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Vol. 23, No. 8
August 2017

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WORKERS' COMPENSATION

Some NM workers' benefits will take a hit under WCA amendments

by Barbara J. Koenig

McDonald's management was upset. The restaurant chain had fired a shift manager under its zero-tolerance policy for failing to report an allegation of sexual harassment. However, the shift manager was eligible for workers' compensation benefits. When McDonald's challenged her eligibility for benefits, the workers' compensation judge (WCJ) ruled that even though she had been fired for cause, she was entitled to temporary total disability (TTD) benefits as well as permanent partial disability (PPD) benefits, including modifier points, after she reached maximum medical improvement (MMI). McDonald's appealed, but the New Mexico Court of Appeals affirmed the WCJ's order.

The appellate court said that it was bound to construe the Workers' Compensation Act (WCA) "in favor of providing compensation to an injured worker absent clear statutory language to the contrary. It is not our place to insert language into the WCA that does not exist. That task falls to the Legislature alone." The New Mexico Legislature took the hint.

During the 2015 legislative session, and later in the 2017 regular legislative session, lawmakers started redrafting the sections of the WCA that seemed unfair and unworkable to many employers. The revisions became law on June 16, 2017. Now, when a worker is fired for cause unrelated to a workplace injury, the worker is no longer eligible for workers' comp benefits beyond the basic impairment rating benefit.

Purpose of WCA

When a worker reaches MMI, she is given an impairment rating based on the extent of her permanent impairment. The impairment rating is applied to two-thirds of her preinjury wage to determine her PPD benefits. If the worker isn't earning her preinjury wage at the time of MMI, she is also eligible for modifier points based on her age, education, and physical capacity. The modifier points are added to the impairment rating to arrive at a higher PPD rating. The worker's PPD benefits are calculated by multiplying the higher PPD rating by two-thirds of her preinjury wage. Modifier points can make a substantial difference in a worker's PPD benefits.

If an employer makes a reasonable work offer to an injured worker at or above his preinjury wage and within his medical limitations, he must accept the offer or face losing a substantial portion of his monetary workers' comp benefits. If the worker accepts a job with another employer at or above his preinjury wage, he is likewise no longer eligible for a substantial portion of his monetary workers' comp benefits. The injured worker will continue to receive reasonable and necessary medical care

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AGENCY ACTION

EEOC marks 50th anniversary of ADEA with discussion on discrimination. Experts invited to a June meeting of the Equal Employment Opportunity Commission (EEOC) told of the continuing effects of age discrimination 50 years after passage of the Age Discrimination in Employment Act (ADEA). A 2017 AARP survey reports that nearly two-thirds of workers age 55 to 64 report their age as a barrier to getting a job. Also, a 2015 survey using résumés for workers at various ages found significant discrimination in hiring for female applicants and the oldest applicants, according to Patrick Button, an assistant professor of economics at Tulane University and a researcher with the National Bureau of Economic Research Disability Research Center. Laurie McCann, a senior attorney for AARP Foundation Litigation, called on the EEOC to strengthen ADEA protections and enforcement. John Challenger of the outplacement and career transition firm Challenger, Gray & Christmas said that older workers, particularly skilled workers, are being channeled out of the workforce, damaging the country's economic health. If more older workers stayed in the workforce, it would significantly reduce the skilled worker shortage in the United States, he said.

Obama-era guidance on joint employment, independent contractors withdrawn. On June 7, Secretary of Labor Alexander Acosta announced that the U.S. Department of Labor's (DOL) 2015 and 2016 informal guidance on joint employment and independent contractors has been withdrawn. The two guidance letters from the Obama administration—FLSA 2015-1 (dealing with independent contractors) and FLSA 2016-1 (dealing with joint employment)—narrowed the definition of independent contractor and made more employers subject to joint-employer status. Acosta's announcement said the DOL will continue to enforce both the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act even though the guidance letters have been withdrawn.

