FEDERAL Employment Law Insider

An update on new federal law and regulation affecting your workplace

David S. Fortney and H. Juanita (Nita) Beecher, Editors
Fortney & Scott, LLC

Vol. 15, No. 11
July 2018

CIVIL RIGHTS

Supreme Court rules in favor of baker in LGBT rights case

by David Fortney and Sara Nasseri
Fortney & Scott, LLC

In a 7-2 decision issued on June 4, the U.S. Supreme Court ruled in favor of a baker in Colorado who refused to bake a wedding cake for a same-sex couple based on his Christian beliefs. In *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Commission,* the majority concluded that the baker didn't get a fair hearing on his complaint in the state proceedings. The Court specifically ruled that the Colorado Civil Rights Commission (CCRC) exhibited improper bias toward the baker.

Although it discussed the tension between the competing legal rights in the case—EEO protections for gay people versus an individual's sincerely held religious beliefs—the Supreme Court didn't rule on the ultimate question of how such conflicts should be resolved. The ruling fails to set out any new criteria under which an individual's sincerely held religious views may create an exemption to the general antidiscrimination laws. However, the Court reaffirmed that the First Amendment's protection of religious rights also protects an individual during the proceedings resolving a discrimination claim.

The highly anticipated ruling in *Masterpiece Cakeshop* comes after years of litigation. In 2012, David Mullins and Charlie Craig met with bakery owner Jack Phillips to order a custom wedding cake for their reception. Phillips refused to bake them a cake and indicated that the bakery wouldn't sell wedding cakes to same-sex couples. Mullins and Craig subsequently filed a complaint of sexual orientation discrimination with the CCRC, which enforces the Colorado Anti-Discrimination Act (CADA). The commission determined that the bakery had violated the CADA, and Phillips appealed.

In 2015, the Colorado Court of Appeals affirmed the CCRC's ruling, rejecting Phillips' argument that he had a constitutional right to refuse to bake the cake based on his First Amendment rights. The U.S. Supreme Court granted *certiorari* (i.e., agreed to hear the case) on June 26, 2017.

Justice Anthony Kennedy, writing for the majority, emphasized that Phillips was entitled to have his arguments heard by a neutral decision maker who would give full and fair consideration to his religious objections. The Court didn't discount the impact and significance of the CADA but instead focused on the importance of providing a fair and neutral forum for resolving the claims. Justice Kennedy noted that while it is undeniable that the CADA "can protect gay persons in acquiring products and services on the same terms and conditions that are offered to other members of the public, the law must be applied in a manner that is neutral toward religion." The Court concluded that the CCRC's treatment of Phillips violated the state's duty under the First Amendment not to base laws or regulations on hostility toward a religion or religious viewpoints.

In the dissent, Justice Ruth Bader Ginsburg emphasized that the circumstances of this case do not evince hostility toward religion of the kind the Court has previously deemed a free-exercise violation. The dissent also

What's Inside

On HRHero.com

Federal Employment Law Insider subscribers can find additional resources at www.HRHero.com/feli:

- online version of current issue
- comprehensive index
- search engine for all past issues

Fortney & Scott, LLC, is a member of the Employers Counsel Network

EMPLOYERS COUNSEL NETWORK
EMPLOYERSCOUNSEL.NET

argued that any comments by the commissioners signaling any sort of hostility could not justify reversing the judgment of the lower court.

Although it's a victory for the baker, the Court's ruling is fact-intensive and based on narrow and unusual circumstances. Justice Kennedy recognized the narrowness of the ruling when he stated, "The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue respect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." Yet, on June 25, the Supreme Court took the ruling in *Masterpiece Cakeshop* and applied it to a pending appeal on somewhat similar facts, involving a florist in Washington who had appealed a state ruling that she violated state law by refusing to provide wedding flowers for a same-sex couple. The Court vacated the lower court ruling and sent the case back to the Washington Supreme Court for further consideration "in light of" *Masterpiece Cakeshop*, proving that the ruling there may not be so narrow and unique after all.

