Bloomberg Law

2026

Sharp Outlooks Into an Uncertain Future

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Introduction

Bloomberg Law 2026: Sharp Outlooks Into an Uncertain Future

Every year, Bloomberg Law asks its legal analysts to identify the key developments, data trends, and hot-button issues that they are noticing in the legal market today, follow them into the future, and predict what will happen in these areas in the year ahead.

But 2025 was not like every year. Seemingly from week to week, old paradigms buckled and new norms took hold, leaving the legal industry uncertain. With lawyers scrambling to make sense of the present, the task of predicting the future has become a thornier challenge than ever.

If looking ahead has seldom felt more difficult, that also makes it all the more important. With so many areas of the law going through so many dynamic changes, lawyers need to know which areas deserve the most attention—and which ones can be regarded as more flash than consequence—as the new year begins.

It is through this real-world lens that Bloomberg Law has approached this latest installment of its annual outlook series, which takes a sharp, focused look ahead to what 2026 has in store for professionals in the legal industry.

This year's iteration features deep dives into trends across four broad themes: Litigation, Executive Orders & Authority, Corporations & Transactions, and Artificial Intelligence.

Our **Litigation** analyses examine developments inside and outside the courtroom that will shape the course of law in the year ahead. Topics include:

- What's next for the beleaguered Delaware court system amid rapid changes in corporate law
- Whether force majeure will be embraced as a survival strategy by businesses hard-hit by government actions on immigration
- Why intellectual property lawyers are exploring the International Trade Court as an alternative to traditional litigation
- What the cannabis industry can expect when the Supreme Court addresses gun ownership for drug users
- What judges' statements, in decisions and in public, foretell about the state of the judiciary
- Whether anti-union "captive audience" meetings are on their way back into workplaces
- What 2026 holds for employees' political speech in private-sector workplaces
- How judicial pushback against defensive bankruptcies will change the face of mass tort litigation
- How litigation funders will play a key role in accelerating the pace of nonlawyer investment in law firms

Our **Executive Orders & Authority** analyses explore the most consequential changes in federal oversight and where they will lead lawyers in the year ahead. Topics include:

- Why the major questions doctrine will fade as a courtroom check on executive power
- Why a controversial drug discount program will be more vulnerable than ever in 2026
- What recent court cases signal about the survival of the National Labor Relations Board
- Why discovery will be a crucial battleground in Administrative Procedure Act lawsuits
- Where a new government database tracking patient information will come up short, legally
- Whether a newly replenished EEOC will provide much-needed DEI clarity for employers
- How federal immigration crackdowns will spur states to test their lawmaking limits

Our **Corporations & Transactions** analyses focus on the trends and forces shaping key markets of interest in the year ahead. Topics include:

- How the SEC plans to set up a legal framework for cryptocurrency
- Why dealmakers are poised for a breakout year in M&A—especially across international borders
- Whether mergers among digital asset treasuries will create a new era of DAT lawsuits
- Where the conflict over debanking will lead the banking and crypto industries
- What's next for Big Tech's biggest antitrust cases
- Why tariff headwinds for companies won't subside in 2026

Our **Artificial Intelligence** analyses address the most compelling challenges that generative AI will bring to legal professionals in the year ahead. Topics include:

- How AI hallucinations are getting lawyers into expensive trouble in court
- How law firms can best harness the potential of agentic AI
- How the administration's push to free up AI will benefit biotech M&A
- Why states are shifting from privacy regulation to AI regulation
- Why corporate legal departments will struggle to gauge the ROI of AI
- How AI's need for energy and infrastructure will affect corporate transactions
- Why US tech firms aren't holding their breath waiting for EU AI Act implementation
- How AI in the workplace will spur a legal test of disparate impact

Join Bloomberg Law's analysts as they preview the themes and trends that they will be keeping an eye on in 2026.

Litigation

Delaware on Edge Amid Corporate Law Inflection Point

Michael Maugans
Legal Analyst

The last two years in Delaware corporate law have been characterized by significant **upheaval**, and now the state's high court is in the unenviable position of determining Delaware's legal future. In 2026, the Delaware Supreme Court will likely issue opinions in two cases (**Musk** and **Rutledge**) that could fundamentally alter or undermine over a century's worth of corporate law precedent.

At the heart of these cases lies a common denominator: backlash to the Court of Chancery and its recent opinions that critics **argue** unfairly target controlling stockholders. The cases will test whether the state's high court believes Chancery crossed the proverbial Rubicon in its decisions, perhaps therefore justifying the legislative blowback that followed.

Despite unexpectedly having to contend with forces that transcend corporate law, including the anti-Delaware bullhorn of the world's wealthiest individual and a trend of larger companies reincorporating outside of Delaware, the Delaware Supreme Court will likely operate as a rational actor. In its desire to maintain an independent judiciary, the court in *Rutledge* will strike down Senate Bill 21 on the grounds that it unconstitutionally subsumes Chancery's equitable jurisdiction.

Relatedly, in the case that arguably kickstarted the current climate in Delaware, the high court will affirm Chancery's holding that Musk controls Tesla, but will ultimately soften the remedy from complete rescission to a less extreme equitable remedy.

Tornetta v. Musk and 'Control'

If the ongoing turmoil in Delaware can be traced to a singular event, it was the **invalidation** of Elon Musk's \$56 billion compensation package from Tesla. In early 2024, Chancellor Kathaleen McCormick **ruled** that Musk, despite owning a minority share of 22% in Tesla, was a controlling stockholder of the company and thus the negotiation of the bonus package was subject to the plaintiff-friendly entire fairness standard, rather than the de facto business judgment treatment.

As it stands under Delaware **law**, a controlling stockholder is defined as an entity that owns more than 50% voting shares; or, a minority shareholder can be a controller if they exert "actual control" over the corporation's business and affairs. The crux of this appeal is that question of control; namely, whether Musk is a controlling stockholder despite his relatively low 22% share, and what standard of review applies to the negotiation of his compensation package.

In a case like *Musk*, the appellate court will review mixed questions of law and fact (such as whether "transaction-specific" control is sufficient to warrant controller status). In other words, did Musk's actions, combined with his nearly one-quarter voting stake in Tesla, constitute control for purposes of applying entire fairness rather than the board-deferential business judgment standard?

SB 21 and Rutledge Question Scope of Chancery's Power

In March, responding to Chancery decisions like *Musk* that some saw as hostile to controlling stockholders, the Delaware legislature enacted **Senate Bill 21**, which among other changes provided a so-called "safe harbor" for corporate transactions involving controllers. *Rutledge v. Clearway Energy Group* challenges that bill, and the outcome of the case will inform the future of Delaware corporate law.

The first question **certified** to the Delaware Supreme Court was whether SB 21 violated the Delaware constitutional provision delegating jurisdiction to determine equitable issues to the Chancery. Among other things, the amendments actually define what constitutes a controlling stockholder.

The determination of control, like that in *Musk*, has historically been a common law analysis conducted by the judiciary. But fears among Delaware lawmakers that such Chancery opinions would drive large corporations away from doing business in the state caused the legislature to delineate a baseline level of control of no less than 33.33%—thus purporting to take that determination away from the Delaware judiciary.

The perks this bill provides to controllers are demonstrable. Even though SB 21 isn't retroactive, *if* the bill was applied to the *Musk* case for example, Musk would *not* be considered a controller. Since Musk owned only 22% of Tesla stock at the time of the lawsuit, under SB 21 a tribunal would not be permitted to engage in further fact finding with respect to Musk's control of Tesla.

What Will the Delaware Supreme Court Do?

Considering the higher level of deference owed to the trial court's factual findings, the Delaware Supreme Court will affirm the finding that Musk's actions constituted control of Tesla and thus warranted entire fairness treatment. However, in an effort to strike a balance, the court will impose a remedy less harsh than McCormick's complete rescission of the package, perhaps **quantum meruit**. Apart from the merits, it's certainly also possible that the court will first stay this case pending the outcome of Rutledge, as both cases involve elements and definitions of control.

Rutledge is where the rational actor prediction will be tested. Since the issues presented deal directly with the scope of Chancery's equitable jurisdiction, the court will see SB 21 as a salvo against the concept of an independent Delaware judiciary. The Delaware Supreme Court will strike down the safe harbor provisions of SB 21 pertaining to controlling stockholders in order to preserve its jurisdiction.

What Does This Mean for Practitioners?

If the Delaware Supreme Court upholds SB 21 as well as Chancery's determination with respect to Musk's control, the state's corporate law will more or less remain at the status quo. The legislative response of SB 21 might have shaken Chancery enough that it will approach its analysis of controlled transactions more narrowly going forward, but there has been nothing in their decisions leading to these appeals that would indicate such a pivot. The Delaware Supreme Court's first priority will be returning the state's judicial system to equilibrium.

ITC Proceedings to Gain Traction in IP Enforcement

Travis Yuille
Legal Analyst

Enforcing intellectual property rights against foreign infringers has historically been a challenge. Elusive and often unknown parties operating abroad frustrate traditional litigation with due process, service, and jurisdictional thorns. Yet, litigation in federal district court remains the most common approach for IP holders seeking relief from foreign defendants, largely due to the availability of ex parte temporary restraining orders in plaintiff-friendly venues.

Next year, however, will see an increase in the number of complaints filed in another venue: the International Trade Commission. There are two main reasons for this: (1) broader applicability of the Tariff Act's domestic industry requirement following a court **ruling** in March and (2) uncertainty in the top jurisdiction regarding the constitutionality of ex parte injunctive relief in these cases.

Enforcing IP Through the ITC

Traditional patent infringement litigation in district court can take up to five years if a case goes to trial, and offers the plaintiff damages, lost profits, and injunctive relief. The ITC provides IP owners with an alternative path to protect their property from infringing imports, with limited remedies. ITC proceedings are resolved by an administrative law judge, typically within 18 months, and relief consists primarily of exclusion orders blocking imports of the defendant's products.

Complaints in the ITC are brought under **Section 337** of the Tariff Act, which covers all forms of intellectual property. In addition to proving infringement, ITC plaintiffs must satisfy an additional "domestic industry" element by demonstrating significant domestic investments in manufacturing, labor or capital, research and development, or licensing.

Historically, the ITC has been underutilized by IP owners. According to the Commission's own **statistics**, only 28 cases were filed in fiscal year 2025, and 50 in FY 2024. The over 13,000 federal cases **filed** under the patent, copyright, or trademark Nature of Suit in 2025 thus far dwarf the ITC's figures.

Federal Circuit Opens Door for More ITC Proceedings

In the past, the ITC has excluded from the "domestic industry" analysis expenses relating to warehousing, marketing, and distribution for products fully manufactured abroad, drawing a distinction between mere importers and truly "domestic" activity. In March of this year, however, the US Court of Appeals for the Federal Circuit clarified the scope of the domestic industry requirement in **Lashify, Inc. v. ITC**.

Lashify, a US company that sells and distributes eyelash extensions, satisfied the domestic industry prong of Section 337 by demonstrating its investment in sales, marketing, and warehousing, the court said. Such activity constituted "capital or labor" under the law, even if Lashify's products were wholly foreign made, it said.

The *Lashify* decision will open up ITC proceedings for direct-to-consumer businesses that were previously excluded due to their product-sourcing practices. The number of these business is **projected to grow** by 14.5% next year, according to the International Trade Administration. Many of these businesses rely on foreign manufacturing and face steep competition in the online space, so trademark and design patent enforcement through the ITC will likely increase in the coming years.

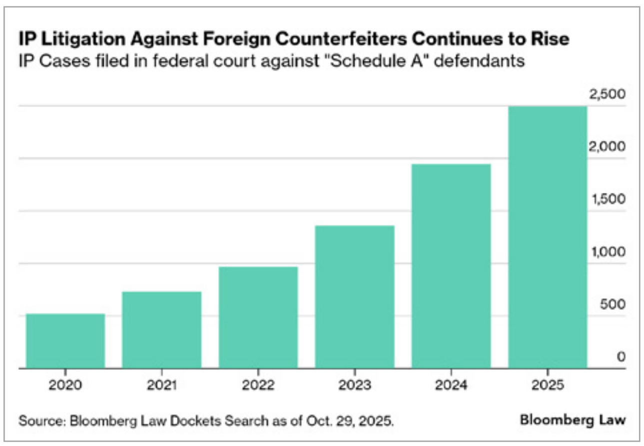
Skeptical Judges Push Back on Schedule A Cases

Shifting attitudes towards certain plaintiff-friendly procedural mechanisms in the Seventh Circuit may also push plaintiffs into the arms of the ITC.

When dealing with foreign infringers, identifying the infringing individual or company is itself a challenge. Often, plaintiffs may only know the online storefronts where the infringing sales are taking place.

A common practice in these instances is for plaintiffs to file an infringement case in federal court against unknown, unassociated "Schedule A" defendants and to immediately seek an ex parte temporary restraining order to freeze the assets of the infringing storefront. Plaintiffs argue—often successfully—that a TRO before service of process is necessary because defendants would simply shift operations to another alias if they knew a lawsuit was pending.

If it works, the Schedule A pipeline can be even faster and more cost effective than the ITC, which makes it the first choice for most IP owners. A **Bloomberg Law dockets search** as of Oct. 29 reveals a steady increase in patent, copyright, and trademark cases filed over the last few years against Schedule A defendants as the popularity of this practice grows.



The Northern District of Illinois has become the unofficial home for these types of cases due to its past willingness to grant plaintiff TROs. This year, 86% of Schedule A cases were filed there, according to the **Bloomberg Law dockets search**.

In an August opinion, however, Judge John F. Kness of the US District Court for the Northern District of Illinois, Eastern Division, expressed **concern** that without proper service, such a form of relief may violate the defendants' right to due process. If courts adopt stricter standards for granting ex parte TROs, then stopping foreign infringers will get considerably more challenging.

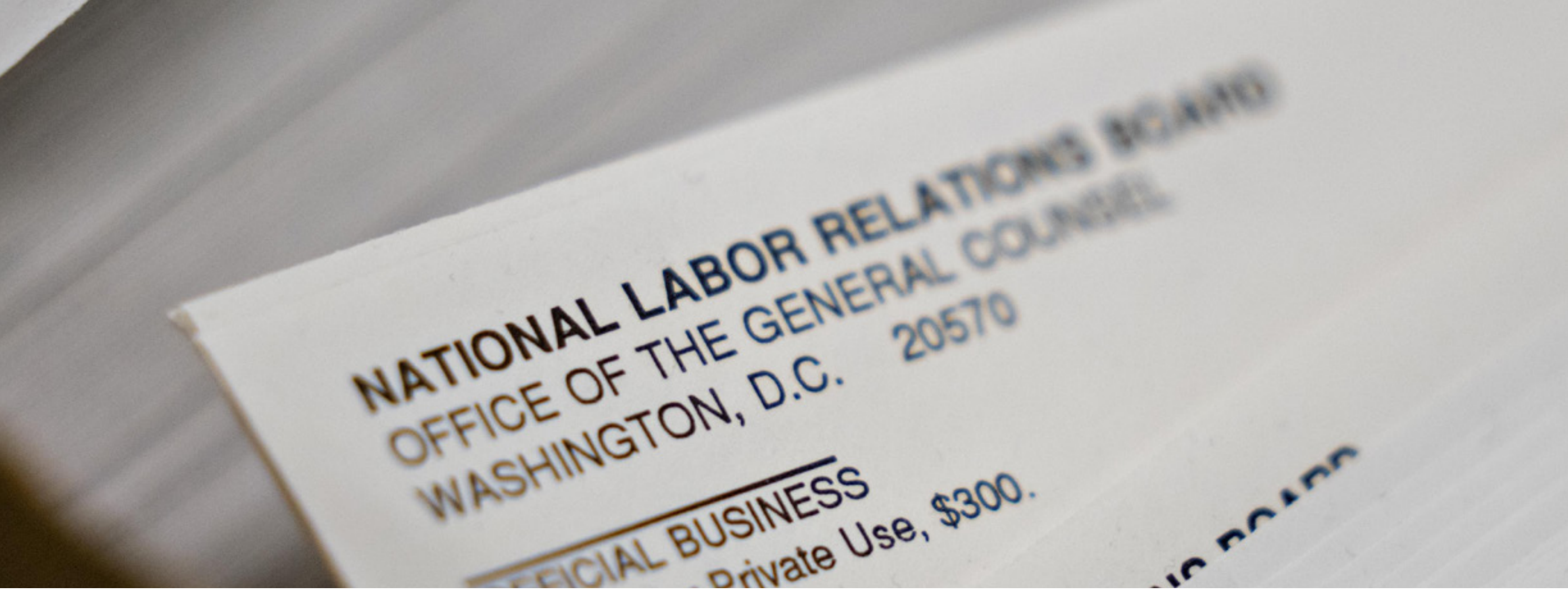
Last year, Judge Jeremy C. Daniel of the same court **dismissed** a similar case, but for joinder reasons. Raising his concerns sua sponte, Daniel held that without evidence linking each unrelated defendants' actions, joinder based on the plaintiff's "hub and spoke" conspiracy was improper.

If the wariness that the judges have expressed gains traction, then plaintiffs will have to file separate cases against each infringer with no guarantee of an asset freeze before the defendants pack up shop and leave. Increased litigation costs and uncertainty might leave the ITC as the only meaningful option.

ITC as an Alternative for Schedule A Plaintiffs

Unlike traditional infringement litigation, personal jurisdiction isn't required for ITC proceedings. Instead, it exerts in *rem* jurisdiction over the accused imported products. ITC complainants therefore don't face the same due process challenges associated with a **rule 12(b)** motion to dismiss for lack of jurisdiction, and service of process procedures are generally more flexible.

If an IP owner's primary concern is preventing the sale of counterfeit goods, the ITC provides a faster and more cost-effective way to obtain relief. The *Lashify* decision, as well as uncertainty with Schedule A litigation in the Seventh Circuit, could push plaintiffs to the ITC in 2026.



Employers Look to Speak to a 'Captive Audience' Again

Cathy Minkler
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At the end of 2024, the National Labor Relations Board overturned **Babcock & Wilcox**, a 76-year-old precedent, ruling that union-related "captive audience" meetings violate the **National Labor Relations Act**. In **Amazon.com**, one of the board's most prominent decisions under the Biden administration, the board prohibited employers from holding mandatory meetings to persuade employees to vote against union representation. These meetings, which require employees to attend or risk discipline or discharge, had been a standard employer campaign tactic during unionization drives since 1948.

The *Amazon.com* decision will likely be overturned after the board reaches a quorum. That outcome will spur more lawsuits aimed at the state laws that ban captive audience meetings, but it won't necessarily help those lawsuits succeed. Instead, it could lead to further legislation.

How a New NLRB Could Deal With *Amazon.com*

Under the Biden administration, the NLRB began to reconsider whether its 1948 *Babcock & Wilcox* decision aligned with the purpose and language of the NLRA. In 2022, then-NLRB General Counsel Jennifer Abruzzo **issued a memo** stating that the agency's legal opinion on the issue had changed, and urged the board to overturn the precedent at the next available opportunity. *Amazon.com* was that opportunity.

Under the Trump administration, William Cowen, the NLRB's acting general counsel, **rescinded** the 2022 memo regarding captive audience meetings because it is "no longer relevant" in light of the board's *Amazon.com* decision. While that decision remains in place for now, the board's new members and leadership will likely seek to overturn it once a quorum is re-established.

President Trump submitted **two nominees** for open board seats in July. Their confirmation, most likely by the end of 2025, will give the board a quorum and allow it to issue decisions again. A flurry of rulings is expected in subsequent months, as the board catches up on a backlog of cases after nearly a year without a legally functioning quorum. Based on how the previous Trump-appointed NLRB majority ruled on major cases, the new majority will likely have an employer-friendly interpretation of federal labor law.

The new board majority could choose to restore the previous precedent, using the dissenting opinion in the *Amazon.com* ruling as a blueprint for drafting a new majority opinion on the issue. That dissent outlined three main points for upholding the legality of captive audience meetings.

The first question is whether captive audience meetings violate employees' **Section 7 rights** by "pressuring and coercing employees to participate in or accept" their employer's union-related opinions. The second question is whether banning captive audience meetings is unlawful under First Amendment grounds as chilling employer speech. Finally, there is the question of whether the text and legislative history of the revised portions of NLRA **Section 8(c)** support the protection of captive audience meetings.

Although all three of these points were addressed by the majority at the time, they will likely be the three main questions that federal courts will deal with in any litigation that ensues.

How the Courts Could Decide *Amazon.com*'s Fate

There is also the possibility that the NLRB will decide not to overrule *Amazon.com* while it has only three members, even if two of them would otherwise vote to do so, as there is a **long-standing past practice** within the board where it doesn't overturn its own precedent with only a three-member panel. Although events of the past year have demonstrated that past practice **isn't a significant factor** in the decision-making process within the Trump administration, the possibility that the NLRB won't take up a case to overturn *Amazon.com* in 2026 still exists.

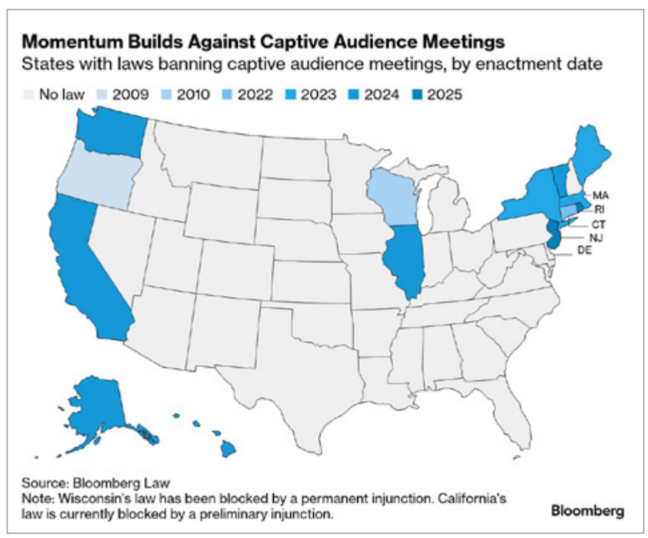
Whether or not past practice is followed, the federal courts could end up ruling on the legality of captive audience meetings under the NLRA. After the NLRB issued its ruling, Amazon appealed to the **Eleventh Circuit**, where the case is awaiting arguments. If the board decides not to follow past practice and overrules *Amazon.com* with only a three-member board, the Eleventh Circuit case would become moot, while a new case would likely make its way to a federal appeals court. In either case, the issue of the legality of captive audience meetings is potentially being set up for the Supreme Court to make a ruling before the end of the Trump administration.

Will State Laws Hold Up?

The battle over captive audience meetings will heat up in the states if *Amazon.com* is overturned, resulting in more litigation and possibly new state laws.

State captive audience laws generally prohibit retaliation against employees who decline to attend meetings or receive other communications conveying employer opinions about religious or political matters. The union angle appears in the "political matters" definition of these laws, which includes the decision to join or support a labor organization.

