); Yang, *supra* note 4, at 228 (proposing an auditing system, and a workers' bill of rights for algorithmic decisions); Chambers Goodman, *supra* note 8, at 504 (recounting the challenges of regulating AI); Kelly, *supra* note 8, at 303 (recommending that the Department of Labor adopt guidance on AI); Dubal, *supra* note 8, at 445 (assessing data transparency laws in the worklaw context).

I. COVERAGE HURDLES UNDER THE FLSA AND TITLE VII

Software can cause or contribute to violations of wage and hour law and antidiscrimination law. Wage and hour claims are enforced through the federal Fair Labor Standards Act of 1938 and related state law, while antidiscrimination claims are enforced through Title VII of the Civil Rights Act, the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and similar laws.

Coverage poses a central challenge to any employee attempting to sue software-related actors under federal employment laws. These statutes tend to be structured around assigning rights to "employees" against "employers." Employees affected by software-related harms are generally employed by the corporate-end user that purchased the software and may have little to no relationship with the software-related actor.

Subparts A and B, below, discuss jurisprudence that applies to the question of whether a software-related actor could be covered under wage and hour law and antidiscrimination law. In both contexts, there is limited case law specific to software-related actors. However, there is substantial jurisprudence in both realms regarding statutory coverage, which can inform an assessment of whether a software-related actor could plausibly be covered by the statute.

Wage and hour jurisprudence is quite unfavorable to coverage of third parties because applicable multifactor tests focus on whether the affected worker qualifies as an "employee" of the entity. By contrast, antidiscrimination law is far more favorable from a coverage standpoint, due to jurisprudence that interprets "employer" to include third-party "agents" of the primary employer.

Coverage limitations primarily affect employees' ability to bring lawsuits against software-makers. However, coverage is also implicated in statutory claims for indemnification and contribution brought by employers, which are discussed in Part II. In such cases, courts focus on the intended beneficiary of the statute, and whether Congress intended to provide a contribution remedy for employers.

A. Wage and Hour Law

The Fair Labor Standards Act provides for a federal minimum wage and an overtime premium for hours worked in excess of forty hours.[48] The FLSA can be enforced through a private right of action by affected employees or through an enforcement action by the federal Department of Labor.[49] Plaintiffs can also obtain liquidated damages equal to the amount of unpaid wages, unless the employer can show the "act or omission giving rise" to the claim was made in "good faith" and that it had "reasonable grounds for believing" the act was lawful.[50]

State wage and hour law can provide additional protections, such as a higher minimum wage, provisions for meal and rest breaks, the right to be paid one's hourly rate for every hour worked, and penalties for failure to pay wages on a timely basis.[51] Indeed, the majority of states provide for a higher minimum wage than federal law, making state law the primary remedy for minimum wage violations in those states.[52] For simplicity, however, the analysis below is confined to federal law.

The FLSA defines "employee" to mean "any individual employed by an employer,"[53] and the term "employ" "includes to suffer or permit to work."[54] The "suffer or permit" language gave rise to the economic realities test for employment status. The economic realities test considers whether the putative employer "(1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records,"[55] among other factors. Although the test is meant to be broad, it does not appear to encompass circumstances where

---

[48] 29 U.S.C. §§ 206, 207(a)(2).
[49] 29 U.S.C. § 216(b), (c).
[50] 29 U.S.C. §§ 260, 216(b).
[51] *See, e.g.*, N.Y. Lab. Law § 652 (2023) (minimum wage); Del. Code Title 19 § 707 (2025) (meal breaks); Cal. Lab §§ 510, 512.1 (2025) (overtime for work in excess of 8 hours a day and meal breaks); Or. Rev. Stat. § 652.120(1) (2025) (regular paydays, employers must pay "all . . . the wages due and owing" to employees).
[52] *State Minimum Wages*, NAT'L CONF. OF STATE LEGISLATURES, (Jan. 5, 2026) https://www.ncsl.org/labor-and-employment/state-minimum-wages [https://perma.cc/QES7-JB78].
[53] 29 U.S.C. § 203(e)(1) (2018).
[54] *Id.* § 203(g).
[55] Orozco v. Plackis, 757 F.3d 445, 448 (5th Cir. 2014) (citation omitted).

employers delegate a single function to a third party—such as maintenance or records, or pay determinations—but the third party is otherwise entirely uninvolved in the work relationship.

In the FLSA context, both statutory language and applicable jurisprudence support the proposition that more than one entity might meet the definition of "employer."[56] This is most commonly presented as "joint employment" where multiple entities jointly control the work of a particular employee,[57] such as a temp agency and a worksite,[58] or a contractor and subcontractor.[59] Joint employment tends to be quite difficult to establish, however, in contexts where only one of the two entities actually exercises direct control over the worker, such as a franchisor-franchisee relationship.[60]

The joint employment test is focused on the "total employment situation" and "economic realities," and consists of a multifactor test examining various forms of control that a putative employer might exert, such as hiring, firing,

---

[56] 29 U.S.C. 203(d) (defining employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee"); Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947), Ling Nan Zheng v. Liberty Apparel Co., 617 F.3d 182, 186 (2d Cir. 2010),; 42 U.S.C. § 2000e(b) (1991); Salinas v. Comm. Interiors, Inc., 848 F.3d 125, 133-49 (4th Cir. 2017); Browning-Ferris Indus. of Cal. v. NLRB, 439 U.S. App. D.C. 170, 182 (2018).

[57] Harrison v. Soave Enters. L.L.C., 826 F. App'x 517, 520 (6th Cir. 2020) (citation omitted) (two entities could be deemed "'so intertwined that they constitute[d] a single employer' under the ADA").

[58] Michael Harper, *Using the Anglo-American Respondeat Superior Principle to Assign Responsibility for Worker Statutory Benefits and Protections,* 18 WASH. U. GLOB. STUD. L. REV. 161*,* 196 (2019) (itemizing common types of joint employment relationships, including "where one employer both generally controls the work and compensation of the employees as a service to a set of customers who have some discretion to direct the service").

[59] *Salinas*, 848 F.3d at 144 (2017).

[60] Timothy P. Glynn, *Taking the Employer out of Employment Law?: Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 101, 104 (2011) (noting that third-party suppliers generally cannot be held liable "unless regulators or workers can demonstrate that sufficient control is being exercised by the end-user firm to

create "employer" status"); Andrew Elmore and Kati L. Griffith, *Franchisor Power as Employment Control*, 109 CAL. L. REV. 1317, 1322 (2021) ("joint employer claims against franchisors usually fail"); Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 GEO. WASH. L. REV. 907, 934 (2018) (itemizing the challenges in applying joint employment principles in the franchisor-franchisee relationship, which focuses heavily on the amount of "day-to-day supervision" exercised by the franchisor); Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. 1, 28 (2024) (noting the challenges of holding franchisors liable under employment law).

setting work rules, supervision, and records maintenance.[61] In recent years, some circuits have implemented a two-step joint employment inquiry that includes the economic realities test as well as the relationship between the businesses—such as whether the work was integral to the other's manufacturing process; whether the work was performed predominantly for the other entity; whether the entities share the power to hire or fire; and ownership and investment in equipment and facilities.[62]

The statutory coverage language under the FLSA also includes "any person acting directly or indirectly in the interest of an employer in relation to an employee."[63] The phrase "acting in the interest of" would seem to include third parties acting as agents of employers. However, agency alone is not sufficient for coverage under the FLSA. Coverage will still depend on whether the agent qualifies as an "employer" under the "joint employment" test or "economic realities" test.[64]

Software vendors traditionally do not fit the mold for "joint employers."[65] They rarely exercise direct control over workers, and have largely served as the means through which employers accomplish an end that they themselves determine.[66] For example, in *Kroeck v. UKG*, the court assessed whether software-maker UKG qualified as a joint employer as a "third-party payroll software provide[r]."[67] The court concluded that UKG did not qualify as an employer given that it lacked "the ability to hire or fire" staff, "implement work

[61] *In re* Enterprise Rent-a-Car Wage & Hour Employment Practices Litigation, 683 F.3d 462, 469 (3d Cir. 2012); Zheng v. Liberty, 355 F.3d 61, 72 (2nd Cir. 2003)
[62] *Zheng*, 617 F.3d 182 at 184 (2d Cir. 2010); Layton v. DHL Express Inc., 686 F.3d 1172, 1178 (11th Cir. 2012); *Salinas*, 848 F.3d at 141-42 (2017).
[63] 29 U.S.C. § 203.
[64] Fegley v. Higgins, 19 F.3d 1126, 1131 (6th Cir. 1994) ("we have noted that more than one 'employer' can be simultaneously responsible for FLSA obligations. The court determines as a matter of law whether a party is an employer using an 'economic reality' test."); United States DOL v. Cole Enterprises, 62 F.3b 775, 778 (6th Cir. 1995).
[65] *Salinas*, 848 F.3d at 141-42 (2017); Browning-Ferris Indus. of Cal. v. NLRB, 439 U.S. App. D.C. at 182 (2018); *Zheng,* 617 F.3d at 184-86 (2d Cir. 2010); Harper *supra* note 58, at 195, (discussing formulation of joint employment in the Restatement of Employment Law); Elmore, *supra* note 60, at 940-942 (discussing case law describing the joint employer test).
[66] *Cf*. Elmore, *supra* note 60, at 932 (in the context of franchisor-franchisee relationships, "courts have limited joint employer liability to franchisors that exercise day-to-day supervision over franchise stores or that control the policy or business tool that causes the harm").
[67] Kroeck v. UKG Inc., No. 2:22-CV-00066, 2022 WL 4367348, at *3 (W.D. Pa. Sept. 21, 2022).

rules" or "engage in the day-to-day supervision of hospital staff."[68] The court also concluded that control over workplace records does not necessarily support joint employer status if the employer "had the ability to pay its staff, absent the software at issue, but chose not to."[69]

It is, however, possible that software companies could qualify as joint employers where they provide both software and additional temp agency or professional employer organization ("PEO") services. Temp agencies and PEOs are commonly treated as statutory employers under the FLSA, [70] and the contract between the parties often treats them as the employer of record. In *Veritas v. ADP*, payroll services provider ADP provided both software and PEO services.[71] In that case, ADP contributed to the client's failure to pay overtime by providing incomplete wage and hour advice and software that failed to flag the problem.[72] Although the affected employees did not sue ADP directly under wage and hour law, ADP's PEO role presumably would have established coverage under the FLSA.

As software companies increasingly displace temp agencies and PEOs,[73] or—like ADP—combine software with related HR services, they may fall within the coverage of the FLSA. Otherwise, they are unlikely to be covered.

B. Federal Antidiscrimination Law

A variety of federal and state statutes protect employees from discrimination, including Title VII, the ADEA, the ADA, and many others. These statutes provide a private right of action to affected employees and can also be enforced by the Equal Employment Opportunity Commission.

---

[68] Id.
[69] Id.
[70] Scalia v. Emp. Sol. Staffing Grp., 951 F.3d 1097, 1101 (9th Cir. 2020); Barfield v. New York City Hospitals, 537 F.3d 132 (2d Cir. 2008).
[71] Order on Mot. for Summ. J., No. 1:19-cv-22435, 2020 WL 7493186, at *1 (S.D. Fla. Nov. 2, 2020).
[72] Id. at *5.
[73] See, e.g., Cognizant Worldwide Ltd. v. Barrett Business Services Inc., No. C19-1848, 2020 WL 6434835, at *2 (W.D. Wash. May 7, 2020) (describing software serving that function).

As with the FLSA, coverage under major employment discrimination statutes tends to be limited to "employers."[74] Title VII and the ADA, however, also cover "agents" of employers.[75] Title VII additionally prohibits discrimination by "employment agenc(ies)," defined as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person."[76]

Although the FLSA contains similar language about agency, antidiscrimination jurisprudence diverged from wage and hour law on the question of whether a third-party agent might qualify as an "employer" in the absence of a traditional master-servant relationship with the employees at issue. This separate interpretation arises from a footnote in the Supreme Court's 1978 Title VII decision in *City of L.A. Department of Water & Power v. Manhart*.[77] The case involved a discrimination case against a municipal water department for "requir[ing] its female employees to make larger contributions to its pension fund than its male employees."[78] Although the factual record was somewhat thin, the water department appears to have delegated decision-making authority regarding contribution rates to an outside Board of Commissioners, who were individually named in the complaint.[79] The Court declared that the gender-based contribution rates violated Title VII, and then assumed—in a footnote—that a third-party "agent" of the employer (the Board of Commissioners) was covered by the statute.[80] It did so without assessing whether the agent must also independently qualify as an employer, through the common law "control" test or a "joint employer" test.[81]

[74] Glynn, *supra* note 43, at 108-09.
[75] 42 U.S.C. § 2000e(b); 42 U.S.C. § 12111(5)(A) (defining employer as "a person engaged in an industry affecting commerce who has 25 or more employees . . . and any agent of such person").
[76] 42 U.S.C. § 2000e(c).
[77] 435 U.S. 702, 718 n.33 (1978).
[78] Id. at 704.
[79] *Id.* at n.2.
[80] *Id.*; *But see* Tolar v. Bradley Arant Boult Commings, LLP, No. 19-11546, 2014 WL 12836011, at *7 (11th Cir. 2021) (N.D. Ala. 2014) (citing case law that "agent" refers only to "the employer" and "not to the individual agents or employees whose conduct gives rise to the violation of the act" and "is to be based on principles of agency.")
[81] *Manhart*, 435 U.S. 702 at n.33.

Several circuits have elaborated on this principle in contexts where third parties performed employment-related functions.[82] In these cases, the third-party agent did not need to qualify as an "employer" under the common law test. Instead, as long as the employer "delegated control of some of the employer's traditional rights, such as hiring or firing, to a third party, the third party has been found to be an 'employer' by virtue of the agency relationship."[83] A 1994 First Circuit case, *Carparts Distribution Center v. Automotive Wholesaler's Association*, included an in-depth discussion of third-party coverage under the ADA, which the court interpreted to have the same agency-based coverage as Title VII. [84]

Carparts involved an employee who sued a third-party benefits provider for disability discrimination for excluding AIDS-related conditions from health insurance coverage.[85] The First Circuit ruled that the third party could be covered as an "agen[t]" under the ADA if it "act[ed] on behalf of the entity in the matter of providing and administering health benefits."[86] The First Circuit

---

[82] Williams v. City of Montgomery, 742 F.2d 586, 589 (11th Cir. 1984) (a personnel board that decided appeals from the city's personnel decisions deemed "agent of the City"). Noah Zatz discussed a structurally similar challenge—though not specific to the software context—as a problem of "disaggregated discriminatory intent" in contexts involving "third parties with discriminatory intent." Noah Zatz, *Managing the Macaw: Third Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1416 (2009).

[83] *Williams*, 742 F.2d at 589 (quoting Schlei & Grossman, *Employment Discrimination Law*, at 1002 (2d ed. 1983)); *see also, e.g.*, Holiday v. City of Chattanooga, 206 F.3d 637, 645 (6th Cir. 2000) ("employers do not escape their legal obligations under the ADA by contracting out certain hiring and personnel functions to third parties"); Satterfield v. Tennessee, 295 F.3d 611, 618 (6th Cir. 2002). *But see* United States EEOC v. AIC Sec. Investigations, 55 F.3d 1276, 1282 (7th Cir. 1995) ("individuals who do not otherwise meet the statutory definition of 'employer' cannot be liable under the ADA").

[84] Carparts Distrib. Ctr. Inc. v. Auto Wholesaler's Ass'n of New England Inc., 37 F.3d 12, 16 (1st Cir. 1994). Notably, the Americans with Disabilities Act includes a provision prohibiting employers from "participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee . . . to . . . discrimination." 42 U.S.C. § 12112(b)(2). *See also* 42 U.S.C. § 12203(b) (prohibits interference with an individual's exercise or enjoyment of a right).

[85] *Carparts Distrib. Ctr. Inc.*, 37 F.3d at 17-18. *But see* Williams v. Grimes Aero. Co., 988 F. Supp. 925, 936 (D.S.C. 1997) (interpreting "agent" as "an unremarkable expression of respondeat superior—that discriminatory personnel action taken by an employer's agent may create liability for the employer.")

[86] *Carparts Distrib. Ctr. Inc.*, 37 F.3d at 18. *See also* Brown v. Bank of Am., N.A., 5 F. Supp. 3d 121, 135 (D. Me. 2014) (benefits administrator could potentially qualify as an "agent" of employer for purposes of the ADA); E.E.O.C. v. Benicorp. Ins. Co., No. IP 00–014–MISC, 2000

also offered a separate basis for coverage, declaring that the benefits provider could be an "employer" if "they exercised control over an important aspect of his employment"[87] such as the "authority to determine the level of benefits."[88] The focus of the inquiry was distinct from the common law master-servant control test, which holistically examines the putative employer's control over many aspects of the work.[89] Instead, the third party could become an "employer" if the primary employer delegated a core employment function to the third party.[90]

In so ruling, the First Circuit seemed to be addressing a market reality of the time, where many employers delegated benefits management to third-party providers. The court surmised that such benefit providers "exist solely for the purpose of enabling entities such as Carparts to delegate their responsibility to provide health insurance."[91] Although the court did not explicitly comment on

---

WL 724004, at *4 (S.D. Ind. May 17, 2000) (holding that "an employer's agent who otherwise meets the statutory definition of an employer [could] be held liable under the ADA," where "otherwise meets" referred to threshold coverage issues).