Executive Order expands apprenticeships, vocational training. Secretary Acosta in June hailed President Donald Trump's Executive Order to expand apprenticeships and vocational training. The order calls on the secretary of labor, in consultation with the secretaries of education and commerce, to propose regulations that promote the development of apprenticeship programs by industry and trade groups, nonprofit organizations, unions, and joint labor-management organizations. It also directs the DOL and the Commerce Department to promote apprenticeships to business leaders in critical industry sectors, including manufacturing, infrastructure, cybersecurity, and health care. ✤

for his injury in all these scenarios; only his monetary benefits will be affected.

The policy and intent of the WCA is to provide every person who suffers a workplace injury that results in a permanent impairment the opportunity to return to gainful employment as soon as possible with minimal dependence on workers' comp. However, to employers and the insurance companies that provide workers' comp policies, a series of court decisions in the last several years seemed to contradict that policy and give injured workers an unfair way to collect substantial monetary benefits.

Recent cases strike employers as unfair

Three cases in particular bothered employers. In all three cases, the workers were found to be entitled to full benefits even though they had voluntarily retired or had been fired for cause.

In the first case, Jesse Cordova, who belonged to a union, was injured a month before his scheduled retirement. Although he returned to work in a light-duty job that accommodated his shoulder injury, he decided to retire on the date he had previously selected. Under union rules, he wasn't able to work for a union company, including his employer, and still collect his union retirement benefits. The sticking point was his eligibility for workers' comp benefits.

Cordova's whole-body permanent partial impairment rating for his shoulder injury was seven percent. His modifier points, based on his age, education, skills, and residual physical capacity, were 45, leading to an impairment rating of 52 percent. The employer challenged his eligibility for workers' comp after his retirement, but the court ruled that he could collect his TTD and PPD benefits with modifier points even though he had voluntarily left the labor market.

To many employers and their attorneys, that decision seemed unfair. The employer was being forced to pay substantial workers' comp benefits to someone who had voluntarily retired. If a worker returns to work at or above his preinjury wage, the employer doesn't pay PPD modifier points, which can greatly increase the monetary PPD benefits. In this case, however, the employer was effectively prevented from offering the employee a job after his retirement date.

In the McDonald's case, the shift manager, Michelle Hawkins, knew the young employee who claimed she had received a sexually inappropriate message from a supervisor. The complaining employee was a friend of her son's, and Hawkins found the young employee not particularly trustworthy or credible. However, McDonald's zero-tolerance policy required that all sexual harassment claims had to be reported. Hawkins was fired for cause for failing to report the alleged harassment.

Hawkins had injured her lower back a few months before she was fired. She was released to work by her doctor but had a 20-pound lifting restriction. McDonald's put her on light duty and paid her the same wage she was earning before her injury. Upon firing her, however, it stopped paying workers' comp benefits. Hawkins litigated McDonald's decision to terminate her monetary workers' comp benefits.

The WCJ ruled that Hawkins was entitled to TTD benefits until she reached MMI and then was entitled to PPD benefits with modifier points until she was able to obtain employment at her preinjury wage. The court of appeals affirmed, ruling that the WCA was designed to provide compensation to injured workers, even if they were fired for cause. The court reasoned that a worker doesn't voluntarily remove herself from the labor market when she is terminated, with or without cause.

Finally, Lawrence Jaramillo, an injured worker who had been receiving PPD benefits, was fired by the New Mexico Corrections Department (NMCD) after he was accused of sexual harassment. When the NMCD stopped paying his PPD benefits and modifier points, he filed a claim to reinstate them. The WCJ ruled that Jaramillo was entitled to receive his PPD benefits enhanced by modifier points. The appellate court agreed, ruling again that a worker who is terminated for misconduct hasn't voluntarily removed himself from the labor market.

Legislature responds to employers' frustration

Employers found those cases discouraging. The courts had previously ruled that an injured worker who quit his job to start his own business had voluntarily removed himself from the labor market and therefore was no longer eligible for PPD modifier points. Likewise, a worker who committed a felony and was incarcerated for several years had voluntarily removed himself from the labor market and couldn't receive PPD modifier points. However, the same logic didn't extend to workers who violated workplace rules and were fired for cause. Instead, they were deemed not to have voluntarily removed themselves from the labor market.