Some states banned captive audience meetings before the *Amazon.com* decision. The first two state laws—in Oregon and Wisconsin—were enacted in 2009 and 2010, respectively. This was followed by a 12-year gap until 2022, when Abruzzo's memo conveyed support for a nationwide ban. In the three years since, 12 more states have enacted laws.



Six of those laws have been challenged in eight federal court cases, with mixed results. Generally, the lawsuits have sought declaratory and injunctive relief, alleging that the laws are preempted by the NLRA.

An overturning of Amazon.com will embolden more challenges to state captive audience laws, but it won't necessarily help those lawsuits succeed. Instead, their success will hinge on whether the NLRA preempts those laws, as determined by each court. For example, in September, a court sided with the California Chamber of Commerce and **temporarily enjoined** California's law prohibiting captive audience meetings, even though the law is aligned with the NLRB's current interpretation of the NLRA under *Amazon.com*. Acknowledging that this conclusion was "somewhat counterintuitive," the court found that the legality of those meetings is for the NLRB to decide, not the states.

Court Challenges to State Captive Audience Bans

State	Court	Litigation Status	Details
California	C.D. Cal.	Dismissed	Plaintiff lacked standing due to its exemption from law's limits on politically focused speech.
California	E.D. Cal.	Preliminary injunction	Court agreed with NLRA preemption argument and found that law infringes on employers' free speech rights.
Connecticut	D. Conn.	Pending	Unresolved after three years of litigation.
Illinois	N.D. Ill.	Dismissed	Dismissed based on state officials' sovereign immunity claims; plaintiffs failed to show imminent threat of enforcement.
Minnesota	8th Cir.	Dismissed	Dismissed based on state officials' sovereign immunity claims; plaintiffs failed to show imminent threat of enforcement.
Oregon	D. Or.	Dismissed	Law survived challenge by employer group that was found to lack standing.
Oregon	D. Or.	Dismissed	Law survived NLRB challenge due to lack of standing.
Wisconsin	E.D. Wis.	Permanent injunction	Court agreed with NLRA preemption argument.

Source: Bloomberg Law

Bloomberg Law

Overturning *Amazon.com* might also embolden some states to enact new captive audience laws of their own to replace the protections provided by that decision. The recent proliferation of those laws, and their high survival rate in court challenges so far, might look encouraging for state lawmakers considering new bans, although the renewed risk of litigation might be dissuasive.

Floods, Fires, and ICE: Where Force Majeure May Go Next

Gary Almeter,
Legal Analyst

Farm bankruptcies tied to immigration enforcement are setting the stage for a new wave of litigation over the extent to which "acts of government" can excuse nonperformance.

The sharp rise in agricultural bankruptcies in 2025 will force bankruptcy courts to wrestle with **force majeure**, a conventional contract clause that will see renewed relevance in the light of 2026. The upheaval caused by immigration enforcement, visa suspensions, and regulatory audits has thinned the labor supply upon which agriculture relies, leaving farms unable to harvest crops and honor contracts. The litigation that results will test whether government-induced labor shortages—in agriculture and beyond—would qualify as a force majeure event, thereby **excusing non-performance** and limiting liability.

Through mid-October, **Chapter 12 bankruptcy** filings, the bankruptcy chapter reserved for family farms and fisheries, surged nearly 50% from the **same period in 2024**. This uptick is sharpest in states where agriculture depends heavily on undocumented labor. But it's being felt everywhere, as **roughly 4 out of 10** farm workers nationwide lack legal work authorization.

What begins as a workforce crisis becomes a contract crisis and then a bankruptcy issue. Growers short on workers fail to meet delivery schedules, performance becomes an impossibility, buyers claim breach, lenders tighten credit, and Chapter 12 petitions follow. Chapter 12 filings will **continue to rise** as seasonal volatility and enforcement cycles converge.

From Labor Shortage to Litigation

The forthcoming bankruptcy skirmishes will not be simply about how—or whether—the debtor might reorganize. They will also be about how—or whether—the debtor might use force majeure to fend off plaintiffs.

Traditionally, the doctrine covers fires, floods, and natural disasters. But force majeure has steadily widened to include political and regulatory disruptions. Cases testing whether executive actions prompting immigration enforcement are "acts of government" sufficient to discharge contractual duties will further expand the doctrine.

Under **11 U.S.C. §365**, a debtor may reject burdensome contracts and convert them into unsecured claims. But rejection alone does not eliminate liability. Creditors can still assert breach damages under **11 U.S.C. §502(b)**. A well-drafted force majeure clause will blunt those 502 claims by demonstrating that the breach was both unavoidable and unforeseeable. Section 365 provides the mechanism for debtors to exit unfavorable contracts, and force majeure provides the cover that allows them to reach that exit.

The closest court precedent for immigration-related force majeure arguments may be a **Covid-era case** in which an Illinois federal bankruptcy court held that a state shutdown excused the non-payment of rent under a lease's force majeure clause. Government-heightened immigration enforcement is not necessarily the same type of action as a state order directly barring operations, but it does exert a similar economic effect on farms through a longer causal chain.

This causal chain will be at the heart of much 2026 bankruptcy litigation. Creditors—and creditors' creditors—**will argue** that the labor shortage was foreseeable. Debtors will argue that it was both **sudden and governmentally** induced. Any outcome will hinge on the scope and specificity of the parties' force majeure clause language and whether government actions or labor shortages were enumerated. From there, courts will consider the **factual evidence** linking labor enforcement to performance failure.

The Expanding Edges of 'Governmental Action'

For decades, US courts have policed force majeure narrowly. To prevail, a debtor must show the event was (1) enumerated, (2) beyond its control, (3) unforeseeable at contracting, and (4) the direct cause of nonperformance. These standards, from **In re Old Carco LLC** and similar cases, are standard across jurisdictions.

But as executive policymaking stretches and reaches deeper into labor markets, the definition of "governmental action" will expand accordingly, and farm bankruptcies will demonstrate how indirect regulation like ICE audits, visa program freezes, and compliance raids can cripple institutions without a single explicit prohibition. Bankruptcy courts, accustomed to parsing complex causation, may become the forum that formalizes this evolution.

Expect creditor **objections to Section 365 rejections** to increasingly invoke foreseeability and mitigation. And expect debtors to use force majeure to narrow damages and justify rejection. The likely result will be a patchwork of rulings that collectively enhances and expands the doctrine's elasticity.

Parallel industries like construction, hospitality, and **logistics** should watch these developments closely. Their success relies on the same migrant ecosystem, and a judicial shift recognizing immigration enforcement-related **impossibility** could ripple across supply and service agreements nationwide.

What Lawyers Should Do Now

For restructuring lawyers, 2026 will test the precision of contract drafting as much as litigation strategy as force majeure moves from boilerplate to battleground. Counsel representing distressed clients should audit contract portfolios now and identify clauses that list "governmental action," "labor shortages," or "immigration enforcement" as qualifying force majeure events. They should also note those that don't. Where such clauses are silent, litigation risk increases.

In pending bankruptcies, debtors should meticulously document causation, including workforce data and ICE correspondence. This can transform a sympathetic narrative into a legally sufficient record. Meanwhile, creditors should prepare to invite courts to more thoroughly scrutinize debtors' mitigation efforts, including debtors' efforts to hire alternate crews, use H-2A labor, or investigated subcontractors. This will raise the evidentiary bar.

How This Plays Out in 2026

The doctrine that traditionally protects against floods and fires will soon be wielded to protect against administrative swings. For restructuring and commercial lawyers alike, 2026 will be the year when force majeure evolves into active litigation strategy.

By late 2026, a series of rulings from bankruptcy courts will likely expand the recognized scope of "governmental action" within force majeure clauses. The shift will be incremental rather than revolutionary, but its effect will be lasting, and government policy will join weather and war among the accepted triggers for excused performance.

Courts' treatment of a "governmental action" provision in a force majeure clause will broaden in proportion to broadening executive power. Contract lawyers will respond with far more granular drafting. Expect drafters to spell out immigration enforcement, visa suspensions, and regulatory audits as specific events, and for counterparties to define tighter mitigation and notice requirements.

And courts? The next year will see bankruptcy courts try to fashion some jurisprudence from the shock of executive action. In so doing, they will reshape the economics of labor and the contours of impossibility. For lawyers in bankruptcy, commercial, and restructuring practices, the expansion of force majeure will redefine what it means to plan for the unforeseeable.

Emerging Mass Torts Expose Bankruptcy Code's Limits

Gary Almeter
Legal Analyst

The US Supreme Court's **rejection of Purdue Pharma's** proposed opioid settlement and the bankruptcy court for the Southern District of Texas's **dismissal of Johnson & Johnson's** third talc-related filing mark a decisive shift in judicial tolerance for defensive bankruptcies. Courts are no longer willing to extend **Chapter 11's protections** to entities that are solvent yet seeking to manage mass tort exposure through innovative application of **section 524** and its protections. Instead, they are signaling renewed enthusiasm for the reassertion of a fundamental boundary for bankruptcy: that it exists to address genuine financial distress, not to circumvent liability.

A crucial consequence of this recalibration is that it will leave corporate defendants without a reliable mechanism to resolve mass tort claims at scale.

Section 524(g), which was enacted to handle asbestos claims, remains the only statutory model for channeling settlement monies for present and future claimants into a trust. Yet its narrow drafting and aging assumptions make it ill-suited to today's latent, intangible, and globally distributed harms. As new tort litigation proliferates across new industries like technology, artificial intelligence, social media, and gambling, the pressure to modernize the Bankruptcy Code will grow.

From Asbestos to Opioids and Beyond

Congress enacted section 524(g) in 1994 to resolve the **asbestos claims that** emerged decades after exposure and threatened to exhaust corporate value before asbestos companies could compensate future victims. **The statute's innovation** lay in creating a trust, funded by the debtor and protected by a channeling injunction, to process both current and future asbestos claims while protecting the solvency of the defendant corporation. That structure balances debtor finality with equitable compensation for all victims.

In the decades since, bankruptcy courts extended components of section 524(g)—particularly non-debtor releases—to non-asbestos companies in bankruptcy. By the time Purdue Pharma proposed its opioid settlement, these mechanisms had become central to mass tort reorganizations. But the Supreme Court's 2024 decision to strike down Purdue's non-consensual releases re-established the statutory limits of 524(g) and underscored a judicial discomfort with using bankruptcy as a liability shield for solvent parties.

Johnson & Johnson's failed attempt at pulling off a **Texas Two-Step**—a bankruptcy strategy whereby a beleaguered company divides itself, with one entity keeping assets and business while the other assumes the liabilities—followed much the same trajectory. The Texas court's opinion echoed Purdue's underlying concern: that a solvent enterprise was attempting to manufacture distress in order to obtain **Chapter 11 relief**. The continuity between the two high-profile cases forms a new judicial consensus that bankruptcy protection requires economic reality, not corporate choreography. Courts are now asking: Is this company truly in financial distress? Or is it seeking to manipulate bankruptcy to preempt mass tort litigation?

The Latent Harm Problem

Determining the answer to that question becomes exponentially more difficult for courts when a mass tort's number of claimants and the scope of their injuries are unknown.

What makes Section **524(g) unique** is in how it addresses the issue of future claimants, unknown at the time of debtor's proposed bankruptcy plan due to latent harm. Asbestos injuries took decades to appear, and Congress designed the statute to anticipate future claims. Many modern mass torts, though different in substance, share that temporal uncertainty. **Addiction**, psychological injury, and digital harm unfold gradually, often emerging only after social or regulatory recognition transforms diffuse injury into actionable claims.

Latent harm is a salient component of most mass torts and therefore something with which courts are familiar. Opioid addiction claims follow this pattern, as do recent claims of sexual abuse filed against the **Boy Scouts of America**.

Digital defendants in particular will soon be testing bankruptcy's limits. These companies differ structurally from traditional manufacturers: Their assets are intangible and mobile; their operations spread across the globe; and their harms manifest in data, attention, or emotion rather than physical injury. While unknown claimants from latent harm will emerge from injuries allegedly caused by social media, gambling, and algorithmic exposure, the existing 524(g) framework cannot accommodate these emerging liabilities without significant modification.

The Coming Wave of Digital Mass Torts

This next generation of legal disputes involving mass torts will be rooted in behavioral influence, not chemical or physical exposure. The **recent public nuisance suits that several municipalities** have **filed** against DraftKings and FanDuel demonstrate this evolution: The alleged harm is collective, latent, behavioral, and systemic. Similar claim theories are beginning to surface against AI developers, social platforms, and data aggregators. The **ChatGPT wrongful death case** against OpenAI makes it clear that there are putative torts waiting to be identified.

If these defendants turn to bankruptcy as a procedural refuge, courts may be forced to scrutinize the legitimacy of their unprecedented valuations and ability to pay claimants. The very features that make digital businesses agile also make those businesses difficult to fold into a single bankruptcy estate. This structural tension reinforces the need for a retooled statutory framework capable of processing complex, non-physical harms.

Toward a Modernized 524(g)

Since courts are now viewing with suspicion procedural bankruptcy maneuvers like divisive mergers, non-consensual third-party releases, and expansive stays, judges must increasingly look to good faith for distinguishing legitimate restructurings from litigation strategy. Codifying that good faith standard would restore coherence to the system and limit the elasticity that has distorted Chapter 11's purpose.

Congress is the only body capable of creating durable clarity. An updated or expanded 524(g) (or, alternatively, a corresponding provision for industries beyond manufacturing) should establish explicit criteria for financial distress, authorize third-party releases only under defined conditions, and standardize creditor voting procedures. Most importantly, the revised version should extend its channeling-trust structure beyond asbestos to address latent digital and psychological harms while preserving equitable recovery for present and future claimants.

2026 and Beyond

Political realities in all branches of government suggest that 2026 will bring these problems into sharper focus but will likely not bring any meaningful solution. Yet the trajectory of the issue is clear: Without legislative intervention, finality will remain elusive for all parties involved in a defensive bankruptcy. The confluence of as-yet-unknown harms from as-yet-unknown torts, along with growing intolerance for prolonged uncertainty from claimants and debtor defendants alike, is building a demand that will be too compelling for lawmakers to ignore forever.

The traditional bankruptcy playbook no longer guarantees a company's emergence from mass tort litigation as a solvent company. A retooled, expanded 524(g) could restore both certainty and equilibrium. To do this, it must create a defensible channel for mass tort resolution. This new channel must harmonize the need for equitable recovery for claimants with a legitimate exit and restructuring strategy for companies facing true distress and litigation tumult. Until then, everyone will traverse that liminal space where innovative liability theories and aggressive procedural strategies continue to test Chapter 11's elasticity.

Employee Political Expression Faces Shifting Tides

Marissa Zalasky
Legal Analyst

Employee political expression reignited as a hot topic in September of this year. After political organizer and media personality Charlie Kirk was shot and killed while speaking at a debate, many members of the public took to social media to disavow what they believed to be his derogatory political views and cultural influence. In response, a cohort of Kirk supporters, including prominent Republican government officials, publicly called for their firing. Several individuals, including media personalities, were fired or disciplined for their remarks.

These workers would likely have little recourse under state law, as most laws protecting employee speech or political activity would not prohibit private-sector employers from firing them under such circumstances.

Next year, employers can expect new efforts to protect the political expression of private-sector employees—this time from Democratic legislators—and may see new claims alleging that the First Amendment protects private-sector employees from being fired for their political expression when such terminations have been urged by government officials.

New State Employee Political Expression Bills

Only about half of states have explicit legal protections for the speech or political activity of private-sector employees. And several of those existing protections only apply to their participation in election-related political activities. Consequently, in most states, private-sector employers have broad latitude to fire or discipline employees for their speech on political issues—even when the employee's actions took place outside the workplace and during their personal time.

We can learn from the existing patchwork of state employee speech and political activity laws that such laws are often enacted by states in response to a particular political moment or issue.

Montana's law, for example, prohibits employers from taking adverse employment actions against employees and job applicants for their "legal expression of free speech," including on social media. The sponsoring state senator who introduced the bill said he did so in response to reports of employees being fired from their jobs for their social media posts criticizing policies such as the inclusion of critical race theory or "gender equality and diversity" in school curricula, or current events such as public disorder following the killing of George Floyd.

Charlie Kirk's assassination happened during the off-season for most state legislatures. After the new legislative sessions begin in 2026, we are likely to see some Democratic lawmakers introducing employee speech or political activity protection bills. Whether they will have the votes to pass is another story.

Still, there will be a number of Democrat-controlled states in 2026 without any such legal protections for private-sector employees, including Delaware, Maryland, Massachusetts, New Jersey, and Oregon.

Other Democrat-controlled states like New York have significant room to expand their protections. New York's statute protects off-duty participation in political activities and recreational activities. However, "political activities" is narrowly defined to refer only to enumerated activities related to formal participation in the political process. And while "recreational activities" is defined more broadly, courts have declined to apply its protections to the content of employees' social media posts.

Employees May Raise Jawboning Claims

As a general rule, the First Amendment does not protect private-sector employees from being fired for their political expression, because their employers are not state actors. However, if a government official coerces a private-sector employer into firing an employee to suppress the employee's speech, then the employee may have a First Amendment claim against the government.

The Supreme Court has recognized **since 1963** that the government cannot skirt around First Amendment protections by coercing a private entity into suppressing speech—a practice informally known as jawboning.

The word "jawboning" has floated in the air since ABC took Jimmy Kimmel's show **off the air**. After Kimmel made **comments** suggesting that Kirk had been killed by a MAGA supporter, FCC Chair Brendan Carr made a number of comments on Benny Johnson's podcast suggesting that the agency may pull the licenses of ABC and its parent company Disney in retaliation. Kimmel's program was **reinstated** the following week.

Furthermore, other prominent members of the Trump administration—including Vice President J.D. Vance and Attorney General Pam Bondi—made **public statements** calling for the firing of employees who made disparaging remarks about Charlie Kirk's death. Eager employee-side lawyers and constitutional lawyers are likely looking longingly at these statements from government officials with two words on their mind: state action.

Although jawboning has not yet been applied to the employment context, the Supreme Court has recently reaffirmed that the First Amendment prohibits the government from coercing a third party into punishing or suppressing disfavored speech. In 2024, the Supreme Court ruled unanimously in **National Rifle Association v. Vullo** that the NRA had sufficiently pleaded a First Amendment claim against a New York state regulator based on allegations that the regulator had threatened private entities under the agency's regulation to disassociate with the NRA or face enforcement action in order to suppress the organization's pro-gun advocacy.

However, in the absence of targeted public remarks by government officials, employees who suspect they have been fired due to jawboning may have difficulty establishing the causation element of standing.

Weeks after the *Vullo* decision, the Supreme Court ruled 6-3 in **Murthy v. Missouri** that the plaintiffs lacked standing to obtain an injunction against future government coercion of social media companies to suppress supposed misinformation about Covid-19 and government elections. While the court was focused on the issue of whether the record included sufficient proof of ongoing coercion to justify an injunction, it ruled that the plaintiffs (individual social media users and two states) failed to "link their past social-media restrictions to the defendants' communications with the platforms."

Taking *Vullo* and *Murthy* together, a private-sector employee who has been fired (or received some other adverse employment action) due to the government pressuring their employer to punish them for their speech may have an injury under the First Amendment. But the employee will need specific evidence connecting their termination to the government coercion to obtain relief in court.

Most employees would not be privy to the private communications between their employer and government officials. Yet given the Trump administration's public statements urging employment consequences for disparagement of Kirk, some employees punished for their comments may have a better case for standing if their comments had high visibility and their employer has some known entanglement with the government that would make it more vulnerable to coercion.

Cracks in the Federal Judiciary Will Widen in 2026

Erin Webb
Legal Analyst

Eleanor Tyler
Legal Analyst

The federal judiciary's internal strains have spilled out into the **news**—something that doesn't ordinarily occur. The stresses stem from litigation involving the Trump administration and from changes in how the US Supreme Court has chosen to handle that litigation.

As a result, it isn't just the law in flux: The path a case normally follows through the federal courts, and the likelihood of holding onto a ruling at any given level of the court system, have changed in litigation involving the federal government. With emergency stays, injunctions, and reconsideration orders at every level of the courts, federal litigation is more intense and less predictable.

These issues will likely come to a head in 2026. The constitutional crisis that the Supreme Court seems to be trying to avoid—a **showdown** between the executive and the judiciary—isn't avoidable on the current trajectory. The impacts of that crisis aren't foreseeable.

Strain Showing Inside the Federal Courts—and Out

There's a heated conversation happening between some of the justices on the Supreme Court and judges in the lower federal courts. Justice Neil Gorsuch in August **scolded** lower courts for "defying" the high court's recent rulings in his concurrence in, appropriately, a terse **order** on the **emergency docket**. Some district and circuit appellate judges responded, stating that such reprimands were "**unhelpful and unnecessary**," and that the conversation had become "**adversarial**."

The friction point is a substantial increase in the Supreme Court's use of its "**emergency docket**," and in particular, its use in very high-profile, legally novel cases involving the administration.

Emergency docket decisions differ procedurally and substantively from merits decisions. The Trump administration has frequently asked the high court to stay injunctions issued in a district court, or to intervene while the administration waits for an appeal. That means that the Supreme Court's emergency docket orders don't come after the full litigation of a dispute—and may even occur right after an emergency decision on a temporary restraining order at the district court level. Nearly all of these emergency docket orders lack any published reasoning, and by their very nature don't address the merits of the claims. Both of these factors are a sharp **difference** from past practice, according to Georgetown University law professor Stephen Vladeck, an expert on the court's emergency docket and its recent use.

And the high court isn't just using the emergency docket differently, the Trump administration is **asking** for emergency **rulings** in unprecedented **volume**.

Several problems follow. First, a lack of proceedings below makes it difficult to discern what these orders mean when applied to other cases. What's more, the lack of reasoning attached to them further complicates the job lower courts have in applying the Supreme Court's orders in the thickets of related litigation involving the administration.

Second, by intervening in these cases at early stages, the Supreme Court isn't allowing the litigation to proceed normally through the courts, and often hasn't given the federal courts a chance to exercise their own strengths at the district and appellate levels. District courts are experts at fact finding. Appellate courts carefully consider the legal impacts of individual decisions scaled up to the circuit level. Together, these layers of the system fully develop the issues of a case so that the public impact of decisions in individual cases can be thoroughly weighed, and justice can hopefully result. Interrupting the usual process, scrapping carefully considered opinions, and allowing novel executive actions to go forward without any merits consideration, have all created tension, misunderstandings, and sniping among the judiciary.

These factors also impact the public's view of the law and the judiciary. And, of course, these maneuvers have profound impacts on litigants and on those trying to understand and comply with the law.

Growing Discontent

New legal holdings always take some time to filter through the courts—and we've seen some big shifts in legal precedent in recent years. But when shifts come from the emergency docket, judges are particularly struggling to apply the high court's rulings.

Legal commentators have noted that this is "not a very **workable** situation for the judiciary," and that it "reflects a house **divided** against itself."

When tensions build in the federal system, the courts usually keep those issues to themselves. But this dispute is playing out in public. A group of federal district judges **spoke anonymously to the press** about frustration with the high court, and about the public exasperation expressed by Gorsuch. Other judges and justices have publicly **commented** on the **situation** as well.