[87] *Carparts Distrib. Ctr. Inc.*, 37 F.3d at 17. *See also Satterfield*, 295 F.3d at 611; Alam v. Miller Brewing Co., 709 F.3d 662, 669 (7th Cir. 2013) (summarizing the Title VII jurisprudence regarding "agency" liability) (quoting *Carparts Distrib. Ctr. Inc.*, 37 F.3d at 17 (citation omitted)); Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d. 1054, 1063 (2d Cir. 1982), *vacated on other grounds,* 463 U.S. 1223 (1983), *reinstated and modified on other grounds,* 735 F.2d 23 (2d Cir. 1984) (citation omitted); Nealey v. Univ. Health Servs., 114 F. Supp. 2d 1358, 1367 (citation omitted); Dittmann v. Quest Diagnostics, Inc., 756 F. App'x 616, 617-18 (7th Cir. 2019) (health screening provider for employer did not qualify as "agent" because it did not "control" employee's benefits); Deal v. State Farm Cnty. Mut. Ins. Co. of Tex., 5 F.3d 117, 119 n.3 (5th Cir. 1993); Swallows v. Barnes & Noble Book Stores, 128 F.3d 990, 996 (6th Cir. 1997). Nelson v. Wal-Mart, No. 23-CV-3012, 2023 WL 6465377, at *6 (S.D. Ill. Oct. 4, 2023) (permitting plaintiff to proceed against third-party entity that appears to have managed employer's leaves of absences and workers' compensation claims); Bradley v. City of Lynn, 403 F. Supp. 2d 161, 169 (D. Mass. 2005) (state human resources division could qualify as an "employer" of municipal firefighters for purposes of Title VII because it "extensively control[led] the hiring of municipal firefighters and police officers.").

[88] *Carparts Distrib. Ctr. Inc.*, 37 F.3d at 17.

[89] *Id.* at 16 ("The issue before us is not whether defendants were employers of Senter within the common sense of the word"). *Cf*. Krouse v. American Sterilizer Co., 984 F.Supp. 891, 908 (W.D. Pa. 1996) (workers compensation carrier not a third-party employer under the ADA because it "does not control the level of benefits provided to injured employees or their decedents, as those levels are statutorily prescribed").

[90] The agent-employer must also meet the other coverage requirements of the statute, such as engaging in an industry affecting commerce and employing more than the minimum threshold number of employees specified in the statute. *See* DeVito v. Chi. Park Dist., 83 F.3d 878, 882 (7th Cir. 1996).

[91] *Carparts Distrib. Ctr. Inc.*, 37 F.3d at 17; Rodriguez v. P.R. Marine Mgmt. Inc., 975 F. Supp. 115, n.23 (D.P.R. 1997) (summarizing jurisprudence as to whether a third-party plan administrator qualifies as an "employer").

the policy implications at stake, they were not hard to deduce from the fact pattern involving an AIDS patient denied health coverage. If third parties were wholly beyond the reach of antidiscrimination law, it meant that these agencies could profit by discriminatorily denying coverage to third-party employees without consequence. Moreover, holding the primary employer liable for discrimination could be challenging if it was not involved in the decision to deny coverage. The employee would have no meaningful remedy, and market incentives would favor delegating employment decisions to reckless third parties.

Other appellate and district courts have taken a similar approach to the First Circuit, although they tend to consolidate the two separate theories of third-party liability, characterizing the third party as a covered agent-employer if the primary employer delegates control over an important aspect of employment to a third party. For example, in *Williams v. City of Montgomery*, the Eleventh Circuit cited a statute that granted a third-party board the power to determine pay, evaluate probational employees, and determine a transfer, promotion, and reinstatement plan.[92] That document provided sufficient evidence of the board's power to "exercise duties traditionally reserved to the employer," rendering it covered by the statute.[93] Likewise, in *Spirt v. Teachers Insurance & Annuity Association*, the Second Circuit determined that TIAA-CREF—a third-party retirement provider—was covered by Title VII as an "agent" of the employer because the employer had "delegate[d]…responsibility for employee benefits" to TIAA.[94]

The D.C. Circuit, Fourth Circuit, and Sixth Circuit have followed a separate theory for third-party liability characterized as "indirect liability" for "interference with an individual's employment with third parties."[95] Under this

---

[92] *Williams*, 742 F.2d at 589.
[93] *Id.*
[94] Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated and rem'd on other grounds,* 463 U.S. 1223 (1983), *reinstated and modified on other grounds,* 735 F.2d 23 (2d Cir. 1984).
[95] Bender v. Suburban Hosp., Inc., 159 F.3d 186, 188 (4th Cir. 1998); *Satterfield*, 295 F.3d 611 at 617 (discussing ADA liability for third parties who "significantly affected access . . . to employment opportunities."); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973); Christopher v. Stouder Mem'l Hosp., 936 F.2d 870, 876 (6th Cir. 1991) (noting a third-party hospital that revoked nurse's access privileges qualified as an employer under Title VII). *See also* Michael H. LeRoy, *Algorithmic Bias in Hiring: Amending Title VII to Prohibit AI Discrimination*, 51 J. LEGIS. 261, 282 (2025) (discussing *Sibley*).

theory, third parties that "exert significant control over an individual's access to or terms and conditions of employment" "can be considered an 'employer' despite the absence of a common-law employment relationship with the individual."[96] The most common context in which this theory has applied involved a third party serving as a gatekeeper for the plaintiff's access to employment.[97] This theory has not gained universal acceptance among circuits, and more recent jurisprudence from the First Circuit declined to extend the principle to claims against third parties responsible for credentialing or examination.[98]

Only one case has thus far applied the above theories of third-party coverage to an HR software company: *Mobley v. Workday*, an ongoing federal collective action in California.[99] In *Mobley*, a job applicant rejected from "over 100 positions with companies that use Workday's screening tools" sued software maker Workday directly for employment discrimination under Title VII, the ADEA, and the ADA.[100] Mobley survived a motion to dismiss, arguing that Workday qualified as an "agent" of the employers that used its service.[101]

The district court held that the term "agent" under Title VII could include third parties "when the employer has delegated…functions that are traditionally exercised by an employer."[102] The court reasoned that the complaint "plausibly alleges that Workday's customers delegated their traditional function of rejecting candidates or advancing them to the interview stage to Workday."[103]

---

[96] United States v. New York State Dep't of Motor Vehicles, 82 F. Supp. 2d 42, 47 (E.D.N.Y. 2000) (applying the "indirect liability" theory of employment but ultimately concluding that defendant state actors did not qualify as "employers").

[97] *Sibley Mem'l Hosp.*, 488 F.2d at 1342 (D.C. Cir. 1973) (finding that a third-party hospital covered as an "employer" because it controlled access to the plaintiff's employment opportunities); Doe ex rel. of Doe v. St. Joseph's Hosp., 788 F.2d 411, 422 (7th Cir. 1986); LeRoy, *supra* note 38, at 282 (discussing *Sibley*).

[98] Lopez v. Massachusetts, 588 F.3d 69, 88-89 (1st Cir. 2009) (discussing interference theory, noting that the First Circuit declined to apply it in *Carparts*, and declining to apply it to a state human resources division responsible for promotional exams).

[99] Mobley v. Workday, Inc., 740 F. Supp. 3d, 796, 802-14 (N.D. Cal. 2024); LeRoy, *supra* note 44 at 285 (discussing the *Workday* case); Mobley v. Workday, Inc., 2025 WL 1424347, at *11 (granting preliminary collective certification).

[100] *Mobley*, 740 F. Supp. 3d at 802-14.

[101] *Id.* at 814.

[102] *Id.* at 804 (citing Williams v. City of Montgomery, 742 F.2d 586, 589 (11th Cir. 1984)).

[103] *Id.* at 805.

The changing role of technology in employment practices appears to have factored into the Court's ruling. At oral argument, "the Court asked Workday to address a hypothetical in which a software vendor intentionally provides employers with a tool that the vendor knows, but the employers do not, automatically screens out all applicants who previously attended historically black colleges when recommending candidates to be considered for interviews."[104] Workday responded that the employer would not be liable in that instance.[105] In the absence of Title VII coverage for the software vendor in such a scenario, "no party would be liable for intentional discrimination in that scenario."[106] The district court concluded "this is the very gap that the agency theory is intended to address" such that "a third-party agent may be liable as an employer where the agent has been delegated functions traditionally exercised by an employer."[107]

In summary, there is a substantial divergence between antidiscrimination law and wage and hour law with respect to coverage of third parties, and potentially software companies. There is substantial authority under federal antidiscrimination law for the proposition that a third party can be held liable as an employer's agent when the employer delegates control of an important employment function to a third party. In other words, if the employer outsources hiring, firing, or compensation decisions to a third party—including a third-party software maker—that entity could be covered as an "employer" under antidiscrimination law.[108]

By contrast, courts have interpreted references to "agents" in the FLSA to refer to employee-agents of the employer enterprise, not third parties. A putative employer will only be covered by wage and hour law if they qualify as a "joint employer" or satisfy the "economic realities" test.

The above analysis presupposes that the employee-plaintiff includes the third-party agent as a defendant in the complaint. But what if the employee only sues their primary employer? The employee-plaintiff may not know that

---

[104] *Id.* at 806.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] This analysis sets aside the question of proving the merits of a discrimination claim, which may prove complex without a human decisionmaker to pinpoint as the source of the discriminatory animus. See citations in *supra* note 38.

the software company contributed to the harm, may not want to manage the complexity of suing a third party, or may not need to sue a third party if the employer has sufficient resources to satisfy a judgment or settlement in their favor. That leaves the primary employer two options to recover from the software maker: (1) attempt to implead the software maker for indemnification or contribution in the employee's underlying lawsuit; or (2) bring a subsequent contract or tort claim against the software maker after the employee's claim has settled or resulted in an unfavorable judgment.

Next, Part II describes the jurisprudence relating to third party claims for indemnification or contribution brought by employers to recover judgments or settlements paid to employees. Parts III and IV then assess employer efforts to recover from software companies in contract and tort.

II. FEDERAL COURTS DISALLOW STATUTORY CLAIMS FOR CONTRIBUTION.

I did not locate any federal case law where an employer attempted to implead a software maker in a discrimination or wage and hour claim. This dearth of case law is almost certainly attributable to unfavorable employment law jurisprudence regarding third party claims for indemnification and contribution. Federal courts are quite hostile to employer efforts to obtain contribution from third parties, regardless of whether those third parties are covered by the statute or responsible for the underlying harm. In some cases, courts have even interpreted federal statutes to preempt common law claims, like breach of contract, arising under state law.

Indemnification and contribution originated in common law tort claims. Indemnification refers to when the defendant seeks to recoup the entire judgment from a third party responsible for the harm.[109] Contribution refers to recouping a portion of the judgment from a third party for the portion of their

[109] *See, e.g.*, N.Y. State Workers' Comp. Bd. v. Consol. Risk Servs., Inc., No. 7546-11, 2013 NY Slip Op 51403(U) at *10 (Sup. Ct. Albany Cnty. Aug. 26, 2013) ("Implied indemnity is a common law concept intended to equitably distribute a loss occasioned by multiple defendants by implying a restitutionary duty in favor of the party who ought not to bear the loss.").

responsibility for the harm.[110] The defendant seeking indemnification or contribution becomes a third-party plaintiff and bears the burden to prove the third party committed or contributed to the harm to the original plaintiff, or is otherwise legally responsible for the harm.[111] The purpose of indemnification and contribution is to allocate the costs of an injury to those responsible for the it, proportional to their contribution to the harm. Indemnification and contribution force multiple tortfeasors to internalize the cost of the harm and deter future misconduct.

Impleader is permitted under Federal Rule of Civil Procedure 14: "a third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it."[112] Through this procedure, a defendant-employer in an employment law case could become a third-party plaintiff suing a third-party defendant as part of the broader lawsuit asserted by the employee-plaintiff. However, where the employee-plaintiff's claim against the employer-defendant is a statutory claim—such as a Title VII or FLSA claim—federal courts have imposed additional burdens upon third-party plaintiffs based on statutory interpretation.[113]

The lone Supreme Court case to address indemnification and contribution in the employment context is the 1981 ruling, *Northwest Airlines Inc. v. Transport Workers Union of America*. The case involved a Title VII claim and Equal Pay Act ("EPA") claim brought by a class of female flight attendants against Northwest Airlines for paying lower wages than male flight attendants classified as "pursers." The plaintiffs successfully proved that the purser jobs "required equal skill, effort, and responsibility" under "similar working conditions" under the EPA and obtained $20 million in backpay and other damages.[114] The airline

---

[110] Even under pure tort principles, a defendant may not be able to bring a claim for indemnification and contribution until after they have been held liable for the entire harm or for a disproportionate share of the harm. *See* Doe v. Scotts Bluff Country Club, No. 4:20-CV-3013, 2020 WL 3498110 (D. Neb. June 29, 2020).
[111] FED. R. CIV. P. 14.
[112] *Id.*
[113] As previously noted, state law remedies are often available both for wage and hour and discrimination claims. In states with equivalent or more favorable statutory remedies, plaintiffs have the option of pursuing claims in state court, subject to state rules of civil procedure and state jurisprudence regarding contribution and indemnification. State jurisprudence regarding indemnification and contribution may well be more favorable than the case law described in this Part, and discussed in Part V.A, *infra*.
[114] Nw. Airlines Inc. v. Transp. Workers Union of Am., 101 S. Ct. 1571, 1575 (1981).

brought a claim for contribution from the union, arguing that it satisfied the common law principles for contribution: "(1) common liability and (2) the party seeking contribution has been required to pay more than its just share of the award."[115]

The Supreme Court assumed that the common law standard for contribution was met but imposed an additional statutory hurdle for contribution claims. The third-party plaintiff would need to show that Congress "expressly create[d] a contribution remedy," that "its intent to do so may fairly be inferred from" the statute, or that "a cause of action for contribution…bec[ame] a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct."[116]

The Court declared that the EPA did not create an express claim for contribution, nor was a contribution claim previously recognized under federal common law. The Court then assessed whether a contribution claim could be "fairly inferred" based on "the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies."[117]

In doing so, the Court focused on whether the statute "indicates that they were enacted for the special benefit of a class of which petitioner is a member."[118] The Court then reasoned that neither Title VII nor the Equal Pay Act was passed for the benefit of *employers*, rather "both statutes are expressly directed against employers…for the benefit of employees."[119] Finally, the Court identified no support in the legislative history for such a remedy. Taken together, the Court concluded that it would be "improper" to "add a right to contribution to the statutory rights that Congress created."[120]

The Supreme Court has not addressed the separate question of whether indemnification or contribution is available under the Fair Labor Standards Act. However, several courts of appeal have applied the test from *Northwest Airlines*

---

[115] *Id.* at 1576.
[116] *Id.* at 1580.
[117] *Id.*
[118] *Id.* at 1580-81.
[119] *Id.* at 1581.
[120] *Id.* at 1584.

to FLSA claims. The leading circuit court case to decide the issue appears to be a Second Circuit ruling from 1999, *Herman v. RSR Security Services*, where the Secretary of Labor sued the primary corporate employer, as well as three individual owner-defendants.[121] One of the defendants attempted to assert cross claims against his co-defendants, which the lower court dismissed.[122] The Second Circuit affirmed the lower court ruling, holding that there was no right to indemnification under the statute, due to the lack of express statutory language, its intent to benefit employees rather than employers, the lack of legislative history on point, and the presence of a comprehensive remedial scheme.[123] As a result, a lone individual owner-defendant was apparently held liable for the entire amount of the judgment, because all of the other defendants settled with the DOL prior to trial.

A more recent case, the 2020 Ninth Circuit ruling in *Scalia v. Employer Solutions Staffing Group*, involved a similar sequence of events with a similar outcome. The DOL sued seven different entities on behalf of a group of employees under the FLSA, including the worksite, a placement agency, a payroll provider, and 4 entities serving as a staffing company. [124] The DOL then settled with 6 of the 7 entities for a "consent decree" but apparently no monetary amount.[125] One of the staffing companies, ESSG, was the only entity that remained at the end of the litigation, and was held liable for the entire

---

[121] Herman v. RSR Sec. Servs., Ltd., 172 F.3d 132 (2d Cir. 1999); Neilwoldman v. AmeriColor LLC, No. 3:18-CV-00151, 2018 WL 4384996 (M.D. Tenn. 2018) (citing *Herman*, 172 F.3d at 132). Several circuit court rulings on the question of indemnity under the FLSA involved employers asserting counterclaims against employee-plaintiffs who were managers and participated in the wage and hour violation. *See* LeCompte v. Chrysler Credit Corp., 780 F.2d 1260, 1264 (5th Cir. 1986) (affirming dismissal of employer's indemnification counterclaim against individual plaintiffs who were also managers); Lyle v. Food Lion, 965 F.2d 984 (4th Cir. 1992) (same). In *Martin v. Gingerbread House Inc.,* an employer under investigation with the Department of Labor for wage and hour violations filed a third-party lawsuit for indemnification against individual employees. 977 F.2d 1405 (10th Cir. 1992). The Tenth Circuit declared the third-party lawsuit for indemnification inconsistent with the purpose of the FLSA and declared it preempted by the Supremacy Clause. *Id.* at 1407.

[122] *Herman*, 172 F.3d. at 138.

[123] *Id.* at 143-44.

[124] Scalia v. Emp. Sols. Staffing Grp., 951 F.3d 1097 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1376 (2021).