The new law changes that. Now, a worker isn't eligible for TTD benefits if:

(1) The employer makes a reasonable offer of work at the preinjury wage and the worker rejects the offer;

(2) The worker accepts other employment at or above the preinjury wage; or

(3) The worker is terminated for misconduct unrelated to the workplace injury.

The law contains provisions allowing WCJs to penalize employers that terminate workers for pretextual reasons, including assessing a fine of up to $10,000, payable to the worker.

Moreover, a worker won't be eligible for PPD modifier points if:

(1) The worker returns to work at or above the preinjury wage;

(2) The worker accepts other employment at or above the preinjury wage;

(3) The employer makes a reasonable work offer at the preinjury wage and the worker rejects the offer; or

(4) The worker is terminated for misconduct unrelated to the workplace injury.

WORKPLACE TRENDS

Survey finds HR gaining C-suite influence. A survey from payroll and HR software provider Paychex finds that HR leaders at small and midsize companies say they have grown beyond serving a traditional administrative function to taking on a more strategic role within their organizations. The survey of more than 300 HR decision makers from organizations with 50 to 500 employees found that 75% of respondents feel HR technology has enabled them to secure a seat at the leadership table. According to the study, 41% of respondents meet with their CEO or CFO or both on a weekly basis, while close to one-third have access to top management when they need it.

Unemployment rate for persons with disabilities stable in 2016. The U.S. Bureau of Labor Statistics (BLS) reported in June 2017 that the unemployment rate for persons with a disability, at 10.5%, was little changed from the previous year, while the rate for those without a disability declined to 4.6%. Highlights of the 2016 data show that nearly half of all persons with a disability were age 65 and over, about three times larger than the share of those with no disability. Also, for all age groups, the employment-population ratio was much lower for persons with a disability than for those with no disability. Another finding showed that for all educational attainment groups, jobless rates for persons with a disability were higher than those for persons without a disability. The report also noted that in 2016, 34% of workers with a disability were employed part-time, compared to 18% for those with no disability. Also, employed persons with a disability were more likely to be self-employed than those with no disability.

Study finds employees dissatisfied with senior leaders. A survey from advisory firm Willis Towers Watson finds that U.S. employees give their senior leadership low marks on key aspects of people management, including the ability to develop future leaders, evoke trust and confidence, and demonstrate sincere interest in employees' well-being. The Willis Towers Watson Global Workforce Study found that just 45% of U.S. employees have trust and confidence in the job being done by their organization's top leaders. That's down from 55% of those who responded similarly in 2014. Just under half (47%) believe leaders have a sincere interest in employee well-being, while just 41% think their organization is doing a good job of developing future leaders. The research found that employees give their immediate managers higher grades. Eighty-one percent say their managers treat them with respect, while 75% say managers assign them tasks that are suited to their skills and abilities. ✤

UNION ACTIVITY

Unions speak out on air traffic control initiative. Union leaders representing airline and government employees are speaking out on President Donald Trump's air traffic control reform initiative. Lee Saunders, president of the American Federation of State, County, and Municipal Employees, says his union is opposed to what he calls "inefficient and risky efforts to privatize the nation's air traffic control operations." He said the reform plan "has the potential to threaten safe and efficient air travel for many Americans, to significantly weaken the economy, and to harm the committed federal workforce that is dedicated to the safe and efficient aviation all Americans deserve and expect." Captain Tim Canoll, president of the Air Line Pilots Association, Int'l (ALPA), said the U.S. air traffic control system should operate as a not-for-profit organization, and key stakeholders, including ALPA and the National Air Traffic Controllers Association, must hold a role in its governance and oversight.

Machinists union hails Uber decision to allow tipping. The International Association of Machinists and Aerospace Workers (IAM) is taking credit for the decision by ride-hailing company Uber to allow riders to tip straight from Uber's app. "Thanks to pressure from thousands of ride-hail drivers joining together in the IAM's Independent Drivers Guild, Uber riders across the United States will soon be able to tip straight from Uber's app," a June statement from the union said. "We were proud to lead the way in this fight on behalf of drivers in New York City and across the nation," said Jim Conigliaro, Jr., founder of the drivers' group and IAM Eastern Territory chief of staff. "This is an important first step toward a fairer ride-hail industry," he said.