David Fortney is an attorney with Fortney & Scott, LLC, in its Washington, D.C., office. You can reach him at dfortney@fortneyscott.com. Sara Nasseri is an associate with Fortney & Scott, LLC. You can reach her snasseri@fortneyscott.com. ✤

DISCRIMINATION

EEOC wins two large disability discrimination settlements

by H. Juanita M. Beecher
Fortney & Scott, LLC

The Equal Employment Opportunity Commission (EEOC) charged a Chicago-based company with violating the Americans with Disabilities Act (ADA) when it disqualified job applicants based on the results of a nerve conduction test for carpal tunnel syndrome performed by a third-party contractor rather than conducting an individualized assessment of each applicant's ability to do the job safely. The EEOC filed its lawsuit in 2014 in the U.S. District Court for the Southern District of Illinois on behalf of Montrell Ingram and other applicants who sought work as "chippers" at Amsted Rail's facility in Granite City, Illinois. Chippers use a hammer or grinder to remove metal protrusions from steel casings.

In November 2017, the court ruled that Amsted Rail's use of the nerve conduction test was unlawful, finding the test had little or no value in predicting the likelihood of future injury. *EEOC v. Amsted Rail Co.*, 280 F. Supp. 3d 1141 (S.D. Ill., 2017). After the court ruled in the EEOC's favor, the company agreed to pay $4.4 million to settle the disability discrimination class action filed by the EEOC.

The consent decree entered by Senior Judge J. Phil Gilbert on June 11, 2018, requires Amsted Rail to provide lost wages and compensatory damages to 40 applicants who were unlawfully denied employment opportunities because of the company's unlawful hiring practices. In addition, the company will extend job offers to some of the applicants and adopt policies intended to prevent similar discriminatory practices in the future.

In the second case, *EEOC v. Nevada Restaurant Services,* the EEOC alleged that an employer maintained a well-established companywide practice of requiring employees with disabilities or medical conditions to be 100 percent healed before they returned to work. Such policies violate the ADA's mandate that employers engage in an interactive process with employees in an attempt to provide reasonable accommodations for their disabilities. The EEOC also charged that Nevada Restaurant Services fired or forced employees to quit because it regarded them as disabled, they had a record of a disability, or they were associated with someone who is disabled.

The consent decree settling the lawsuit provides for $3.5 million in monetary relief for the employees who were subjected to discrimination. In addition, Nevada Restaurant Services will retain a consultant with ADA experience to review and revise its disability policies as appropriate. The company will also implement effective ADA training for HR and supervisory personnel and staff. Additionally, it will develop a centralized tracking system for employee requests for reasonable accommodations. The company must submit regular reports to the EEOC verifying its compliance with the decree during its 3½-year term.

H. Juanita M. Beecher is an attorney with Fortney & Scott, LLC. Contact her at nbeecher@fortneyscott.com. ✤

WAGE AND HOUR LAW

Supreme Court declines to review case involving rest break pay

by Sara Nasseri
Fortney & Scott, LLC

On June 11, 2018, the U.S. Supreme Court issued an order denying review of the U.S. 3rd Circuit Court of Appeals' ruling that workers must be paid for breaks shorter than 20 minutes under the Fair Labor Standards Act (FLSA). The U.S. Department of Labor (DOL) sued publishing company American Future Systems (AFS), which does business as Progressive Business Publications, challenging its policy on midday work breaks. The 3rd Circuit issued a partial judgment in favor of the DOL, underscoring the agency's long-standing position that workers must be paid for short breaks throughout the day. The company subsequently appealed, arguing, among other things, that the workers' breaks didn't constitute work time under the FLSA. The case could have established a nationwide standard and provided some guidance on how employers should handle short breaks.