[125] *Scalia*, 951 F.3d at 1101.

amount of unpaid wages plus penalties. The Ninth Circuit refused to let ESSG obtain contribution from the other defendants.[126]

Some federal courts have gone one step further and interpreted the FLSA to preempt employer tort and contract claims arising under state law. These cases have tended to involve counterclaims brought against employees, rather than claims against third parties. The Tenth Circuit and the Fifth Circuit decided cases involving employee plaintiffs in wage and hour claims who were also low-level managers at the company. The employer in each case claimed that these individual managers had contributed to the wage and hour violation at the company by working off the clock, allowing other employees to do so, or otherwise "perpetrat[ing] the [FLSA] violations for which [the employer] is now held liable."[127] Both circuits were unsympathetic to the employer's counterclaims, treating them as a bad faith effort to avoid their underlying liability: noting that "an employer who believed that any violation of the overtime or minimum wage provisions could be recovered from its employees would have a diminished incentive to comply with the statute."[128] Both concluded that the FLSA preempts state indemnification claims.[129]

Lower courts have been somewhat less aggressive in preempting state claims when employers seek contribution or indemnification from third parties, rather than employee-plaintiffs. In recent years, a few unpublished lower court decisions have noted that state wage and hour laws permit contribution or indemnification from third parties.[130] In other cases, the court has permitted third-party claims for breach of contract to survive a motion to dismiss, noting that "all these claims involve factual disputes as to who, if anyone, was responsible for paying…overtime wages" and that "it is far more efficient for all

---

[126] *Id.* at 1102. *See also Neilwoldman*, 2018 WL 4384996, at *1 (M.D. Tenn. Sept. 13, 2018) (dismissing third party complaint against "fee-based staffing agencies" because the FLSA does not permit contribution or indemnification).
[127] LeCompte v. Chrysler Credit Corp., 780 F.2d 1260, 1264 (5th Cir. 1986); Martin v. Gingerbread House, Inc., 977 F.2d 1405, 1409 n.2 (10th Cir. 1992).
[128] *Lecompte*, 780 F.2d at 1264.
[129] *Martin,* 977 F.2d at 1407-08; *LeCompte*, 780 F.2d at 1264.
[130] Advanced Pain Consultants v. Richmond, No. 15 C 479, 2015 WL 4972231, at *2-3 (N.D. Ill. Aug. 18, 2025); Wiember v. Felberbaum & Assoc. v. ADP Totalsource III, Case No. 07-80934, 2008 WL 299016, at *2 (S.D. Fla. Feb. 1, 2008) (permitting third party complaint in FLSA case); Berryman v. Newalta Env't Servs., Inc., No. CV 18-793, 2018 WL 5631169, at *3 (noting the possibility that contribution or indemnification may be available under the Pennsylvania statute).

these claims to be heard in the same suit."[131] As a practical matter, many employers have avoided preemption in standalone breach of contract claims against software companies; the question of preemption does not appear to have arisen.[132]

In summary, employers cannot seek contribution or indemnification under Title VII, pursuant to the Supreme Court's 1981 ruling in *Northwest Airlines*. Appellate courts applying *Northwest Airlines* to FLSA claims have also declared indemnification and contribution unavailable to employers. They have also declared counterclaims against employees arising under state law to be preempted by the FLSA. Some trial courts, however, have left employers some latitude to assert state law claims against third parties.

The combined case law regarding coverage and indemnification tends overall to limit or foreclose liability against software-related actors. As Part I described, Title VII leaves the door open for a software-related actor to be sued directly by employees if the employer has delegated "control over an important aspect of his employment"[133] to the software-related actor. However, if the employee only sues the primary employer under Title VII, *Northwest Airlines* precludes the employer from asserting a third-party complaint against a software-related actor. The potential liability of a software-related actor thus depends on whether the plaintiff named it in the complaint.

The path for holding software-related actors liable under the FLSA is far narrower. First, the software-related actor would need to pass the threshold for employment status, at minimum pursuant to the economic realities test. There is little precedent for doing so. As in the Title VII context, however, liability will depend on whether the software-related actor was named by the plaintiff in the original cause of action. Employers are unlikely to succeed in impleading the software-related actor as a third-party defendant, unless there is authority for indemnification or contribution pursuant to state statutory remedies. Furthermore, there is only limited authority for asserting state common law

---

[131] *Berryman*, 2018 WL 5631169, at *4; Crowell v. M St. Ent., LLC, No. 3:21-cv-00517, 2023 U.S. Dist. LEXIS 58069 (M.D. Tenn. Apr. 3, 2023) (denying motion to bring third party complaint, without ruling on whether a follow on breach of contract claim could be asserted).
[132] *See infra* cases cited in Parts III and IV.
[133] *Carparts Distrib. Ctr. Inc.*, 37 F.3d at 17. *See also* Satterfield v. State of Tennessee, 295 F.3d 611 (6th Cir. 2002); citations *supra* note 87.

claims—such as breach of contract—through a third-party complaint, as they risk implied preemption pursuant to the FLSA.

The dearth of statutory case law involving software-related actors is likely attributable to these legal barriers. Consequently, employers have turned to standalone lawsuits against software-related actors, often following a judgment or a settlement with employees. These lawsuits commonly allege breach of contract or common law tort claims and face a separate set of challenges, described in Parts III and IV below.

III. COURTS ROUTINELY ENFORCE LIMITATION OF LIABILITY PROVISIONS IN SOFTWARE CONTRACTS.

Part III examines the contract landscape in the HR software space, beginning with an overview of common contractual arrangements and the players involved, and how the landscape might change in the near future. It then examines claims employers have brought against software companies for breach of contract, and how limitation of liability provisions in those contracts have largely stymied efforts to obtain meaningful remedies from HR software companies. Finally, Part III discusses two breach of contract claims that employees have asserted against HR software companies on a third-party beneficiary theory.

A. Structure and Price of Contracts

Employers enter into contracts with software-related actors upon purchasing or renewing a software license or software-related services. Software licenses and services are expensive. Although software companies do not publicly disclose the rates they charge for software, lawsuits over the delivery of software and/or support services, commonly involve millions of dollars in license fees, implementation, and support services.[134]

---

134 McHugh v. DLT Sols., Inc., 618 F.3d 1375, 1377 (Fed. Cir. 2009) (contract for Oracle "marketing and HR management" software for the Navy's Office of Civilian Human Resources on a "lease to ownership basis" provided for a $2.8 million downpayment, and $8.6 million

Contracts between software companies and corporate clients can be highly complex. See Figure 1. They typically consist of a license and/or lease agreement for the use of software and/or cloud storage, and related service contracts to provide customization, support, or training.[135] Sometimes software consultants or resellers provide software support rather than the software company itself.[136] These implementation and software support services can occur through a contract between the software maker and the consultant;[137] a contract between the employer and the consultant;[138] or both.[139] Further complicating the picture, some software companies specialize in providing HR and payroll software services to companies—in the same manner that "professional employer organizations" might have previously done in the more traditional role of an employment or temp agency.[140]

---

subsequent payment for "ownership of the software"); Montclair State Univ. v. Oracle, No. 11-2867 (FLW), 2012 WL 3647427, at *2, *7 (original contract for enterprise software was $15 million after which "Oracle demanded additional fees for work…beyond the scope of the parties' agreement," for which it required a minimum of $4 million).

[135] Mercury Air Grp., Inc. v. Kronos Inc., No.: CV 18-04139 AB (SKx), 2019 WL 6721596, at *2 (C.D. Cal. 2019) (referencing a "Master Lease Agreement" and subsequent "Sales, Software License and Services Agreement"). *See* contract appended to Summons and Compl., Aegis v. UKG, Case No. 23-CV-026235, at *26-29 (Cal. Super. Ct. Alameda Cty. 2023), *infra*, Appendix 1.

[136] *See, e.g.*, Attain, Inc. v. Workday, Inc., No. 5:17-cv-03499, 2018 WL 2688299, at *3 (E.D. Pa. June 4, 2018); *McHugh*, 618 F.3d at 1377 (involving an "authorized software reseller and licensor" who sold Oracle software to the Navy's office of civilian human resources). Sometimes workers within a company implement the software, train employees on how to use it, and interface with the software company. *See, e.g.*, Wolfslayer v. Ikon Office Sols., Inc., No. CIV.A. 03–6709, 2004 WL 2536833, at *4 (E.D. Pa. Nov. 8, 2004) (describing an employee as responsible for implementing software related to warehousing and shipping).

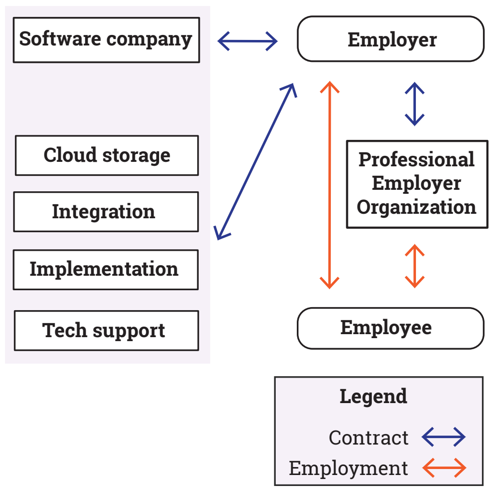
[137] *See, e.g.*, *Attain, Inc.*, 2018 WL 2688299, at *3; *see also* Workday, Inc. v. Khan, No. 4:17CV299-ALM-KPJ, 2017 WL 3017514, at *1 (E.D. Tex. June 26, 2017) (characterizing Workday as a "provider of cloud-based software-as-a-service ('SaaS') solutions, and along with various business partners, assists customers in implementing its SaaS solutions, and offers integrations and integration support services for use with Workday's services").

[138] Emmes Co. LLC v. SAP Am., Inc., No. 21-0019, 2021 WL 1696304, at *1 (E.D. Pa. Apr. 29, 2021).

[139] *Id.* The *Emmes* case was a dispute between the employer and consultant. However, the employer alleged that the consultant was the exclusive implementation vendor for SAP, suggesting that SAP had a contract with the consultant, even though the case did not reference such an arrangement. *See also* Cognizant Worldwide Ltd. v. Barrett Business Services Inc., No. C19-1848, 2020 WL 6434835, at *2 (W.D. Wash. May 7, 2020) (involving a complicated set of contracts with the software maker, a third party company specializing in cloud integration, and the parent company of that third party).

[140] *See, e.g.*, *Cognizant Worldwide Ltd.*, at *2 ("BBSI is a professional employer organization ('PEO') that establishes relationships with small and medium-sized companies to assume responsibility for their human resource functions including payroll, payroll taxes, workers' compensation coverage, and employee benefits.")

Figure 1. Contractual relationships with software-related actors.



Employers also hire software and consulting companies to integrate the many different software systems they use so that they can work together or work with outside systems.[141] Less commonly, the HR software is customized for

[141] In *In re Oracle Corp. Securities Litigation*, the court offers this historical account of the software market:

"Enterprise applications" are computer programs used to help companies automate their business processes. Enterprise resource planning ("ERP") applications perform functions such as accounting, human resources, and manufacturing. Customer relationship management applications ("CRM") perform functions such as managing call centers. Through the late 1990s, businesses that used enterprise applications software could not obtain ERP and CRM applications from the same vendor. Customers generally followed the "best of breed" strategy, buying different applications from several vendors. They would achieve "systems integration" by hiring software engineers to write custom code that would allow their applications to run together. Suite 11i was marketed as a product that would combine ERP and CRM applications." Order Granting Def.s' Mot. for Summ. J. and denying Pl.'s Mot. for Partial Summ. J., at *2, In re Oracle Corp. Sec. Litig., Case No. C-01-000988, 2009 WL 1709050 (N.D. Cal. June 19, 2009).

This market ecosystem has since been disrupted somewhat by cloud computing, where the software—and the customer's data—sits on a remote server rather than the customer's own the employer's idiosyncratic needs—for example, a customized version of HR software for the federal government that complies with "federal statutory and regulatory reporting requirements."[142] Disputes can arise not from the software itself but from the implementation,[143] such as the settings governing how meal and rest breaks are allocated.[144]

Individual employees generally do not contract with the software maker directly. However, there may be circumstances where an employee accepts terms-of-service contracts from a software maker, for example, if they are using a third-party platform or service to apply for jobs with the employer, or installing an HR app on their phone, such as a timekeeping or internal messaging app. Employee use of HR apps on personal phones—and the associated direct contracting with software companies—may become increasingly common as software-makers displace HR functions with employee self-service options for scheduling, shift switching, or time off requests. However, even in the absence of a direct contract, employees may be able to sue as third-party beneficiaries of the contract, an approach discussed at the end of this Part.

It is hard to predict how rapid advances in artificial intelligence will affect the cost of software and the bargaining power between software companies and employers over time. As previously noted, the HR software industry is dominated by large, national companies, while their corporate customers vary in size.[145] These companies are trying to maintain market share and prove their

---

servers or computers. *See* City of Sunrise Firefighters' Pension Fund v. Oracle Corp., 527 F. Supp. 3d 1151, 1161 (N.D. Cal. 2021) (describing the shift to cloud computing). Many software vendors now operate on a "software as a service" model, where clients pay monthly for access to the software (and often their own data) rather than purchasing an outright license. This model also makes HR data much more vulnerable to hacking, because hackers can target a single software vendor and gain access to the data of hundreds of companies, rather than one at a time. *See, e.g.*, Am. Trim L.L.C. v. Oracle Co., 383 F.3d 462, 466 (6th Cir. 2004) (dispute involving software integration system).

[142] *See, e.g.*, McHugh v. DLT Sol. Inc., 618 F.3d 1375, 1378 (Fed. Cir. 2009); U.S. v. Oracle Corp., 331 F. Supp. 2d 1098, 1102 (N.D. Cal. 2004) (explaining the distinct software needs of large enterprises, particularly customization and specialized integration).

[143] *See, e.g.*, Montclair State Univ. v. Oracle, USA, Inc., No. 11–2867, 2012 WL 3647427, at *1 (D.N.J. Aug. 23, 2012); Emmes Co. v. SAP America, Inc., No. 21-0019, 2021 WL 1696304, at *1 (E.D. Pa. Apr. 29, 2021).

[144] *See, e.g.*, Mercury Air Grp., Inc. v. Kronos Inc., No. CV 18-04139 AB, 2019 WL 6721596, at *2 (C.D. Cal. Oct. 16, 2019).

[145] See discussion *supra*, in the Introduction. According to ADP, more than 4 in 10 workers in the US are "employed at businesses with fewer than 50 employees." [https://perma.cc/FFX7-LLLL].

value by adding AI enhancements to their existing offerings. They do so in the shadow of rapid advances in AI-assisted coding tools that could enable smaller competitors with cheaper offerings to gain a foothold in the market. AI-assisted coding could likewise enable enterprise customers to develop their own software in-house.

Nevertheless, enterprise software with a compliance component, like timekeeping and payroll software, needs to incorporate and implement state and federal law. Businesses purchase compliance software both for its functionality and the perception—real or imagined—that the software complies with applicable law. This perception tends to provide an advantage to established players. It may also deter companies from attempting to use AI coding tools to develop their own HR software for internal use.

B. Enforcement of Contracts

The most common type of breach of contract claim against HR software companies involves allegations that the software does not perform as advertised or specified, or that the related services were not performed.[146] For example, in *Emmes v. SAP* a corporate customer alleged that it signed a contract for SAP's "cloud-based human resource management products" for "over $85,000."[147] However, Emmes claimed that the software was "unusable" due to "constant error messages, missing data, and lack of support," and sued for breach of contract.[148] Similarly, in *Murphy Homes v. Management IT Corp.*, a corporate customer sued over a $100,000 contract with an IT company that promised to integrate its HR system, sign on, benefits and payroll system, but failed to do so.[149] Corporate end users have also sued payroll software providers

---

[146] *See, e.g.*, Montclair State Univ., No. CIV.A. 11-2867 FLW, 2012 WL 3647427, at *2 (plaintiff university alleged that enterprise software "did not possess the 'critical functionality' that Oracle represented it would possess," that "substantially more customization was required", and that "Oracle was grossly negligence in its management of the . . . project").
[147] *Emmes Co.*, 2021 WL 1696304, at *1.
[148] *Id.* at *1.
[149] Murphy Homes v. Mgmt. Info. Tech. Corp., No. 22-2728-PJM, 2023 WL 6293648, at *1-2 (D. Md. Sept. 26, 2023).

for design flaws that obscured or enabled employees to embezzle money from the company.[150]

Employers have also successfully sued professional employer organizations ("PEO") where some of the services provided by the PEO were software-based.[151] Because the PEO is often considered an "employer"—whether as a matter of law, or as specifically designated in the contract—the applicable contracts are less likely to have aggressive limitation of liability provisions or may even have mutual indemnification provisions. In such circumstances, employer end-users are well-positioned to assert a breach of contract claim if the software directly leads to an employment law violation.

Veritas Personnel Service Inc. v. ADP presented the most in-depth treatment of this scenario. Veritas is a staffing agency that entered into a contract with ADP Total Source for HR and related compliance services, as well as payroll processing, including ADP's software.[152] Veritas then contracted with a trucking company to serve as a co-employer, but relied heavily on ADP to provide the underlying HR work.[153] After conferring with ADP, Veritas incorrectly concluded that drivers in Texas could be paid a daily, rather than hourly rate—which meant that the company neither tracked, nor paid overtime.[154] Veritas continued this practice for its drivers for 5 years, a setup that produced no warning "flags" in the ADP software.[155] The drivers later sued. Although ADP contributed $170,000 to Veritas' legal fees and costs, Veritas sued to recover the remaining $1.5 million it incurred in damages.[156] The breach of contract claim survived a motion to dismiss and cross motions for summary judgment, enabling Veritas to proceed to a jury on penalties and fees paid to the drivers that were attributable

---

[150] *See, e.g.*, AWK Consulting Eng'rs v. Paylocity, No. 2:24-CV-898-NR, 2025 WL 359820, at *1 (W.D. Pa. Jan. 31, 2025) (dismissing complaint alleging that the defendant's payroll system allowed an employee to create two profiles for herself under the same social security number and run payroll for herself multiple times a week); Delaware River Waterfront Corp. v. Wellspring Software, Inc., No. 22-1905, 2022 WL 17869139, at *5 (E.D. Pa. Dec. 22, 2022) (software had a security loophole that enabled employee to embezzle more than $2.4 million).