Usual Channels Aren't Open

Historically, the layers of the federal courts generally viewed one another as allies, each contributing different but valuable roles. When intrabranch problems arise, judges traditionally **meet**, discuss, and propose solutions through several **administrative channels**, ending in a defined process that recommends changes to the court system for **Congress** to consider.

Congress, however, is in no position to pass legislation at present. Furthermore, the federal courts and their role in the constitutional structure are increasingly **politicized**. In previous years, changes to the structure or jurisdiction of the courts were usually uncontroversial. But it's difficult to imagine that being the case now. Under the present circumstances, just *introducing* such legislation would involve **risks** that the courts might be unwilling to take.

In short, even if the federal courts could agree among themselves on changes that would salve the current strains, it's unclear how those would be instituted. Even more fundamentally, serious problems in the judiciary that warrant impeachment probably can't be addressed in Congress right now.

What Happens Next? Strategies for Litigators

These internal pressures (and serious pressures on the judiciary from outside as well) add litigation risk to a potent stew of legal uncertainty. In addition to the whack-a-mole of appealed injunctions, before the Supreme Court are a number of merits cases that will heavily impact the work of the federal government and the operation of regulated industries. For example, voting rights, the scope of executive tariff power, removal of agency heads, states' authority to include or exclude transgender athletes from specific school sports teams, and even district court discretion over time limits for removal are on the court's docket.

For litigation involving the administration, be aware of where cases can be brought—and where they should. Data about results from specific districts and courts of appeal can be critical. Public relations strategies and amici can also be helpful in advancing the issues. There's a significant first-mover advantage, so take control as early as possible.

Be open to state court litigation. So far, state courts haven't shown the same types of issues that are roiling the federal judiciary. Strategies to remand cases to state court, or even certify important questions of state law to a state court where remand isn't available, can be important strategic tools.

Cannabis May Find Unexpected Ally in SCOTUS Next Year

Meghan Thompson
Legal Analyst

The US cannabis industry is approaching a financial breaking point. The conflict between federal law and state law on the drug's legality has left even the industry's largest operators buried under **debt**, haunted by their **tax bills**, and grappling with **falling prices**. If something doesn't change for cannabis at the federal level in 2026, many of its top players won't survive another year.

The next big push for cannabis reform may not come from Congress or the federal government, but from the US Supreme Court. The court agreed in October to hear a **Second Amendment challenge** to a federal ban on gun possession for cannabis users, and a ruling on the issue next year could thrust rescheduling efforts back in the spotlight.

Federal Reform Is Critical to Industry's Survival

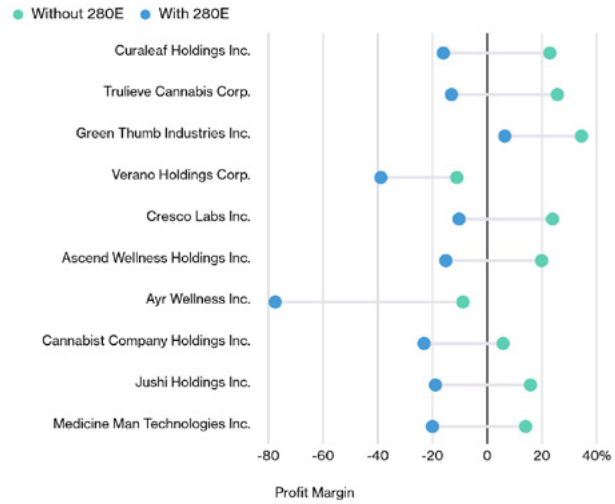
Moving cannabis from Schedule I to the less restricted Schedule III of the federal Controlled Substances Act would alleviate the industry's most crippling financial constraint: **Section 280E** of the Internal Revenue Code. Section 280E prohibits companies that "traffic" in Schedule I or Schedule II substances from deducting ordinary business expenses, resulting in an effective tax rate of roughly 70% or more for cannabis companies.

A Schedule III classification would provide state-legal companies with much-needed financial relief, rekindle **investor interest**, and unlock the door to profitability that Schedule I keeps locked shut.

Of the top 10 US cannabis operators by revenue in 2024, only one reported a profit—despite generating a combined $718 million in revenue the same year. Without the Section 280E penalty, profitability margins for seven of these companies would turn from red to black virtually overnight.

Most Top Cannabis Firms Become Profitable Without 280E

Top 10 cannabis companies' profit margins before and after tax penalty



Source: Bloomberg

Note: Profitability with and without Section 280E penalty is represented by profit margin and EBITDA margin, respectively.

Bloomberg Law

Meanwhile, multistate operators owe about **$6 billion in debt** maturing in 2026, according to industry research firm Whitney Economics. Without access to traditional banking or bankruptcy protections, some will be forced to sell assets to stay solvent (like **Ayr Wellness** is doing now).

Although rescheduling wouldn't **legalize cannabis** or open **interstate commerce**, relief from Section 280E could suffice to keep many operators afloat through next year.

Supreme Court Could Be Rescheduling's Silver Bullet

The Supreme Court's decision to hear a cannabis-related case couldn't have come at a better time for the industry. The high court's ruling in **US v. Hemani**, on appeal from the Fifth Circuit, may trigger the most significant shift in federal cannabis law since the drug was placed in Schedule I in 1970. However, the case isn't about the state-legal industry at all, but rather the Second Amendment rights of cannabis users.

Under **18 U.S.C. § 922(g)(3)**, anyone who is an "unlawful user" of a controlled substance, including all cannabis users under federal law, is barred from owning firearms—regardless of state legality. Since the Supreme Court established a **new constitutional test** for federal gun restrictions in 2022's **N.Y. State Rifle & Pistol Ass'n v. Bruen**, at least five circuit courts and more at the district level have heard new constitutional challenges to Section 922(g)(3) as applied to cannabis users.

The Third, Fifth, Seventh, Eighth, Tenth, and Eleventh circuits have each ruled that Section 922(g)(3) may be unconstitutional as applied to the defendants, either directly or by remanding for further fact-finding regarding the defendants' state of intoxication at the time of the offense. Notably, none have held that a blanket gun ban for cannabis users is facially constitutional; each post-Bruen decision has required some individual assessment.

In *Hemani*, the Fifth Circuit relied on its decision in **US v. Connelly**, which requires the government to prove intoxication at the time of firearm possession. As in *Connelly*, the appeals court held that Section 922(g)(3) was unconstitutional as applied. The Justice Department urged the Supreme Court to hear *Hemani* over four other similar cases with cert petitions asking the same question.

The question before the court now is whether Section 922(g)(3) is unconstitutional as applied to the defendant. The *Bruen* test requires firearm restrictions to align with the country's history of gun regulation. Multiple lower courts have already found that there's no sufficient historical analogue to Section 922(g)(3)—the closest prohibits carrying a firearm while drunk, and it doesn't ban ownership entirely.

Absent a stronger analogue, the Supreme Court is likely to affirm the Fifth Circuit's decision vacating the defendant's conviction. Such a ruling could effectively narrow Section 922(g)(3)'s constitutionality to defendants who were actively intoxicated or belong to a particular class of drug users who present a comparable historical danger. Congress or the Department of Justice would need to align the statute with the ruling to avoid a flood of new appeals in cases involving cannabis users. This scenario may intensify pressure on the White House to push rescheduling forward and presents an opportunity to align the proposal with Second Amendment protections.

High Court Ruling Puts Pressure on Trump

Hemani will lay bare the widening gap between federal cannabis law and reality. Nearly **one in five** Americans use cannabis, and roughly **one in three** own a gun—those who do both are committing a federal felony.

Forty states have legalized cannabis for either medical or adult use, yet many Americans don't realize that federal law requires them to choose between using it and owning a gun. With renewed attention on this paradox, the Trump administration could be motivated to finish what the Biden administration started by moving cannabis to Schedule III.

The fate of rescheduling—and, by extension, the industry's short-term viability—now rests with the administrator of the Drug Enforcement Administration, Terrance Cole, who is expected to follow the White House's lead. While President Donald Trump expressed support for rescheduling on the campaign trail, his administration's statements about cannabis so far have been inconsistent.

The Supreme Court's conservative majority could ironically prove to be the US cannabis industry's most unexpected ally. The court's ruling in *Hemani* might build enough momentum to advance rescheduling in 2026, leading to the financial boon that the industry needs to stay afloat.

Lit Finance Will Help Drive New Models of Law Practice

Robert Dillard
Legal Analyst

Investors are **increasingly interested** in buying stakes in US law firms and businesses that serve them. There are varying rules and regulations among the states regarding nonlawyer ownership, yet a slow chipping away at them has allowed nonlawyer investment in some jurisdictions. In 2026, litigation funders will play a key role in accelerating the pace of this type of arrangement.

In turn, key stakeholders, including state regulators, will capitalize on these options to modernize and promote investment in the legal industry, particularly by nonlawyers.

Litigation Finance Investment

The **litigation finance** industry will play an important role in this accelerated transformation of the delivery of legal services and the industry itself may see a transformation in how it invests in the legal industry.

Litigation finance—when a third party funds litigation in exchange for a portion of any recovery—has been around for more or less a decade in the US. Advocates say that it allows parties to pursue claims they otherwise couldn't afford to. Those who oppose it, say that this model allows funders to control litigation, which would be a violation of legal ethics rules.

Based on recent industry actions, it appears that funders are contemplating new business models at the enterprise level (i.e., investing in ways that impact an entire firm, not just certain cases). Such investment could allow law practices to expand and become more efficient and more modern.

This new type of involvement is gaining steam heading into 2026 and shows how litigation finance is evolving. Some big players like Fortress Investment Group have taken steps toward **widening their investment scope** from cases to firm-level financing. This year, a company associated with the asset manager secured a 20% interest in an Arizona personal injury firm. The move signals a future where funders like Benefit Street Partners and Crossbeam Venture Partners are **increasingly interested** in joint ventures with law practices and, where available, in holding equity interests in law practices. It will, in turn, encourage more states to investigate the idea of loosening restrictions on nonlawyer investment.

Burford Capital's **announcement** in August that it's interested in taking minority stakes in law firms in the US is another one of the most recent examples of the industry's burgeoning interest. The litigation finance company has **touted** litigation funders' advantage in providing immediate cash to firms that can be used to make key hires, invest in vital technologies like artificial intelligence, and facilitate growth into new sectors.

The strategy of investing in the law firms themselves, rather than just their current and future cases, could be a win for both investors and firms, the latter of which will be granted much more flexibility to direct resources toward growing their practices with this type of investment.

Alternative Practice Models

Fortress was able to invest in an Arizona law firm because of the state's relaxed rules on law firm ownership. Other types of investors like **private equity** firms are looking to take advantage of regulatory changes and pilot programs in some states that have created more opportunities for nonlawyer investment in the profession.

Alternative Business Structures

Tennessee is considering allowing nonlawyer ownership of firms and in October, Washington began accepting applications for its **pilot program** that seeks to attract investment in the state's legal market.

Washington's **Entity Regulation Pilot Project** focuses on encouraging innovative business models for the delivery of legal services, including by businesses or firms that incorporate investments from nonlawyers. The program is also interested in attracting entities that use technology to create entirely new legal service models in coordination with nonlawyers.

Washington's model builds upon efforts other **jurisdictions** are taking toward modernizing the profession, particularly Arizona.

In February, KPMG **secured permission** to operate its own law practice in Arizona. The accounting firm's entry into legal practice is enabled by Arizona's alternative business structures program, which has grown to just under 150 **licensed entities** since its inception in 2020.

KPMG Law plans to offer services to its existing accounting and consulting clients from its office in the state and, when necessary, partner with co-counsel to address clients' needs in other jurisdictions. KPMG Law will be one of the most closely watched examples of alternative business structures attempting to innovate in legal practice. Expect other nontraditional legal outfits to follow suit in 2026.

Management Services Organizations

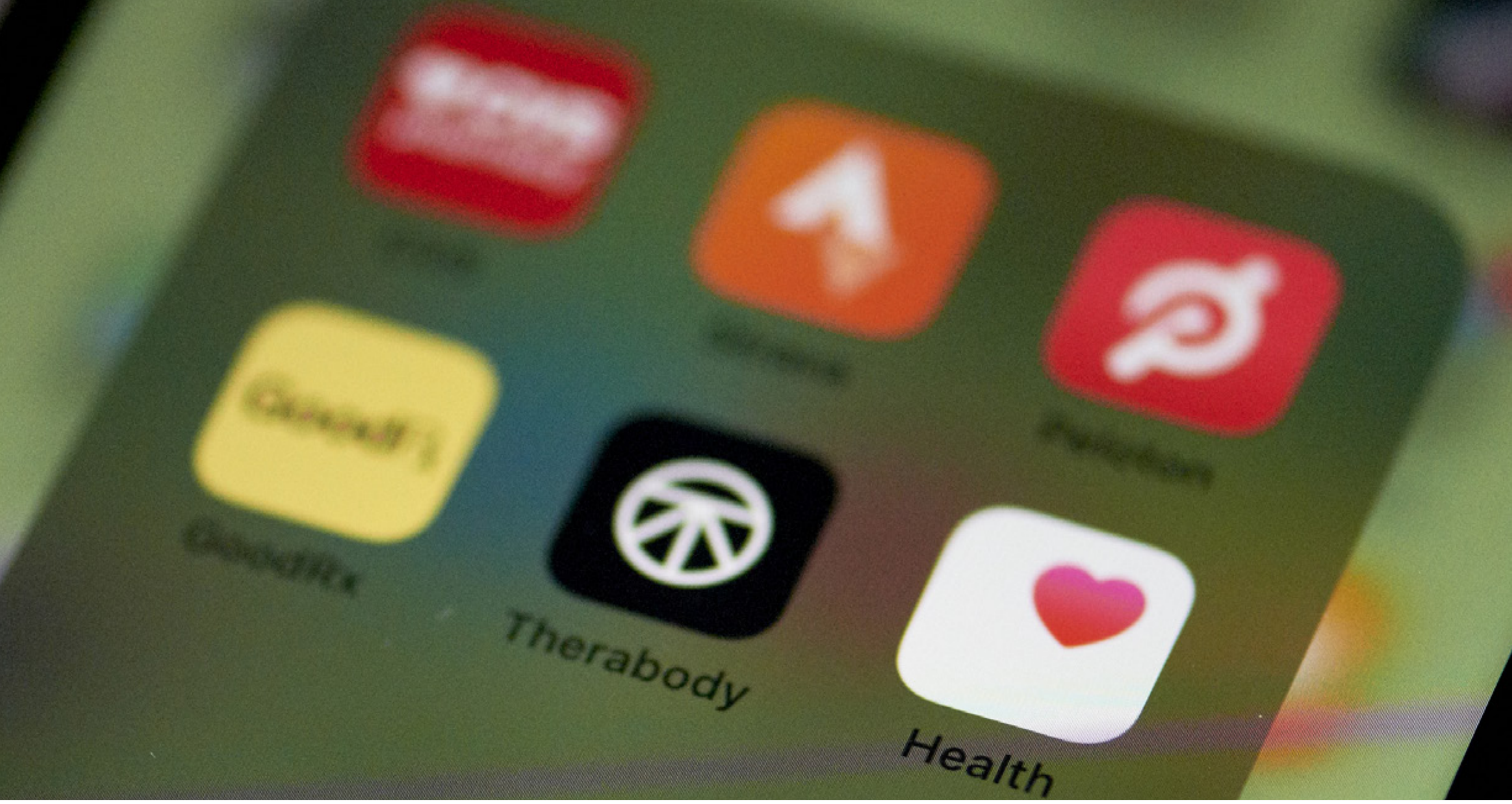
Management services organizations are another vehicle that will push this trend forward in 2026. MSOs—most frequently seen in healthcare settings—are separate business entities that provide administrative and financial services. In a law firm setting, the firm contracts with an MSO to take over responsibilities like human resources, billing, and information technology.

One argument in favor of MSOs in the legal profession is that they'll improve the delivery of services by allowing attorneys to focus on advising clients, while the MSO focuses on the practice's administrative needs. The law firm pays the MSO for the services it provides and, because the entity doesn't practice law, it can sell equity to investors.

The arrangement requires a careful balance, requiring compliance with the American Bar Association's **Model Rule 5.4**, which prohibits fee-sharing with nonlawyers to ensure that attorneys maintain their professional independence.

So far, it appears that interest in MSOs among national firms is **modest**. However, as new capital is invested in the legal industry and state reforms and pilot programs take hold next year, the practice of law will change. The innovation and efficiencies gained will benefit the stakeholders yet may also be drivers for improving access to justice, which was an **original ABS goal**.

Executive Orders & Authority



Health Apps Face Privacy Problems In New CMS Ecosystem

Laura Travis
Legal Analyst

In September, the Trump administration launched the **Health Technology Ecosystem**, which will gather user health information from patient-facing apps, CMS-aligned networks, and other health care industry players to promote interoperability and enable information sharing for patients and providers.

The Ecosystem's baseline privacy protections for patient-facing health apps will likely fall short of consumer expectations around health data privacy. Despite this disconnect, incentives to join—like the opportunities to access patient health data and to partake in AI-driven app innovation—will drive participation and could boost innovation in health tech in 2026. But public pressure in the shadow of massive data breaches will act as an alternative regulator, forcing app companies to take steps to protect patient information.

Patient-Facing App Risks and Regulatory Gaps

Operated by the Centers for Medicare and Medicaid Services, the Health Technology Ecosystem is intended to modernize how health information is shared and to improve interoperability, but privacy concerns and related risks over shared health data loom large over the program, app creators, and consumers.

The Health Insurance Portability and Accountability Act, the main federal law governing health information privacy, doesn't typically apply to private companies or the apps they market. But within the Ecosystem, apps administered by a covered entity or business associate are now subject to HIPAA. However, many apps will not fall into this category, and there is not an existing regulatory federal framework that offers strong **protection** for health information stored in apps.

Beyond this HIPAA coverage gap, apps still face risks outside of government action that can impact the viability of a company.

In October 2023, 23andMe faced a data breach where the information, including health data, of 6.9 million users was **compromised**. Since then, 23andMe has faced legal **settlements**, **bankruptcy**, and a £2.31 million regulatory **fine** in the UK. As part of its bankruptcy, 23andMe has been authorized to **sell off** customer data.

A major **factor** in 23andMe's data breach was that it had inadequate security to protect information and was slow to address evident security concerns, highlighting the risks that data breaches—and public reactions to them – can have a non-governmental regulatory force.

Incidents like the 23andMe breach will serve as a cautionary tale to health apps. They may not have a regulatory impetus, but the risk of litigation, loss of business and public trust, bankruptcy, and even foreign regulatory fines for apps that operate internationally will push apps to look for stronger privacy and security protections.

The Stakes of Public Opinion

App developers have many incentives to join the Ecosystem: helping to shape the program's privacy requirements, getting extensive access to patient information, and being part of developing new app technology—especially involving AI. But public opinion may serve as the strongest force to motivate apps to use the Ecosystem to protect health information in it, despite the program's regulatory gaps and risks.

App creators may or may not have a regulatory incentive to have robust privacy and security policies, but, in the shadow of cases like 23andMe, they will face more exposure and pressure from the public if incidents occur.

It wasn't regulatory enforcement that brought down 23andMe. Rather, it was the financial cost of litigation, foreign regulatory enforcement, and bankruptcy, combined with the loss of public trust. Business success frequently turns on public opinion, and with the increasing amount of data that apps have at their fingertips, they will implement heightened privacy and security measures if they want success in the market and to avoid financial repercussions.

Patient Data and AI

Ecosystem apps will be able to obtain medical records from CMS-aligned networks to build new apps, including conversational AI assistants, in line with the Trump administration's push to use AI as detailed in an **executive order** and an **AI action plan**.

With apps having access to more information in the ecosystem, they will be able to develop AI-based apps and features more quickly. But this raises numerous privacy concerns for patient information, including how data is used and the security risks that come with such a high volume of information.

Even though being part of the Ecosystem provides an opportunity be part of the development of health AI-driven apps and to gain access to patient information, patients may be wary of using these apps due to concerns about how their information could be used by the government that maintains it. Public opinion is one of the most important factors for a business, and the stakes of how the public views the ecosystem are very high.

Additionally, for ecosystem apps, the public is wary of the government handling their health information. A recent, KFF poll **reported** that most Americans are "very concerned" or "somewhat concerned" about information privacy in health-related apps managed by the government. Although the information would be part of the Ecosystem, which will have some regulatory guardrails, there is a risk of the government using that information for other purposes or even experiencing a program-wide breach.

While being part of the Ecosystem provides an opportunity for app owners to develop health AI-driven apps and access to patient information that could benefit patients, patients may be wary using these apps due to the concern of how their information could be maintained and utilized by the government. Public opinion is one of the most important factors for a business, and it will both determine the success of the Ecosystem (and the apps within it) and dictate what privacy requirements are necessary for adoption.

Why DEI in 2026 Will Be a Learning Curve for Employers

Rachel DuFault
Legal Analyst

It might feel like the Trump administration's push to end DEI workplace practices has cooled, leaving employers to wonder if interest in regulating DEI has been replaced by other initiatives. But the current lull in publicly visible DEI-related enforcement activity may only be the calm before the storm. With the EEOC's DEI activity ramping up in 2026, and some state enforcers poised to follow suit, their actions will at least shed some light on their priorities and processes, giving employers some much-needed insight on what lies ahead for DEI.

Early 2025 saw a surge in activity by federal and even state executive branches aimed at driving companies to eliminate their DEI programs. By March, President Trump had signed **three DEI-related Executive Orders** to end DEI workplace practices. The Equal Employment Opportunity Commission followed up in March by sending official **inquiries** into Big Law's DEI-related employment practices and by joining the Department of Justice in releasing informal **DEI-related discrimination guidance** for workplaces.

A total of 24 state attorneys general had joined federal efforts to end workplace DEI practices by midyear, sending **letters** to inquire about and discourage such practices at **retailers**, **financial institutions**, **law firms under EEOC inquiry**, and **members of Business Roundtable**.

Since then, however, the Trump administration has been relatively quiet in DEI-related activities. There have been no new executive orders; no public updates from the EEOC (which could do so even without having a **quorum**); and no updates on a DEI report that Trump **directed** the Attorney General to complete by May.

Echoing this slowdown, there has not been significant new activity among state attorneys general about private-sector DEI workplace practices. While attorneys general supporting DEI workplace practices have filed **amicus briefs** in DEI-related litigation, those opposing DEI have not further inquired or engaged in enforcement activity—at least not publicly—against workplace DEI measures.

EEOC Charges Reach the Public Arena

Although there's been scant public action from the EEOC since March about DEI-related discrimination, that does not mean that the commission hasn't been working behind the scenes on it.

The EEOC's **DEI-related discrimination guidance** solicited the filing of DEI-related discrimination charges against employers—charges that the commission can **continue** to work on, despite its lack of quorum.