Sara Nasseri is an associate with Fortney & Scott, LLC. You can reach her at snasseri@fortneyscott.com. ✤

FEDERAL CONTRACTOR CORNER

Proposed merger of DOL and DOE will affect OFCCP

by H. Juanita M. Beecher
Fortney & Scott, LLC

On June 21, 2018, the Trump administration proposed that the U.S. Department of Labor (DOL) be merged with the U.S. Department of Education (DOE). The proposal would move the Office of Federal Contract Compliance Programs (OFCCP), the other DOL enforcement agencies, and the DOE's Office of Civil Rights into the Enforcement subagency of a new U.S. Department of Education and the Workforce. Congress is not expected to take up the proposal before the November elections. (For more details on the administration's proposal, see "Trump administration releases proposal to merge DOL and DOE" on pg. 7 of this issue.)

House subcommittee approves lower FY 2019 budget for OFCCP

On June 15, the House Subcommittee on Appropriations approved the DOL's budget for fiscal year (FY) 2019, which included a little over $99 million for the OFCCP. That is more than the $91 million proposed by the Trump administration, but less than the $103 million the agency received in FY 2018.

Cordis to pay $340K to settle discrimination allegations

Cordis Corporation, a medical device development and manufacturing company that's part of the Cardinal Health network, has agreed to pay $340,383.39 to resolve allegations of compensation discrimination at its facility in Miami Lakes, Florida. A compliance review by the OFCCP found that prior to being acquired by Cardinal Health, Cordis discriminated against 64 women employed in professional/management and research and development jobs as well as those in administrative assistant/coordinator and production/operator jobs by paying them less than similarly situated male employees.

Cordis denies the claims but has agreed to resolve the issue through a conciliation agreement. Under the agreement, Cordis will revise its compensation policies and procedures, provide training to compensation decision makers, conduct regular self-audits of its compensation policies, and ensure that all records pertaining to compensation are properly maintained.

Fastenal settles hiring discrimination allegations for $250K

Fastenal Company resells industrial, safety, and construction supplies and offers inventory management, manufacturing, and tool repair services. Its facility in Denton, Texas, specifically handles inventory and product distribution in a warehouse setting. A recent compliance review by the OFCCP found that the federal contractor discriminated against 291 qualified female applicants, 258 qualified black applicants, and 170 qualified Hispanic applicants when it failed to hire them for part-time laborer positions. Fastenal denies the claims, but it has agreed to resolve the issue through a conciliation agreement. Under the agreement, the company will pay $250,000 to resolve the allegations of hiring discrimination at its Denton location, extend 55 job offers to affected applicants, and maintain all records associated with its hiring process.

UMD to pay $150K to settle allegations of hiring discrimination

The University of Maryland (UMD) has agreed to pay $150,000 to settle allegations of hiring discrimination brought by the OFCCP after a compliance review. The OFCCP alleged that the oral board interview UMD used for the university police officer position (UPO-I) resulted in a statistically significant disparity in the rates of black applicants advanced to the next stage in the selection process. UMD did not produce an acceptable validity study to support the oral board interview.

The university entered into a conciliation agreement with the OFCCP without admitting liability. It will pay $150,000 to the affected class members and hire three black applicants for the UPO-I position. In addition, UMD will examine, monitor, and modify its selection procedures as necessary and ensure that its selection criteria are applied uniformly for hiring decisions for the UPO-I position. The university has agreed to stop using the oral board interview until it is validated and to train all individuals involved in recruiting, selection, or tracking applicants in the revised hiring process for UPO-I.

UMD has also agreed to monitor selection rates at each step of the selection process. Finally, the university will submit reports to the OFCCP on its management training efforts as well as its compliance with the conciliation agreement.