[151] *See, e.g.*, Order on Mot. for Summ. J., at *122, Veritas Pers. Servs., Inc. v. ADP Totalsource, Inc., No. 1:19-cv-22435, 2020 WL 7493186 (S.D. Fla. Nov. 2, 2020); Wiemer v. Felberbaum & Assocs., No. 07-80934-CIV, 2008 WL 299016, at *2 (S.D. Fla. Feb. 1, 2008).

[152] Order on Mot. for Summ. J., at *122, *Veritas Pers. Serv., Inc.*, 2020 WL 7493186.

[153] *Id.* at *3.

[154] *Id.* at *4.

[155] *Id.* at *5.

[156] *Id.* at *6.

to ADP's acts, as well as administrative fees paid to ADP in connection with the drivers.[157]

However, other lawsuits to recover third-party losses from HR software companies—primarily UKG—have fared poorly, largely due to limitation of liability provisions in the underlying contract.[158] Common provisions in these contracts limit liability or available remedies to the cost of the software, repair of the alleged problem, or in more extreme cases, service credits.[159]

Limitation of liability provisions are enforceable under general principles of contract law,[160] subject to exceptions for intentional torts, gross negligence, unconscionability or public policy.[161] Courts will also occasionally decline to

---

[157] *Id.* at *16; Veritas Pers. Servs., Inc. v. ADP Totalsource, Inc., No. 1:19-cv-22435-UU, 2020 WL 7493186, at *18 (S.D. Fla. Dec. 27, 2019); Veritas Pers. Servs., Inc. v. ADP Totalsource, Inc., No. 1:19-cv-22435-UU, 2019 WL 11506033, at *5 (S.D. Fla. Oct. 21, 2019) (granting in part and denying in part Defendant's partial motion to dismiss).

[158] *Id.* at *6. *See also* Montclair State Univ. v. Oracle USA Inc., No. 11–2867 (FLW), 2012 WL 3647427, at *12 (D.N.J. Aug. 23, 2012) (software contract for enterprise software provided that "maximum liability for any damages . . . shall be limited to the fees you paid [except] damages resulting from acts of gross negligence or intentional wrongdoing"); Recreational Equipment, Inc., v. UKG, Inc., No. C21-0107JLR, 2021 WL 1063347, at *1 (W.D. Wash. Mar. 18, 2021) (venue dispute involving employer seeking to recover from UKG for "failing to design and issue accurate wage statements to REI non-exempt employees").

[159] *See, e.g.*, Mercury Air Grp. v. Kronos Inc., No. CV 18-04139, 2019 WL 6721596, at *4 (repair and replacement); Aegis Senior Cmtys. LLC v. UKG Inc., No. 23-cv-01076, 2024 WL 4093912, at *1 (describing contract that "set forth service credits as the sole and exclusive remedy for service outages, waived indirect and consequential damages, and limited the scope of indemnification that Kronos could be responsible for."); Emmes, Co. v. SAP Am., No. 21-0019, 2021 WL 1696304 (E.D. Pa. Apr. 28, 2021) (contract limiting remedy for breach of warranty); *Montclair State Univ.*, 2012 WL 3647427, at *12 (referencing a contract that stated the "maximum liability for any damages arising out of related to this agreement . . . whether in contract or tort . . . shall be limited to the fees you paid," except for "damages resulting from acts of gross negligence or intentional wrongdoing").

[160] A minority of courts, however, scrutinize such provisions as liquidated damages provisions. Mattegat v. Klopfenstein, 50 Conn. App. 97, 102 (1998) (assessing whether "(1) the damage which was to be expected as a result of a breach of contract was uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable."). *Cf*. 24 WILLISTON ON CONTRACTS § 65:6 (4th ed. 2025) (asserting that liquidated damages provisions are distinct from "a contract provision limiting liability for breach of the contract to an agreed maximum"); Fox Elec. Co. v. Tone Guard Sec., 861 S.W.2d 79, 83 (Tex. App. 1993) (distinguishing limitation of liability provision from liquidated damages).

[161] *See, e.g.*, WILLISTON ON CONTRACTS, *supra* note 141, at § 65:6 ("the validity of such provisions has long been recognized and is well established, so long as they do not violate public policy" or other narrow restrictions); Restat. (Second) of Contracts § 195 (Am. L. Inst. 2024) ("Term Exempting from Liability for Harm Caused intentionally, Recklessly or Negligently"); *Fox Elec.*

enforce a limitation of liability provision where the limitation provision does not cover the conduct at issue,[162] or where the defendant materially breached the contract.[163] Otherwise, such provisions are presumed to represent the parties' chosen allocation of economic risk.[164]

In *Mercury Air Group, Inc. v. Kronos Inc.*, a California employer was sued by a class of employees for violating California meal and rest breaks.[165] The underlying complaint from the employees is somewhat non-specific as to the cause of the problem, though it references "improperly rounding time worked by employees" and failing to provide compensation for missed breaks.[166] Mercury paid $1.6 million to settle the class action with its employees, which it sought to recoup in a subsequent breach of contract lawsuit against Kronos (UKG's predecessor entity).[167]

In a follow-on lawsuit, *Mercury Air Group, Inc. v. Kronos Inc.*, Mercury alleged that it had purchased a "gold tier service"[168] service package from Kronos that entitled Mercury to configuration services.[169] Mercury claimed

---

Co., 861 S.W.2d at 83 (Tex. App. 1993) (enforcing provision that limited liability to the value of the services in negligence claim against alarm company following a fire, and noting that the agreement "will not violate public policy if there is not disparity in bargaining power between the parties").

[162] *See Montclair State Univ.*, 2012 WL 3647427, at *12 (allowing breach of contract claim to proceed where the plaintiff alleged the breach constituted gross negligence and the limitation of liability provision included an exception for gross negligence); *Emmes Co.*, 2021 WL 1696304, at *3-4 (declining to enforce provision in software contract limiting remedies for breach of warranty to "replace[ment of the] materially nonconforming" service, because the plaintiff alleged the defendant breached its "responsibility to provide a confirming service in the first place"); Prysmian Cables and Sys. USA LLC v. ADT Commer. LLC, 665 F. Supp. 3d 236, 254 (D. Conn. 2023) (permitting breach of contract claim alleging reckless and intentional misconduct and setting aside limitation of liability provision).

[163] *See, e.g.*, Horne v. Elec. Eel Mfg. Co. Inc., 987 F.3d 704, 718 (7th Cir. 2021) ("under Illinois law, a party in material breach may not enforce a provision of a contract that is favorable to him, such as an exculpatory clause.").

[164] Childs. Surgical Found. v. Nat'l Data Corp., 121 F. Supp. 2d 1221, 1225 ("In a commercial setting, the terms of a contract—and its allocation of risks among the parties – are generally accepted by the courts"). Harper, *supra* note 58, at 196 ("any judicial determination of primary responsibility, in any event, can be obviated by indemnification agreements between the employers, which always can be negotiated in contractual relationships.").

[165] Mercury Air Grp. v. Kronos Inc., CV 18-04139, 2019 WL 6721596, at *2 (C.D. Cal. Oct. 16, 2019).

[166] Complaint at 4, Starks v. Mercury Air Cargo, Inc., No. BC 614 067, (Cal. Super. Ct., Mar. 16, 2016).

[167] *Id.* at *2.

[168] *Id.* at *4.

[169] *Mercury Air Grp.,* 2019 WL 6721596, at *4.

Kronos configured the software improperly, and failed to include a missed meal period premium required by California law.[170] Kronos, for its part, claimed that it "told [Mercury] that [the meal and rest break settings were] not configured" and "offered to configure it" (possibly at additional expense).[171]

Kronos argued that Mercury's claims were barred by "limitation of liability and limited warranty clauses" in its contract.[172] The clause stated that Mercury's "sole remedies are set forth specifically in the Agreement" and limited Kronos' liability to "repair or replacement of defective parts or software, or the reperformance of any [sic] deficient services."[173]

The court applied Massachusetts law, which will enforce limitation of liability provisions unless unconscionable; the state does not recognize a separate public policy exception. The court granted summary judgment in favor of Kronos "[b]ecause this is a contract between two business entities and the loss involved is commercial."[174] The court further noted that Mercury did not attempt to make an unconscionability argument. As the court explained, an unconscionability "argument would be hard to win: the parties here are two sophisticated business entities and the MLA demonstrates a clear intent to allocate risks between them, whereby Plaintiffs accepted the risk of consequential damages."[175] The court did not consider the impact of Kronos' alleged failures on employees, who had no say over the contract's terms and bore the brunt of the harm even if they ultimately obtained a remedy from their employer. The court likewise did not consider the incentives its ruling would create for software companies that fail to embed legal compliance in the basic software design and instead sell it as a premium feature only available at additional cost.

An assisted living facility also brought a breach of contract claim against UKG for the wage and hour liability it incurred as a result of the Kronos

---

170 *Id.* at *2.
171 *Id*. at *5.
172 *Id*. at *2.
173 *Id.* at *4; *See also* Aegis Senior Cmtys. LLC v. UKG, Inc., No. 23-CV-01076, 2024 WL 4093912, at *1 (N.D. Cal. Sept. 4, 2024). *See also* Emmes v. SAP, 2021 WL 1696304, at *2 (remedy for breach of warranty limited).
174 *Mercury Air Group*, 2019 WL 6721596, at *5.
175 *Id.*

ransomware outage in *Aegis Senior Communities LLC, v. UKG Inc.*[176] One month prior to the outage, Aegis employees filed a class action lawsuit against the nursing home for various state wage and hour violations.[177] Aegis was therefore already on plaintiff's counsel's radar when the company lost access to all their timekeeping software and records during the outage. The employer's inability to accurately calculate hours and pay wages during the outage likely added to their prior liability or exposed them to additional wage and hour penalties. Aegis was subject to a second class action a few months later, which included both FLSA claims and a state claim for failure to pay for all hours worked.[178]

Aegis later brought a lawsuit against UKG to recoup damages paid to its employees.[179] The contract at issue provided a license to the software hosted in the UKG cloud, which was inaccessible for six weeks during the outage.[180] The contract included the same disclaimer as in the *Mercury Air* case that the services were "NOT GUARANTEED TO BE ERROR-FREE OR UNINTERRRUPTED."[181] The contract also limited the remedy to "service credits," "waived indirect and consequential damages and limited the scope of indemnification."[182]

Aegis did not attempt to argue that the limitation of liability provision was unconscionable or unenforceable on public policy grounds. Instead, it claimed that UKG had been grossly negligent for "failing to prevent or appropriately respond to the ransomware attack."[183] As previously discussed, gross negligence is a recognized basis for invalidating limitation of liability provisions under contract law.[184] Although the court could have nullified the limitation of liability

---

[176] *See Aegis Senior Cmtys.,* 2024 WL 4093912, at *1.
[177] *Salonga v. Aegis Senior Cmtys. LLC*, No. 22-cv-00525-LB, 2022 WL 1439914, at *1 (N.D. Cal. Jan. 26, 2022).
[178] *See Melgoza v. Aegis Senior Cmtys. LLC*, No. 3:22-cv-01756-LB, 2022 WL 1693706, at *1 (N.D. Cal. May 26, 2022).
[179] *Aegis Senior Cmtys.*, 2024 WL 4093912, at *1.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Aegis Senior Cmtys.*, 2024 WL 4093912, at *3.
[184] Kalisch-Jarcho, Inc. v. New York, 58 N.Y.2d 377, 384-85 (1983) (holding that an "exculpatory agreement . . . will not exonerate a party from . . . willful or grossly negligent act"); Sommer v. Fed. Signal Corp., 79 N.Y.2d 540, 554 (1992) (holding that public policy precluding prospective waiver of gross negligence "applies equally to contract clauses purporting to . . . limi[t] damages to a nominal sum."). In *Sommer*, the court defines gross negligence as "conduct that evinces a reckless indifference to the rights of others." *Id*.

provision and authorized the plaintiff to pursue ordinary contract remedies, it treated Aegis' gross negligence allegations as a separate standalone tort.[185] It then declared the gross negligence claim unviable due to the economic loss doctrine—discussed in Part IV, *infra*. The end result of the court's tortured logic was enforcement of the limitation of liability provision, which limited Aegis' remedy to service credits from UKG.[186]

None of the breach of contract cases sought to invalidate the limitation of liability provision on a public policy basis. The common law public policy exception focuses on whether the contract "affect[s] the public interest," as opposed to "affect[ing] only the private affairs of the parties."[187] Matters are considered public when "performing a service of great importance to the public" or "a matter of practical necessity" and whether the "person or property of the purchaser is placed under the control of the seller."[188] Corporate plaintiffs may have assumed that the courts would take a similar stance as the Court in *Aegis*, characterizing the claim as a business-to-business dispute. However, as discussed in Part V, *infra*, any dispute where a party's conduct contributed to or caused an employment law violation implicates public policy, demonstrated by the many federal and state statues that regulate the employment relationship.

C. Third-Party Beneficiary Claims Brought by Workers

In two separate lawsuits, *Maxfield v. UKG* and *Kroeck v. UKG*, employees have attempted to sue the software-maker directly on a third-party beneficiary theory. Although state law varies somewhat, contract law permits a non-party to a contract to sue for breach of contract if they were an intended beneficiary of the contract.[189] The Restatement (Second) of Contracts provides, "a

---

[185] See citations *infra* at notes **Error! Bookmark not defined.** and 261.
[186] *Id*. at *4 (The court insisted that "the parties foresaw this possibility and included a provision in the WFC Agreement specifically delineating the recoverable damages.")
[187] *Tunkl v. Regents of Univ. of Cal*., 60 Cal.2d 92 (1963).
[188] *Id*. at 99-100; Yang v. Voyagaire Houseboats, Inc., 701 N.W.2d 783 (Minn. 2005) ("public service" refers to those "thought suitable for public regulation" such as "common carriers, hospitals and doctors, public utilities, innkeepers, public warehousemen, *employers* and services involving extra-hazardous activities.") (emphasis added).
[189] RESTATEMENT (SECOND) OF CONTRACTS § 302 (A.L.I. 1981); Michigan's third-party beneficiary statute, for example, focuses on whether the "promisor . . .had undertaken to give or to do

beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and…the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance."[190] For example, an individual listed as the beneficiary on an insurance contract could sue for an insurance payment even if they were not a party to the underlying contract.[191]

There is some precedent for treating employees as third-party beneficiaries of contracts undertaken by their employer for their benefit.[192] For example, in *Knight v. United States*, a failing Head Start daycare entered into an agreement with the government to maintain federal funding and retain all existing employees, in exchange for relinquishing its license and handing the daycare to another entity. When the new entity did not hire on existing employees, they successfully sued as third-party beneficiaries.[193] The Federal Circuit explained, that the "third-party beneficiary inquiry focuses on whether the contracting

. . . something directly to or for said person." Mich. Comp. Laws Ann. § 600.1405 (West). Delaware's common law rule requires that "the conferring of a beneficial effect on such third party . . . should be a material part of the contract's purpose." Insituform of N. Am., Inc. v. Chandler, 534 A.2d 257, 270 (Del. Ch. 1987). Under Hawaii law, "the parties to the contract must have intended to benefit the third party, who must be something more than a mere incidental beneficiary." Balboa v. Haw. Care and Cleaning, Inc., 105 F. Supp. 3d 1165, 1170 (D. Haw. 2015); CAL. CIV. CODE § 1559 ("A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."); Prouty v. Gores Tech. Grp., 121 Cal. App. 4th 1225, 1232-33 (2004) (interpreting "expressly" to mean "merely the negative of incidentally") (quotations omitted).

[190] RESTATEMENT (SECOND) OF CONTRACTS § 302 (A.L.I. 1981).

[191] *Id.* § 302(d) (Illustrations).

[192] *Id.* (using illustration of employees as third party beneficiaries of a collective bargaining agreement); Int'l. Union of Auto. Workers. v. Park-Ohio Indus., 687 F. Supp. 338, 341 (N.D. Ohio 1987), *aff'd*, 876 F.2d 894 (6th Cir. 1989) (employees deemed third-party beneficiaries of collective bargaining agreement); Terry v. Northrop Worldwide Aircraft Servs., Inc., 786 F.2d 1558, 1561 (11th Cir. 1986) (dismissing third party beneficiary claim by employees named in a conciliation agreement between the government and employer because the underlying agreement was suspended); Comrie v. Enterasys Networks, Inc., No. CIV. A. 19254, 2004 WL 293337, at *3 (Del. Ch. Feb. 17, 2004) (employees covered by a stock agreement in connection with a failed corporate acquisition qualified as third-party beneficiaries even though they were not signatories to the agreement); *Prouty*, 121 Cal. App. 4th at 1232 (employees of acquired company qualified as third-party beneficiaries of stock purchase agreement that provided for severance payments, despite language in the contract stating that there were "no third party beneficiaries").