In general, discrimination claims must pass through a **charge phase**, in which the EEOC investigates and tries to close claims through alternative measures before litigation can be filed by the charging party or the EEOC on their behalf. Charges and investigations are confidential, though, which means that information about DEI-related discrimination charges filed against employers in 2025 is not publicly available. As a result, the nature and extent of the EEOC's enforcement activity regarding DEI is difficult for employers to gauge.

This will change in 2026, as many of those 2025 charges will pass to the litigation phase. Employers can expect to see the first EEOC-filed lawsuits on DEI-related discrimination and a dramatic increase in private individual lawsuits.

Those lawsuits potentially will reveal for employers which workplace practices may be substantive grounds for DEI-related discrimination. Trump's executive orders and the EEOC's **technical assistance guidance** list various practices that may be scrutinized for DEI-related discrimination, such as selection for interviews, access to mentoring or training, or promotion practices that are based on a protected characteristic under Title VII. 2026 will provide the first chance for employers to see what materializes.

DEI-related litigation activity will gain momentum in 2026 because EEOC Chair Andrea Lucas announced it as a **priority**. Employers will need to prepare for an uptick in DEI-related discrimination litigation as more discrimination charges are filed and pursued by EEOC.

New DEI-Related Regulations Ahead

Because of its lack of quorum for most of 2025, the EEOC could not issue **new regulations or formal guidance**. But even with a quorum now achieved, the agency is still waiting for congressional appropriations to fund its efforts. With that delay, it might be 2026 before the EEOC releases regulations or formal guidance about DEI-related employment practices.

For employers navigating EEOC's initial **DEI guidance**, such regulations and formal guidance would clarify which DEI practices might violate Title VII, and instruct employers on how they may avoid such discrimination claims.

Of course, there may be a wrinkle in the EEOC's DEI regulatory plans because, much like the **litigation** challenging the executive orders that undergird the EEOC efforts, any regulations and guidance proposed by the agency might face court challenges to implementation and enforcement. But by then, employers will already be on notice about what the administration is looking for and what compliance will look like. And employers will still have to deal with the rise in individual private lawsuits.

States to Provide Added Scrutiny—And Clarity

With the EEOC able in 2026 to actively pursue its agenda on DEI-related discrimination, state attorneys general may not be far behind.

Employers can anticipate that AGs in states whose pursuits to end DEI workplace practices went publicly dormant in late 2025 may jump back into the public fray in 2026 with activity as they mirror the priorities of the Trump administration.

These attorneys general also may actively advocate for EEOC efforts by commenting in favor of proposed federal regulations, like they **have** for other anti-DEI federal regulations, or filing amicus briefs in possible litigation.

All of these actions might move at a quicker pace than at the federal level. For employers in these states, having to deal with the new realities of DEI compliance early could leave them better prepared to handle any federal requirements that come later.

Tussle Over Drug Discounts to Tip Pharma's Way in 2026

Brian Forst
Legal Analyst

After years of setbacks in state legislatures and federal courts, drugmakers opposing growth in the 340B Drug Pricing Program have found new openings that will likely begin to arrest the program's expansion. Recent district court rulings" and a new Trump administration initiative could force hospitals and clinics that rely on drug discount revenue to accept more financial and operational risks.

Enacted by Congress in 1992 and administered by HHS's Health Resources and Services Administration (HRSA), the 340B program requires drugmakers to offer deep discounts on drugs to covered entities, which include hospitals and clinics that serve a disproportionate share of low-income and uninsured patients.

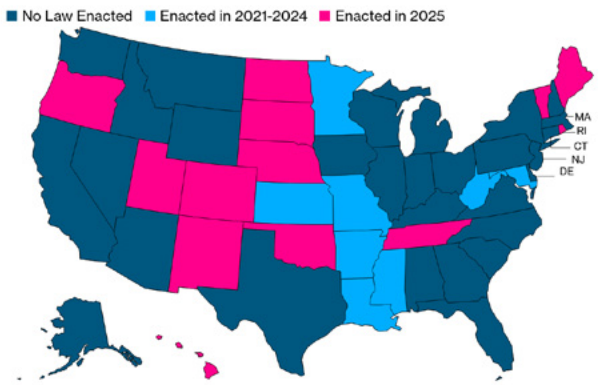
The program has seen considerable growth in recent years, in part due to a 2010 policy change that allowed covered entities, who often don't have their own in-house pharmacies, to contract with an unlimited number of outside retail pharmacies to dispense discounted drugs to their patients.

Beginning in 2020, drugmakers responded by restricting the practice, alleging that it leads to covered entities receiving both Medicaid drug rebates and 340B discounts, as well as discounts going to patients who are ineligible under federal law.

In response, states in 2021 began enacting laws barring drugmakers' limitations on the delivery of 340B discounted drugs to contract pharmacies. Drugmakers sued, primarily arguing that the federal 340B statute preempts the state laws. Bloomberg Law data show that more than 60 lawsuits have been filed by drugmakers since states started passing the laws.

Prior to late 2024, federal courts ruled in favor of the states, leading in 2025 to a predicted surge in state contract pharmacy access laws. There are now 21 states with similar statutes, up from eight states in 2024.

States Race to Enact 340B Contract Pharmacy Laws
States with laws that bar drugmaker restrictions on pharmacy arrangements



Source: Bloomberg Law as of Oct. 26, 2025

Drugmakers' Court Wins on Contract Pharmacies

These court rulings against drugmakers have found that state laws on contract pharmacies were not preempted by the 340B statute.

But this is changing.

In December, drugmakers got their first **win** when a federal district court in West Virginia issued a preliminary injunction against the state's contract pharmacy access law.

The court found that drugmakers are likely to succeed on the merits regarding several provisions of the law.

First, it examined a provision of West Virginia's law that had not been addressed by prior courts. In addition to barring drugmaker restrictions on delivery of drugs to contract pharmacies, the law prohibits drugmakers from requiring pharmacy claims data as a condition for 340B discounts. The court agreed with drugmakers that this added provision hampers their ability to conduct audits of covered entities.

The court reasoned that by barring access to claims data, the state was creating an obstacle to two federal purposes of the program: to provide discounts to covered entities and to prohibit fraud in the form of duplicate discounts.

The court also ruled that the law's enforcement provisions, which allow the state to investigate complaints and impose civil penalties against drugmakers for violations, likely conflict with Congress's intent to centralize enforcement with the federal government, citing **Supreme Court precedent** in a different case on the 340B program.

And in a key finding, the court said that the West Virginia law regulates the pricing of 340B-covered drugs, not their delivery, breaking with previous courts, including the Eighth Circuit when it upheld Arkansas's law.

West Virginia **appealed** the decision to the Fourth Circuit, which heard oral arguments in September.

But regardless of the outcome of the appeal, the ruling is proving influential. In late October, a federal district court in Oklahoma cited its reasoning in blocking that state's law. An appeal of that decision would go to the Tenth Circuit.

The rising tide of litigation against these state laws will increase the opportunities for more courts to side with drugmakers in the year ahead, likely forcing other circuit courts, and ultimately perhaps the Supreme Court, to weigh in.

Trump Administrative Rebate Pilot: A Major Shift

In addition to drugmakers' court win on contract pharmacies, another front opened in 340B battle that will lay the groundwork in 2026 for a fundamental shift in how covered entities receive discounts: a limited **340B Rebate Model Pilot Program** launched by HHS in August in response to **litigation** over drugmakers' attempts to create one themselves.

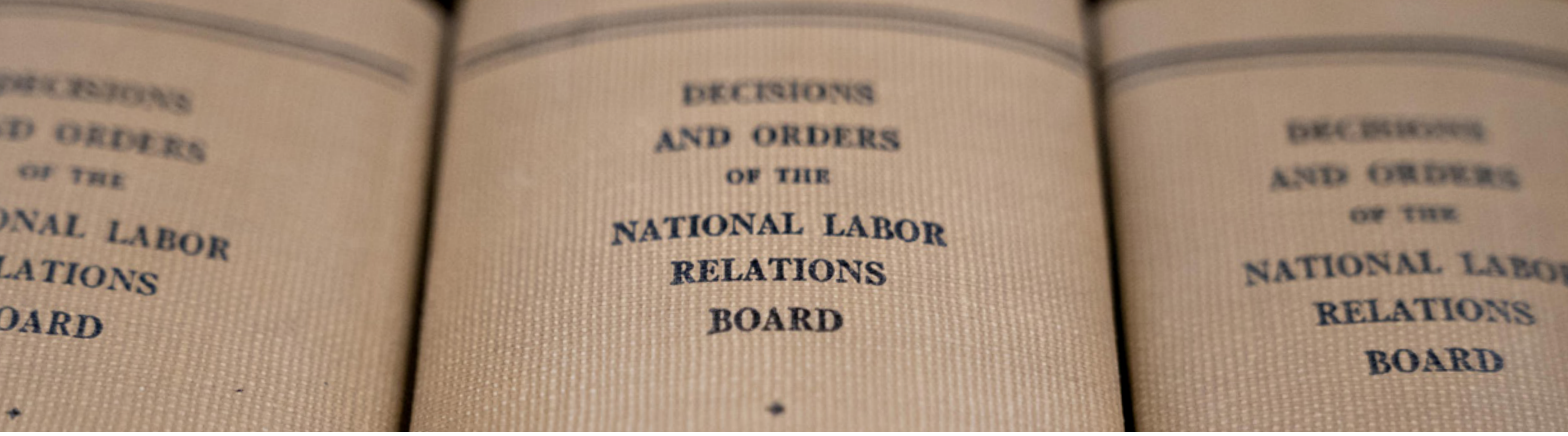
The program will test the option for drugmakers to provide their 340B discounts to covered entities in the form of a rebate upon receiving claims data, rather than up front, as has been standard practice under the program for decades. Drugmakers say they need the claims data to verify patient eligibility and prevent duplicate discounts, including for drugs subject to the **Medicare Drug Price Negotiation Program** in 2026.

Hospitals and other covered entities who will pay full price for 340B drugs first and submit data later **say** they can't afford to float the significant funds while waiting for drugmakers to issue discounts, and that gathering the data is an administrative burden on their already-thin margins, which will reduce the program savings they can devote to supporting patients.

The pilot program is voluntary for drugmakers and limited initially to the drugs selected for the first year of the negotiation program. HRSA has approved eight drugmakers' plans to participate, beginning Jan. 1, 2026. The agency has left open the door to expanding it to other drugs in the future after evaluating the pilot.

Navigating Changes

Between the increasing likelihood of a circuit split over contract pharmacy laws and a major regulatory shift in how drugmakers offer discounts, 2026 is set to be a crucial year for both the health care and pharmaceutical industries. Lawyers on both sides will need to be prepared for new rebate compliance procedures and a potential shift in litigation. But if current developments and trends hold, then it's the covered entities under the 340B program, not the drugmakers, that will face the biggest new financial and operational challenges in 2026.



The NLRB's Labor Law Enforcement Days May Be Numbered

William Welkowitz
Legal Analyst

In the 10 months since the beginning of the second Trump administration, the National Labor Relations Board has gone from being the working enforcement authority on federal labor law to being a non-functioning body to potentially being declared unconstitutional and permanently unable to legally enforce the provisions of the National Labor Relations Act.

Previous analyses on the **fortunes of the NLRB** have pointed out that the board has certain protections from challenges to its authority, while also **pointing to the danger** posed by a certain **case**, brought by Elon Musk's **SpaceX Corp.** that is making its way through the federal courts. But events and developments this year have created doubts about the strength of those protections.

The Musk case, along with the current Supreme Court's greater willingness to overturn long-standing precedent—particularly when it comes to the powers of the administrative state—suggests that there is a strong possibility that the Supreme Court could rule in 2026 that the NLRB structure itself is unconstitutional.

Danger Spots For the NLRB

Within a week after the start of his second term, President Trump **removed** a member of the NLRB from her position, reducing the board's membership to two and leaving it without a legally functioning quorum. (Another member's term has since expired, leaving the current membership at one). Since then, Trump has placed **two people** up for nomination to the NLRB, both of whom are expected to be confirmed by the Senate before the end of the year. This would finally give the board a quorum and allow it to legally make rulings again under the NLRA.

But that authority could be short-lived, depending on the outcome of the SpaceX case, which constitutionally challenges the NLRB's authority to enforce the NLRA. Most recently, the **Fifth Circuit** upheld an injunction issued by a district court, which prevents the NLRB from ruling on any unfair labor practice charge originating from within its jurisdiction.

Elon Musk and SpaceX, as well as **other companies** that have joined his lawsuit or have filed separate lawsuits on the issue, make several arguments attacking both the processes and structure of the NLRB. There are two arguments in particular that challenge the board's very existence.

First, they argue that the NLRB's administrative law judges, who have the initial opportunity to adjudicate cases brought before the agency, are making decisions on private rights without a jury trial, in violation of the **Seventh Amendment**. This argument seems most likely to turn on how the courts ultimately interpret the Seventh Amendment's meaning of "suits at common law."

Second, they argue that the NLRB simultaneously exercises executive, legislative, and judicial authority, in violation of the Fifth Amendment's **due process clause**. This argument hinges on a determination of what type of power the board wields and whether its procedures actually violate due process.

These lawsuits also argue that the removal protections for individual board members and administrative law judges violate **Article II** by restricting the president's ability to remove appointed members of executive agencies at will. This was partially the basis for the Fifth Circuit's decision upholding the district court's injunction. However, the **Sixth Circuit** refused to grant such an injunction in a similar case, stating that the employer had failed to show any harm caused by the removal protections.

Removal-Based Cases Could Be an Indicator

Simultaneously, the NLRB's power and authority could also be hindered by the outcome of a case currently **scheduled for argument** before the US Supreme Court, which challenges the removal protections granted to board members of an agency with a similar structure to the NLRB. Here, the Trump administration is looking to overturn the long-standing precedent of **Humphrey's Executor v. US**, which states that presidents can't remove commissioners of multi-member, bipartisan independent agencies for purely political or policy disagreements.

The outcome of this case will have both a direct and indirect impact on the NLRB's power. Such a ruling would not only destroy the independent nature associated with the NLRB and other agencies with similar characteristics; it would also show the extent of the animus the Supreme Court's majority has towards the administrative adjudication system, increasing the possibility that the majority would be open to accepting SpaceX's arguments on the NLRB's structure.

If the Supreme Court overturns *Humphrey's Executor* and rules that the president can't be prevented from removing the commissioner at will, it will have a direct impact on NLRB members' job security. Specifically, a **parallel case** being argued in the federal courts involving NLRB board member Gwynne Wilcox challenging her firing by President Trump under almost identical circumstances would almost certainly have the same outcome. However, this outcome is not a foregone conclusion, as the court has recently **refused** to allow President Trump to fire Federal Reserve Governor Lisa Cook in another similar case.

Could States and Localities Fill the Potential Void?

Allowing federal district courts to assert jurisdiction over controversies involving the NLRA would seem to be the most logical outcome if the NLRB were ruled unconstitutional. However, the statute's enforcement provisions make it unclear as to whether such an arrangement would be lawful. Alternatively, some states and localities are taking measures into their own hands.

In September, New York Governor Kathy Hochul **signed into law** a provision granting the state's administrative apparatus the authority to hear and rule on private-sector labor law cases if the NLRB is in an extended period where it is non-functioning. In October, California Governor Gavin Newsom **followed suit**. **Massachusetts** is considering similar legislative action, and the government of **Allegheny County** in Pennsylvania is also considering taking action to allow local jurisdiction over labor law matters.

Immediately after the New York bill was signed into law, acting NLRB General Counsel William Cowen announced that the board would be **filing suit** to stop the implementation of the law, claiming preemption over labor law enforcement under the Supremacy Clause and US Supreme Court precedent. However, if the Supreme Court declares the NLRB unconstitutional, the preemption argument vanishes, leaving the state and local legislation intact.

Depending on the administrative structure and processes of the state and local agencies being empowered by these pieces of legislation, those laws could still face challenges under the same legal arguments that the NLRB is currently facing. However, the states passing these laws are more likely to legislatively account for such arguments, should the dismantling on the NLRB come to pass.

Discovery Orders to Infuse Light Into APA Challenges

Ashley Skladany
Legal Analyst

Last year saw the **demise** of judicial deference to agencies' statutory interpretations. This year, **limits** on nationwide injunctions and **emergency** Supreme Court rulings have hampered judges' ability to enjoin executive action. In 2026, look for the tug of war between the executive branch and the lower federal courts to extend into a typically more mundane arena: discovery.

In suits that are filed under the Administrative Procedure Act, discovery is the exception, and plaintiffs face a high bar to obtain it. But in 2026, district courts may increasingly allow APA plaintiffs to take discovery, including discovery of agency deliberative materials covered by a broad, but non-absolute, form of executive privilege.

District courts are facing a cascade of what they've described as atypical APA suits challenging agency implementation of executive orders, as well as mounting **tensions** with a high court demonstrably willing to intervene to block preliminary relief orders. But matters of discovery, at least, remain largely within judges' locus of control.

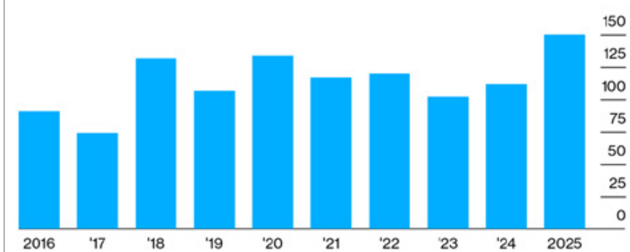
In the year ahead, discovery orders in APA cases may reflect embattled district courts' heightened sense of obligation to create transparency and to ensure that a fully developed factual record supports their merits decisions for appellate—and possibly Supreme Court—review.

Old Problem, New Era

The evidence a court considers when **evaluating** agency action under the APA is ordinarily confined to the "whole record": the universe of material considered by the agency decision maker. To take discovery, APA plaintiffs must either overcome a **presumption** that that record—as designated by the agency—already includes what it should, or make a showing of **bad faith**.

Data suggests courts are grappling with APA plaintiffs' requests for discovery with increasing frequency. According to the results of a search of Bloomberg Law's court opinions, terms related to evidence and discovery in APA suits—including "**deliberative process privilege**", a privilege often invoked to justify omitting materials from the record—have appeared in 150 court opinions in 2025 as of Oct. 21. That's more opinions mentioning these terms than in each of the preceding nine full years.

Discovery Issues Are Hot Topic in APA Suits in 2025
Federal court opinions addressing discovery and/or DPP in APA cases



Source: Bloomberg Law Court Opinions Search
Note: The data reflect the number of court opinions issued in each year responsive to the following search terms: "Administrative Procedure Act" AND ("deliberative process privilege" OR "extra-record" OR ((supplement or complete) np/3 record)). For 2025, the data reflects search results as of October 21, 2025.
Bloomberg Law

This year marks the first time in at least a decade that the annual total has risen in two consecutive years, suggesting that courts are poised to issue an even greater number of opinions on these matters in 2026 than in 2025.

Not Your Average APA Cases

In the world of APA litigation, 2026 is shaping up to be a contentious year, given the volume of APA claims being filed and the nature of the contested agency actions.

As of mid-October, plaintiffs in 2025 have filed 158 APA suits challenging agency actions implementing executive orders, according to Bloomberg Law's **Executive Orders Tracker**. Overwhelmingly, the challenged actions—like grant terminations, reductions in force, and personal data disclosures—didn't follow public-facing **rulemaking** or any other decision making process resulting in a readily-defined, contemporaneous "record."

As multiple **courts** have **observed**, these are **not typical** APA cases. Some courts have granted plaintiffs **limited discovery**—including **written** and **deposition** discovery—to fill in the gaps. And some have hinted that the usual presumption that the agency's record is complete may **frustrate** judicial review where the challenged action is not the product of **ordinary processes**.

APA challenges to actions with such ill-defined contours will continue to proliferate, as agencies **move away** from—or **disclaim** any obligation to follow—public rulemaking procedures. In a new era of agency action, courts may increasingly find ordinary presumptions ill-suited to extraordinary times.

Peering Into the Process

Two Northern District of California cases suggest that the atypical nature of recent APA challenges may also impact courts' approach to DPP—a **qualified** privilege that can be overcome by a showing of need.

In **AFGE v. Trump**, involving a challenge to agency RIFs, the district court **ordered** production of agency RIF plans, over the government's DPP assertion. The court found that DPP might not even apply, but if it did, the privilege was overcome by the need for accurate fact-finding—highlighting, in the court's words, the case's "significant public importance" and the lack of transparency to the public or affected federal employees.

The Ninth Circuit **denied** the government's mandamus petition in mid-September. (However, it has **stayed** the production order while the government seeks rehearing.)

In **National TPS Alliance v. Noem**, involving a challenge to the revocation of Temporary Protected Status for certain foreign nationals, the district court **ordered** production of agency communications from numerous custodians, which the court found relevant to plaintiffs' "credibly-alleged" claims that the agency's stated reason for the decision was pretextual.

Here the court found DPP did apply but was overcome. It noted the seriousness of the issues at stake and the "anomalous process" by which the challenged decisions were made, and found that "society has a strong interest in accurate fact finding where the propriety of government decision making is at issue."

When litigants seek material covered by DPP, courts will have to **balance** competing interests. And where the stakes are high, courts may find the scales tipped in favor of disclosure. In the year ahead, we may see courts increasingly inclined to order disclosure of DPP material, or at least to closely scrutinize agencies' use of the privilege.

Out of the Shadows

District courts may perceive their dominion over the factual record in APA cases as especially important in light of the Supreme Court's use of its "shadow docket" to halt preliminary injunctive relief orders—as it did in both **AFGE v. Trump** and **National TPS Alliance v. Noem**.

In ordering discovery, some courts have **stressed** the preliminary nature of shadow docket decisions and the **absence** of full records supporting them, suggesting that the high court's decisions are, in the judges' view, underscoring the importance of a fully developed record.

A Separation of Powers Issue?

One June shadow docket decision halting a discovery order in a **FOIA** case demonstrates the high court's willingness to enter the fray when discovery against the executive is at issue.

In **US DOGE Service v. Citizens for Responsibility and Ethics in Washington (CREW)**, a six-justice majority found that a discovery order against DOGE raised "separation of powers concerns" and counseled "judicial deference and restraint" regarding discovery into internal executive branch communications.

Although the *CREW* majority's concerns may derive from DOGE's status as an entity within the Executive Office of the President, its framing of the issue in separation of powers terms could shape future disputes about discovery against the executive branch more generally.

States to Take a Swing at Their Own Immigration Laws

Charlotte Tucker
Legal Analyst

While the federal government retains ultimate authority over immigration policy, deciding who may enter, who may remain in, and who must leave the US, individual states are increasingly leveraging their jurisdiction over labor and employment matters to influence immigration-related issues. This trend, which began during President Donald Trump's second term, is likely to intensify in 2026.

Look for states to emerge as players on the immigration stage in 2026, flexing their legislative muscles to influence issues that sit at the intersection of employment and immigration. Expect to see expanded equal employment opportunity laws, new laws shaping how employers can respond to federal immigration enforcement investigations, and stricter enforcement of employee eligibility verification requirements when state legislative sessions kick off next year.