Union leaders criticize withdrawal from Paris climate agreement. President Trump's decision to withdraw the United States from the Paris climate agreement has drawn criticism from union leaders. AFL-CIO President Richard Trumka called the move "a decision to abandon a cleaner future powered by good jobs." He said Scott Pruitt, administrator of the U.S. Environmental Protection Agency (EPA), has given dangerous advice and following his lead "is a failure of American leadership." Mary Kay Henry, president of the Service Employees International Union (SEIU) said Trump and his political allies "are killing the creation of new industries and jobs that could give communities the boost they need to thrive in favor of corporate polluters who want to pad their bottom line on the health of our communities." She said already in the United States, clean energy jobs outnumber fossil fuel jobs, with solar and wind energy at the forefront. ✤

Takeaway

As with all new or modified laws, the effectiveness of the revisions to the WCA will be determined when they are applied to difficult cases. The legislature's fiscal impact report warns of increased litigation over the reasonableness of work offers and predicts that the changes may lead to inconsistent rulings among WCJs because each case will be dependent on the circumstances of the job offer and the worker's rejection of the offer. Time will tell how well the revised WCA works in real employment situations, but employers are hopeful that they can now terminate workers for cause and not be forced to pay excessive workers' comp benefits to former employees.

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SUPERVISOR ISSUES

When words used in a disciplinary report suggest implicit bias

by Barbara J. Koenig

Implicit bias is an unconscious preference for or an aversion to a person or a group of people. In other words, we may have an attitude toward others or stereotype them without conscious knowledge of what we're doing. If we act in accordance with our implicit bias, we may be discriminating against a person or a group of people without even being aware of our bias. Two recent cases illustrate the fact that HR managers need to educate supervisors on implicit bias and how a seemingly straightforward description of an employee or a workplace incident can suggest racial animus and unconscious discrimination.

Seemingly innocent words suggest bias

In recent employment discrimination cases, two federal courts, one from Illinois and one from New York, looked at the words used to describe employees' shortcomings and found they could imply their supervisors held racial stereotypes. Both cases were in the initial stages of litigation. The first case has now been dismissed, and the second case received court approval to proceed with the employee's complaint. However, what's interesting is that both courts recognized that seemingly innocent words can suggest racism in the right circumstances.

In the Illinois case, a black employee was written up several times and eventually fired when she didn't meet her employer's expectations. In describing the employee's difficulties at work, the employer focused on her "anger." The disciplinary reports about the employee's workplace conduct included the phrases "became angry," "got visibly upset and angry," and "getting angry." The reports also described the employee as being prone to "outbursts and negative comments" or getting offended and failing to defuse situations with coworkers or customers.

The disciplinary reports weren't unusual; it was the court's concern that was unusual. The court recognized the long history of the stereotype of angry black women, tracing its roots back to slavery. The court mentioned academic studies about

the continuation of the stereotype and its detrimental impact on black women, inside and outside the workplace. According to the court, "When a word or concept is so pervasively and enduringly linked to a derogatory stereotype, its use to reference individuals traditionally subject to the stereotype inherently raises the specter of motivation or bias." In the end, the complaint was dismissed, but the court's musings on racial stereotypes caught the attention of lawyers across the nation. *Young v. Control Solutions, LLC,* U.S.D.C., N.D. Ill. Case No. 15-cv-3162, June 19, 2017.

The New York case involved a black physician's assistant supervised by four white physicians. Thomas Wooding alleged that over a several-year period, the physicians criticized his work, belittled him in front of coworkers, yelled at him, called him names, and gave him conflicting orders. The physicians wrote progressively critical disciplinary reports and told Wooding that he was being "disrespectful and overbearing." He complained to the HR department that he was being singled out for undue criticism because of his race and was facing retaliation by his supervisors. Eventually, he was fired for allegedly violating the Health Insurance Portability and Accountability Act (HIPAA).