[193] Knight v. United States, 65 F. App'x 286, 290 (Fed. Cir. 2003). *Cf. Balboa*, 105 F. Supp. 3d at 1170 (employees not third-party beneficiaries of service contract between employer and client, due to express language in the agreement "stating that the contracting parties did not intend to make Plaintiffs third party beneficiaries").

parties intended to *directly* benefit the plaintiffs."[194] Neither reliance nor direct communication with the third-party beneficiaries is required.[195]

In *Maxfield v. UKG* and *Kroeck v. UKG*, the plaintiffs survived a motion to dismiss on their third-party beneficiary claim.[196] In *Maxfield*, the court ruled that it was not "implausible that the payroll services agreement between Defendant and Plaintiff's employers would have intended that Plaintiffs benefit from Defendant's provision of timely, accurate payroll services."[197] The *Maxfield* court, however, expressed doubt about the viability of the claim, noting that the ultimate outcome would depend heavily on the language in the contract.[198] The court in *Kroeck* reached a similar conclusion, and like *Maxfield*, noted that the absence of the underlying contract prevented it from further assessing the claim's viability.[199] Both cases eventually settled before the viability of the theory was further tested.

The rights of a third-party beneficiary are derivative of the rights and remedies set forth in the contract: "the foundation of an intended beneficiary's rights lies in the contract between the promisor and the promisee."[200] This will likely limit the usefulness of a third-party beneficiary theory for employee-plaintiffs over time. First, software makers can revise their form contracts to cut off the availability of third-party beneficiary claims. Second, plaintiffs would ultimately have to contend with any limitation of liability provision in the contract.[201] On the other hand, it is possible that courts might be more open to

---

[194] *Knight*, 65 F. App'x at 290.
[195] *Id.* ("our case law does not require that . . . the promise must actually be communicated to the third-party beneficiaries.").
[196] Maxfield v. UKG Inc., No. 22-cv-10947, 2025 WL 1581308, at *5–6 (D. Mass. June 4, 2025). The *Maxfield* case settled in September 2025. Kroeck v. UKG Inc., No. 2:22-CV-00066, 2022 WL 4367348, at *5 (W.D. Pa. Sept. 21, 2022). The *Kroeck* case settled in November 2022.
[197] *Maxfield*, 2022 WL 4367348, at *5.
[198] *Id.*
[199] *Kroeck*, 2022 WL 4367348, at *5.
[200] 13 WILLISTON ON CONTRACTS § 37:57 (4th ed. May 2025 Update); *See Shay v. Aldrich*, 790 N.W.2d 629, 640 (Mich. 2010); *See BAII Banking Corp. v. UPG, Inc.*, 985 F.2d 685, 697 (2d Cir. 1993) ("As a third party beneficiary, [the plaintiff] possessed no greater right to enforce a contract than the actual parties to the contract."); *Terry*, 786 F.2d at 1561; *Balboa v. Haw. Care & Cleaning*, 105 F. Supp. 3d 1165, 1170 (D. Haw. 2015).
[201] Nat'l Ben. Fund for Hosp. & Health Care Emps. v. Presbyterian Hosp. in City of N.Y., Inc., 448 F. Supp. 136, 138 (S.D.N.Y. 1978) ("In general, a third party beneficiary is subject to any defenses which could be asserted against the promisee."). Cf. Benson v. Brower's Moving & Storage, Inc., 907 F.2d 310, 314 (2d Cir. 1990) (special application of third-party beneficiary principles under ERISA intended to prevent employer gamesmanship).

applying public policy exceptions to limitation of liability provisions when employees, rather than employers, challenge such provisions.

IV. TORT CLAIMS RARELY OVERCOME THE ECONOMIC LOSS DOCTRINE.

Most states require claims for indemnification or contribution to be rooted in an underlying cause of action, whether statutory, contractual, or in tort.[202] Thus, companies seeking to recover for employment-based losses in tort generally must assert a tort claim, such as negligence, gross negligence, fraud, or unfair competition.

Beyond the risk of statutory preemption of such common law claims described in Part II, tort claimants face an additional doctrinal hurdle: the economic loss doctrine. The economic loss principle bars negligence-based claims where the plaintiff seeks only economic damages, rather than property damage or personal injury, particularly when those economic damages arise from a contractual duty.[203] In the absence of "personal injury or property damage" or an "abrupt, cataclysmic occurrence," courts will conclude that the "plaintiff is essentially seeking enforcement of the bargain" and must proceed in contract.[204] The rationale behind this principle is to "preven[t] the law of

---

[202] *See, e.g.*, N.Y. State Workers' Comp. Bd. v. Consol. Risk Servs., Inc., 40 Misc. 3d 1232(A) at *10–11 (N.Y. Sup. Ct. 2013) (observing that a claim for implied indemnity must still "state a viable cause of action"); Wiember v. Felberbaum and Assocs., No. 07-80934, 2008 WL 299016, at *2, (S.D. Fla. Feb 1, 2008) ("Indemnification is a distinct cause of action. It is not an affirmative defense."); *Aegis Senior Cmtys.,* 2023 WL 7644280, at *3-4 (contractual provisions regarding indemnity control over equitable indemnity claims). Some states, however, recognize claims for implied or equitable indemnity where "there is an implied contract for indemnity or when justice demands there be the right." Alexander v. Golden Margarita LLC, No. CV-22-00781, 2023 WL 1818911, at *11 (D. Ariz. Feb. 8, 2023); *Veritas Pers. Servs.*, 2019 WL 11506033, at *2, *5 (discussing California's "third-party tort of another" claim, which is equivalent to an implied indemnity cause of action, as well as claims for common law indemnification under Florida law).

[203] DOBBS, ET AL., THE LAW OF TORTS § 449 (2d ed.) The risk of identity theft could serve as a basis for property loss. However, when an employee-plaintiff sought to recover from UKG for risk of identity theft posed by the data breach, the court characterized the mere risk of identity theft as an economic loss and dismissed the plaintiff's negligence claim. *See Kroeck,* 2022 WL 4367348, at *6.

[204] Dobbs, *supra* note 203, at 552. Massachusetts is a rare state that does not recognize the economic loss doctrine, and instead "specifically permits recovery of economic losses caused by negligent breach of a contractual duty." Commonwealth Care All., Inc. v. Babel Health,

contract and the law of tort from dissolving into one another"[205] and to effectuate the parties' intent.[206] Although the doctrine generally does not apply to non-parties to a contract, some states will dismiss any tort claim asserting only economic damages regardless of the presence of an underlying contract.[207]

Some states follow a variant of the economic loss doctrine, such as the "gist of the action" doctrine or the "independent tort" doctrine. Florida applies the "independent tort" doctrine, which permits plaintiffs to pursue negligence claims asserting only economic damages, provided that the claim is independent of a breach of contract.[208] Pennsylvania applies a "gist of the action" doctrine which requires a party to proceed in contract "when the parties' obligations are defined by the terms of a contract and not by a duty imposed by social policy."[209] These doctrines serve the same function as the economic loss doctrine: to maintain a clear delineation between contract and tort claims, and to prevent contract plaintiffs from availing themselves of tort remedies.

Inc., No. 20-CV-10931, 2020 WL 5237697, at *1–2 (D. Mass Sept. 2, 2020) (permitting a negligence and gross cause of action against a "healthcare technology company" for failing "to process and submit data to Medicare for . . . reimbursement"). *But see Maxfield*, 2025 WL 1581308, at *4–5 (Mem. & Order) (expressing doubt on this point as to Massachusetts law).

[205] Robinson Helicopter Co. v. Dana Corp., 102 P.3d 268, 273 (Cal. 2004); Alejandre v. Bull, 153 P.3d 864, 868 (Wash. 2007) (en banc) ("In general, whereas tort law protects society's interests in freedom from harm . . . contract law is concerned with society's interest in performance of promises").

[206] Dobbs et al., *supra* note 203, §§ 449, 614; Digicorp, Inc. v. Ameritech Corp., 662 N.W.2d 652, 659 (Wis. 2003) ("[T]he economic loss doctrine was created to . . . protect commercial parties' freedom to allocate economic risk by contract."); Anita Bernstein, *Keep it Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 799–809 (2006) (assessing law and economics arguments in defense of the economic loss doctrine).

[207] *Compare* Sullivan v. Pulte Home Corp., 306 P.3d 1, 3–4 (Ariz. 2013) (limiting the economic loss doctrine to contracting parties), *with*, Dobbs et al., *supra* note 203, § 614 (noting that some courts "bar recovery even when the plaintiff was in no contractual relationship with the defendant at all"), and Banknorth, N.A. v. BJ's Wholesale Club, Inc., 442 F. Supp. 2d 206, 213 (M.D. Pa. 2006) (concluding that "privity is not a requirement" for applying the economic loss doctrine).

[208] *Veritas Pers. Servs.*, 2019 WL 11506033, at *4–5 ("A plaintiff may not pursue a tort theory of relief where a contract created the duty to act [and] performance is measured against the contractual obligations.") (internal quotation marks omitted).

[209] Delaware River Waterfront Corp. v. Wellspring Software, Inc., No. 22-1905, 2022 WL 17869139, at *5 (E.D. Pa. Dec. 22, 2022).

States recognize a variety of exceptions to the economic loss doctrine.[210] The doctrine generally does not apply to intentional torts and in some cases gross negligence.[211] Fraud cases, however, have been treated somewhat inconsistently by trial courts. Although fraud is an intentional tort,[212] courts have occasionally applied the economic loss rule where there is an underlying contract.[213]

A further exception to the economic loss doctrine applies to a duty "imposed by law as an incident to the parties' relationship" such as "professionals, common carriers and bailees" who have a duty to "exercise reasonable care, irrespective of their contractual duties."[214] For example, in *Sommer v. Fed Signal Corp. New York*, a fire alarm company mistakenly turned off an alarm system and failed to report fire signals to the fire department, resulting in extensive damage to an apartment building.[215] The alarm company's contract with the building owner limited damages to "$250 or 10% of the annual service charge" for the alarm service. In a lawsuit brought by building tenants and owners, the alarm company argued that the economic loss doctrine barred the gross negligence claim.[216] The court allowed the gross negligence claim to proceed and observed that the alarm company's duty arose from the "nature of its services," citing the variety of "fire-safety regulations." The court reasoned that "fire alarm companies thus perform a service affected with a significant

---

[210] California itemizes those exceptions as follows: "where the conduct also (1) breaches the duty imposed by some types of 'special' relationships; (2) breaches a 'duty' not to commit certain intentional torts; or (3) was committed "intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages." Aegis Senior Comm. v. UKG, No. 23-cv-01076, 2024 WL 4093912, at *4 (N.D. Cal. Sept. 4, 2024) (citing *Robinson Helicopter*, 34 Cal. 4th at 990).

[211] Dobbs et al., *supra* note 203, § 449.

[212] Here I use "fraud" to refer to a common law fraud claim and not related causes of action, such as negligent misrepresentation.

[213] Dobbs et al., *supra* note 203, §§ 615, 686 ("The [economic loss] rule was soon adapted by some courts to bar claims for certain intentional torts, particularly fraud and deceit, between parties in a contractual or semi-contractual relationship"). *But see Digicorp*, 662 N.W.2d at 660 (concluding that the economic loss doctrine did not bar a fraudulent inducement claim because "a party engaging in fraud should not be allowed to hide behind the protections of the economic loss doctrine" because the state "has a long-standing principle that parties need a background of truth and fair dealing in commercial relationships").

[214] *Sommer*, 79 N.Y.2d at 551 (1992); Dobbs et al., *supra* note 212, § 615.

[215] *Sommer*, 79 N.Y.2d at 549.

[216] *Id*.

public interest" where "failure to perform the service carefully and competently can have catastrophic consequences."[217]

Tort claims against software companies are commonly dismissed on the basis of the economic loss rule.[218] In *Veritas v. ADP*, the plaintiff, a staffing company, sued payroll and software provider ADP for negligence in connection with its role in failing to pay overtime to truck drivers.[219] Although the ruling related to a conflict-of-law issue, the court considered how Florida would apply the "independent tort" doctrine and concluded that the negligence claim would be dismissed, since "ADP does not owe a duty to the general public to provide human resource services; ADP's duty only arises as a result of the Agreement."[220]

In *Maxfield v. UKG*, plaintiff-employees sued UKG for negligence in connection with the ransomware outage, "because their direct employers…were unable to process payroll."[221] A federal district court in Massachusetts applied the economic loss doctrine despite the absence of an underlying contract between the plaintiffs and UKG. The doctrine, the court ruled, applied to any tort claim asserting "purely economic damages."[222]

In *Aegis v. UKG*, an employer brought a gross negligence claim against UKG for wage and hour liability incurred as a result of the ransomware outage.[223] A California court dismissed the claim on the basis of the economic loss doctrine, reasoning that the gross negligence claim was "premised on a supposed duty of care arising from the WFC contract" and the damages it sought were "purely

---

[217] *Id*. at 552–53.
[218] *Aegis Senior Comm. v. UKG*, 2024 WL 4093912, at *4 ("Aegis' purported gross negligence claim, for which Aegis seeks purely economic recovery, is necessarily intertwined with the underlying WFC Agreement, and thus is barred by the economic loss doctrine."); *Emmes v. SAP*, No. 21-0019, 2021 WL 1696304, at *4–5 (E.D. Pa. Apr. 29, 2021) (dismissing negligence claim because software maker whose software failed had no duty independent of the contract); Alejandre v. Bull, 153 P.3d 864, 866 (2007) (economic loss rule bars negligent misrepresentation claims but permits fraudulent concealment claims).
[219] *Veritas Pers. Servs.*, 2019 WL 11506033, at *1.
[220] *Id*. at *5.
[221] *Maxfield*, 2025 WL 1581308, at *2.
[222] *Id.* at *4. *See also* Fraga v. UKG, Inc., No. 22-20105-CIV, 2022 WL 19486310, at *13 (S. D. Fla. May 10, 2022) (negligence theory dismissed for lack of standing, reasoning that the plaintiff's claims were speculative and did not explain why the direct employer "cannot process payroll" or "pa[y] [wages] on time").
[223] *Aegis Senior Comm.,* 2024 WL 4093912, at *1, *3.

economic."[224] The plaintiffs unsuccessfully attempted to argue that the provision of software services was professional in nature, as a "professional servicer of technical safeguards and data security."[225] The court reasoned that the cybersecurity standards cited by the plaintiff exceeded the "negotiated standards" that appeared in the contract.[226] The court also declined to apply professional standards to UKG's status as a "provider of payroll and IT services" on the basis the contract provided for "software as a service…not anything approximating professional services similar to physicians, lawyers, or auditors."[227] The court then limited Aegis to the remedies set forth in the contract's limitation of liability provision: service credits.[228]

Plaintiffs have successfully asserted fraud claims in a number of software-related cases and thereby avoided the economic loss doctrine. However, these cases tend to be asserted against software implementation or integration companies rather than the software companies themselves.[229] The plaintiffs typically proceed under a fraudulent inducement theory, claiming they entered into a software contract on the basis of knowingly false statements.[230]

---

[224] *Id*. at *4.
[225] *Id.* at *4.
[226] *Id*. at *5.
[227] *Id.* at *5.
[228] *Id*. at *4 ("The parties foresaw this possibility and included a provision in the WFC Agreement specifically delineating the recoverable damages for an outage.").
[229] Murphy Homes Inc. v. Mgmt. Info. Tech. Corp., No. 22-2728-PJM, 2023 WL 6293648 (D. Md. Sept. 26, 2023) (Mem. & Op.) (denying motion to dismiss in fraudulent misrepresentation case brought by corporate software purchaser against software integrator that falsely claimed it could provide a solution that would "seamlessly integrate" into various HR-related software); *See* Copart, Inc. v. Sparta Consulting Inc., 277 F. Supp. 3d 1127 (E.D. Cal. 2017) (denying motion for summary judgment on fraud claims in connection with representations made regarding software functionality and implementation); Digicorp, Inc. v. Ameritech Corp., 262 Wis. 2d 32, 42 (Wis. 2003) (fraudulent inducement claim not subject to economic loss doctrine); *Alejandre*, 153 P.3d at 866 (economic loss rule bars negligent misrepresentation claims, but permits fraudulent concealment claims); *But see Montclair State Univ. v. Oracle USA, Inc.*, No. 11–2867, 2012 WL 3647427 at *4 (D.N.J. Aug. 23, 2012) (dismissing fraud claims based on "alleged misrepresentations relat[ing] to matters expressly addressed by the parties' agreement" on the basis of the economic loss doctrine); *Aegis Senior Comm.,* 2024 WL 4093912, at *6 (fraud claims barred by economic loss rule because the alleged "misrepresentations relate to the Agreement's terms, they are not independent of it; plaintiff also failed to specifically identify a misrepresentation or justifiable reliance").
[230] *Copart*, 277 F. Supp. 3d at 1138 (the plaintiff's "fraudulent inducement claim requires a misrepresentation about a party's intent to perform on a promise for this element"); *Am. Trim, LLC*, 383 F.3d at 472 (affirming jury verdict on fraud claim involving automotive software).