Immigration Status

The federal Immigration and Nationality Act prohibits citizenship or immigration status discrimination in hiring, firing, and recruiting. States and cities can add the protection to their discrimination laws, and some cities have—Denver, New York, and Seattle, specifically. So far, immigration status is a protected class in just California and Washington, but other states, perhaps looking at the federal landscape with concerns about the stability or enforcement of federal protections, may seek their own levels of protection. Likely candidates include New York and Illinois, both Democrat-led states that have been the targets of federal immigration enforcement actions.

Washington—which, like New York and Illinois, has been a focus of federal enforcement in 2025—further strengthened its anti-discrimination statute this year. Under a new law, employees are protected from coercion in the workplace. Coercion, the law says, occurs when an employer makes any implicit or explicit threat related to the immigration status of an employee—or, notably, of an employee's family member—in order to deter the employee from engaging in protected activities or exercising rights under state employment laws.

Limiting Access

California, typically a national leader when it comes to enacting employment laws, passed a package of laws in September aimed at controlling federal law enforcement access to employment sites. The laws focus on public gathering places, such as hospitals and **schools**, and bar the facilities from allowing federal immigration officers acting within the scope of their employment onto employer premises without a valid judicial **warrant**. As is often the case, other states may not be far behind with their own laws.

Some states are making sure employees are informed when access to worksites is required, such as when federal agencies seek to inspect records or workers' employment eligibility documents. **California**, **Oregon**, and **Illinois** have laws going back as far as 2018 requiring employers to give employees up to 72 hours of notice of an impending inspection, and Washington's attorney general has announced his **intent** to seek similar legislation.

E-Verify & Employment Eligibility

Even as recently as **this year**, states have been reluctant to act on E-Verify bills. E-Verify is the federal system to confirm the employment eligibility of new hires. Under federal law, use of the system is optional. Some states **require** its use by all employers, while others limit it only to those with a number of employees above a certain threshold.

State bills aiming to increase use have almost universally failed over the past two years. Bills in **Kansas** and **Kentucky**, for example, never made it out of committee. A bill in **Florida**, which would have lowered the threshold to require use by employers with 25 or more employees, also failed. Some states have hesitated to pass the laws up until now, pressured by industries such as agriculture, which expressed worry that their workforce could be devastated and an already-tight labor market further stretched.

The tide may be changing.

In today's immigration climate, state politicians could see the E-Verify requirement as a way to illustrate their support for President Trump's immigration agenda. Previous concerns they may have had about E-Verify requirements depleting labor pools may be mitigated by carefully written laws that focus on specific industries. A **bill** that would require construction employers to use the system is pending in Ohio, for example.

In states that have the E-Verify requirement, fines for failure to use the system, and for hiring undocumented workers, could also increase.

Illinois is poised to take a different approach. The state's legislature passed a **bill** that would prohibit employers from taking adverse action against employees for certain discrepancies in tax or identification documents that are typically associated with immigration status. The bill's scope is limited – it would only apply when the discrepancy is noted by an agency that does not enforce immigration law, and only prohibit adverse action based on the notice from the agency to the employee. The bill, which as of Nov. 3, 2025, is awaiting Gov. JB Pritzker's signature, would require employers to notify employees of the discrepancy, including that it was identified by an agency that does not enforce immigration laws, and provide required next steps.

Penalizing Workers

One of the biggest changes from the Biden administration to the Trump administration has been the shift in focus on who is being targeted in immigration issues.

While the Biden administration focused largely on the role of employers in hiring ineligible workers, the Trump administration is focusing on the workers themselves, with **immigration raids** and **deportations**. States, of course, cannot deport, but they can pass laws creating the crime of "impermissible occupation," or being present in a state without having obtained legal authorization to be in the United States. One such law, recently passed in **Oklahoma**, may serve as a blueprint for other states. The laws might further appeal to business-friendly states by shifting the liability to individuals and may prove attractive to states that don't wish to be seen as targeting businesses.

The landscape of laws affecting immigration is becoming increasingly complex and polarized. As we approach 2026, employers need to be aware of not just federal requirements but also of new steps states are taking to either blunt or further the federal agenda.

Foreign Affairs Will Derail Major Questions Doctrine

Erin Webb
Legal Analyst

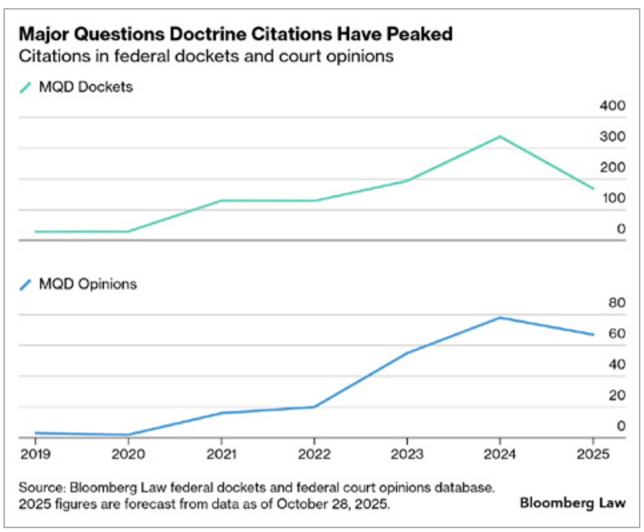
The major questions doctrine's heyday is past. Due to the executive branch's increasing reliance on foreign policy and national security powers as rationales for action, and the emerging view that those topics are immune from major questions scrutiny, the doctrine is likely to fade into the background for at least the next several years.

The doctrine **states** that in cases of "vast economic or political significance," the executive branch must show "clear congressional authorization" for any action it takes that's "unheralded" and "transformative"—i.e., not the subject of previous exercises of power under the relevant statute.

If it can't do so, the action's subject to overturn by the courts. While the doctrine has been **recently popular**, it's falling out of favor and will continue to do so over the next year.

Major Questions Citations Are Down

Major questions doctrine citations in federal court filings and in court decisions had climbed every year since 2020, peaking in 2024.



Yet 2025 is on track to have fewer court filings and opinions citations than last year, and this downturn will likely continue next year, based on executive policy and hints in jurisprudence.

Does the Doctrine Apply in International Contexts?

A US Supreme Court concurrence from late last term sheds light on what could be a new limitation on the major questions doctrine. In **FCC v. Consumers Research**, Justice Brett Kavanaugh said that the major questions doctrine doesn't apply to foreign policy or national security questions. The doctrine doesn't "translate to those contexts because of the nature of Presidential decision making in response to ever-changing national security threats and diplomatic challenges," Kavanaugh said.

Foreign policy and national security fall under what's known as the "**Youngstown category 2**" presidential power, Kavanaugh said. This means that they're independent constitutional **powers** that don't rely on delegation from Congress by statute.

When these powers are at play, the usual major questions presumptions are flipped, Kavanaugh said. Courts should assume that Congress intends to give the president "substantial authority and flexibility" to protect Americans, and that Congress must specify any limits on the powers, he said.

Fifth Circuit Judge Andrew Oldham cited Kavanaugh's concurrence in his dissent in **W.M.M. v. Trump**, a Fifth Circuit case challenging President Donald Trump's declaration of an enemy incursion under the **Alien Enemies Act**. Courts "have afforded the President extensive deference in making fact-intensive determinations involving sensitive issues of national security," Oldham said.

The majority decision in **W.M.M. v. Trump**, which upheld the district court's preliminary injunction on the ground that Trump hadn't sufficiently identified an "invasion" or "predatory incursion" under the AEA for purposes of deporting Venezuelan nationals, was **vacated** on Sept. 30 in anticipation of rehearing en banc, currently scheduled for January. It remains to be seen whether Kavanaugh's view will have greater influence on rehearing.

While Kavanaugh's concurring opinion isn't binding law, it may be an important portent of precedent to come—as Justice Neil Gorsuch's dissent in **Gundy**, his concurrence in **NFIB**, and the per curiam opinion in **Alabama Association of Realtors** foreshadowed the court's embrace of the major questions doctrine in **West Virginia v. EPA**.

Are Tariffs Foreign Policy?

The Federal Circuit, however, recently took a different view of whether foreign policy or national security makes an executive decision immune to a major questions challenge. In **V.O.S. Selections v. Trump**, that court heard an appeal of a Court of International Trade ruling that five Trump executive orders exceeded his tariff powers under the **International Emergency Economic Powers Act**. In its opinion, the Federal Circuit said that the power asserted in the executive orders had run afoul of the doctrine.

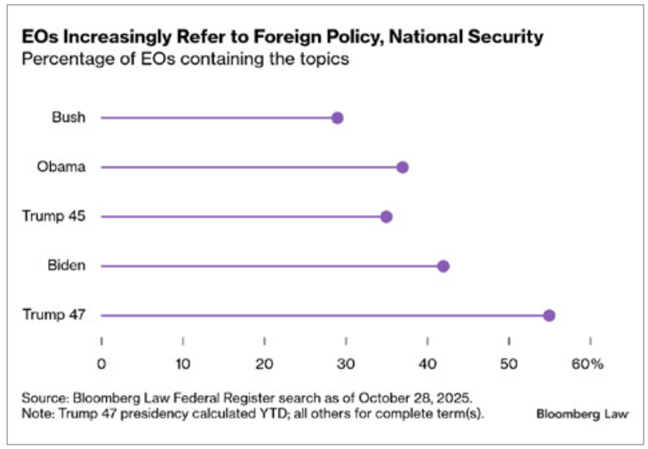
The court found that the tariffs power question was one of "vast economic and political significance" and that the tariffs at issue implicated the doctrine because they were both "unheralded" and "transformative." Finding no clear congressional authorization for the tariffs, the court upheld the lower court's summary judgment ruling. In a footnote, the Federal Circuit joined three fellow circuits in holding that the president isn't exempt from a major questions inquiry. The only circuit to hold that he is exempt, the Ninth, did so in a decision that's now **in question**.

The dissent cited Kavanaugh's concurrence in *FCC*.

Because it's the **home** for many executive action challenges, the Federal Circuit's ruling could hold a lot of sway. It may also point to future splits between the appeal court's view and those that side with Kavanaugh's concurrence.

Trump's EOs Reference Potentially Exempt Ground

The majority of Trump's executive orders so far this year refer to foreign policy or national security—a first for any president's executive orders in the past 25 years.



Trump's second term is, of course, only beginning. But as of Oct. 28, he's issued 213 executive orders—a generous sample size. That's more than President Joe Biden **issued** during his entire four-year term (170). Trump's current nine-month executive order count hasn't yet passed his own four-year total from his **first term** (383); President Barack Obama's eight-year **total** of 289; or President George Bush's eight-year **total** of 300, but it's certainly on track to do so.

Citations to the major questions doctrine are noticeably down. If Trump continues to lean on foreign policy and national security as justifications for his executive orders, it could give courts a reason to shun major questions doctrine challenges to his executive orders and to the agency actions that carry them out. Additionally, Justice Kavanaugh thinks that courts should decline to apply the doctrine in those contexts. It's possible that additional justices will join him in the near future. All these factors will contribute to sidelining major questions arguments in the coming year.

Corporations & Transactions

Tariff Headwinds for Companies Will Continue in 2026

Louann Troutman
Legal Analyst

Tariffs regularly impact company operations and supply chains—but the nature of President Donald Trump's tariffs and the **numerous delays and revisions** to their implementation have sparked **widespread uncertainty**. Companies have adapted in various ways to the tariffs, including updating **force majeure and change-of-law contract** clauses and **proactively assessing their** suppliers to renegotiate contracts. The uncertainty has also been reflected in companies' 8-K filings this year.

Trump used a 1970s law never before used to levy tariffs as the basis for his authority to levy them. As a result, they've been the subject of litigation that the US Supreme Court agreed to hear on an expedited basis.

No matter which way the court rules, tariff uncertainty will remain high next year. Companies are likely to continue facing substantial operational challenges, including contract complexity, as a result of tariffs, which will be reflected in 8-K filings next year.

New Tariffs Have Broader Impacts

The scope and impact of tariffs in Trump's first term were comparatively limited. Those tariffs covered a narrow range of products, and Trump used **well-established legal bases** to implement them.

Trump announced safeguard tariffs in 2018 on solar panels and washing machines under section 201 of the Trade Act (codified at **19 U.S.C. § 2253**). Importantly, section 201 provisions expressly allow the levying of tariffs. Such safeguard actions are temporary and targeted, limiting their impact both on individual businesses and the economy as a whole.

Also in his first term, Trump announced tariffs on steel, aluminum, cars, uranium, titanium sponge, and transformers. He used a national security provision in **section 232 of the Trade Expansion Act** that allows tariffs on imports of goods that are a threat to national security.

Trump's second-term tariff program is **much broader** than his tariff actions in his first term. Second-term tariffs are being applied—using a novel legal regime—to almost everything from almost everywhere. Trump **used** the **International Emergency Economic Powers Act** (IEEPA), to invoke, for example, a blanket 10% tariff on all imports, across products ranging from steel to movies and pharmaceuticals.

These so-called reciprocal tariffs under IEEPA will create an environment of uncertainty for companies due to supply chain disruptions and altered spending plans for both businesses and consumers trying to navigate sweeping tariffs.

Legal Challenges to Tariffs

Unlike other tariff bases, IEEPA doesn't make any reference to tariffs, and its use to levy tariffs has been subject to litigation to determine whether tariffs using IEEPA are legal. As a result, Trump's 2025 tariffs are facing **many legal challenges**. Even if the challengers were to prevail in every case, companies would likely not see much relief for quite some time after the rulings.

The most prominent legal challenge to the tariffs comes from ***Learning Resources v. Trump***. The Supreme Court heard oral arguments for the case on Nov. 5 after agreeing to hear it on an **expedited schedule**. The justices **appeared to agree with** the petitioners—a family-owned business that creates and sells educational toys and products for children—that the **International Emergency Economic Powers Act** doesn't authorize Trump to impose tariffs.

If the Supreme Court allows reciprocal tariffs to remain in place, companies will need to adjust their operations to cope with the resulting **supply chain disruptions**.

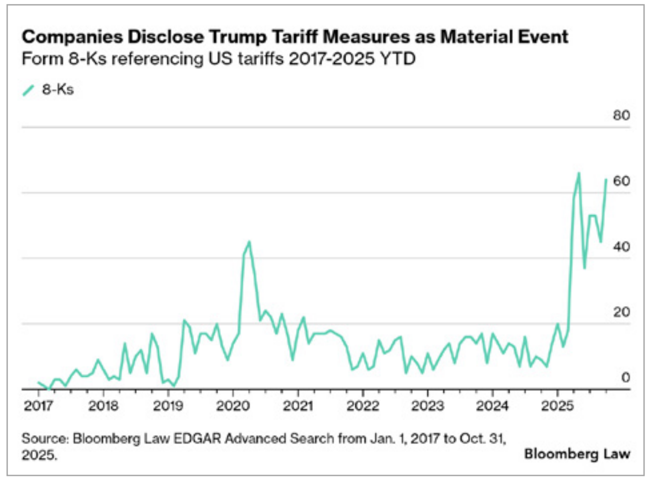
Companies Bear the Brunt of Tariff Costs

Regardless of how the courts resolve the legal challenges to Trump's tariff measures, it's very likely that rapid changes to tariff measures will continue into 2026.

SEC registrants are required to file a **Form 8-K** to disclose material corporate events or changes. From Jan. 20 to Oct. 31, **414 company filings** mentioned tariffs as a material event or change (duplicates have been removed).

Almost immediately after Trump announced **reciprocal tariffs** on over 100 countries on April 2—"**Liberation Day**"—the number of 8-K filings mentioning tariffs shot up.

Since then, the number of Form 8-K filings mentioning tariffs has remained considerably higher than during Trump's first term and under the Biden administration.



Company 8-K **disclosures** on Trump's 2025 tariffs often mirror concerns about **higher prices**, increased **compliance costs**, and higher risk of **default on debt**. These types of material changes will remain heightened if tariff uncertainty continues.

Even if the Supreme Court rules in favor of the petitioners in *Learning Resources* and the tariffs get revoked, it may not be the salve companies need. There will likely be **delays or complications relating to refunds**—if they're issued at all. Importers will need to have their right to claim a refund preserved, and Customs and Border Protection will need to evaluate all such claims before determining which, if any, are eligible.

Trump also has a **tariff toolbox** at his disposal to levy other types of tariffs. If the high court rules that IEEPA doesn't authorize Trump to impose tariffs, he will likely rely on another authority to impose tariffs, like sections 201 and 301 of the Trade Act. Thus, even in the absence of IEEPA tariffs, tariff measures will continue to materially impact businesses in 2026.

North American Companies to Break M&A Records in 2026

Emily Rouleau
Legal Analyst

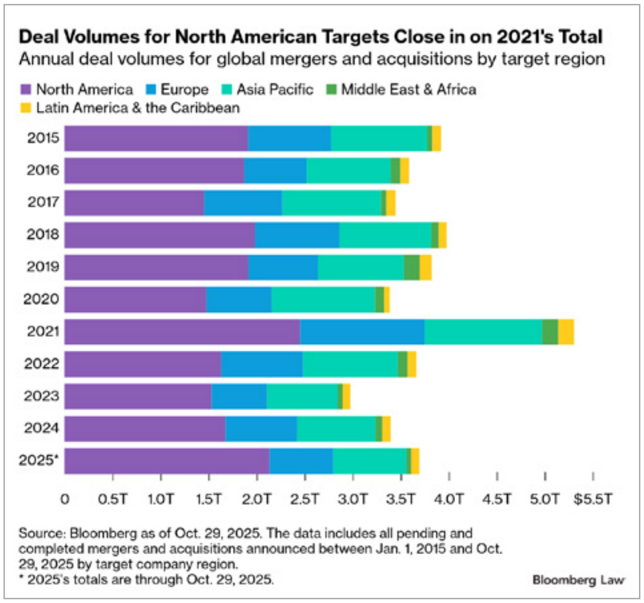
After a **cautious start** to 2025, the M&A market took off in the third quarter. Quarterly deal volumes for global mergers and acquisitions hit **heights** at the end of Q3 ($1.33 trillion) not seen since Q4 2021 ($1.39 trillion).

Moreover, Q3 2025 deal volumes for target companies located in North America ($822.26 billion) exceeded all other quarterly volumes in the last 10 years, beating Q2 2021's mark ($703.05 billion) from that **record-breaking year** by more than $100 billion. The upward trajectory for this target region shows few signs of slowing down, despite **political tensions** in the US and a lengthy US **government shutdown**.

Next year, deal volumes for North American target companies will exceed this year's volumes and will also surpass 2021's annual total of $2.46 trillion. Furthermore, buyers in the Middle East and Africa will do more deals with North American target companies, increasing the deal volumes for these cross-border transactions.

North American Targets Are Hot Commodities

By the end of October, deal volumes for transactions involving North American target companies ($2.14 trillion) had already surpassed all annual totals for this region since 2015 except for 2021's record-breaking $2.46 trillion.

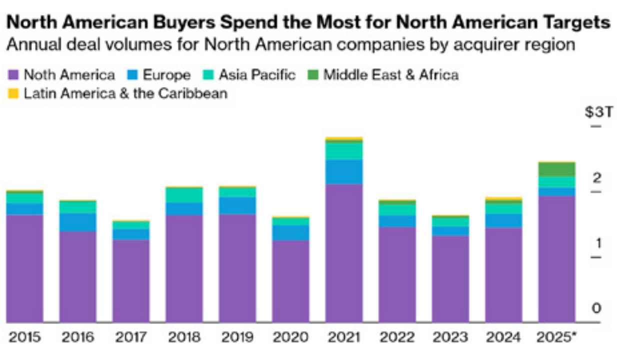


Deal volumes with North American targets for 2025 through Q3 were valued at $1.87 trillion—which exceeds the *annual* totals for these types of deals for 2022–2024. (2021 exceeded all these years but is considered to be an **outlier** in terms of deal volume.)

The popularity of North American targets will continue in 2026, and deal volumes for these targets will likely increase, especially given deal activity in the **technology industry**. For example, in September, **Nvidia Corp. announced** that it will invest $100 billion in OpenAI in order to build data centers, and there are no signs that the AI boom will fade soon.

Buyer Regions for North American Targets

Since 2015, North American buyers have spent more money than other buyer regions on North American target companies, and this trend is likely to hold fast for 2025.



Source: Bloomberg as of Oct. 29, 2025. The data includes all pending and completed mergers and acquisitions for North American targets announced between Jan. 1, 2015 and Oct. 29, 2025 by acquirer region.
* 2025's totals are through Oct. 29, 2025.

It seems likely that the deal volumes for M&A transactions between North American buyers and North American companies will increase in 2026 for the following reasons:

- As of Oct. 29, the year-to-date deal volume was already the second highest since 2015 (only 2021's annual total was higher).
- Q3 2025 had the highest single quarter deal volume for these deals in the last 10 years. If the typical Q4 surge in deals happens, Q4's deal volume could exceed Q3's deal volume.

The Middle East and Africa Will Acquire or Invest More

Buyers located in the Middle East and Africa stand out from the other regions for their dramatic increase in spending on North American target companies this year, spending $135.09 billion in Q3. This is the highest quarter since 2015, and is more than triple that of the next-highest quarterly deal volume: $40.35 billion in Q3 2015.

2025's year-to-date total ($213.31 billion as of Oct. 29) is also more than triple that of 2024, which falls in second place with $64.45 billion worth of deals.

Source: Bloomberg as of Oct. 29, 2025. The data includes all pending and completed mergers and acquisitions for North American target companies by acquirers in the Middle East and Africa announced between Jan. 1, 2015 and Oct. 29, 2025.
* 2025's totals are through Oct. 29, 2025.

In 2026, expect the Middle East and Africa to increase their spending on or investing in North American target companies. Despite geopolitical tensions and **outright conflicts** over the last several years, there's a lot of **money being spent**, and that will continue next year.

Sovereign wealth funds will to continue to invest in North American companies. The technology industry will likely drive more deals from buyers from the Middle East and Africa, as countries in this region seek to increase their involvement with funding and operating **AI data centers and infrastructure**.

Get Ready for Fights Over Crypto Treasury Mergers

Benjamin Cooper
Legal Analyst

Boebin Park
Legal Analyst

This has been the year of the digital asset treasury. The Trump administration's crypto-friendly approach and resulting spike in digital asset prices has encouraged enthusiasm for investing in companies that own large quantities of digital assets.

The trend of forming digital asset treasuries has reached critical mass this year, and 2026 will be the year of litigation over digital asset treasury mergers.

'Pots of Crypto' and the Temptation to Merge

Digital asset treasuries are companies that hold a significant amount of digital assets—usually cryptocurrencies like Bitcoin or Ether—and that raise capital or issue debt to purchase more digital assets. Many are chasing a premium that the stock market had, for most of 2025, given to DATs.

The US stock market will pay "$2 for $1 worth of crypto," Bloomberg columnist Matt Levine said in July. "If you have a pot of crypto, you should merge it with a small US public company," Levine said.