Wooding brought a lawsuit alleging discrimination on the basis of his race. What's interesting in this case is that Wooding argued that the white physicians used code words for race discrimination when they told him that he was "disrespectful and overbearing." He argued that those words may appear nondiscriminatory on their face, but they can "invoke racist concepts that are already planted in the public conscious."

The court seemed to agree, noting that whether the speaker was motivated by assumptions or attitudes relating to the protected class would depend on the context in which the words were spoken. As a result, the physicians' words, among other statements, were sufficient to allow the complaint to go forward. *Wooding v. Winthrop University Hospital,* U.S.D.C, E.D. New York, Case No. 16-cv-4477, June 12, 2017.

The courts in both cases were concerned about the supervisors' implicit bias. HR managers may be shaking their heads in disbelief at the courts' analyses. However, the point of both cases is that even apparently neutral words can be perceived, in the right circumstances, to suggest an employer's bias toward an employee.

Avoiding a finding of implicit bias

HR managers should train supervisors and managers to use specific words in their disciplinary reports rather than resorting to stereotypes. One good rule of thumb is, don't generalize. For example, when writing up a habitually tardy employee, don't say, "She is always late." Instead, document the specific days and times the employee was late. Or explain that "Susan's work performance is deficient because she fails to complete her assignments on time and communicate her progress to her supervisor" rather than just saying "her work performance is poor."

Don't characterize an employee's actions or communications with language that might show bias or prejudice. Instead of including personal commentary in your write-ups ("She gave another lame excuse"), document what the employee said even if you find her explanation unbelievable ("The reason she gave for her tardiness was that her alarm clock failed to go off"). Rather than stating, "She started her new assignment with a bad attitude," provide the specific reason you concluded the employee had a bad attitude or note that "after she was given a new assignment, she failed to pay attention to the details of the assignment." And don't use slang ("She escalated the confrontation with her coworkers through her use of derogatory words" rather than "She was really mad at her coworkers and cussed them out").

If, after several attempts at training, a supervisor continues to include generalities or personal opinions in his write-ups, there may be a reason to suspect implicit bias. While overcoming implicit bias is beyond the scope of this article, the first step toward stamping it out is to recognize it in yourself and others. It's especially important for HR managers to understand implicit bias and be aware of it in your workplace.

Takeaway

Implicit bias is, by its very nature, an unconsciously held belief. As our world becomes more multicultural, implicit bias has gained academic attention and is beginning to grab the attention of the courts. To avoid allegations of implicit bias that could result in litigation, it's important to bring awareness of the concept to your supervisors and managers and train decision makers on how to write factual, fair, and neutral disciplinary reports.

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EEOC ENFORCEMENT

Best practices for employers under EEOC's new SEP

The Equal Employment Opportunity Commission (EEOC) recently released its Strategic Enforcement Plan (SEP) for 2017 to 2021. The new plan replaces an earlier version issued in 2012, but it isn't a radical departure from the agency's previous agenda. Employers hoping for a more employer-friendly EEOC under the new administration may be disappointed by the 2017 SEP.

The plan makes clear that the agency will continue to aggressively investigate and litigate issues it sees as having the greatest impact on the development of the law or on promoting compliance across a large organization or industry. The EEOC expresses its intent to "focus on strategic impact" to be effective as a "national law enforcement agency," despite its increasingly limited funding and staffing.

The new plan focuses on developing substantive areas, including the "gig economy," "backlash" discrimination against Muslim and Middle Eastern employees, and discriminatory hiring and recruitment policies. It also makes clear that hot-button topics from recent years are likely here to stay. Employers are strongly urged to develop practices now to help them avoid EEOC charges and withstand the agency's scrutiny.

EEOC takes on 'gig economy'

Today, employees are more likely than ever before to be temporary, part-time, leased, employed through a staffing agency, or employed by more than one employer. These days, more workers fall in that ill-defined gray zone between true independent contractors and employees. The "gig economy" is defined by the prevalence of short-term contracts and freelance work. In its SEP, the EEOC "adds a new priority to address issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on[-]demand economy."