H. Juanita M. Beecher is an attorney with Fortney & Scott, LLC. Contact her at nbeecher@fortneyscott.com. ✤

INSIDE THE NLRB

NLRB—again, a hotbed of controversy

by Burton J. Fishman
Fortney & Scott, LLC

Perhaps because it is one of the few fully staffed agencies in the federal government, perhaps because its leadership has been totally reconstituted, or perhaps because it actually deals with issues that affect the lives of employers and employees, the National Labor Relations Board (NLRB) remains a source of continuing conflict and controversy. Nearly all the disputes the Board is currently facing relate to the major issue of joint-employer status, but the politicized agency must also address "weaponized" ethics accusations as well as questions about the validity of "microunits."

Ethics issue apparently settled

At the root of many of the disputes is the NLRB's decision in *Hy-Brand,* which returned the Board's standard for determining who is a joint employer to the standard that was in place before the Obama Board's broad ruling in *Browning-Ferris*. The *Hy-Brand* decision prompted a highly politicized investigation by the NLRB's inspector general (IG) into Republican Board member William Emanuel's participation in the ruling because his former law firm represented one of the parties in the case. The IG found that Emanuel should have recused himself even though he personally had no role in representing the client.

The IG's finding raised the specter of "issue recusal," a controversial, rarely applied doctrine that seeks to identify and assess whether an NLRB member has or appears to have a known position on certain issues, rather than whether the member actively participated in particular matters or cases. Issue preclusion, if broadly applied, could affect every ruling by every NLRB member in every case because each member has a well-known partisan history as either a labor or management advocate.

In any event, in light of the IG's determination, the NLRB—without Emanuel's participation—voted to withdraw and reverse its decision in *Hy-Brand.* Suffice it to say, that decision sent ripples through the legal and judicial community. The appeals court hearing *Browning-Ferris* refused to act on the pending appeal until the Board settled its position on the matter. The Board recently decided to affirm its original ruling in *Hy-Brand* and asked the appeals court to complete its review of *Browning-Ferris.* Moreover, clarity may be emerging on the ethics front in another case.

Emanuel's participation was again challenged in the *Boeing* election case because his firm had represented Boeing in the past, although not in the election case. An NLRB ethics official cleared him to hear the case, which will likely permit the full Board to vote on the *next* joint-employer case, if there is one. Further, Chairman John Ring has announced that a review of the whole recusal issue will be undertaken, possibly bringing this volatile subject to a close.

The full Republican-controlled NLRB will now be able to rule on Boeing's petition for review of the recent surprising union victory in an election at its South Carolina plant. Boeing claims the NLRB regional director's decision to permit a vote in a microunit was contrary to the Board's reversal of the precedent-making decision in *Specialty Healthcare* during the Obama era. A reversal of the election is clearly possible, if only to establish the NLRB's decisional authority. Not incidentally, the regional director's action, apparently in direct contradiction of a valid Board ruling, will strengthen the efforts of new NLRB General Counsel Peter Robb to rein in the authority of regional directors.

Back to joint-employer future

Even before the recent ethics decision, Chairman Ring, himself a target of recusal demands, announced that the joint-employer issue would be removed from the impermanent world of NLRB decision making and settled through formal rulemaking, with regulations being drafted by the new Board membership. Ring recently stated that the proposed joint-employer rule would be issued by the end of the summer—a record-breaking pace if the Board is able to achieve that.

The chairman's decision to settle the issue through rulemaking has exposed him to criticism from Democratic politicians and union advocates. Even the two Democrats on the NLRB have objected to a practice that was supported by the Obama Board, a sign that normalcy has returned to the NLRB. The Democrats' opposition to the move likely isn't prompted merely by concerns about its effect on labor law and union organizing. The NLRB's position on the issue will have an influence on pending decisions by federal courts involving joint-employer status under the Fair Labor Standards Act.

Burton J. Fishman is an attorney with Fortney & Scott, LLC, in Washington, D.C. You can reach him at bfishman@fortneyscott.com. ✤

AGE DISCRIMINATION

Targeted use of Facebook ads may violate federal age discrimination law

by H. Juanita M. Beecher
Fortney & Scott, LLC

In December 2017, the *New York Times* published an article in which it reported on prominent U.S. companies' use of Facebook to place recruiting ads in feeds targeted at users in certain age groups. In an investigation with nonprofit news organization ProPublica, the *Times* found that dozens of the country's leading employers had placed the limited recruiting ads. The practice, known as microtargeting, is a marketing strategy created by tech companies that uses demographics and consumer data to influence the thoughts and actions of targeted individuals.