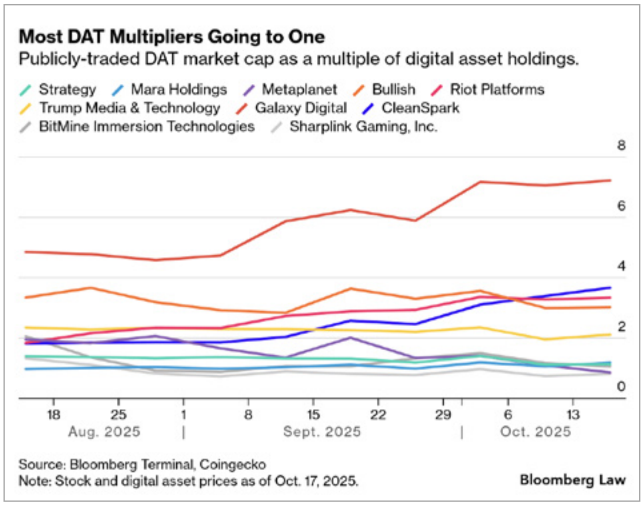
Some DATs like Strategy are or were companies that offered a product or service and pivoted to primarily holding digital assets. Other DATs like Hut 8 Corp. are cryptocurrency miners holding on to a large supply of digital assets. Still others have been incorporated (or formed through special purpose acquisition companies) for the sole purpose of acquiring a pile of digital assets to hoard. Over 80 DATs have been created in 2025 as of October.

Top Ten Bitcoin Treasuries by Value of Holdings

Company	Bitcoin Held	Held Bitcoin Value
Strategy	640,418	$72.3B
MARA Holdings	53,250	6.0B
Twenty-One Capital	43,514	4.9B
Metaplanet	30,823	3.5B
Bitcoin Standard Treasury Company	30,021	3.4B
Bullish	24,000	2.7B
Riot Platforms	19,287	2.2B
Trump Media & Technology Group	18,430	2.1B
Galaxy Digital Holdings	17,102	1.9B
CleanSpark	13,011	1.5B

Source: Coingecko, Bloomberg Terminal
Note: Bitcoin holdings and pricing as of Oct. 21, 2025.
Bloomberg Law

While top Bitcoin treasury Strategy once was valued at twice the $72.3 billion in Bitcoin it held, that **premium has now fallen**, and the premium for DATs that aren't also involved in **crypto mining** (or associated with President Donald Trump like Trump Media & Technology Group) have been reverting to the value of the underlying assets.



As the premium over assets the stock market will pay for DAT shares declines, DATs will be **tempted to merge**. While DATs are still being formed—**Ripple Labs Inc.** is **fundraising** $1 billion through a SPAC for a DAT holding its XRP token, and the memecoin firm linked to Trump is **getting in** on the wave—the market is trending towards a declining DAT premium, and consolidation has already begun. Medical device maker **Semler Scientific**, which in May 2024 **purchased** $40 million of Bitcoin, signed off on being **acquired** by **Strive Inc.** on Sept. 22 of this year.

With DAT Mergers Come Lawyers and Vulnerability

Valuation and volatility will be the two primary drivers for DAT litigation.

Valuation

Mergers and acquisitions attract investor lawsuits, and DAT mergers provide investor plaintiffs with a ready-made controversy: How much should the acquiring firm pay?

- The price including the highest premium of the two firms to the underlying digital assets, where shareholders in the acquirer will argue that the acquirer overpaid?
- The price of the lower of the two premiums to the underlying digital assets, or some other lower amount relative to the market price of the digital assets, where shareholders in the acquired DAT will argue that the board could have gotten a better offer?

Since the price can't satisfy everyone, lawsuits are almost inevitable.

Volatility

Another potential cause for DAT litigation is their volatility: The fluctuation in value to market values even below the value of the held crypto make the valuation disparity higher. Many of the **DATs** created this year celebrated an initial spike that was quickly followed by a decline.

In early October, most major tokens **dropped precipitously** after Trump announced 100% tariffs on China. At the same time, **crypto traders** saw a record of $19 billion in liquidations. **Metaplanet Inc.**'s **drop in mNAV** (the ratio of assets minus debt to market capitalization) to below the value of the owned bitcoin is a cautionary tale of how the volatility of the market can quickly affect the performance of a DAT.

Less than a month after Strive's acquisition of Semler, a Semler shareholder **filed a lawsuit** challenging the merger. The Oct. 15 **complaint** challenges the amount and valuation of Strive stock that will be swapped for Semler stock as the price of Strive stock has noticeably declined since the announcement of the merger (Strive stock was at $4.10 at the time of the merger announcement, and **83 cents on Oct. 17**). The valuation of goodwill—essentially the premium of Semler's stock price over the value of the Bitcoin it holds—is key to the complaint; the drop in Strive's stock price potentially eliminates any benefit of buying Semler versus buying its underlying Bitcoin.

The question of what's an equitable price for a DAT merger will likely not get resolved via the courts any time soon. Expect challenges to other DAT mergers on similar grounds next year as shareholders dispute stock and goodwill valuations.

Predictions to Make Crypto Regulation Less Cryptic

Preston Brewer
Legal Analyst

A transformation is happening at the SEC. It's a "new day" at the agency, according to Chair Paul Atkins, and the traditional emphasis on investor protection is yielding to the goals of reducing regulation and promoting innovation.

This is particularly true for crypto. Once the federal government shutdown is resolved, expect the SEC to move faster next year than it has since the 2008 financial crisis to create a crypto-friendly legal framework.

The Innovation Commission

Under Atkins, who's even started calling the agency the "Securities and Innovation Commission," the agency has pulled back from crypto-related litigation, abandoning nearly all crypto-enforcement actions the Commission started under former Chair Gary Gensler in favor of those focused on insider trading and offering fraud.

Shortly after the Trump administration took over, the SEC replaced its crypto enforcement unit with a smaller, cyber-related fraud team. It also initiated "Crypto 2.0" with a Crypto Task Force led by "Crypto Mom" SEC Commissioner Hester Peirce. She promised the group would "help to draw clear regulatory lines" and "provide realistic paths to registration for both crypto assets and market intermediaries."

Crypto Rules Planned, Gensler Proposals Removed

In September, the SEC issued its latest Regulatory Flexibility Agenda for Spring 2025, and, unsurprisingly, it's crypto-heavy. This agenda is telling for the agency's revised priorities.

Fourteen Gensler-era proposed rules are now withdrawn, reflecting a hard-turn away from the prior Commission's priorities like ESG, now discarded under Atkins. The new agenda puts forth 18 rules labeled as "proposed rule stage" with fully one-third of those pertaining to crypto.

Proposed SEC Rulemaking Designed to Accommodate Crypto

Proposed Rulemaking	Description	RIN
Crypto Assets	Rules relating to the offer and sale of crypto assets, potentially to include certain exemptions and safe harbors, to help clarify the regulatory framework for crypto assets and provide greater certainty to the market.	3235-AN38
Updating the Exempt Offering Pathways	Rule amendments to facilitate capital formation and simplify the pathways for raising capital for, and investor access to, private businesses.	3235-AN42
Amendments to the Custody Rules	Amendments and/or new rules to improve and modernize the Investment Adviser/Company regulations around the custody of advisory client and fund assets, including to address in each case crypto assets.	3235-AN46
Transfer Agents	Updates to modernize the SEC's existing regulatory regime for transfer agents, including rules relating to crypto assets and the use of distributed ledger technology by transfer agents.	3235-AL55
Amendments to Broker-Dealer Financial Responsibility and Recordkeeping and Reporting Rules	Amendments to Rules 15c3-1 and 15c3-3 and other broker-dealer financial responsibility rules, as well as Rules 17a-3 and 17a-4, to address the application of these rules to crypto assets.	3235-AN48
Crypto Market Structure Amendments	Amendments the Exchange Act Rules to account for the trading of crypto assets on ATSs and national securities exchanges.	3235-AN49

Source: Spring 2025 Regulatory Flexibility Agenda, Federal Register. Bloomberg Law

The agency has yet to provide specific rule amendments for these proposals so we don't know what they will say. The government shutdown may delay official rule amendments. However, after analyzing public statements made by Atkins, here are five predictions about how the Commission may change its treatment of crypto:

Prediction 1: Most Tokens Aren't 'Securities.'

Analysis: Atkins has **said** that very few crypto tokens are securities and that the agency will examine the token as a whole—its characteristics and how it's being sold—to determine whether it's a security.

Adoption odds: Likely to highly likely. This is a foundational stance by this Commission rather than a rule proposal. It reflects this Commission's desire to allow crypto's legal operation.

Prediction 2: Accommodation for Tokenizing Assets.

Analysis: Tokenizing assets **includes** allowing so-called super-apps that vertically **integrate** trading, staking, and lending of tokenized assets "under a single regulatory umbrella." Atkins is so keen on getting this going that in September he **talked** about having an "innovation exemption" rolled out by December to permit crypto firms to *immediately* launch products.

The intent is for tokenized securities and non-security tokens to have clear regulatory relief paths under one unified regime with super-apps that consolidate custody and trading so brokers can offer multiple services under one license. This could help with interagency (SEC and Commodity Futures Trading Commission) cooperation where products fall under both their remits.

Public exchanges would eventually have crypto asset securities and non-security crypto assets **traded** side-by-side. A unified regulatory framework for both SEC and CFTC rules would avoid the shortcomings of the current system which can require multiple licenses and dual compliance frameworks owing to duplicative regulations.

Adoption Odds: Likely to some degree but working out the details of trading these assets on public exchanges may take additional time. The shutdown will delay this proposal's introduction.

Prediction 3: Regulatory Safe Harbors Coming Soon.

Analysis: Atkins **wants** clearer rules and lighter compliance burdens for digital assets. To that end, the chair seeks to create regulatory safe harbors for the offer and sale of crypto assets. The three Republican commissioners are in agreement on this goal, which is enough for adoption without additional votes.

Adoption Odds: Highly likely. This is a key point of demarcation from the prior SEC regime and an important goal of both the crypto industry and the administration. Expect a strong push to establish these new regulatory pathways.

Prediction 4: Protection for Crypto Self-Custody.

Analysis: Custody is a significant issue for crypto under existing rules, and Atkins has **emphasized** that the agency needs to show flexibility and ditch archaic rules. The chair is against forcing crypto holders to use an intermediary if the blockchain system on which the asset resides permits direct transactions.

Adoption Odds: Likely. Atkins is trying to **remedy** the custody problem via Project Crypto. He wants crypto holders to have the right to self-custody and also afford them "maximum choice" in custody arrangements and where crypto assets are traded.

Prediction 5: Market Activities to Move 'On-Chain.'

Analysis: The SEC's Project Crypto includes an effort to push exchanges to move some activities onto a blockchain (a public, digital ledger), known as "on-chain." It **means** getting exchanges to embrace using a blockchain in asset issuance, trading, and settlement.

Adoption Odds: Likely—but getting exchanges and other stakeholders on-board with this effort could take considerable time and effort, and initial results may prove short of Atkins' ultimate goals.

Even Moving Fast, New Rule Adoption Will Take Time

Actual adoption of far-reaching new rules may take time and compromise. The proposed rules identified in the SEC's regulatory agenda still need official rule amendments, and the SEC may delay or withdraw them at any time.

The government shutdown and the ambition of these six crypto proposed rules make official issuance of proposed rules unlikely until Q2 2026 or later, and actual final rule adoption perhaps not until 2027 or later after public review and comment.

2026 to Be a Watershed in Big Tech's Antitrust Battles

Eleanor Tyler
Legal Analyst

After decades of hand-wringing and much spilled ink, antitrust cases and new enforcement tools against the technology platform behemoths are finally starting to bite. Which means that, in 2026, we'll see whether ongoing attempts to rein in the platform monopolies will succeed in denting their market power. It's not a foregone conclusion.

Regulators, competitors, and customers are trying to make platform markets more open and competitive via ongoing lawsuits and new regulation. These efforts, years in the making, will reach critical junctures in 2026 and even succeed or fail. By the end of the 2026, pressures on the tech giants to open up closed ecosystems could lead to a new wave of competition and innovation. Or emerging AI markets could fall into the same few hands, and extend existing market power.

Can a Regulatory Approach Work?

In November 2021, the European Union tried something new with its Digital Markets Act, which seeks to regulate "gatekeepers" in the digital economy. Gatekeepers were **identified** under the law in September 2023, and were required to comply with its mandates by March 2024. The EU issued its first noncompliance determinations under the DMA in April 2025 against Apple and Meta, fining them **€500 million** ($576 million) and **€200 million** ($230.5 million) respectively.

Those determinations followed more than a year of investigation. The companies have **challenged** the DMA in the EU's courts, so we're likely years from a final determination of whether fines under the DMA will amount to a "**speeding ticket**" (or the DMA will be repealed altogether) or will force real change in digital markets in the EU. The wheels of European justice, needless to say, grind slowly. But if the EU succeeds in forcing changes to the platforms' operations in the meantime, those shifts may wind up profoundly impacting digital markets.

When a Win Isn't a Win

Even if public and private plaintiffs win their cases against the digital platforms, will it change anything on the ground? That hinges on what remedies are available under the antitrust law, whether courts will in fact impose those remedies, and how they'll be enforced.

The battle itself takes a toll. **Epic Games**, plaintiff in several suits, is a poster child for the costs of victory. In August 2020, Epic picked a fight with both mobile operating giants, Apple and **Google**, by pushing an update to its blockbuster game Fortnite that allowed users to bypass each app store's payment system. Apple and Google promptly removed Fortnite from their app stores, and Apple sought to further **retaliate** against Epic's game development business. In an ensuing **lawsuit**, Epic sought to use antitrust law to break the app stores' **payment monopolies**.

In September 2021, the court **held** that Apple isn't an app store monopolist, but that its payment "anti-steering" provisions are unfair practices under California law. Epic lost the lawsuit, effectively, but won an injunction that would force Apple to accept alternative payments through apps. The court has **sanctioned** Apple for flouting that injunction, and Apple's **appeal** of that sanction is **pending** decision. The parties continue to fight about Fortnite's availability on Apple products, as well, but as of **May 20**, it's back on the app store after almost a full five years of litigation.

Epic's lawsuit against Google about in-game payments was stunningly more successful. At the end of 2023, a jury **found** that Google monopolizes app distribution and app payments for its Android operating system. That decision held up on **appeal**, and Google has **asked** the US Supreme Court to step in.

In short, Epic has in hand court orders to force open the ecosystems in both mobile applications systems, yet is still battling to see those orders enforced on the ground after five years of multi-front court battles. Was the antitrust law a success here? It's likely that we'll find out next year, with implications across the multi-billion dollar mobile gaming industry. But it's difficult to envision many competitors taking on the platforms in this way across any of the markets they control.

Public Plaintiffs Also Stretched

Public plaintiffs aren't faring a lot better. The Justice Department and Federal Trade Commission—often with state attorneys general—have antitrust suits pending against **Meta**, **Apple**, **Amazon**, and two (regarding the **search market** and **ad-tech market**) against Google. Those have yielded mixed success. Despite a landmark **ruling** that Google has a monopoly in the online search market, for example, the federal district court **declined** to impose the structural remedies the DOJ requested to address Google's market power.

Even public coffers strain under the weight of litigation on this scale, and the Trump administration has proposed **cuts** to federal antitrust regulators' budgets. In 2026, many of these pending cases will see a court opinion. Whether the federal government will bring additional cases is less clear and, overall, the direction that the Trump antitrust regulators will take is still cloudy. But hanging over all pending cases is the question of how to pry open platform markets, even if the plaintiffs succeed in court.

A Shifting Landscape

When a company has as much money and power as the tech platforms have, regulating is less about "pitched battles" than about guerrilla warfare on an ever-shifting battlefield.

Take, for example, "**acquihires**," a new tactic that leaves the assets of a target intact, but removes the people who actually run the target company and drive its innovation. The acquirer hires away the key personnel of a smaller rival or a complimentary technology, and acquires a non-exclusive license to the technology as well—leaving a shell, but no "merger" for regulatory purposes. It's a tactic that demonstrates how regulation, legal proceedings—anything with a fixed process and a backward-looking standard—will struggle to impact quickly evolving digital markets. The growth of AI and the future control of multiple related markets are high-stakes pieces of that puzzle.

Pending antitrust lawsuits and the EU's new digital laws suggest that regulators have concluded that critical junctures of the digital revolution were mishandled (or at least that the "open" competitive phase of those markets could have been longer and more productive). Antitrust regulators seem to be trying to take those lessons from the first tech boom into the AI revolution. But if courts and existing laws don't prove effective in protecting competition in the latest iteration of the tech boom, then the coming year will likely see the ossification of new AI markets in a familiar set of hands.

We've certainly learned that, once market power accumulates in a few hands, it's difficult to pry loose and restore competition.

Debanking EOs Will Pit Prudence Against Compliance

Benjamin Cooper
Legal Analyst

Bank regulator enforcement actions have traditionally focused on "unsafe and unsound" practices. For bank regulators, this standard means that a bank has risked its business (and, if big enough, the stability of the US financial system) by not following best practices for balancing its business risk and for avoiding entanglement with crimes such as money laundering.

Under the Trump administration, federal banking regulators have a new focus: "debanking," which is the practice of banks denying or terminating business with customers based on the customers beliefs, politics, or line of business.

As regulators engage in their anti-debanking effort in 2026, banks will have to walk a fine line between traditional safety and soundness and denying business to some at the risk of a debanking investigation.

A Short History of Debanking

Concern about debanking originated with "Operation Chokepoint," an Obama administration effort in 2014 to induce banks into dropping high-risk customers. The operation was believed to target payday lenders, coin dealers, and gun dealers because they were thought to be "high-risk" businesses. There were allegations that this label was based more on their being in industries disfavored by the administration than their particular risk profile.

A 2015 Federal Deposit Insurance Corporation Inspector General investigation into FDIC practices found no intentional targeting; instead the FDIC "created a perception" that banks shouldn't deal with the targeted businesses, the investigation report said. Similar to Operation Chokepoint, the New York Department of Financial Services in 2017 encouraged insurers to discontinue business with the National Rifle Association, leading to a Supreme Court **ruling** that the NYDFS had to face a First Amendment discrimination suit (**still pending**) from the gun rights organization.

During the Biden administration, a number of individuals connected to the digital assets industry **alleged** that they or their businesses had banking relationships refused or ended due to an "**Operation Chokepoint 2.0**" against crypto. The digital assets industry made significant **campaign contributions** to the 2024 presidential campaign of Donald Trump, who **also claims** to have been debanked.

Trump and Regulators Step In

Almost immediately after he was sworn in, Trump signed **Executive Order 14178**, to protect and promote "fair and open access to banking services." The order also established a working group on digital currency to come up with a framework "governing the issuance and operation of digital assets."

This was followed in August by **Executive Order 14331**, which required bank regulators and the Small Business Administration to:

- End the use of "reputation risk" as a separate factor in evaluating a financial institution.
- Amend any regulations that might lead to debanking.
- Review the regulated institutions for past debanking actions and conduct enforcement actions against them.

The **Federal Reserve**, **Office of the Comptroller of the Currency**, **FDIC**, and **National Credit Union Administration** have removed reputation risk from their guidance (changes to rules are pending). The SBA **requires** all its lenders to report potentially debanked clients by Dec. 5; the **OCC** and **Consumer Financial Protection Bureau** are also investigating.

Current Pitfall: Risky Client or Discrimination Charge?

Prior to Trump's debanking order, banks were already **claiming** that debanking was related to risk management, especially money laundering risk. It's true that many "**red flags**" for money laundering, like the movement of money to or from one large account from many smaller accounts, can be common non-criminal events in crypto businesses.

The failure and FDIC takeover of Silvergate Bank in 2023 **has been attributed** in part to an over-concentration of the bank's business with crypto customers who withdrew their deposits when the market slumped.

A balance can be struck, however, between anti-money laundering risk (especially now that FinCEN has **recalibrated** reporting guidelines), business risk, and doing business with customers that raise concerns like the digital asset industry.

But will that balance meet the demands of Trump administration-favored parties, such as **pardoned federal felons** who want banks to ignore their convictions? How risky must a person or business who may have the ear of the administration be in order for a bank to be sure that they can safely (i.e. they won't be investigated) refuse to do business with them?

What to Do About 2029?

Calculations about customers who straddle compliance issues between risk management and debanking must also take into account that there will be a new administration in 2029, and it may have different views on what bank risk should look like.

Just as current banking regulators are looking askance at bank actions that banks claim they took to comply with Biden-era rules, the next administration (especially if there is a change in parties or an intervening financial crisis) may try to penalize banks for being too accommodating to Trump administration priorities. A Davis Wright Tremaine **analysis** looking at banks' current defenses against debanking enforcement, points out that estoppel defenses are unlikely and some other legal challenges are "practically impossible."

It's also **unclear** how far back the current debanking investigations by regulators will go. Any real deep dives into Biden administration era bank actions, however, will set a precedent that debanking compliance failures—including failures of risk management in favor of avoiding debanking—today may be the subject of enforcement by another administration.

Artificial Intelligence

Agentic AI Is the Hurdle Law Firms Must Clear in 2026

Robert Brown
Legal Analyst

Law firms are lagging behind their corporate counterparts in using generative AI and agentic AI. Next year, law firms must bridge the gap because of agentic AI's potential to solve pressing issues and because clients—and legal ethics—demand technological competency.

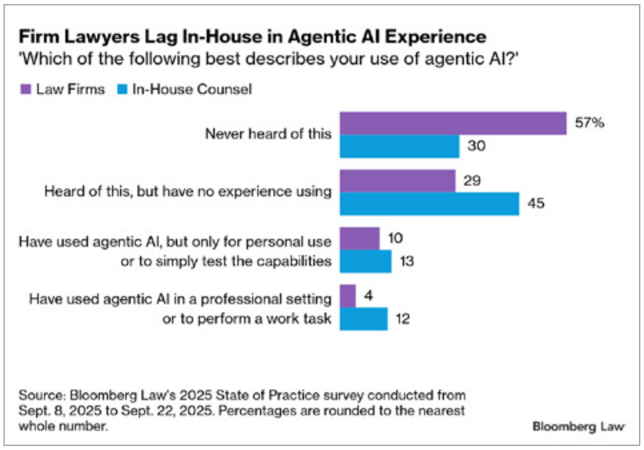
Hesitation to Adopt New Tech

Agentic AI—unlike reactive systems such as traditional generative AI that creates original content in response to a user's prompt or request—is proactive and capable of initiating tasks, adapting to changing environments, and operating independently in real time. It can be thought of as generative AI's more autonomous cousin.

This technology, already being used by large law firms such Wilson Sonsini, has the potential to drastically improve the efficiency and productivity of all lawyers. Its current deployment includes redlining contracts, executing conflicts checks, and reviewing documents for responsiveness in commercial litigation.

Future uses of agentic AI could involve proactively selecting jurors deemed empathetic to a client's position, and even virtual moot courts.