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Employers that use those types of employment arrangements must remember that "gig" workers can also allege discrimination or harassment. Don't cut corners on training on your antidiscrimination and antiharassment policies. Temporary employees may be viewed as easy targets for harassment, discriminatory treatment, or bullying. As the recent events at Uber have made clear, companies that grow quickly need to make sure they "grow up" by timely implementing clear and consistent policies and encouraging a culture of professionalism.

Discrimination against Muslim, Middle Eastern employees

Another focus area for the EEOC is "addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asian descent, as well as persons perceived to be members of these groups." While it's somewhat unusual for the EEOC to announce that it will specifically focus on particular religious groups or nationalities, the plan explains that strategic protection is necessary because of "backlash against [those groups] from tragic events in the United States and abroad." It's unclear how enforcement of the issue will proceed under the new presidential administration.

Remember that you must provide employees reasonable accommodations for religious observances, including breaks for prayers. Appearance and dress code standards that arbitrarily ban or restrict beards, turbans, or head coverings likely will draw increased scrutiny from the EEOC. Backlash discrimination should be specifically covered in antidiscrimination training.

Barriers in recruitment and hiring

The EEOC restated its commitment to eliminating barriers in recruitment and hiring and added new details to its goal. Specifically, the EEOC will take aim at the lack of diversity in certain industries, including technology and police work, and the increasing use and impact of data-driven employment screening tools. Employers in targeted industries should continue to focus on recruiting a diverse workforce.

Employers that use online applications, algorithms, or similar data tools to screen applicants must be particularly careful. Those tools can provide a first look at applicants and assist hiring managers. However, you must know what parameters are used in the screenings and make sure you consider how the screenings could present barriers (even unintentionally) for groups such as older workers, minorities, women, and people with disabilities. For example, a screening tool that automatically eliminates applicants with a long gap in employment may unintentionally have a disparate impact on women who left the workforce to care for a young family. Date-of-birth inquiries could discriminate against

older workers. Online application processes that aren't accessible to people with disabilities present an obvious problem.

Screening applicants by checking their social media profiles also can be risky. Social media profiles may reveal more than a potential employer should know about employees' religion or other protected characteristics.

Pregnancy discrimination, unequal pay, LGBT protections

The EEOC will continue to prioritize substantive issues such as rooting out pregnancy discrimination, preventing unequal pay, and protecting LGBT individuals from discrimination.

The EEOC has focused on accommodating employees' pregnancy-related limitations. Employers are reminded that pregnant employees should be treated the same as nonpregnant employees with a similar ability or inability to work. Remember, if a pregnant employee hasn't requested leave or a new role, you can't force her to take leave or change roles because you believe she shouldn't perform a certain job. At the same time, a pregnant employee who requests an accommodation should be treated the same as other employees who request accommodations.

The EEOC will continue to focus on equal pay. However, the SEP makes clear the agency won't focus on equal pay strictly as a gender issue: "The Commission will also focus on compensation systems and practices that discriminate based on any protected basis." The guidance reminds employers that pay differentials should be based on seniority, merit, or quantity or quality of production, not on protected characteristics.

Finally, as you likely know by now, the EEOC interprets the prohibition against sex discrimination under Title VII of the Civil Rights Act of 1964 as forbidding employment discrimination based on gender identity and sexual orientation. The agency has enjoyed great success in enforcing its position. It has obtained more than $6 million in monetary relief for LGBT workers, required policy changes by employers, and convinced a growing number of courts to endorse its interpretation of Title VII.

The number of EEOC charges based on sexual orientation or gender identity increased by 34 percent in 2015. The agency is unlikely to slow down in its strategic enforcement in this area, and you would do well to include sexual orientation and gender identity as protected characteristics in your equal employment and antiharassment policies. The Human Rights Campaign has reported that the vast majority—89 percent—of Fortune 500 companies already prohibit discrimination based on sexual orientation, and two-thirds prohibit discrimination based on gender identity.