In response to questions about whether such practices violate the Age Discrimination in Employment Act (ADEA), Facebook argued that the Communications Decency Act of 1996 (CDA) makes it immune from liability for discriminatory hiring ads. After the *Times* article ran in December, a number of employers said they had changed their recruiting practices to eliminate any hiring ads that discriminate based on age.

Nevertheless, on December 20, 2017, the Communications Workers of America filed a class action age discrimination lawsuit in San Francisco against employers it accused of placing the age-targeted recruiting ads on Facebook. The union sued T-Mobile, Amazon, and Cox Communications, among others, on behalf of its members and Facebook users older than 40 who may have been denied the opportunity to learn about job openings as a result of Facebook's use of ad placement tools, which facilitated the discrimination by employers and employment agencies.

On May 29, 2018, the union expanded its complaint in *Communications Workers of America v. T-Mobile US, Inc.*, adding claims under California's fair employment and unfair competition statutes. The union also added IKEA, Enterprise Rent-A-Car, and University of Maryland Medical Center to the list of companies that used Facebook's tools to filter targeting candidates by age. The amended complaint claims that Facebook also used its age-filtering tools when it sought new employees.

In the amended complaint, the union states that Facebook encourages advertisers to exclude some jobseekers by providing both age filters and regularly updated data on the effectiveness of ads among different age groups. The union argues that "in addition to encouraging and allowing employers and employment agencies to restrict which Facebook users will receive job ads based on their age," the algorithm factors in age to determine which users among the population chosen by the advertiser will see the job ad.

Whether Facebook will be liable for age discrimination because it allows employers to target recruitment ads will depend on whether its actions are covered by the immunity provisions of the CDA. Although courts have interpreted those protections very broadly for Internet platforms that act as "passive conduits," the 9th Circuit has held that the CDA doesn't protect a company that "contributes materially to the alleged illegality of the conduct."

H. Juanita M. Beecher is an attorney with Fortney & Scott, LLC, in its Washington, D.C., office. You can reach her at nbeecher@fortneyscott.com. ✤

SEXUAL HARASSMENT

EEOC sues 8 employers in the wake of workplace harassment task force meeting

by Sean D. Lee
Fortney & Scott, LLC

In mid-June, the Equal Employment Opportunity Commission (EEOC)—the agency responsible for enforcing federal laws prohibiting discrimination and harassment—filed sexual harassment lawsuits against eight employers in three days.

In a press release issued on June 14, the EEOC announced it had filed suits against seven companies across the country in a wide range of industries: Master Marine Inc., Real Time Staffing Services Inc., C2 Corporation, New Prime Trucking Inc., Sierra Creative Systems, Tapioca Express, and Total Maintenance Solutions. Most of the suits contain similar allegations by female workers who claim their male managers subjected them to sexual comments, touching, and other unwelcome conduct. The lawsuit against Master Marine was filed on behalf of a male welder who allegedly endured harassment by a male supervisor.

The EEOC filed an eighth lawsuit on June 15 against Georgina's Taqueria in which it alleged that female employees at the Traverse City, Michigan, restaurant were subjected to repeated sexual harassment and one of them was retaliated against for opposing the harassment. EEOC Acting Chair Victoria A. Lipnic stated, "There are many consequences that flow from harassment not being addressed in our nation's workplaces. These suits filed by the EEOC around the country are a reminder that a federal enforcement action by the EEOC is potentially one of those consequences."