For example, in *Copart v. Sparta Consulting*, a vehicle auction company brought a fraud claim against a "software development company" based on false representations regarding planned software functionality and implementation pursuant to an $18 million contract.[231] The court denied a motion for summary judgment on both the fraudulent inducement and more general fraud claim, citing six different statements or acts of concealment Copart alleged in its complaint—such as failing to disclose that a "module was not functioning and might cause 'severe' problems"; failing to "disclose ongoing failures regarding its project team"; and asserting that it had "ALL the information" to identify necessary functionality.[232] The court declined to apply the economic loss doctrine, ruling that the fraud claim was independent of the breach of contract claim.[233]

Similarly, in *Cognizant Worldwide Limited v. Barrett Business*, a professional employer organization ("PEO") contracted with a software implementation company for HR-related cloud software.[234] The PEO argued that the company made false representations about its ability and implementation experience.[235] The court declined to apply the independent duty doctrine to the plaintiff's negligent misrepresentation and fraud claims, declaring such claims "independent" of a breach of contract.[236]

In *Aegis v. UKG*, the plaintiffs also asserted a fraud claim against UKG based on marketing statements relating to its security standards and assurances that it would "replicate data and would restore data in a commercially reasonable timeframe."[237] The court ruled that the plaintiffs had not pled their fraud claim with sufficient specificity. [238] Even had the allegations been more specific, the court ruled that the plaintiffs did not sufficiently rely on the misstatements, as

---

[231] *Copart*, 277 F. Supp. 3d at 1138 (denying motion for summary judgment on fraud claims in connection with representations made regarding software functionality and implementation).
[232] *Id*. at 1150 (narrowing fraudulent inducement claim to only one statement relating to the defendant's intent, but permitting fraud claim as to all six alleged statements or acts of concealment).
[233] *Id*. at 1152–53.
[234] Cognizant Worldwide Ltd. v. Barrett Bus. Servs., Inc., No. C19-1848, 2020 WL 6434835, at *2 (W.D. Wash. May 7, 2020), report and recommendation adopted, No. C19-1848, 2020 WL 5105443 (W.D. Wash. Aug. 31, 2020).
[235] *Id*. at *6 –*7.
[236] *Id*. at *9.
[237] *Aegis Senior Comm.,* 2024 WL 4093912, at *6.
[238] *Id*. at *5.

they renewed their contract after learning about the ransomware attack. Although the court did not apply the economic loss doctrine, it cited the integration clause in the contract, which "superseded all prior or contemporaneous representations" and prevented the plaintiff from reasonably relying on marketing statements.[239]

In summary, the economic loss doctrine and state variants of that doctrine have enabled software companies to escape liability for negligence relating to the design, implementation, and security of their software. Fraud claims may be available to employer-plaintiffs where they can identify specific material statements upon which they relied when entering into a contract with the software maker. However, such claims would be unavailable to affected employees, who lack direct dealings with the software maker.

V. CLOSING THE HR SOFTWARE LOOPHOLE

A. The Costs of the Status Quo

As Parts I-IV recount, software companies have largely avoided accountability for their role in employment law violations affecting employees of their corporate end users. Software companies are not covered by the Fair Labor Standards Act unless they qualify as "employers" of the affected workers, an unlikely prospect for any software company other than those serving a role equivalent to a PEO. Title VII and the ADA cover "agents" of employers, a category that could encompass software companies if the employer delegates its hiring function wholesale to the software. This creates a potential avenue for employees to sue software companies directly under Title VII and the ADA. However, Supreme Court precedent interpreting Title VII forecloses indemnification or contribution claims by employers, which prevents the loss from being reallocated to software companies if they are not named in the employee's original complaint.

Although breach of contract presents a theoretical avenue for employers to redistribute the loss, limitation of liability provisions in many such contracts prevent employers from recovering meaningful damages from software

[239] *Id*. at *6.

companies. Tort claims are routinely dismissed pursuant to the economic loss doctrine or similar state variants.

A legal system that does not meaningfully permit employers or employees to recover for employment law violations caused in whole or in part by software is bad for workers. Only a small fraction of workers affected by employment law violations ever sue to recover damages, leaving them to absorb the harms of wage loss and discrimination. Even when employees successfully sue to recover damages from their employer, only the employer faces meaningful deterrence from future misconduct. Moreover, when responsibility for employment practices is shared with non-employer third parties, employees may have difficulty proving their case against the primary employer. The Court in *Mobley* alluded to this very dilemma, describing a hypothetical in which the primary employer lacks discriminatory intent due to its ignorant reliance on third-party software, while the software provider responsible for the employee selection process insists it is not covered by the statute.[240]

Software companies insulated from liability have little to no incentive to fix their products or invest in precautions that better prevent employment law violations. While some corporate end-users may be sophisticated purchasers that scrutinize software functionality for sources of legal risk, others may not. And in the context of artificial intelligence, the underlying workings of the software are almost certainly a black box to corporate end users.[241] The many instances of unsuccessful litigation against software companies suggest that software-related legal violations were a costly surprise to a variety of employers. Likewise, the prevalence of limitation of liability provisions in these contracts suggests that software companies anticipated future claims relating to their products, and that their corporate clients did not—or lacked the bargaining power to have the provision removed from the contract. Either way, these provisions have successfully insulated software companies even from ordinary contract damages for the harms posed by the software.

Absent liability, software companies may even have an incentive to engage in unfair business practices. They can offer features that are essentially a public nuisance—such as high-risk wage and hour features like rounding and automatic break deductions, or personality tests to select workers based on

[240] *Mobley*, 740 F. Supp. 3d at 805.
[241] *See* citations *supra* note 41**Error! Bookmark not defined.**.

questionable psychometrics. Employers will be attracted to these features if they mistakenly assume that software companies only offer products that are legally compliant. The allure is particularly strong if the software is widely used, creating the illusion that the product does not create a liability risk for the employer.

The absence of liability can also embolden software companies to make a variety of claims in sales and marketing, which are then disclaimed in the contract or short-circuited through limitation of liability provisions. Such assurances can lull employers into a false sense of complacency that leads them to take inadequate care in the selection and implementation of software systems. When software companies avoid liability for false or misleading statements, it gives them a competitive advantage over more cautious competitors.

Broadly, the absence of remedies against software companies under statutory, contract, and tort law is inconsistent with how the tort system has come to allocate liability among tortfeasors over the last 50 years.[242] Although principles of joint and several liability allow an innocent plaintiff to fully recover against any given tortfeasor, a follow-on remedy for contribution "enables a joint tortfeasor that has paid more than its equitable share of damages to recover the excess from the other tortfeasors." [243] The ultimate "goal of contribution… is fairness to tortfeasors who are jointly liable."[244] Where multiple co-defendants are named in a suit, principles of "apportionment" enable courts to "assig[n] damages proportional to their fault."[245]

As courts have long recognized, the failure to allocate damages according to fault is inequitable. In the landmark 1972 New York case, *Dole v. Dow Chem. Co.*, the court concluded that "right to apportionment of liability or to full

---

[242] Michael Harper has advocated in favor of importing tort-based principles into the employment context, such as applying a wrongful interference with employment relationship tort to circumstances where a non-employer contributed to discrimination or retaliation. Michael C. Harper, *Escaping the Allure of Joint Employment: Using Fault-Based Principles to Impose Liability for the Denial of Employee Statutory Rights*, 36 ABA J. OF LAB. AND EMP'T L. 225, 229 (2022). Similarly, Harper recommended that negligence principles might apply when a non-employer bears some fault in connection with wage and hour law. *Id*. at 230.

[243] *Sommer*, 79 N.Y. 2d at 556.

[244] *Id*. at 556–57; Rogers v. Dorchester Assocs., 32 N.Y.2d 553, 564 (1973).

[245] *Id*. at 556; N.Y. CPLR §§ 1401–1403 (2014).

indemnity…among parties involved together in causing damage by negligence, should rest on relative responsibility and to be determined by the facts."[246] That case involved a widow of an employee killed by workplace exposure to a toxic pesticide manufactured by Dow Chemical. [247] The widow had no recourse against the employer due to workers' compensation preclusion, but successfully sued Dow Chemical on a negligence theory.[248] Dow brought a third-party complaint against the employer for its role in causing the employee's death.[249] The New York Court of appeals instructed the lower courts to apportion damages between Dow and the employer, noting "widespread dissatisfaction with the inequality of result" in alternate frameworks,[250] and rejecting "the unwillingness of the law as a matter of policy to make relative value judgments of degrees of culpability among wrongdoers."[251] A failure to apportion "runs counter to tort policy goals of deterrence, equitable loss sharing by all the wrongdoers, effective loss distribution over a large segment of society, and rapid compensation of the plaintiff."[252] Relative wrongdoing, the court explained, is a question of "fact" which can be determined "in a separate action" or through a third-party complaint in the original action.[253]

Courts could apportion liability between employers and software companies in an equitable manner. In *Veritas v. ADP*, the employer failed to properly compensate truck drivers due in large part to poor advice from ADP, a payroll processor that also served as a PEO in that instance. ADP's software prolonged the legal violation, by failing to flag several years of time entries without any overtime hours. The employer's case was bolstered by a mutual indemnification provision in the contract, where each would be responsible for their share of the wrongdoing. In assessing damages in a follow-on breach of contract claim, the court correctly imposed liability on the employer for unpaid wages. However, the court left open the possibility that the employer could recover for taxes, penalties and fees attributable to the violation—rather than

---

[246] Dole v. Dow Chem. Co., 30 N.Y.2d 143, 153 (1972).
[247] *Id*.
[248] *Id*. at 147.
[249] *Id*.
[250] *Id*. at 149.
[251] *Id*. at 147.
[252] *Id*. at 150 (quoting Robert G. Werner (*Contribution and Indemnity*, 57 CAL. L. REV. 490, 516 (1969)).
[253] *Id*. at 149.

ordinary payroll taxes otherwise owed.[254] The court was also willing to consider a fee refund from ADP as to the portion of the workforce affected by the legal violation.[255] Courts could apply a similarly equitable approach in other wage and hour cases, holding the employer responsible for the wages owed while imposing contractual damages or a portion of the penalties on the software maker.

B. Legal Reforms

Software companies need an incentive to improve their product design to reduce the likelihood of legal violations and other employment-related harms, like ransomware attacks. Improvements to software design are critical from a public policy standpoint because they benefit all employees whose employment applications or timesheets are run through that software.

Altering the incentives of software makers would not require wholesale legal reforms. Instead, even a single change to the existing legal doctrine would succeed in imposing non-zero liability and likely alter their incentives. Meaningful legal reforms could include: (1) permitting contribution claims in Title VII and FLSA claims; (2) declining to enforce limitation of liability provisions in contracts on the basis of gross negligence or public policy; or (3) applying the bailment or professional services exception to the economic loss doctrine.

1. Permitting Third-Party Complaints for Contribution in Title VII and FLSA Claims

As Part II described in detail, the 1981 Supreme Court case, *Northwest Airlines Inc. v. Transport Workers Union of America,* precluded employers from bringing third-party claims against co-employers for their share of the harm.

---

[254] Veritas v. ADP, No. 1:19-cv-22435, 2020 WL 7493186 at *16, November 2, 2020 (S.D.Fla. 2020) ("In sum, the Court finds as a matter of law that Veritas cannot recover an amount attributable to payroll taxes that should have been paid contemporaneously with the overtime that should have been paid to the Texas Day Rate Drivers, but otherwise denies summary judgment as to the payroll taxes and processing fees. In addition, the Court finds as a matter of law that Veritas cannot recover processing fees it was never charged in connection with the *Walker* Action settlement.")

[255] *Id.* ("Veritas cannot recover administrative fees unrelated to the non-payment of overtime to Texas Day-Rate Drivers and the subsequent litigation. However, the Court takes no position at this time, due to the undeveloped record, regarding the extent to which this sub-set of administrative fees might be recoverable.")

Several circuits have applied this principle to the FLSA context.[256] The Supreme Court should consider overturning this decision. It is in direct conflict with a large body of jurisprudence in Title VII, the ADA, and the FLSA recognizing joint employer status.

In a system that recognizes joint employment but prohibits third-party complaints, the liability of a co-employer depends entirely on whether the plaintiff happened to sue one co-employer, the other, or both. Plaintiffs are poorly positioned at the filing stage to identify the corporate actors that employed them when multiple entities are involved. Plaintiffs also have little incentive to identify all possible corporate actors responsible for the harm if the primary employer can be found and has sufficient resources to satisfy a judgment.

Allowing third-party complaints would not alter the underlying statutory duties of the parties. The third-party plaintiff would still need to show that the co-employer was covered by the statute. As the *Workday* case illustrates, such a showing may be possible under Title VII where the employer has delegated important HR functions such as hiring to a software company. In the FLSA context, establishing co-employer status for a software-related actor is more challenging because courts tend to apply a more holistic economic realities test. However, in cases where a software-related actor assumes functions similar to a PEO—as in the *Veritas v. ADP* contract dispute—it might qualify as a co-employer. Where a plaintiff successfully prevails against more than one employer, whether directly or indirectly through a third-party complaint, courts should then apportion damages between co-defendants according to relative fault.

2. Declining to Enforce Limitation of Liability Provisions on the Basis of Gross Negligence or Public Policy

As Part III discussed, limitation of liability provisions are the main barrier preventing employers from obtaining contract remedies for the costs they incurred as a result of software failures. Courts should consider applying two possible exceptions to these limitation of liability provisions: the exception for gross negligence, and the exception for public policy.

---

[256] See discussion *infra* at Part II.

First, in cases where the plaintiff-employer successfully pleads gross negligence, intentional torts, or a statutory claim, courts should set aside the limitation of liability provision.[257] Plaintiff-employers and individual employees should also be permitted to avoid limitation of liability provisions when suing pursuant to statutory remedies for unfair business practices or consumer protection.[258]

Applying an exception to a limitation of liability provision should enable the plaintiffs to pursue contract remedies where the underlying claim sounds in contract. Many states already recognize an exception for gross negligence but fail to recognize this exception as a feature of contract law. Instead, they treat the gross negligence allegations solely as a standalone tort claim that is then dismissed under the economic loss doctrine.[259] Yet, the purpose of the economic loss doctrine is to force parties to pursue a contract remedy where one is available. In applying the economic loss doctrine to a breach of contract claim alleging gross negligence, courts effectively nullify the contract principle recognizing an exception for gross negligence.[260] The purpose of the gross negligence exception is—at least in part—to ensure that parties cannot disclaim all meaningful contract remedies where their own behavior is egregious.

Some consequential damages may be available through contract remedies.[261] For example, a 1984 case from the Supreme Court of Wisconsin

---

[257] 8 WILLISTON ON CONTRACTS § 19:21 (4th ed., 2025) ("contract for the future discharge of a claim will be upheld according to its terms unless it purports to immunize future conduct that is either intentionally tortious or grossly negligent, or unless it otherwise violates a strong, well articulated, and clear public policy").

[258] H1 Lincoln Inc. v. S. Wash. St., LLC, 489 Mass. 1, 3–4 (2022) (declining to enforce limitation of liability in contract, where commercial plaintiff sued landlord for unfair and deceptive business practices under state law, and enforcing statutory damages); Corral v. Rollins Protective Servs. Co., 240 Kan. 678, 693 (1987) (declining to enforce limitation of liability in contract where plaintiff was suing pursuant to consumer protection statute); All Bus. Sol. Inc. v. Nationsline, Inc., 629 F. Supp. 2d 553, 560 (W.D. Va. 2009) ("limitation of liability provision 'cannot as a matter of public policy, exempt Nationsline from liability for intentional, conspiratorial misconduct'").

[259] *Montclair State Univ.*, 2012 WL 3647427, at *12.

[260] In other contexts, business plaintiffs have successfully pursued contract remedies where courts declined to enforce limitation of liability provisions for gross negligence or intentional torts. *See, e.g.*, Prysmian Cables and Sys. USA LLC v. A DT Commer. LLC, 665 F. Supp. 3d 236, 254 (D. Conn. 2023) (permitting breach of contract claim alleging reckless and intentional misconduct and setting aside limitation of liability provision for these claims).

[261] Novak & Co. Inc., v. New York City Hous. Auth., 125 Misc. 2d 647, 655 (Sup. Ct. 1984) (breach of contract claim to recover "expenses for increased labor, superintended and office costs" due to the defendant's delay).

affirmed a jury award of $9,000 in business losses to a company whose name was negligently left off a large advertisement placed in the phone book.[262] The court declared the limitation of liability provision in the telephone company's contract unenforceable as a matter of public policy because it sought to relieve the company from liability for its own negligence in a near-monopoly service of "great importance to the public."[263]

The public policy exception should also apply in cases where the plaintiff can allege that the software company's breach harmed employees. The public policy exception applies to bailments—where a party handles property for another—as well as professional service providers.[264] Software companies that handle wage and hour functionality are equivalent to bailees. Even if they do not have physical custody of employee wages, they represent a fundamental link in the chain between the hours worked, the entry of those hours, and the conversion of those hours into wages ultimately paid to workers. Software that causes or interferes with employee payment in accordance with legal rules is mishandling the property of the third-party employee, and is equivalent to a bailee that mishandles, loses, or exposes a third party's property to theft.

The fact that wages and hours are highly regulated by both federal and state law is further indication of the public interest in ensuring that software complies with those rules.[265] In the same way that city codes regulating fire alarms furnished a public policy basis to disregard a limitation of liability provision in a company's contract with a fire-alarm provider, wage and hours laws furnish a public policy basis for setting aside limitation of liability provisions in software contracts.[266]

---

[262] Discount Fabric House of Racine Inc. v. Wis. Tel. Co., 117 Wis. 2d 587, 593, 597 (1984).
[263] *Id*.
[264] I.C.C Metals Inc. v. Mun. Warehouse Co., 50 N.Y.2d 657, 660 (1980) (when warehouse failed to return stored property, limitation of liability provision was held to be unenforceable); Griffin v. Nationwide Moving and Storage Co. Inc., 187 Conn. 405, 414 (Conn. 1982) (plaintiff stored property at defendant's warehouse, which was destroyed by a fire; "courts have . . . demonstrated a strong tendency to hold contracts of this type against public policy"); Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 101 (1963) (noting public policy interest if "the person or property of the purchaser is. . . subject to the risk of carelessness by the seller or his agents").
[265] 5 WILLISTON ON CONTRACTS § 12:4 (4th ed. 2025) (public policy determinations to be based on "precedent" in the absence of "a clear-cut declaration of such policy by constitution, legislation or judicial precedent.")
[266] *See Sommer*, 79 N.Y. 2d at 547.