Bottom line

The EEOC expects employers to follow not only the laws it enforces but also its interpretations of those laws. Take the time to analyze your work environment regarding the issues in the agency's SEP. Consider revising your policies and practices to more closely align them with the EEOC's strategic positions. Your efforts will prove to be invaluable if your company faces an EEOC charge or investigation. ✤

PENSIONS

Supreme Court delivers sermon on ERISA 'church plan' exemption

The Employee Retirement Income Security Act of 1974 (ERISA) generally requires private employers offering pension plans to adhere to a lengthy list of rules designed to ensure plan solvency and protect plan participants. Church plans, however, are exempt from those requirements. But what exactly constitutes a "church plan"? The U.S. Supreme Court has just ruled—unanimously—on this issue.

Church-affiliated hospital pension plans

The case involved three church-affiliated nonprofits that run hospitals and other healthcare facilities. The hospitals offer defined-benefit pension plans to their employees. The plans were established by the hospitals themselves—not by a church—and are managed by internal employee benefits committees.

The three hospitals involved in the case were Advocate Health Care Network, associated with the Evangelical Lutheran Church in America and the United Church of Christ; Saint Peter's Health Care System, which is both owned and controlled by a Roman Catholic diocese; and Dignity Health, which maintains ties to the Catholic religious orders that initially sponsored some of its facilities.

A group of current and former employees filed class actions alleging that the hospitals' pension plans didn't fall within ERISA's church-plan exemption because they weren't established by a church. The district courts agreed with the employees, ruling that a plan must be established by a church to qualify for the exemption, and the appeals courts affirmed the district court's ruling.

The U.S. Supreme Court, however, ruled 8-0 (Justice Neil Gorsuch didn't participate in the case) that a plan maintained by a principal-purpose organization qualifies as a "church plan," regardless of who established it.

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9-6 Paid Sick and Family Leave Hotbed: Multi-State Updates for Mastering Emerging Compliance Obligations ✤

Majority opinion

Justice Elena Kagan wrote the majority opinion. The definition of "church plan" came in two distinct phases, noted the Court. Initially, ERISA defined it as a "plan established and maintained . . . for its employees . . . by a church or by a convention or association of churches."

But in 1980, Congress amended the statute to expand the definition. Now, for purposes of the church-plan definition, an "employee of a church" includes an employee of a church-affiliated organization, such as the hospitals in this case.

Congress in 1980 also added a provision stating that the definition of "church plan" includes a plan established *or maintained* by an entity whose principal purpose is to fund or manage a benefit plan for the employees of churches or church affiliates.

The intent of Congress, the Supreme Court concluded, was to encompass a different type of plan in the definition—one that "should receive the same treatment (i.e., an exemption) as the type described in the old definition." And these "newly favored plans" are described by the Court as those maintained by "principal-purpose organizations," regardless of their origins.

In short, the Court stated that "because Congress deemed the category of plans 'established and maintained by a church' to 'include' plans 'maintained by' principal-purpose organizations, those plans—and *all* those plans—are exempt from ERISA's requirements." *Advocate Health Care Network v. Stapleton,* U.S. Supreme Court 581 U.S. ___ (June 5, 2017).

Sotomayor: Right decision, but a troubling one

Justice Sonia Sotomayor, in a concurring opinion, noted that the majority opinion meant that "scores of employees—who work for organizations that look and operate much like secular businesses—potentially might be denied ERISA's protections. In fact, it was the failure of unregulated 'church plans' that spurred cases such as these."

While Sotomayor joined the majority opinion because she was "persuaded that it correctly interprets the relevant statutory text," she was nonetheless "troubled by the outcome of these cases." She noted that while Congress acted in 1980 to exempt plans established by orders of Catholic Sisters, "it is not at all clear that Congress would take the same action today with respect to some of the largest health-care providers in the country . . . organizations [that] bear little resemblance to those Congress considered when enacting the 1980 amendment." ✤

NEW MEXICO EMPLOYMENT LAW LETTER (ISSN 1079-6363) is published monthly for $447 per year by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094. Copyright 2017 BLR®. Photocopying or reproducing in any form in whole or in part is a violation of federal copyright law and is strictly prohibited without the publisher's consent.

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