However, while promising, most lawyers have limited familiarity with agentic AI. Over half of law firm respondents to Bloomberg Law's recent State of Practice survey hadn't heard of agentic AI, compared with just over 30% of their corporate in-house counterparts.



The percentage of in-house lawyers using agentic AI professionally, while relatively modest at 12%, is triple that of lawyers in firms. This adoption disparity is consistent with patterns observed in 2023, where Bloomberg Law **survey data** showed that in-house legal departments outpaced law firms in generative AI use.

Why the Disparity?

One explanation for the low numbers for agentic AI use among firm attorneys may stem from their different workflows. In-house work tends to involve more collection, analysis, and risk assessment—tasks that could benefit from such technology. Law firm practice is structured around billable hours, which may create less opportunity or incentive to invest time in learning about AI that doesn't directly generate billable work. As such, in-house teams probably possess more operational flexibility with greater inclination to adopt agentic AI to address issues in ways that firms can't right now.

Another explanation might simply be that the steady drumbeat of lawyers **misusing AI** sufficiently deters consideration of new AI tools (including agentic AI)—concerns not shared as much by in-house lawyers. Even if the simpler response is that law firm lawyers are worried about billable hour reductions resulting in less revenue, then perhaps perceiving agentic AI adoption through the lens of **Jevons Paradox**—the economic theory that increased efficiency ultimately leads to greater demand—might assuage those fears.

The Need for Speed

Next year, law firms must close this agentic AI implementation gap for several reasons.

Client Demand. When choosing outside counsel, many in-house lawyers gauge not only how tech-savvy law firm lawyers are, but also how a firm's use of technology will benefit the corporation. Further, as in-house lawyers increasingly adopt agentic AI, there will likely be a growing expectation for greater tech alignment in areas such as contract lifecycle management and knowledge management that will be articulated in outside counsel guidelines.

Problem-fixer. This technology could remedy the hallucinations problem for which generative AI is becoming infamous. Given agentic AI's current ability to **detect fraudulent transactions** in the financial risk management arena, it's conceivable that machine learning engineers could also program agentic AI algorithms to detect ghost cases and quotes that don't exist—which have led to problems for **lawyers** and **judges** alike.

Ethics. **Most states** require lawyers to be technologically competent. In addition, lawyers have a duty to supervise their **junior lawyers**' and **nonlawyer assistants**' use of generative AI—a duty that logically extends to agentic AI as its use becomes more pervasive among less-experienced lawyers and staff.

Bridging the Gap

Law firms can take definitive steps to become familiar with agentic AI and to use it safely.

Agentic AI Governance Model. Even though many law firms using this technology are still quite new to it, they can nonetheless begin to draft policies for an operational framework from which to learn and evolve with agentic AI.

Proactive Training for Partners, Associates, and Support Staff. There's no turning back with regard to adopting technology that could redefine the practice of law. It's wise for firms to gain familiarity with this technology now through education and training with an eye towards future deployment.

There's been talk for years about how the practice of law needs to change—from billing models to hiring practices to the pace of work. As AI further infiltrates **daily work life**, law firms will necessarily take greater steps towards adopting agentic AI, which could be what initiates that change.

Biotech & Pharma Buyers to Spend More on Tech in 2026

Laura Travis
Legal Analyst

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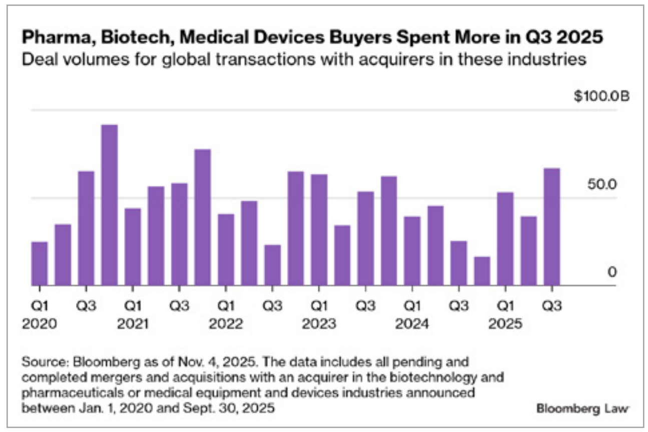
The M&A market experienced an **incredible** third quarter this year, and deal volumes reached totals not seen since 2021. The biotechnology and pharmaceuticals industry and the medical equipment and devices industry also had a robust Q3, as deals involving at least one party in these industries totaled $87.83 billion, which was the highest deal volume since Q4 2021 ($103.79 billion).

Next year, the M&A market has the **potential** to break the **records set in 2021**, and the biotech and pharma as well as the medical equipment and devices industries also have the potential to surpass their 2021 deal volumes. In particular, acquirers in these two industries will spend more on target companies in the technology sector next year than they have since 2017. The global enthusiasm for AI, coupled with the Trump administration's deregulatory approach towards this technology, will bolster these deals.

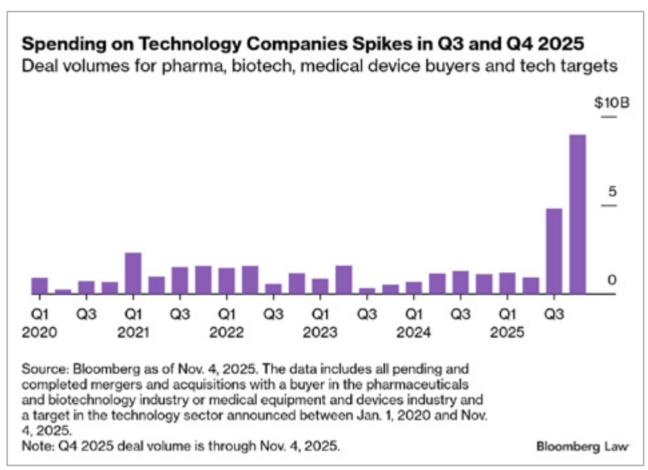
Biotech, Pharma, and Medical Device Buyers Are Busy

Deal volumes for global mergers and acquisitions—covering transaction types including controlling stake acquisitions, private equity investments, and venture capital financing rounds—involving at least one party in the biotechnology and pharmaceuticals industry or the medical equipment and devices industry were higher in Q3 than they've been since the end of 2021, a **record-breaking year** for global M&A deals.

Buyers in these industries were also more active than in recent quarters: They spent more money in Q3 2025 ($66.64 billion) than in any quarter since Q4 2021 ($77.50 billion), and Q3's total was the third-highest quarterly deal volume in the last five years, only surpassed by Q4 2020 ($91.50 billion) and Q4 2021.



What's more striking is the dramatic increase in transactions by pharmaceutical, biotechnology, or medical equipment and devices buyers for target companies in the technology sector in Q3 2025 and at the start of Q4 2025.



As of Nov. 4, Q4 2025's deal volume for transactions with a pharma, biotech, or medical equipment buyer and a technology target company ($8.97 billion) had already beaten all other quarters in the last five years—and there are almost two months to go. Looking back even further, the totals for Q3 2025 ($4.81 billion) and Q4 2025 (so far) are higher than all other quarters in the last 10 years except for Q3 2017. Q3 2017's high of $18 billion was driven by one mega deal where **Toshiba Corporation** sold **Toshiba Memory Corporation** (a computer hardware and storage company) to a consortium of acquirers that included **Hoya Corp** (a healthcare supplies manufacturer) for $17.96 billion.

Growing Incentives for AI in Health Care

Buyers in the biotech, pharma, and medical equipment industries will likely continue to explore options for deals with tech companies to stay competitive, especially as the AI boom continues and the Trump administration moves to foster increased AI development and innovation.

AI Deals

In September, Andrew Woeber, the global head of mergers and acquisitions at **Barclays Plc**, **said** that the M&A market may see a $100 billion-plus deal by the fall of 2026. Just 18 days later, **NVIDIA Corp** and **OpenAI, Inc.** fulfilled that prediction a year early when the companies **announced** that Nvidia would invest $100 billion in OpenAI to build data centers. In another sign of "**AI enthusiasm**," Open AI at the end of October **gave** Microsoft Corp a 27% ownership stake as part of a restructuring plan, which is worth around $135 billion.

Some recent deals from buyers in the biotech, pharma, or medical equipment and devices industries suggest that companies in the healthcare space won't be left behind as the AI arms race **continues**. For example, **Thermo Fisher Scientific, Inc. announced** at the end of October its acquisition of **Clario Holdings, Inc.** for $8.88 billion. The deal would help Clario expand its platform and "proprietary suite of AI Tools," Clario CEO Chris Fikry **said**.

Biotech and pharmaceutical and medical equipment and device companies use mergers or acquisitions to gain AI capabilities or other technologies to remain competitive. M&A deals may offer a strategic path or more efficient way towards acquiring these assets as opposed to developing them in-house.

AI-Friendly Administration

Buyers and targets face a multitude of considerations when deciding whether to enter into a definitive deal agreement, but the AI-friendly Trump administration could add another "pro" to the list of reasons to go forward with a deal. By removing regulatory hurdles, prioritizing building AI infrastructure, and placing high values on companies that could help the US become a global leader in AI, the administration could boost an M&A market that is already primed to see record-breaking deal volumes in these industries.

To this end, the Trump administration unveiled an AI action **plan** in July that focuses on deregulation, removing obstacles to AI innovation, and promoting AI's adoption in major sectors, including healthcare. In contrast to the Biden administration's more cautious **approach**, the Trump administration is treating AI development as a race the US needs to win, and it's shedding regulations and policies that will slow it down.

Overall, AI is proving to be a priority for the US government, which will likely increase the value placed on AI and technology companies in the coming year. This will encourage even more deals between buyers in the biotech and pharma and medical equipment and devices industries and targets in the technology industry in 2026. Next year will see the highest deal volumes for transactions between these industries in the last decade.

As States Fail to Pass Consumer Privacy Laws, AI Rules

Mary Ashley Salvino
Legal Analyst

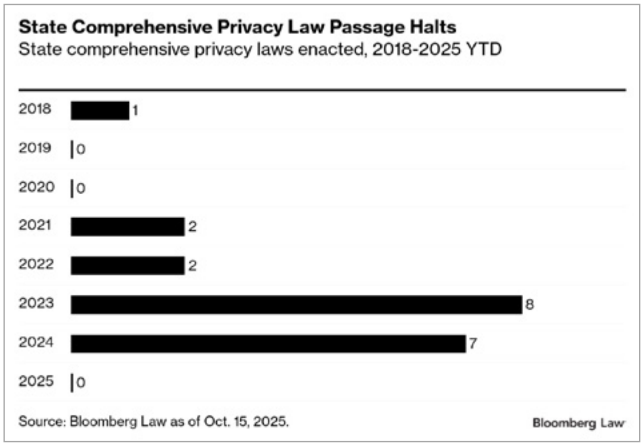
States passed numerous AI and child online privacy laws in 2025, yet not one state has passed new comprehensive privacy state legislation this year. It's no surprise that state legislatures are responding to the buzz surrounding artificial intelligence by enacting related regulation, and AI is likely a big reason why enacting new state privacy legislation was overlooked this year.

Plenty of states amended existing consumer privacy statutes this year—and will continue to do so next year while the lull in new state comprehensive consumer privacy laws persists. Look also for more state AI and child online privacy laws in 2026 and beyond.

State Comprehensive Consumer Privacy Wave Halts

2025 has been an outlier year for the state **consumer privacy patchwork**. Passage of new state comprehensive consumer privacy laws has slowed to a halt following a rapid **surge** in recent years.

Eight such laws were enacted in 2023, and seven were in 2024, so it was logical to expect 2025 to see further legislative activity on this front.



In 2018, California became the first state to pass a comprehensive data privacy law, the **California Consumer Privacy Act**. No state followed suit in 2019 or in 2020 (the pandemic may be partly to blame). Over the next few years, adoption of these laws picked up somewhat: 2021 and 2022 each saw the passage of two state privacy enactments. After the recent **wave** of legislation, the number of states with comprehensive consumer privacy enactments now stands at 20.

The influx has hit a wall in 2025, as proposed measures from over a dozen states have failed to become law. Instead, states have shifted their focus to artificial intelligence legislation, a shift that will continue in 2026.

New AI State Laws Take Center Stage

In the absence of comprehensive federal AI legislation, US states are taking the **lead on AI** and enacting such laws—much like they did with privacy laws.

Since AI burst onto the scene a couple years ago, it's no surprise that state AI enactments have dominated much of the state legislative agenda. State legislation that passed this year includes the following AI-adjacent or sector-specific laws:

- California's **AI Transparency Act** and the state's **Transparency in Foundation Model AI Act**.
- Texas's **Responsible AI Governance Act** (prohibiting companies from developing AI systems that cause certain harms).
- Pennsylvania's **criminal deepfake law**.
- Montana's **AI law** (regulating the use of AI in government).
- Texas's **Responsible AI Governance Act** (prohibiting companies from developing AI systems that intentionally encourage people to harm themselves, impair a person's constitutional rights, or unlawfully discriminate against a protected class).

In 2024, Colorado became the first jurisdiction in the US to pass comprehensive legislation regulating artificial intelligence. However, the **Colorado Artificial Intelligence Act's implementation** has been **delayed** until June 2026, which might mirror the struggle states are having in getting comprehensive privacy legislation over the finish line. However, it is clear that states are passing AI related legislation in droves and that this trend will continue into 2026.

Child Online Privacy Patchwork Grew, Amidst Chaos

This year has seen more state child online privacy and safety laws—**despite court challenges** that even further muddled the patchwork of these laws.

At least seven states enacted state child online privacy and safety laws this year, with privacy obligations including requiring covered entities to establish high default-level privacy and safety settings for minors and to conduct data protection impact assessments for new features likely to be accessed by minors.

Next year will likely continue this trend as states have become more adept at writing privacy laws and amending existing privacy legislation to withstand First Amendment scrutiny and age-verification court challenges.

States Amending, Not Enacting Privacy Laws

Even though there were no new comprehensive privacy laws this year, several states passed major amendments to their privacy statutes.

Connecticut, for example, recently expanded its 2022 privacy law (for a second time) to include new prohibitions on selling sensitive data and targeted advertising for minors; enhanced rights for consumers regarding profiling decisions; a new right for consumers to contest profiling outcomes; and new obligations for controllers to conduct impact assessments.

Montana, **Virginia**, and **Oregon** also amended their privacy laws in the following ways to address common themes:

- Adding additional protections for **minors' personal data**.
- Adding new safeguards for the **protection of health and reproductive data**.
- Refining the **applicability data threshold** for the privacy statutes.

Election Year Placed Focus on Federal Privacy Efforts

Another possible factor for the pause in state comprehensive privacy enactments was the 2024 presidential election. The administration shift from President Joe Biden to President Donald Trump may have further snarled up the already complicated state and federal privacy landscape, due to policy and ideological differences. The continued absence of a national data privacy standard further compounds the situation because the uncertainty at the federal level doesn't give the states a clear privacy mandate to emulate.

The state comprehensive privacy laws that have been passed to date have created a vexing patchwork of state privacy laws that companies and legal practitioners must navigate. While there was a lull this year in comprehensive privacy legislation, more laws will be forthcoming in the next few years—albeit at a slower rate than in previous years—and these nuances will continue to grow as more states enact comprehensive privacy laws.

- With assistance from Jeffrey Florian.

Why US Tech Isn't Holding Its Breath for the EU AI Act

Sennetta Dzamefe
Legal Analyst

With the EU AI Act under review and US states rolling out their own laws to regulate the use of artificial intelligence, companies face mounting compliance costs and operational complexity. Whether timelines shift or not, the challenge for corporate legal departments remains: building governance frameworks that keep pace with global rules without slowing innovation.

On Oct. 14, the feedback period for the EU's call for evidence—similar to the public comment period for proposed US regulations, allowing stakeholders to influence rulemaking—came to a close. Numerous US tech companies, including tech giants such as Snap Inc., OpenAI , and Salesforce, voiced strong concerns. Many commented that the act's requirements are operationally complex and costly. Companies also called for clearer definitions of regulatory objectives, coupled with flexibility in how compliance is achieved.

Industry Pushback and EU Position

Predictably, tech companies are gearing up for sustained resistance to the EU AI Act throughout 2026. Companies like Meta, OpenAI, and Google have warned that heavy regulation could stifle innovation and create operational inefficiencies. Lobbying efforts are intensifying on multiple fronts. Globally, tech giants are urging a pause on the EU AI Act, with some exploring strategies to delay or block its implementation altogether.

Now that the European Commission has heard extensive feedback from tech companies, it faces a pivotal decision: halt enactment entirely, extend implementation guidelines, or ignore industry pressure and proceed as planned.

The non-enactment option is not a particularly likely one. But of the other two outcomes, as far as most US-based companies are concerned, the difference between complying now and complying later might not be great enough for them to alter their strategies.

If enforcement for high-risk AI systems begins in August 2026 as scheduled, companies will need to comply with the EU AI Act's requirements before the AI systems can enter the EU market or face steep fines. Yet even if the commission softens its stance, any reprieve may be short-lived—because US states aren't waiting.

Extended Timelines Won't Offset State Requirements

Even if Europe grants additional implementation time, the practical benefit for tech companies may be limited. Several US states are already advancing AI accountability laws that mirror core elements of the EU AI Act—such as high-risk system classification, impact assessments, and transparency requirements.

The real question isn't whether—or for how long—compliance can be delayed, but whether companies can design governance frameworks and AI systems that function across all jurisdictions—whether those jurisdictions' rules take effect at the same time or not.

While an EU delay may provide breathing room to refine those frameworks, it won't erase the broader challenge these companies face: Compliance for the EU and for leading U.S states is converging in both scope and substance. There is no one-size-fits-all model, but the operational outcome is similar. Delay simply shifts the timeline, not the obligation.

Dual-Track AI Development: A Costly Compromise

Despite the similarities in core compliance requirements between the EU and US, some companies will likely adopt dual-track AI development in 2026—creating separate versions of their systems for US and EU markets. Apple's approach with Apple Intelligence, which remains unavailable in the EU due to the Digital Markets Act, is a prime example.

This approach mirrors how multinational corporations currently adapt to varying data privacy regimes such as the GDPR, but the complexity and expense for AI systems are significantly higher. So, while this strategy ensures compliance, it comes at a cost, and only large corporations with substantial resources can afford parallel systems.

Smaller companies would risk losing access to entire markets, and splitting development efforts across multiple regulatory frameworks may lead to inconsistent product design, less intuitive user experiences, and slower innovation.

Pushed out of the market or forced to remain reliant on the AI systems of larger tech companies, many small and mid-sized companies will face a difficult choice in 2026. In the end, some of the smaller companies may continue to lobby for clarity on EU compliance timelines, wanting guidelines to come sooner so they can plan ahead rather than remain in regulatory limbo. Others may explore alliances, licensing agreements, or modular compliance modules that allow partial conformity with EU standards while maintaining competitiveness in the US. Ultimately, even with the dual track approach, smaller companies may find themselves phased out of the EU market, consolidated under bigger platforms, or forced to innovate around regulatory constraints.

US States Will Emerge as Regulatory Leaders

With federal AI efforts leaning toward deregulation noted in President Trumps AI Action Plan, states are charting their own course with robust AI legislation. This trend signals a fundamental shift: The real regulatory power in the US is moving to state capitals and away from Washington.

In California, Governor Gavin Newsom in September signed the Transparency in Frontier Artificial Intelligence Act, one of the strongest state-level AI laws. It requires companies with revenues over $500 million to disclose safety protocols, report risks, and incident reporting obligations.

Similarly, Colorado's AI Act takes effect in mid-2026, focusing on consumer protection and ethical deployment. These developments reflect a growing determination among states to proactively shape AI's future—even as federal policy trends toward deregulation.

The Bottom Line

Regardless of whether the EU AI Act is enforced, delayed, or dismantled, its impact will persist in shaping global expectations for algorithmic accountability. Even so, the practical center of regulation is shifting to state legislatures as they emerge as the primary architects of AI oversight in 2026.

AI Power, Infrastructure Deals Set to Fuel M&A in 2026

Andrea Molina
Legal Analyst

Increasing power demands from artificial intelligence are set to significantly drive mergers and acquisitions activity in the utilities sector in 2026. As part of their growth strategy, companies are seeking M&A opportunities that will allow them to gain leverage in the power generation and data center infrastructure fields, both key drivers to AI growth and expansion.

2025 was marked by **uncertainty** in monetary, trade, and regulatory policies, and investors approached the first two quarters of 2025 with a **wait-and-see attitude** until the policy and market dynamics settled. What's been clearer to investors is the Trump administration's focus on AI and on providing the conditions and infrastructure needed to develop the rapidly evolving technology. This assurance can be seen in Trump's **AI action plan** and in **incentives** created by the tax changes in the One Big Beautiful Bill Act for companies investing in US-based AI infrastructure, data centers, semiconductor manufacturing, and research.

The impact that AI makes on M&A activities is still hard to measure. But investment patterns in core sectors like electric power and infrastructure—and even in nuclear energy—are offering early indicators of future momentum in AI-related dealmaking.

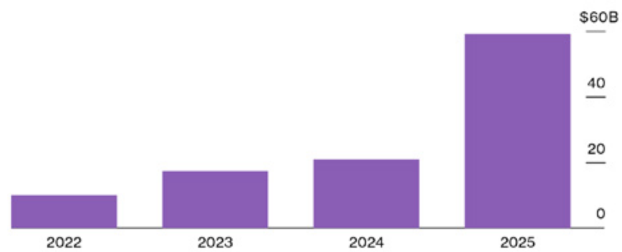
Power Generation and Data Centers

Since the arrival of AI, tech companies have clearly laid out their major challenge to develop and operate this technology: **power**. That need to lock in power sources to meet AI capabilities will roll over into 2026.

Data centers are **projected** to account for 8.6% of all US electricity demand by 2035. With demands of this magnitude weighing on an aging and stretched power grid, companies will have to invest in AI infrastructure and grid modernization through strategic deals in the energy industry.

Bloomberg's deal data suggests that such a move may already be under way. In 2025, deal volume for target companies in the electric utilities industry group reached $59 billion, compared to $20.8 billion in 2024, signaling remarkable growth in M&A activity.

Investors Show New Interest in Electric Utilities
Total volume of deals with targets in the electric utilities industry



Source: Bloomberg as of Nov. 5, 2025. The data includes all pending and completed mergers and acquisitions announced between Jan. 1, 2022 and Nov. 5, 2025 for US target companies in the electric utilities industry. Figures include both AI-related and non-AI related deals.

Investment in energy goes hand in hand with the development of data center infrastructure that eventually will consume the output of power production and generate power demand as AI continues to rise. Recent deals suggest an emerging investment trend in these areas.

For example, investment firm **BlackRock, Inc.** proposed an acquisition of power company **The AES Corporation** (as part of an $18 billion deal through its investment company, **Global Infrastructure Management LLC**) in July 2025 and then announced its acquisition of data center infrastructure company **Aligned Data Centers LLC** (as part of a $40 billion deal) in October. BlackRock **remains in talks** to buy AES, and the proximity between—and the multi-billion dollar values of—these deals serve as examples of the outlook of market dynamics in AI-related industries.