Employers seem reluctant to argue a public policy exception in these cases—and courts are reluctant to consider them—because they involve business-to-business contracts, and businesses are considered sophisticated counterparts.[267] However, applying a public policy exception ultimately serves to protect workers, by forcing software companies to internalize at least some part of the harm they impose on third-party employees. Employees are powerless to alter the software design. And although employers can select software vendors as judiciously as possible and configure the software with care, they likewise have little to no power over how the software is designed. A market that imposes no liability on software makers will not produce better software design. Recognizing the public policy interest in contract disputes between employers and software makers will ultimately improve software practices over time.

Permitting contract remedies for employer-plaintiffs also indirectly serves to allocate losses between the employer and software maker in a somewhat equitable manner. Rescission of a contract, for example, would not impose a disproportionate penalty on the software maker, while providing meaningful contribution to the employer for its losses, given that license fees can cost many thousands or even millions of dollars.[268] In this manner, software makers internalize some of the costs they have imposed on third parties without being driven out of business.

3. Applying the Bailment or Professional Services Exception to the Economic Loss Doctrine

As previously discussed in subpart 2, supra, wage and hour software makers fulfill a similar role to bailees. As such, the bailment exception to the economic loss doctrine could apply. The economic loss doctrine also recognizes an

---

[267] Mattegat v. Klopfenstein, 50 Conn. App. 97, 104 (1998) (courts also tend to find a public policy interest in maintaining liability for "professional service providers in the course of dealing with the general public").

[268] *Novak & Co. Inc.*, 125 Misc. 2d at 658 (allowing breach of contract claim to proceed despite limitation of liability provision, on the basis of gross negligence); *Montclair State Univ.*, 2012 WL 3647427, at *12 (allowing breach of contract claim to proceed where the plaintiff alleged the breach constituted gross negligence and the limitation of liability provision included an exception for gross negligence).

exception for professional services.[269] For example, in a leading 1922 New York Court of Appeals case written by Justice Cardozo, Glanzer v. Shepard, "public weighers" who incorrectly weighed several tons of beans in breach of contract with the sellers were held liable to a third-party purchaser for negligence.[270] The court reasoned that an exception to the doctrine should apply, because the purchasers were the foreseeable beneficiary of the services, and represented an ascertainable and circumscribed class of beneficiaries.[271] As Cardozo explained, "We think the law imposes a duty toward buyer as well as seller . . . The [buyer's] use of the [weight] certificates was not an indirect or collateral consequence of the actions of the weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction."[272] Both in the wage and hour context and in the antidiscrimination context, employees are the foreseeable beneficiaries of the software, and are most acutely affected by negligence in product design or implementation. Harms to those third parties should be recoverable against the party responsible for the harm.

An exception to the economic loss doctrine would not result in unlimited liability for software makers. The employer—or the employees—suing the software-maker would first need to prevail in their underlying substantive claim against the software-maker, such as negligence. A software maker that exercised ordinary standards of care in the design, implementation, and documentation of the software would not be liable. Even if the plaintiff prevailed in the claim, courts should apportion losses according to comparative fault, such that the software maker would only be liable for the portion of the harm attributable to its own actions or omissions.

CONCLUSION

Even as artificial intelligence presents novel challenges in employment law, existing jurisprudence applied to HR software failures can chart a path forward for addressing the risks the technology poses to compliance with discrimination and wage and hour law. Regardless of the state of the technology, AI-related innovations are likely to be sold to corporate end users through license contracts

---

[269] Dobbs et al., *supra* note 212 at § 615.
[270] Glanzer v. Shepard, 233 N.Y. 236, 238 (N.Y. Ct. App. 1922).
[271] *Id* at 238–39.
[272] *Id* at 238–39.

subject to contract law. The corporate end users will continue to be governed by employment law and will likely continue to accrue direct liability for employment law harms.

Lawsuits brought by corporate end users against software companies provide an opportunity to regulate software makers indirectly by forcing them to internalize the costs of harms they impose on third-party employees. Courts assessing these cases thus need to move beyond their conventional view that such disputes are merely business-to-business contracts, where parties knowingly allocate risks according to their preferences.

Instead, courts should view HR software as a potential point of failure in paying workers correctly and ensuring equal access to workplace opportunities. Where employers can prove that an employment harm was caused or exacerbated by HR software, public policy is served by allocating a proportional share of the cost to the software-related actor.

For their part, employers should exercise far greater caution in their selection of HR software vendors. Their due diligence should include searching for legal cases that reference the software maker, including both cases asserted by employees and by employers. Companies should also aggressively negotiate terms-of-service contracts to ensure, at minimum, that they can pursue ordinary contract remedies. Companies should also scrutinize warranties, representations, and disclaimers in software contracts to ascertain whether they are consistent with public or private assurances made by the software maker regarding compliance with employment laws and cybersecurity measures. Lastly, they should not assume that the software complies with applicable antidiscrimination and wage and hour law—gaps can arise both in the software design and implementation. Companies should ensure their in-house or outside counsel has reviewed the software functionality as implemented, to identify potential problems before they compound across the workforce and over time.

APPENDIX

Excerpt from Kronos (UKG) contract

WORKFORCE CENTRAL - SOFTWARE AS A SERVICE TERMS AND CONDITIONS

Customer and Kronos Incorporated ("Kronos") agree that the terms and conditions set forth below shall apply to the Kronos supply of the commercially available version of the Workforce Central SaaS Applications in Kronos' hosting environment, the services related thereto, and the sale or rental of Equipment (if any) specified on a Kronos Order Form. The Applications described on the Order Form shall be delivered by means of Customer's permitted access to the Kronos infrastructure hosting such Applications.

Kronos and Customer hereby further agree that Kronos and/or its direct and indirect majority owned subsidiaries may enter into orders with Customer and/or its direct and indirect majority owned subsidiaries subject to the terms and conditions of this Agreement. By signing and entering into an Order Form that expressly references this Agreement, each such subsidiary of Kronos and/or Customer will be deemed to have agreed to be bound by the terms and conditions of this Agreement and all references in this Agreement to "Kronos" shall be references to the applicable Kronos entity entering into the order, and all references in this Agreement to "Customer" shall be references to the applicable Customer entity entering into the order.

1. DEFINITIONS

"Acceptable Use Policy" means the Kronos policy describing prohibited uses of the Services as further described at: https://www.kronos.com/policies/acceptable-use

"Agreement" means these terms and conditions and the Order Form(s).

"Application(s)" or **"SaaS Application(s)"** means those Kronos software application programs set forth on an Order Form which are made accessible for Customer to use under the terms of this Agreement.

"Billing Start Date" means the date the billing of the Monthly Service Fees begin to accrue as indicated on the applicable Order Form. Notwithstanding, Implementation Services provided on a time and material basis are billed monthly as delivered. The Billing Start Date of the Monthly Service Fees for any Services ordered by Customer after the date of this Agreement which are incremental to Customer's then-existing Services shall be the date the applicable Order Form is executed by Kronos and Customer.

"Cloud Services" means those services related to Customer's cloud environment as further described at: http://www.kronos.com/products/workforce-central-cloud/cloud-guidelines.aspx

"Confidential Information" means any non-public information of a party or its Suppliers relating to such entity's business activities, financial affairs, technology, marketing or sales plans that is disclosed pursuant to this Agreement and reasonably should have been understood by the receiving party, because of (i) legends or other markings, (ii) the circumstances of disclosure or (iii) the nature of the information itself, to be proprietary or confidential to the disclosing party or its Suppliers.

"Customer Content" means all content Customer, or others acting on behalf of or through Customer, posts or otherwise inputs into the Services.

"Documentation" means user manuals published by Kronos relating to the features and functionality of the Applications.

"Equipment" means the Kronos equipment specified on an Order Form.

"Implementation Services" means those professional and educational services provided by Kronos to set up the cloud environment and configure the Applications. Unless otherwise set forth on an Order Form as "a la carte" services (supplemental fixed fee, fixed scope services) or "bill as you go" services (time and material services described in a Statement of Work), Kronos will provide, as part of the Monthly Service Fee for the Applications, the fixed fee, fixed scope Implementation Services described in the Services Implementation Detail set forth at: https://www.kronos.com/wfc-saas-implementation-guideline-details-flat-fee

"Initial Term" means the initial billing term of the Services as indicated on the Order Form. The Initial Term commences on the Billing Start Date. Customer may have access to the Services prior to the commencement of the Initial Term.

"KnowledgePass Content"/"KnowledgePass Education Subscription" have the meanings ascribed in Section 7.5.

"Monthly Service Fee(s)" means the monthly fees described in an Order Form. Monthly Service Fees include fees for usage of the Applications and the Services, Cloud Services as applicable, and Equipment rental, if any. Billing of the Monthly Service Fee(s) commences on the Billing Start Date.

"Order Form" means an order form mutually agreed upon by Kronos and Customer setting forth the items ordered by Customer and to be provided by Kronos, including without limitation the prices and fees to be paid by Customer.
"Personally Identifiable Data" means information concerning individually identifiable employees of Customer that is protected against disclosure under applicable law or regulation.
"Renewal Term" means the renewal billing term of the Services as indicated on the Order Form.
"Services" means (i) the Cloud Services, (ii) accessibility to the commercially available version of the Applications by means of access to the password protected customer area of a Kronos website, and all such services, items and offerings accessed by Customer therein, and (ii) the Equipment rented hereunder, if any.
"Statement of Work", "SOW", "Services Scope Statement" and **"SSS"** are interchangeable terms referring to a written description of the Implementation Services mutually agreed upon by Kronos and Customer and set forth as "bill as you go" services on the Order Form.
"Supplier" means any contractor, subcontractor or licensor of Kronos providing software, equipment and/or services to Kronos which are incorporated into or otherwise related to the Services. Kronos may at its sole discretion replace a Supplier, provided that a change to Supplier will not have a materially adverse effect on the Services delivered by Kronos under this Agreement.
"Term" means the Initial Term and any Renewal Terms thereafter.
"Training Points" has the meaning ascribed to it in Section 7.6 below.

2. TERM

2.1 Billing for the Services commences on the Billing Start Date, and continues for the Initial Term or until terminated in accordance with the provisions hereof. At the expiration of the Initial Term and each Renewal Term as applicable, the Services shall automatically renew each year for an additional Renewal Term until terminated in accordance with the provisions hereof.

2.2 Either party may terminate the Services and this Agreement to be effective at the expiration of the then current Term upon no less than sixty (60) days prior written notice.

2.3 Either party may terminate the Services and the Agreement upon a material breach of the Agreement by the other party if such breach is not cured within thirty (30) days after receipt of written notice.

2.4 In the event that either party becomes insolvent, makes a general assignment for the benefit of creditors, is adjudicated a bankrupt or insolvent, commences a case under applicable bankruptcy laws, or files a petition seeking reorganization, the other party may request adequate assurances of future performance. Failure to provide adequate assurances, in the requesting party's reasonable discretion, within ten (10) days of delivery of the request shall entitle the requesting party to terminate the Agreement immediately upon written notice to the other party.

2.5 If the Agreement is terminated for any reason:

(a) Customer shall pay Kronos within thirty (30) days of such termination, all fees accrued and unpaid under this Agreement prior to the effective date of such termination, provided however, if Customer terminates for material breach of the Agreement by Kronos, Kronos shall refund Customer any pre-paid fees for Services not delivered by Kronos;

(b) Customer's right to access and use the Applications shall be revoked and be of no further force or effect and return rented Equipment as provided in Section 9.1 below;

(c) Customer agrees to timely return all Kronos-provided materials related to the Services to Kronos at Customer's expense or, alternatively, destroy such materials and provide Kronos with an officer's certification of the destruction thereof; and

(d) All provisions in the Agreement, which by their nature are intended to survive termination, shall so survive.

2.6 Customer Content shall be available to Customer to retrieve at any time and at no additional charge throughout the Term and for no more than thirty (30) days after expiration or termination of the Agreement for any reason. After such time period, Kronos shall have no further obligation to store or make available the Customer Content and will securely delete all Customer Content without liability of any kind.

3. FEES AND PAYMENT

3.1 Customer shall pay Kronos the Monthly Service Fees, the fees for the Implementation Services and any additional one time or recurring fees for Equipment, Training Points, KnowledgePass Education Subscription and such other Kronos offerings, all as set forth on the Order Form. The Monthly Service Fees will be invoiced on the frequency set forth on the Order Form ("**Billing Frequency**"). If Customer and Kronos have signed a Statement of Work for the Implementation Services, Implementation Services will be invoiced monthly as delivered unless otherwise indicated on the Order Form. If Kronos is providing Implementation Services in accordance with the Services Implementation Guideline or as "a la carte" services on the Order Form, Kronos will invoice Customer for Implementation Services in advance of providing such Implementation Services unless otherwise indicated on the Order Form. All other Kronos offerings will be invoiced upon execution of the applicable Order Form by Kronos and Customer. Unless otherwise indicated on an Order Form, payment for all items shall be due 30 days following date of invoice. All payments shall be sent to the attention of Kronos as specified on the invoice. Except as expressly set forth in this Agreement, all amounts paid to Kronos are non-refundable. Customer is responsible for all applicable federal, state, country, provincial or local taxes relating to the goods and services provided by Kronos hereunder (including without limitation GST and/or VAT if applicable), excluding taxes based on Kronos' income or business privilege.

3.2 If any amount owing under this or any other agreement between the parties is thirty (30) days or more overdue, Kronos may, without limiting Kronos' rights or remedies, suspend Services until such amounts are paid in full. Kronos will provide at least seven (7) days prior written notice that Customer's account is overdue before suspending Services.

3.3 At the later of (i) one (1) year after the effective date of this Agreement, or (ii) expiration of the Initial Term, and at each annual anniversary of that date thereafter, Kronos may increase the Monthly Service Fee rates in an amount not to exceed four percent (4%). The increased Monthly Service Fees will be reflected in the monthly invoice following the effective date of such increase without additional notice.

4. RIGHTS TO USE

4.1 Subject to the terms and conditions of the Agreement, Kronos hereby grants Customer a limited, revocable, non-exclusive, non-transferable, non-assignable right to use during the Term and for internal business purposes only: a) the Applications and related services, including the Documentation; b) training materials and KnowledgePass Content; and, c) any embedded third party software, libraries, or other components, which form a part of the Services. The Services contain proprietary trade secret technology of Kronos and its Suppliers. Unauthorized use and/or copying of such technology are prohibited by law, including United States and foreign copyright law. Customer shall not reverse compile, disassemble or otherwise convert the Applications or other software comprising the Services into uncompiled or unassembled code. Customer shall not use any of the third party software programs (or the data models therein) included in the Services except solely as part of and in connection with the Services. The JBoss® Enterprise Middleware components of the Service are subject to the end user license agreement found at http://www.redhat.com/licenses/jboss_eula.html Customer acknowledges that execution of separate third party agreements may be required in order for Customer to use certain add-on features or functionality, including without limitation tax filing services.

4.2 Customer acknowledges and agrees that the right to use the Applications is limited based upon the amount of the Monthly Service Fees paid by Customer. Customer agrees to use only the modules and/or features for the number of employees and users as described on the Order Form. Customer agrees not to use any other modules or features nor increase the number of employees and users unless Customer pays for such additional modules, features, employees or users, as the case may be. Customer may not license, relicense or sublicense the Services, or otherwise permit use of the Services (including timesharing or networking use) by any third party. Customer may not provide service bureau or other data processing services that make use of the Services without the express prior written consent of Kronos. No license, right, or interest in any Kronos trademark, trade name, or service mark, or those of Kronos' licensors or Suppliers, is granted hereunder.

4.3 Customer may authorize its third party contractors and consultants to access the Services through Customer's administrative access privileges on an as needed basis, provided Customer: a) abides by its obligations to protect Confidential Information as set forth in this Agreement; b) remains responsible for all such third party usage and compliance with the Agreement; and c) does not provide such access to a competitor of Kronos who provides workforce management services.

4.4 Customer acknowledges and agrees that, as between Customer and Kronos, Kronos retains ownership of all right, title and interest to the Services, all of which are protected by copyright and other intellectual property rights, and that, other than the express rights granted herein and under any other agreement in writing with Customer, Customer shall not obtain or claim any rights in or ownership interest to the Services or Applications or any associated intellectual property rights in any of the foregoing. Customer agrees to

(b) Kronos shall provide to Customer the Equipment support services described in this Agreement if purchased separately by Customer as indicated on the applicable Order Form. If purchased, Equipment support services have a term of one (1) year commencing upon expiration of the Warranty Period. Equipment support services will be automatically extended for additional one (1) year terms on the anniversary of its commencement date ("Renewal Date"), unless either party has given the other thirty (30) days written notification of its intent not to renew. Kronos may change the annual support charges for Equipment support services effective at the end of the initial one (1) year term or effective on the Renewal Date, by giving Customer at least thirty (30) days prior written notification.

9.3 *Equipment with Finger Scan Sensor Technology.* The following terms apply only to any Equipment with finger scan sensor technology purchased by Customer from Kronos or a Kronos reseller ("Finger Scan Equipment"):

(a) To the extent that any biometric privacy laws may apply to Customer's use of the Finger Scan Equipment, Customer warrants that they will comply with any such laws prior to commencing use of the Finger Scan Equipment and will remain in compliance at all times. Customer further warrants that, if required by law, prior to such use it will (i) obtain signed releases from employees consenting to the use of the Finger Scan Equipment for employee timekeeping purposes and (ii) issue policies made available to their employees and the public regarding its retention and destruction of the Finger Scan data. Customer further warrants that it will ensure that any releases, consents, or policies, as required by applicable law, will by their terms expressly apply to Kronos and its authorized subcontractors.