Notably, the lawsuits were filed in the wake of a meeting that reconvened the EEOC's Select Task Force

on the Study of Harassment in the Workplace. The task force was established in 2015 to examine workplace harassment and its causes, consequences, and potential solutions, with its work culminating in a 2016 report. Following the report, the EEOC developed respectful workplace training programs for supervisors and employees. The agency has conducted more than 200 training sessions since October 2017.

On June 11, the EEOC reconvened the task force for a meeting titled "Transforming #MeToo into Harassment-Free Workplaces." At the meeting, a group of legal scholars and practitioners weighed in on a range of issues arising from the high-profile sexual harassment allegations that led to the #MeToo and #TimesUp movements. Panelists included law professors, plaintiffs' and management-side employment attorneys, nonprofit workers, and labor advocates. Notably, Lipnic stated that although women are increasingly speaking out about harassment, the EEOC hasn't seen an uptick in harassment charges since the rise of #MeToo, although it remains to be seen whether that will change.

In the fall of 2017, the EEOC updated its sexual harassment guidelines for the first time in more than 20 years. The new guidelines have yet to receive approval from the Office of Management and Budget (OMB). It's widely believed that the OMB won't approve the guidelines until the Senate confirms Janet Dhillon and Daniel Gade. President Donald Trump's two picks for the five-member EEOC have been awaiting confirmation since October 2017.

Sean D. Lee is an associate with Fortney & Scott, LLC. He can be reached at slee@fortneyscott.com. ✤

LABOR LAW

NLRB announces new guidelines for workplace rules

by Burton J. Fishman
Fortney & Scott, LLC

In what appears to be a coordinated effort, National Labor Relations Board (NLRB) Chairman John Ring and General Counsel (GC) Peter Robb have made it clear that the confounding and ambiguous standards the Obama Board established for workplace conduct rules are a thing of the past. On June 6, the GC issued a 20-page memorandum providing guidance to NLRB regions on handbook rules in light of the Board's 2017 decision in The Boeing Company.

Days later, Ring announced that the NLRB is going to find a new "balance" between the rights of employees and those of employers. One way the Board will seek that balance is by permitting employers to once again require employees to meet traditional standards of workplace conduct without running afoul of the National Labor Relations Act's (NLRA) protections for "concerted activity."

New standard advocates 'reasonable' interpretation

In *Boeing,* the NLRB overturned the *Lutheran Heritage* test, under which the Obama Board invalidated facially neutral workplace rules if they could be interpreted to limit an employee's right to engage in protected concerted activity. *Boeing* shifted the burden of proof, prohibiting only rules that, when reasonably interpreted, would actually interfere with employees' attempt to engage in protected concerted activity. Under *Boeing,* the NLRB will no longer interpret every ambiguity in workplace conduct rules against employers. Instead, the Board will evaluate the nature and extent of the potential impact on employees' NLRA rights and the employer's legitimate justifications associated with the rule. Thus, the new test weighs the impact of a facially neutral rule on employees' rights against the employer's interest in, for example, safety, productivity, or discipline.

The GC's memorandum provides enforcement guidance on the *Boeing* categories. Those categories are enumerated as follows:

- **Category 1:** Rules the NLRB presumptively designates as lawful to maintain, either because (1) when reasonably interpreted, the rule does not prohibit or interfere with employees' exercise of NLRA rights, or (2) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Thus, a rule stating "Insubordination toward a manager or lack of cooperation with fellow employees or guests is prohibited" and similar civility rules are once again lawful.
- **Category 2:** Rules that warrant individualized scrutiny of whether they would prohibit or interfere with employees' NLRA rights and, if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications. Thus, a confidentiality rule broadly encompassing "employer business" or "employee information" may require further scrutiny.
- **Category 3:** Rules the Board will designate as presumptively unlawful to maintain because they would prohibit or limit NLRA-protected conduct and the adverse impact on employees' rights is not outweighed by justifications associated with the rule (e.g., confidentiality rules specifically aimed at discussions about wages, benefits, or working conditions, or rules against joining outside organizations or voting on matters concerning the employer).

The lengthy memorandum provides numerous specific and useful examples and explanations of each category to further illustrate the GC's position. It would behoove interested parties to consult the memo.

Takeaway

The GC's memorandum merely states how the NLRB will enforce the law. Future decisions from the Board will convert the GC's interpretations into binding case law. The GC is guiding the NLRB toward a more balanced approach. It seems certain that the small tidal wave of unfair labor practice charges citing workplace conduct rules will diminish significantly. In sum, employers can once again write workplace conduct rules in plain English, and common sense has returned to the NLRB's interpretation of this area of the law.

Burton J. Fishman is an attorney with Fortney & Scott, LLC, in Washington, D.C. You can reach him at bfishman@fortneyscott.com. ✤

INSIDE THE DOL

The year ahead for WHD: overtime exemption, tip pooling, youth employment

by Sean D. Lee
Fortney & Scott, LLC

The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) has an ambitious year planned. According to the DOL's regulatory agenda, the WHD is working to issue new rules on overtime pay, tip pooling, and youth employment and apprenticeship opportunities.

Of particular interest to employers, the WHD anticipates releasing its proposed update to the overtime rule in January 2019. The DOL's last attempt to update the overtime rule, in the summer of 2017, was shot down by a Texas federal court. The Obama-era rule would have increased the salary threshold for the so-called white-collar exemptions to overtime under the Fair Labor Standards Act (FLSA)—that is, the executive, administrative, professional, and computer employee exemptions—from $23,660 a year to $47,476. The WHD, vowing to recraft the rule under the Trump administration, issued a Request for Information in July 2017 seeking input from employers and employees.

The WHD also intends to release a rule by September 2018 to "clarify, update, and define regular rate requirements." Under the FLSA, an employer must use an employee's "regular rate" of pay to determine the proper value of any overtime compensation. An employee's regular rate includes more than just his hourly rate of pay—it must also account for the value of bonuses, commissions, and other forms of compensation. In its proposed rule, the WHD intends to clarify Section 207(e)(2) of the FLSA, which provides guidance on the types of payments that are excluded from the regular rate.

The WHD also aims to issue a rule by August 2018 that will provide welcome clarity on the controversial topic of tip pooling. Specifically, the rule will formally withdraw a proposed 2017 rule that would have allowed employers that don't count tips toward employees' minimum wage to require tipped employees to share their tips with nontipped colleagues. The 2017 rule also would have allowed employers to keep employees' tips for themselves. In response, Congress amended the FLSA as part of its consolidated budget bill passed in March 2018 to reject the proposal, clarifying that an employer "may not keep tips received by its employees for any purposes." The WHD's new tip rule will align the agency's regulations with the congressional amendment.

Finally, the WHD seeks to release a rule "expanding apprenticeship and employment opportunities for 16[-] and 17-year[-]olds under the FLSA" by October 2018. Although the FLSA prohibits 16- and 17-year-olds from performing certain hazardous jobs outside of agriculture work, it provides limited exemptions for apprentices and student learners who are working under certain conditions. The WHD states that the proposed rule will address whether certain work now designated as hazardous should be "updated to reflect the current economic and work environments and to allow for safe and meaningful apprenticeship opportunities and student-learner programs."

Sean D. Lee is an associate with Fortney & Scott, LLC. He can be reached at slee@fortneyscott.com. ✤

ADMINISTRATIVE AGENCIES

Trump administration releases proposal to merge DOL and DOE

by H. Juanita M. Beecher
Fortney & Scott, LLC

On June 21, 2018, the Trump administration announced a proposal to merge the U.S. Department of Labor (DOL) and the U.S. Department of Education (DOE) as part of its plan to "eliminate federal waste and ensure bureaucratic efficiency." The proposed new Department of Education and the Workforce would have four subagencies: the American Workforce and Higher Education Administration (AWHEA), along with agencies overseeing K-12 education; enforcement; and research, evaluation, and administration.

The K-12 agency would obviously focus on K-12 education. The AWHEA would include the programs that cover higher education, employment of disabled individuals, adult workforce development, youth workforce development, and veterans' employment. The enforcement agency would incorporate all seven of the current DOL's worker protection agencies, including the Wage

and Hour Division, the Occupational Safety and Health Administration, and the Office of Federal Contract Compliance Programs (OFCCP), as well as the DOL's International Labor Affairs Bureau and the DOE's Office of Civil Rights. Finally, the research, evaluation, and administration agency would comprise centralized offices focused on policy development, research, and evaluation as well as management-focused offices dealing with IT, procurement, financial management, and budgeting.

The proposal requires congressional approval. So far, the initial reaction on Capitol Hill appears to be similar to last year's proposal to merge the OFCCP into the Equal Employment Opportunity Commission, an idea that was described as "dead on arrival." Undoubtedly, there will be no action on the proposal before the midterm elections.

H. Juanita M. Beecher is an attorney with Fortney & Scott, LLC, in its Washington, D.C., office. You can reach her at nbeecher@fortneyscott.com. ✤

EMPLOYMENT LAW

Enforcing summer dress codes: Work is no day at the beach

by Elizabeth B. Bradley
Fortney & Scott, LLC

June 21 marked the first official day of summer, and temperatures are certainly on the rise. Often, one of the first signs of summer is the sound of flip-flops slapping down the office hallway. To many managers, the office begins to look more like a backyard barbeque than a professional work environment.

Policy review

Before going on a "Stop the Flop" campaign, you should review your dress code policy and enforcement practices to ensure they don't result in unintended discrimination. If your company hasn't been actively enforcing the dress code, you will likely be met with backlash when you start issuing dress code violations. Employees will undoubtedly complain that their coworkers weren't previously issued similar warnings. You may also hear complaints about inequity in the different policy restrictions for women and men.

Your policy review should address the following areas, at a minimum:

- **Include clear expectations.** Start your policy with a clear statement that employees are expected to present themselves in an appropriate professional manner when they're conducting business on behalf of the company.
- **Remove gender-based restrictions.** Restrictions should be gender-neutral. If a tank top is inappropriate for a male employee, it's also inappropriate for a female employee.
- **Address gender identity issues.** Carefully review your dress code to ensure it doesn't have an unintended discriminatory impact on employees with diverse gender identities.
- **Remove outdated provisions.** Any provisions that are no longer in effect or will not be enforced should be removed. Having unenforced provisions encourages employees to ignore the policy all together.
- **Include an overview of the penalties for violations.** Clearly state how you will enforce the policy.

Communication and enforcement

Once you've reviewed your dress code and whipped it into shape, make sure employees are aware of the rules. Issue the policy to the entire workforce, and notify employees that it takes effect immediately. Inform employees that there will be a grace period before enforcement begins, but make sure everyone is subject to the same grace period. Once the grace period has expired, enforce the policy uniformly across the workforce. We recommend maintaining a log of violations and remedies to ensure consistent enforcement.

Bottom line

If your workplace is full of employees who would look more at home on the beach than in their cubicles, it's the perfect time to refresh your office dress code. Taking decisive steps toward enforcing a dress code can help you protect your company from claims of discrimination while keeping the beach attire where it belongs—in the sand.

Elizabeth B. Bradley is a shareholder with Fortney & Scott, LLC, in Washington, D.C. You can reach her at ebradley@fortneyscott.com. ✤

FEDERAL EMPLOYMENT LAW INSIDER (ISSN 1085-9152) 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.

Editorial inquiries should be directed to David S. Fortney (dfortney@fortneyscott.com), or H. Juanita Beecher (nbeecher@fortneyscott.com) at Fortney & Scott, LLC, 1750 K Street N.W., Suite 325, Washington, DC 20006.

For questions concerning your subscription, ***www.HRHero.com***, or Electronic Multi-User Accounts, contact your customer service representative at 800-274-6774 or custserv@blr.com.