The 2025 surge in deals for targets in the electric utilities industry group has been more optimistic than expected, but it's merely a prelude to how markets and power players will react to the new AI age in 2026. Deals of this magnitude come as part of long-term strategic needs and growth plans, and we should see the results in the energy sphere in 2026 as a continuation of the energy industry M&A momentum of 2025's Q3.

As another example, in May, the asset management firm **Blackstone Inc. announced** its acquisition of the New Mexico utility owner **TXMN Energy Inc.** for $11.8 billion and then in September **announced** the $1 billion acquisition of Hill Top Energy Center, a natural gas power plant in Pennsylvania. The latter was part of Blackstone's **stated strategy** to invest $25 billion to support the construction of digital and energy infrastructure in Pennsylvania.

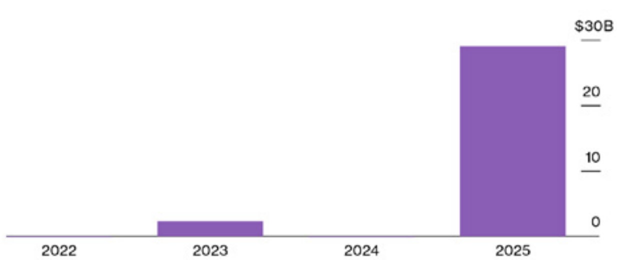
In other forward-looking deals, ChatGPT's developer **OpenAI** and tech giant **Oracle** have **committed** to invest $500 billion to build data center campuses across the US and have started work on one in Abilene, Texas. And chipmaker **Nvidia Corp. announced** an investment of up to $100 billion in OpenAI to build AI data center infrastructure.

Nuclear Power Generation

The enthusiasm surrounding AI and the energy sector has sparked an unusual eagerness to invest in nuclear energy.

Over the last couple of years, Big Tech companies have sought to fulfill their energy demands by investing in nuclear power. **Meta Platforms Inc.** signed a multi-year power purchase agreement with **Constellation Energy Corp.**, and **Amazon.com Inc.** did the same with **Talen Energy Corp.**, for the development and supply of nuclear energy.

2025 Surge of Deal Activity in the Nuclear Power Segment
Total volume of M&A deals in the nuclear power generation sector



Source: Bloomberg as of Nov. 5, 2025. The data includes all pending and completed mergers and acquisitions announced between Jan. 1, 2022 and Nov. 5, 2025 for US target and seller companies in the nuclear power generation product segment.

Bloomberg Law

Similar to the utilities sector, 2025 marked a big year for deals targeting companies in the nuclear power generation product segment, with M&A deal volume totaling $29 billion thus far, according to Bloomberg data.

Additionally, the Civil Nuclear Credit Program is deploying funds to keep nuclear plants operating; for example, California's **Diablo Canyon Power Plant** received such funds in January 2024. That nuclear plant had been scheduled to cease commercial operations by 2025 but has instead received $1.1 billion to keep operating. This hype is backed by the current administration's statements to support energy generation, including enabling efforts that will allow for the commercialization of nuclear energy to meet increasing energy demands.

Overseas Investment

The appetite to invest in the energy industry is also spilling over to attractive companies overseas.

Over the summer, private investment firm **Apollo Global Management Inc.** committed **$6.7 billion** of financing to Paris-based **Electricite de France** for the construction of Hinkley Point C, a nuclear power plant in the United Kingdom, among other investments.

In a similar manner, the US is ramping up its efforts to develop the nuclear industry by partnering up with its international allies. Most recently, the US and the UK signed a **memorandum of understanding** to accelerate AI innovation and support the development of nuclear energy.

The growth in the development of safe and efficient nuclear reactors is at the forefront of the new nuclear build cycle, and even though the results of these efforts may not be observed until after 2026, there is optimism and opportunity for M&A in this industry as the need for power increases.

AI in Workplace to Test Disparate Impact Theory

Lydell Bridgeford
Legal Analyst

Despite Trump administration efforts to limit the Equal Employment Opportunity Commission's handling of disparate impact claims, rising alarm about AI-driven employment bias will bring the issue of disparate impact front and center in 2026, forcing courts to step in and grapple with how the long-standing legal doctrine applies to new AI base HR technologies.

These courts will face the challenge of deciding if employers can be held liable for implementing AI tools that, while appearing unbiased in their essence, inadvertently cause a disproportionate and adverse impact on protected groups, even in the absence of intentional discrimination.

Many high-profile lawsuits are already under way, increasing the likelihood that the issue will come to a head in 2026.

Shifting the AI & Discrimination Landscape

President Donald Trump took two significant actions in the early months of 2025: first, in January, he issued an executive order addressing **artificial intelligence**. This was followed in April by an executive order that restricted the enforcement of **disparate impact claims**. The order instructed federal agencies, including the EEOC, to cease investigations into disparate impact claims under federal anti-discrimination laws.

Although the executive order could hinder private-sector disparate impact employment discrimination claims exclusively through the EEOC, **data shows** that the EEOC has not extensively utilized disparate impact liability as a primary method to enforce federal laws under its jurisdiction.

Still, the executive orders signal a federal posture that promotes AI adoption while narrowing avenues for disparate impact enforcement, a combination that may leave more **AI-related bias claims** to be tested through private litigation and state enforcement.

AI Spurs Employment Litigation

AI litigation so far has focused on hiring platforms, testing whether algorithmic resume screeners and applicant tracking systems unlawfully disadvantage **older** or **minority candidates**. Since these lawsuits proceed under different federal laws—the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act of 1964 (Title VII) each framing disparate impact differently—courts may reach divergent conclusions about AI-driven claims, potentially leading to conflicting legal paths.

Title VII, as interpreted by the Supreme Court in **Griggs v. Duke Power Co.**, offers the broadest framework for challenging neutral practices with disparate impacts, while the ADEA applies a more limited approach as established by the high court in **Smith v. City of Jackson**. The Americans with Disabilities Act (ADA) remains less defined in this area, creating uncertainty about how courts will handle AI-driven discrimination claims, especially those involving disabilities.

Key Cases Testing AI-Driven Workplace Decisions

Initial lawsuits targeted hiring platforms, but the scope is widening

Case	Court / Agency	Year Filed	Law/Statute	Status / Outcome	Claim Description
State of New Jersey v. Amazon.com Services LLC	N.J. Superior Court, Essex County	2025	State Law Against Discrimination	Pending	Alleged use of automated/semi-automated HR systems to deny or delay disablity and pregnancy accommodation requests
ACLU Colorado Complaint v. Intuit & HireVue	Colorado Civil Rights Division	2025	State Anti-Discrimination Act; ADA; Title VII	Pending	Challenges AI-based video interview platform for accessibility barriers
Harper v. Sirius XM Radio, LLC	U.S. District Court, E.D. Mich.	2025	Title VII	Pending	Claims AI-powered applicant screening system produced systemic racial bias
Mobley v. Workday Inc.	U.S. District Court, N.D. Cal.	2023	ADEA	Pending	Alleged AI-driven hiring platform screened out applicants based on protected traits
EEOC v. iTutorGroup	U.S. District Court, E.D.N.Y.	2022	ADEA	Settled	AI hiring tool allegedly rejected applicants automatically based on age cut-offs

Source: Bloomberg Law Dockets as of Nov. 4, 2025.

Bloomberg Law

These differing legal frameworks are being put to the test. A notable example is the ongoing class action lawsuit against Workday Inc., filed in a California **federal district court** under the ADEA. The case alleges that the company's use of AI-powered hiring tools led to disparate impact discrimination. The outcome of this lawsuit could potentially shape how courts evaluate AI-driven employment discrimination claims using the disparate impact standard.

Similarly, the resolution of a putative class action filed under Title VII could also influence how courts evaluate disparate impact discrimination resulting from AI use in hiring practices. A Black IT professional filed the **lawsuit** in a federal district court in Michigan in August against Sirius XM Radio, alleging systemic race discrimination through AI-powered applicant screening tools.

State-Level Recourse

Regardless of what happens at the federal level, plaintiffs still have the right to file employment discrimination claims under both federal and state laws. In fact, **numerous state laws** offer more comprehensive protections, more substantial compensation, or simplified processes for class action certification compared to their federal counterparts.

California, for example, extends **anti-discrimination protections** to employees at companies with as few as five workers, which is far below the federal threshold of fifteen, and allows for uncapped compensatory and punitive damages under state nondiscrimination law. Additionally, state's class action rules under are often more **favorable to plaintiffs**, requiring only a "community of interest" rather than meeting the stricter **federal standards**. The state also has **implemented regulations** aimed at addressing employment discrimination resulting from the use of AI technologies.

These laws give plaintiffs another avenue to challenge AI practices. For example, the American Civil Liberties Union has filed a **complaint** with the EEOC and the Colorado Civil Rights Division alleging that Intuit's use of AI-based hiring platforms illegally discriminates based on race and disability. The complaint, filed on behalf of employee who was denied a promotion, alleges an AI video interview lacked full subtitles and failed to accurately transcribe her speech due to her accent as a deaf Native American.

In a **complaint** filed under New Jersey state law, the state's Attorney General and Division of Civil Rights allege that Amazon relied on **automated or semi-automated systems** to deny or delay disability and pregnancy accommodations, forcing workers onto unpaid leave or out of their jobs. While filed under state anti discrimination law rather than any AI specific legislation, the lawsuit underscores that automation in HR processes is now a litigation target well beyond hiring.

Varied Legal Landscapes

Federal nondiscrimination laws diverge significantly in their approach to disparate impact analysis. The surge of AI-related employment discrimination cases will likely exacerbate these differences, leading to a patchwork of legal interpretations rather than a cohesive doctrine. As courts contend with an increasing number of AI-driven lawsuits, they will need to tailor their disparate impact analysis to specific statutes like Title VII, the ADEA. This process will inevitably expose the unique challenges posed by algorithmic bias, potentially reshaping established legal principles and creating new precedents for the AI era.

Paying Hidden 'AI Tax' May Help Lawyers Stop the Slop

Jason Wilson
Legal Analyst

It's not new for judges to deal with lawyers' citation errors in legal briefs, from **misquotations** to intentional **misrepresentations**. What's new—thanks to AI—is the volume of those errors.

According to the latest Bloomberg Law **analysis**, hallucinations in case filings are growing exponentially. With nearly 70% of surveyed lawyers **saying** that they use AI in legal research, it is likely that hallucinations in filings are far more commonplace than what has been reported.

Today, AI misuse takes many different forms, including completely fabricated cases, names of cases inappropriately mixed with reporter citations, imaginary quotations, and misattributed propositions of law. And courts are trying myriad remedies to ensure that, in the words of one 2025 **ruling**, a "court's interest in having the rules of procedure obeyed never disappears."

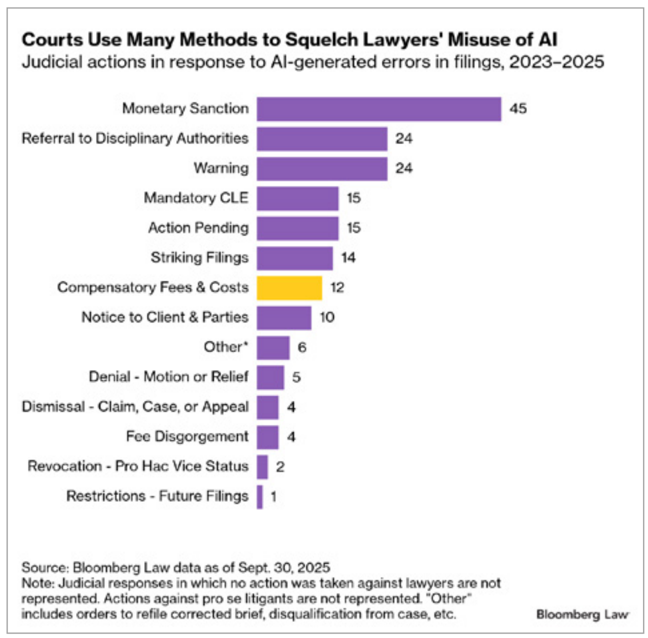
But most of these remedies are doing nothing to alleviate a huge hidden cost of AI misuse: the amounts that lawyers must now spend to conduct an AI audit of both their own work and the work of opposing counsel. These costs essentially constitute a new "AI tax" on the litigation system, one that carries immense consequences to lawyers and litigants. And shifting the tax burden in the form of compensatory fee awards may be the only effective response to the rising problem of AI misuse in the courts.

Monetary Sanctions Make Headlines but Not Progress

Monetary sanctions—that is, orders to pay the court directly—are used to ensure that lawyers don't disregard their professional responsibilities to the bench and bar. Of course, they can also be used to remedy wrongs and promote fairness, but deterrence is the principal goal.

Since the high-profile spectacle of **Mata v. Avianca**, Inc. in 2023, the courts have resorted to numerous deterrence strategies to impress upon lawyers their ethical duties with respect to court filings—specifically, the responsibility for implementing policies and practices to prevent hallucinations in court filings resulting from this new technology. Some have issued broad **standing orders** to regulate the use of the technology. But the more frequent and direct approach has been for judges to call out the misuse of AI in each case as it happens, often levying punishments in the process.

According to an analysis of judicial opinions and other orders in Bloomberg Law's dockets and other public sources, courts have imposed more than 180 actions—monetary or otherwise—against lawyers who were caught misusing AI in their filings since 2023.



By far, courts have most commonly issued monetary sanctions against attorneys—ranging from $10 to **$10,000**—often coupling them with other remedies, such as court referrals to disciplinary authorities or orders to complete continuing legal education on ethics for using AI.

But despite the risk of incurring such financial and reputational consequences, lawyers continue to perform research using generative AI without verifying the results.

Shifting the Burden

While the fines make headlines, the real cost to AI misuse is being absorbed by opposing counsel—and presumably their clients—in the form of hours spent untangling AI-invented law and briefing the findings for the courts, none of which address the merits of the dispute. Among the many harms that flow from AI misuse is what the judge in Mata pointed out over two years ago: the "opposing party wastes time and money in exposing the deception."

Bloomberg Law data shows fewer than 1 in 10 judicial responses in cases in which lawyers were punished for AI misuse involves compensatory fee awards, or fee shifting. Fee-shifting is an order to direct the offending party to pay opposing counsel's reasonable attorney fees and costs that were incurred to unearth and respond to the AI misuse. As one court **stated** in a September opinion, "[c]ounsel who puts the burden of study and illumination on the defendants or the court must expect to pay attorneys' fees."

Unlike monetary sanctions, these awards are rarely reported about in the media, because the amount usually isn't determined until long after a sanctions order is issued. Based on Bloomberg Law's data, though, the amounts can be quite substantial. In fact, many easily exceed those of standard monetary sanctions.

Bloomberg Law has identified 12 such instances of judges imposing compensatory fee awards, shifting a total of more than $197,365 in fees and costs onto AI-misusing attorneys.

Fee-Shifting Punishments for Lawyers' AI Hallucinations

Month	Court	Fees & Costs	Other Actions
Jan. 2024	N.Y. Sup. Ct.	$1,500	Filing struck
Oct. 2024	N.Y. Sup. Ct.	$38,378	None
Jan. 2025	W.D. Tex.	$3,961	Filing struck
May 2025	C.D. Cal.	$26,100	$5,000 fine; filings struck
May 2025	S.D. Fl.	$5,000	$1,500 fine; CLE
May 2025	N.Y. Sup. Ct.	$2,000	None
May 2025	Ut. Ct. App.	Undisclosed	$1,000 fine; fee disgorgement
July 2025	S.D. Fl.	$85,567	Dismissal; bar referral; CLE
July 2025	M.D. Ga.	$6,462	$1,000 fine; CLE
July 2025	E.D. Mich.	$1,485	CLE
Sept. 2025	D. P.R.	$24,492	None
Sept. 2025	C.D. Cal.	$2,418.50	Bar referral

Source: Bloomberg Law data as of Oct. 31, 2025.
Note: Actions against pro se litigants are not represented.
Bloomberg Law

If, as the continuing increase in hallucinations suggests, monetary sanctions aren't having the desired deterrent effect, courts may ultimately focus primarily on fees, shifting the burden of paying this tax first, with other remedies to follow. But it's worth noting that, like a tax, **lawyers who don't bring AI misuse to the court's attention**—that is, who didn't incur costs of their own—shouldn't expect a windfall in the form of court-awarded fees.

Seeing Hallucinations Everywhere?

One possible consequence of this change might be overcorrection. Now that the risk of hallucinations is firmly on the legal industry's radar, everything could be perceived as a potential hallucination. When opposing counsel receives a pleading, memorandum, or brief in support, they may now be asking whether an AI audit, such as a substantive citation review, should be conducted.

If errors are detected, then opposing counsel can raise the issue with the court and seek reimbursement. But what if no errors are detected? Is the tax passed on to the client or is it considered overhead? Either way, lawyers will be absorbing the costs until the courts make more directed policy choices, such as requiring source-check audit trails in addition to disclosures regarding generative AI use with court filings.

Why AI Return on Investment in Legal Will Lag in 2026

Janet Chanchal
Legal Analyst

Most in-house attorneys say their organizations are already using generative AI, according to a recent Bloomberg Law survey. Yet despite growing enthusiasm for and investment in AI, measurable returns remain to be seen.

Across in-house teams, generative AI tools are being piloted for a variety of different legal workflow enhancements, while vendors are embedding AI capabilities into existing platforms. But implementation alone doesn't equal transformation. Valuable ROI depends on deep, consistent adoption and strong data foundations.

In 2026, the gap between investment and impact will reflect uneven usage of GenAI tools and uneven adoption across legal departments, combined with underdeveloped data infrastructure rather than technological shortcomings. Thus, legal departments will focus less on proving AI's value and more on building the systems, consistency, and confidence needed to measure it accurately.

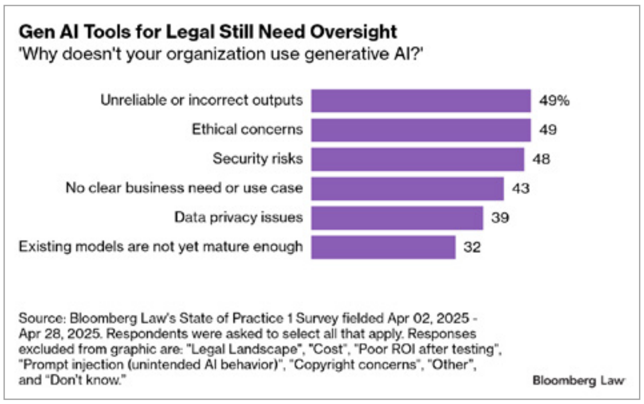
AI in Pilot Mode

AI adoption within corporate legal teams remains fragmented. Many departments are still in pilot mode, testing tools in isolated practice areas or with small user groups. While these pilots highlight potential efficiencies, few have been implemented organization-wide. Until AI becomes embedded in everyday workflows, the data volume and quality needed to assess ROI will remain limited.

Only 23% of in-house lawyers who responded to Bloomberg Law's most recent State of Practice survey use AI tools daily, while 27% haven't used them in the past six months. This uneven engagement suggests that adoption is still surface-level rather than systemic, resulting in scattered performance gains that are difficult to quantify or translate into meaningful metrics.

Among in-house professionals who reported using AI at least a few times a month, one-third say it saves them less than 30 minutes a day, while 22% report time savings of 30 minutes to an hour. These marginal efficiency gains underscore a deeper challenge: Expectations for AI's transformative potential remain out of sync with its current stage of maturity for legal practice.

For organizations that haven't yet adopted generative AI as of late April of this year, both **in-house and law firm attorneys** said that the top reasons include: unreliable or incorrect outputs (49%), ethical concerns (49%), security risks (48%), and the lack of a clear business need (43%). Another 32% point to the immaturity of existing AI models as a limiting factor.



Together, these findings highlight a fundamental truth that despite rapid innovation, generative AI tools for legal practice still require significant oversight, which often offsets the efficiency gains they promise.

Executives frequently anticipate measurable results within a single budget cycle. Yet those expectations are rarely grounded in realistic timelines or well-defined success metrics. Without a consensus on what AI is meant to achieve—whether faster contracting, lower legal spend, or fewer escalations—departments end up with inconsistent AI adoption and unclear ROI benchmarks.

Adoption, after all, isn't a one-time rollout; it's an evolving process that depends on culture, trust, and workflow integration. Until AI becomes universally embedded across teams and practice areas, its measurable impact on legal departments will remain limited.

The Hidden Prerequisite: Data Readiness

Even with widespread adoption across legal teams, AI's ROI can't be accurately measured without strong data foundations. Most corporate legal departments weren't designed for quantitative analysis. Many still rely on manual reporting, fragmented systems, and inconsistent metrics for tracking matters, turnaround times, and **outside counsel spend**.

Without clean, unified baselines, comparing performance before and after AI implementation becomes nearly impossible. The result is that AI's impact often appears weaker than it truly is.

Throughout 2026, legal departments will continue investing heavily in data quality, standardization, and integration. They will focus on cleaning legacy datasets, establishing consistent taxonomies, and connecting disparate systems to create a single source of truth. These foundational efforts may postpone short-term ROI but are critical for building long-term credibility and measurable outcomes.

Effective AI strategies in legal operations depend on structured, **high-quality data** that enables continuous measurement. Until that structure is in place, ROI will remain more aspirational than demonstrable.

2026: The Year of Foundations, Not Payoffs

The coming year will be about creating the conditions for future value rather than about capturing it immediately. Legal operations teams should concentrate on four key areas:

- Measuring adoption by tracking usage, frequency, and workflow integration.
- Building baselines for matter volume, turnaround time, and spend.
- Integrating data across matter management, document, and billing systems.
- Aligning metrics with enterprise goals such as risk mitigation and decision support.

These initiatives won't generate dramatic ROI figures in 2026, but they will produce something more critical: a credible framework for long-term measurement.

Rethinking ROI

Traditional ROI measures like hours saved or costs reduced tell only part of the story. The real impact of **AI lies in how it changes legal's role in the business**. AI improves risk detection, enhances decision-making, and creates capacity for strategic work. These results are harder to quantify but ultimately more valuable.

In 2026, **forward-looking legal departments** will begin transitioning from measuring "efficiency saved" to "value created." This includes risk avoidance, better decision accuracy, and the redeployment of talent to higher-value activities. Once adoption and data readiness mature, these strategic outcomes will form the basis of measurable ROI.

Looking Ahead

2026 will be a foundational year, more about building than boasting. Legal departments will refine adoption strategies, strengthen data infrastructure, and align leadership expectations around realistic timelines for achieving any measurable ROI. These efforts may not deliver immediate payoffs, but they'll lay the groundwork for long-term, demonstrable success.

After 2026, the focus will shift from experimentation to evidence. Departments that have invested in consistent workflows and clean data will finally be positioned to quantify AI's impact, translating early enthusiasm into verifiable efficiency, savings, and strategic value.

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