(b) Customer agrees to defend, hold harmless and indemnify Kronos, its employees, directors, parent, subsidiaries and authorized partners and subcontractors (collectively, "Kronos Indemnitees") for any claims, damages, penalties or fines asserted or awarded against a Kronos Indemnitee arising out of or relating to Customer's breach of any of the foregoing warranties in Section 9.3(a) above. Upon receipt of such notice, the Customer shall assume sole control of the defense and settlement of such claim; provided that (i) Kronos will be entitled to participate in the defense of such claim and to employ counsel at its own expense to assist in the handling of such claim, on a monitoring and a non-controlling basis; (ii) Customer shall not settle any claim on any terms or in any manner that adversely affects the rights of Kronos without its prior written consent; and (iii) Kronos will provide reasonable cooperation and assistance at Customer's sole cost and expense.

10. SERVICE LEVEL AGREEMENT

Kronos shall provide the service levels and associated credits, when applicable, in accordance with the Service Level Agreement attached hereto as Exhibit A and which is hereby incorporated herein by reference. CUSTOMER'S SOLE AND EXCLUSIVE REMEDY IN THE EVENT OF ANY SERVICE OUTAGE OR INTERRUPTION OF THE SERVICES OR FAILURE BY KRONOS TO MEET THE TERMS OF THE APPLICABLE SERVICE LEVEL AGREEMENT, SHALL BE THE REMEDIES PROVIDED IN EXHIBIT A.

11. LIMITED WARRANTY; DISCLAIMERS OF WARRANTY

11.1 Kronos represents and warrants to Customer that the Applications, under normal operation as specified in the Documentation and when used as authorized herein, will perform substantially in accordance with such Documentation during the Term.

11.2 Kronos' sole obligation and Customer's sole and exclusive remedy for any breach of the foregoing warranty is limited to Kronos' reasonable commercial efforts to correct the non-conforming Applications at no additional charge to Customer. In the event that Kronos is unable to correct material deficiencies in the Services arising during the Warranty Period, after using Kronos' commercially reasonable efforts to do so, Customer shall be entitled to terminate the then remaining Term of the Agreement as Customer's sole and exclusive remedy. Kronos' obligations hereunder for breach of warranty are conditioned upon Customer notifying Kronos of the material breach in writing, and providing Kronos with sufficient evidence of such non-conformity to enable Kronos to reproduce or verify the same.

11.3 Kronos warrants to Customer that each item of Equipment shall be free from defects in materials and workmanship during the Warranty Period. In the event of a breach of this warranty, Customer's sole and exclusive remedy shall be Kronos' repair or replacement of the deficient Equipment, at Kronos' option, provided that Customer's use, installation and maintenance thereof have conformed to the Documentation for such Equipment. This warranty is extended to Customer only and shall not apply to any Equipment (or parts thereof) in the event of:

(a) damage, defects or malfunctions resulting from misuse, accident, neglect, tampering, (including without limitation modification or replacement of any Kronos components on any boards supplied with the Equipment), unusual physical or electrical stress or causes other than normal and intended use;
(b) failure of Customer to provide and maintain a suitable installation environment, as specified in the published specifications for such Equipment; or
(c) malfunctions resulting from the use of badges or supplies not approved by Kronos.

EXCEPT AS PROVIDED FOR IN THIS SECTION 11, KRONOS HEREBY DISCLAIMS ALL WARRANTIES, CONDITIONS, GUARANTIES AND REPRESENTATIONS RELATING TO THE SERVICES, EXPRESS OR IMPLIED, ORAL OR IN WRITING, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT, AND WHETHER OR NOT ARISING THROUGH A COURSE OF DEALING, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY THAT MAY OTHERWISE ARISE PURSUANT TO ANY STATUTE, CODE, COMMON LAW OR JUDICIAL DECISION. THE SERVICES ARE NOT GUARANTEED TO BE ERROR-FREE OR UNINTERRUPTED. EXCEPT AS SPECIFICALLY PROVIDED IN THIS AGREEMENT, KRONOS MAKES NO WARRANTIES OR REPRESENTATIONS CONCERNING THE COMPATIBILITY OF THE SERVICES, THE SAAS APPLICATIONS OR THE EQUIPMENT NOR ANY RESULTS TO BE ACHIEVED THEREFROM.

12. DATA SECURITY

12.1 As part of the Services, Kronos shall provide those administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of Customer data as described at: http://www.kronos.com/products/workforce-central-cloud/cloud-guidelines.aspx

12.2 As between Customer and Kronos, all Personally Identifiable Data is Customer's Confidential Information and will remain the property of Customer. Customer represents that to the best of Customer's knowledge such Personally Identifiable Data supplied to Kronos is accurate. Customer hereby consents to the use, processing or disclosure of Personally Identifiable Data by Kronos and Kronos' Suppliers wherever located only for the purposes described herein and only to the extent such use or processing is necessary for Kronos to carry out Kronos' duties and responsibilities under the Agreement or as required by law.

12.3 Prior to initiation of the Services under the Agreement and on an ongoing basis thereafter, Customer agrees to provide notice to Kronos of any extraordinary privacy or data protection statutes, rules, or regulations which are or become applicable to Customer's industry and which could be imposed on Kronos as a result of provision of the Services. Customer will ensure that: (a) the transfer to Kronos and storage of any Personally Identifiable Data by Kronos or Kronos' Supplier's data center is permitted under applicable data protection laws and regulations; and, (b) Customer will obtain consents from individuals for such transfer and storage to the extent required under applicable laws and regulations.

13. INDEMNIFICATION

13.1 Kronos shall defend Customer and its respective directors, officers, and employees (collectively, the "**Customer Indemnified Parties**"), from and against any and all notices, charges, claims, proceedings, actions, causes of action and suits, brought by a third party (each a "**Claim**") alleging that the permitted uses of the Services infringe or misappropriate any United States or Canadian copyright or patent, and Kronos will indemnify and hold harmless the Customer Indemnified Parties against any liabilities, obligations, costs or expenses (including without limitation reasonable attorneys' fees) actually awarded to a third party as a result of such Claim by a court of applicable jurisdiction or as a result of Kronos' settlement of such a Claim. In the event that a final injunction is obtained against Customer's use of the Services by reason of infringement or misappropriation of such copyright or patent, or if in Kronos' opinion, the Services are likely to become the subject of a successful claim of such infringement or misappropriation, Kronos, at Kronos' option and expense, will use commercially reasonable efforts to (a) procure for Customer the right to continue using the Services as provided in the Agreement, (b) replace or modify the Services so that the Services become non-infringing but remain substantively similar to the affected Services, and if neither (a) or (b) is commercially feasible, to (c) terminate the Agreement and the rights granted hereunder after provision of a refund to Customer of the Monthly Service Fees paid by Customer for the infringing elements of the Services covering the period of their unavailability.

13.2 Kronos shall have no liability to indemnify or defend Customer to the extent the alleged infringement is based on: (a) a modification of the Services by anyone other than Kronos; (b) use of the Applications other than in accordance with the Documentation for such Service or as authorized by the Agreement; (c) use of the Services in conjunction with any data, equipment, service or software not provided by Kronos, where the Services would not otherwise itself be infringing or the subject of the claim; or (d) use of the Services by Customer other than in accordance with the terms of the Agreement. Notwithstanding the foregoing, with regard to infringement claims based upon software created or provided by a licensor to Kronos or Suppliers, Kronos' maximum liability will be to assign to Customer Kronos' or Supplier's recovery rights with respect to such infringement claims, provided that Kronos or Kronos' Supplier shall use commercially reasonable efforts at Customer's cost to assist Customer in seeking such recovery from such licensor.

13.3 Customer shall defend Kronos, its Suppliers and their respective directors, officers, employees, agents and independent contractors (collectively, the "**Kronos Indemnified Parties**") from and against any and all Claims, and will indemnify and hold harmless the Kronos Indemnified Parties against liabilities, obligations, costs or expenses (including without limitation reasonable attorneys' fees), arising out of: (a) employment-related claims arising out of Customer's configuration of the Services; (b) Customer's modification or combination of the Services with other services, software or equipment not furnished by Kronos, provided that such Customer modification or combination is the cause of such infringement and was not authorized by Kronos; or, (c) a claim that the Customer Content infringes in any manner any intellectual property right of any third party, or any of the Customer Content contains any material or information that is obscene, defamatory, libelous, or slanderous violates any person's right of publicity, privacy or personality, or has otherwise caused or resulted in any tort, injury, damage or harm to any other person. Customer will have sole control of the defense of any such action and all negotiations for its settlement or compromise. Kronos will cooperate fully at Customer's expense with Customer in the defense, settlement or compromise of any such action.

13.4 The Indemnified Party(ies) shall provide written notice to the indemnifying party promptly after receiving notice of such Claim. If the defense of such Claim is materially prejudiced by a delay in providing such notice, the purported indemnifying party shall be relieved from providing such indemnity to the extent of the delay's impact on the defense. The indemnifying party shall have sole control of the defense of any indemnified Claim and all negotiations for its settlement or compromise, provided that such indemnifying party shall not enter into any settlement which imposes any obligations or restrictions on the applicable Indemnified Parties without the prior written consent of the other party. The Indemnified Parties shall cooperate fully, at the indemnifying party's request and expense, with the indemnifying party in the defense, settlement or compromise of any such action. The indemnified party may retain its own counsel at its own expense, subject to the indemnifying party's rights above.

14. LIMITATION OF LIABILITY

14.1 EXCEPT AS SPECIFICALLY PROVIDED IN THIS AGREEMENT, KRONOS AND ITS SUPPLIERS WILL NOT BE LIABLE FOR ANY DAMAGES OR INJURIES CAUSED BY THE USE OF THE SERVICES OR BY ANY ERRORS, DELAYS, INTERRUPTIONS IN TRANSMISSION, OR FAILURES OF THE SERVICES.

14.2 EXCEPT FOR KRONOS' INDEMNIFICATION OBLIGATIONS SET FORTH IN SECTION 13 ABOVE, THE TOTAL AGGREGATE LIABILITY OF KRONOS OR KRONOS' SUPPLIERS TO CUSTOMER AND/OR ANY THIRD PARTY IN CONNECTION WITH THE AGREEMENT SHALL BE LIMITED TO DIRECT DAMAGES PROVEN BY CUSTOMER, SUCH DIRECT DAMAGES NOT TO EXCEED AN AMOUNT EQUAL TO THE TOTAL NET PAYMENTS RECEIVED BY KRONOS FOR THE SERVICES IN THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE DATE IN WHICH SUCH CLAIM ARISES.

14.3 EXCEPT FOR KRONOS' INDEMNIFICATION OBLIGATIONS SET FORTH IN SECTION 13 ABOVE, IN NO EVENT SHALL KRONOS OR KRONOS' SUPPLIERS, THEIR RESPECTIVE AFFILIATES, SERVICE PROVIDERS, OR AGENTS BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR ANY INCIDENTAL, SPECIAL, PUNITIVE, CONSEQUENTIAL OR OTHER INDIRECT DAMAGES OR FOR ANY LOST OR IMPUTED PROFITS OR REVENUES, LOST DATA OR COST OF PROCUREMENT OF SUBSTITUTE SERVICES RESULTING FROM DELAYS, NONDELIVERIES, MISDELIVERIES OR SERVICES INTERRUPTION, HOWEVER CAUSED, ARISING FROM OR RELATED TO THE SERVICES OR THE AGREEMENT, REGARDLESS OF THE LEGAL THEORY UNDER WHICH SUCH LIABILITY IS ASSERTED, WHETHER BREACH OF WARRANTY, INDEMNIFICATION, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE, AND WHETHER LIABILITY IS ASSERTED IN CONTRACT, TORT OR OTHERWISE, AND REGARDLESS OF WHETHER KRONOS OR SUPPLIER HAS BEEN ADVISED OF THE POSSIBILITY OF ANY SUCH LIABILITY, LOSS OR DAMAGE.

14.4 EXCEPT WITH RESPECT TO LIABILITY ARISING FROM KRONOS' GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, KRONOS DISCLAIMS ANY AND ALL LIABILITY, INCLUDING WITHOUT LIMITATION LIABILITY RELATED TO A BREACH OF DATA SECURITY AND CONFIDENTIALITY OBLIGATIONS, RESULTING FROM ANY EXTERNALLY INTRODUCED HARMFUL PROGRAM (INCLUDING WITHOUT LIMITATION VIRUSES, TROJAN HORSES, AND WORMS), CUSTOMER'S CONTENT OR APPLICATIONS, THIRD PARTY UNAUTHORIZED ACCESS OF EQUIPMENT, SAAS APPLICATIONS OR SYSTEMS, OR MACHINE ERROR.

15. CONFIDENTIAL INFORMATION

15.1 Each Party shall protect the Confidential Information of the other Party with at least the same degree of care and confidentiality, but not less than a reasonable standard of care, which such Party utilizes for its own information of similar character that it does not wish disclosed to the public. Neither Party shall disclose to third parties the other Party's Confidential Information, or use it for any purpose not explicitly authorized herein, without the prior written consent of the other Party. The obligation of confidentiality shall survive for five (5) years after the return of such Confidential Information to the disclosing party or five (5) years after the expiration or termination of the Agreement, whichever is later, as applicable. Notwithstanding anything herein to the contrary, each party acknowledges and agrees that all trade secrets shall be safeguarded by a receiving party as required by this Agreement for so long as such information remains a trade secret pursuant to applicable law.

15.2 Notwithstanding the foregoing, a party may disclose Confidential Information to the extent required: (a) to any subsidiary or affiliate of such Party, or (b) to any consultants, contractors, and counsel who have a need to know in connection with the Agreement and have executed a non-disclosure agreement with obligations at least as stringent as this Section 15, or (c) by law, or by a court or governmental agency, or if necessary in any proceeding to establish rights or obligations under the Agreement; provided, the receiving party shall, unless legally prohibited, provide the disclosing party with reasonable prior written notice sufficient to permit the disclosing party an opportunity to contest such disclosure. If a party commits, or threatens to commit, a breach of this Section 15, the other party shall have the right to seek injunctive relief from a court of competent jurisdiction.

15.3 This Agreement imposes no obligation upon either Party with respect to the other Party's Confidential Information which the receiving Party can establish: (a) is or becomes generally known through no breach of the Agreement by the receiving party, or (b) is already known or is independently developed by the receiving party without use of or reference to the Confidential Information.

16. EXPORT

Customer understands that any export of the Equipment may require an export license and Customer assumes full responsibility for obtaining such license. Customer must obtain Kronos' prior written consent before exporting the Equipment.

17. GENERAL

17.1 This Agreement shall be governed by and construed in accordance with the laws of the state, province and country in which Kronos is incorporated without regard to any conflict of law provisions. The parties waive the application of the United Nations Commission on International Trade Law and United Nations Convention on Contracts for the International Sale of Goods as to the interpretation or enforcement of the Agreement and waive and "opt out" of the Uniform Computer Information Transactions Act (UCITA), or such other similar law.

17.2 The invalidity or illegality of any provision of the Agreement shall not affect the validity of any other provision. The parties intend for the remaining unaffected provisions to remain in full force and effect.

17.3 Customer shall not assign the Agreement or the rights to use the Services without the prior written consent of Kronos and any purported assignment, without such consent, shall be void.

17.4 Neither Party shall be responsible for any failure to perform or delay in performing any of its obligations under this Agreement (other than a failure to comply with payment obligations) where and to the extent that such failure or delay results from an unforeseeable event beyond a party's reasonable control, including but not limited to, acts of war; acts of nature; earthquake; flood; embargo; riot; sabotage; labor shortage or dispute; changes in government codes, ordinances, laws, rules, regulations or restrictions; failure of the Internet; terrorist acts; failure of data, products or services controlled by any third party, including the providers of communications or network services; utility power failure; material shortages or unavailability or other delay in delivery not resulting from the responsible party's failure to timely place orders therefor, or lack of or delay in transportation (each a "**Force Majeure Event**").

17.5 All notices given under the Agreement shall be in writing and sent postage pre-paid, if to Kronos, to the Kronos address on the Order Form, or if to Customer, to the billing address on the Order Form.

17.6 No action, regardless of form, may be brought by either party more than two (2) years after the cause of action has arisen.

17.7 The section headings herein are provided for convenience only and have no substantive effect on the construction of the Agreement.

17.8 The parties agree that if the Agreement is accepted by the parties and that acceptance is delivered via fax or electronically delivered via email or the internet it shall constitute a valid and enforceable agreement.

17.9 This Agreement and any information expressly incorporated by reference herein, together with the applicable Order Form, constitute the entire agreement between the parties for the Services described herein and supersede all prior or contemporaneous representations, negotiations, or other communications between the parties relating to the subject matter of this Agreement. This Agreement may be amended only in writing signed by authorized representatives of both parties. Customer understands and acknowledges that while Kronos may disclose to customers certain confidential information regarding general Service or product development direction, potential future Services, products or product enhancements under consideration, Customer is not entitled to any Services, products or product enhancements other than those contained on the Order Form. Customer has not relied on the availability of any future version of the Services (including SaaS Applications or equipment) identified on an Order Form, nor any other future product in executing the Agreement.

CUSTOMER AGREES TO THESE TERMS AND CONDITIONS FOR ALL ORDER FORMS FOR THE SERVICES. THE INDIVIDUAL ACCEPTING THESE TERMS AND CONDITIONS ON BEHALF OF CUSTOMER REPRESENTS THAT HE/SHE HAS THE AUTHORITY TO CONTRACTUALLY BIND CUSTOMER.

Customer AEGIS SENIOR COMMUNITIES, LLC
Dated: 7/26/19
By:
Name: Walter Jossart
Title: CFO

Kronos Incorporated
Dated:
By:
Name:
Title: