Insight

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Sexual Orientation And Gender Identity

U.S. Supreme Court Poised For Blockbuster Civil Rights Decision Defining "Sex" Discrimination

Title VII of the 1964 Civil Rights Act prohibits discrimination in the workplace because of specific characteristics, including because of "sex." The U.S. Supreme Court has agreed to decide next year whether Title VII's sex discrimination prohibition necessarily includes a prohibition against sexual orientation and gender identity discrimination. The ruling is bound to make headlines and fuel public interest, protests, and debate, not only because it will be decided during a presidential election year when the appointment of judges and justices will be a major issue, but also because the case involves a controversial area of statutory interpretation.

On the one hand, Title VII does not expressly prohibit discrimination based on sexual orientation or gender identity. And most would agree that the 1964 Congress, President Lyndon B. Johnson, and the public did not have "sexual orientation" and "gender identity" in mind when they drafted, debated, and signed the Civil Rights Act into law. Moreover, over the last 25 years, a bill to amend Title VII—called the Employment Non-Discrimination Act (ENDA)—has been proposed in almost every Congressional session to protect LGBT people from discrimination, but has failed to pass. Conservatives, therefore, argue that Title VII could not possibly be read to include sexual orientation or gender identity as protected characteristics.

On the other hand, one of the main arguments in favor of coverage involves the application of a 1989 U.S. Supreme Court precedent, *Price Waterhouse v. Hopkins*. In that case, Ann Hopkins sued her employer, arguing she was passed over for partnership because she did not fit the partners' sexist ideas of what a female should look and act like. There was evidence that partners had called her un-lady-like and foul-mouthed, and had suggested that she needed a "course in charm school." The employer argued this could not be sex discrimination, because it would treat a man the same way—*i.e.*, if a man failed to fit a certain image, they would pass him over for partner as well. The Supreme Court sided with Hopkins and held that "gender stereotyping" was actionable "sex" discrimination under Title VII.

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In the 30 years since *Price Waterhouse* was decided, employers were well-advised not to stereotype employees based on so-called societal gender norms. For instance, it is generally understood that it would be actionable discrimination to terminate the employment of a man for wearing a pink shirt, if the motive was to act against him for not conforming to gender stereotypes. Based on this logic, the issue arose whether it was illegal gender stereotyping to take adverse action against a person because his or her sexual preference or gender identity did not conform to the stereotypical norm. But courts unanimously refused to extend the *Price Waterhouse* gender stereotyping prohibition to issues of sexual orientation or gender identity, leaving LGBT victims of workplace discrimination no legal recourse.

Then, starting a few years ago, some courts began to reverse course, holding in different contexts that gender stereotyping discrimination necessarily included sexual orientation or gender identity discrimination, creating a split among the U.S. Courts of Appeals and uncertainty in the law.

In April 2019, the U.S. Supreme Court agreed to decide the issue in three cases, and presumably settle this area of the law. First, in *Zarda v. Altitude Express, Inc.*, the Second Circuit, sitting *en banc*, held that sexual orientation discrimination is sex discrimination under Title VII. Second, in *Stephens v. R.G. & G.R. Harris Funeral Homes, Inc.*, a three-judge panel of the Sixth Circuit held that gender identity discrimination constitutes sex discrimination. Both appeals courts relied, in part, on the *Price Waterhouse* gender stereotyping theory to reach their conclusions, with the Sixth Circuit finding "[t]here is no way to disaggregate discrimination on the basis of gender non-conformity, and we see no reason to try." Other lower courts, such as a Pennsylvania U.S. District Court in *EEOC v. Scott Medical*, came to a similar conclusion, explaining that "[t]here is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality." The court further stated that "[f]orcing an employee to fit into a gendered expectation—whether that expectation involves physical traits, clothing, mannerisms or sexual attraction—constitutes sex stereotyping and . . . violates Title VII."

The third case that will be argued to the Supreme Court is *Bostock v. Clayton County*, in which the Eleventh Circuit ruled the opposite way, holding that Title VII does not prohibit discrimination on the basis of sexual orientation. That court relied on a prior Eleventh Circuit precedent rejecting a *Price Waterhouse v. Hopkins* gender stereotyping argument.

And earlier this year, the Fifth Circuit, in *Wittmer v. Phillips 66 Co.*, agreed with the Eleventh Circuit and held that Title VII does not and never has protected against either sexual orientation or gender identity discrimination. Judge James Ho, a Trump appointee, wrote a concurrence providing what many commentators believe to be a blueprint for the five conservative Justices, who form a majority on the U.S. Supreme Court, to reject the recent cases that came out in favor of LGBT protection. Judge Ho argued that *Price Waterhouse* does not make sex stereotyping *per se* unlawful — it would be unlawful only "to the extent it provides evidence of favoritism of one sex over the other."

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The Supreme Court has set oral argument on the trio of cases for October 8, 2019. An opinion deciding this issue could be expected around the Spring of 2020—when the presidential election campaign will have heated up. Although predicting Supreme Court outcomes is always precarious, Chief Justice John Roberts will likely be the deciding vote in a 5-4 decision. I predict that, given his statutory interpretation jurisprudence, he will side with the conservative wing of the Court and hold that Title VII does not protect LGBT individuals. That would send the issue to the electorate to decide whether or not to elect a Congress and President that could amend Title VII.

Ryan D. Bohannon

Sobering Facts About Pre-Employment Drug Screens

Since Michigan legalized the recreational use of marijuana, and the use of marijuana has become highly politicized and heavily debated, more employers are questioning whether they should become more lenient with their drug policies. Employers of course need to make informed decisions based on their business's requirements.

In making these decisions, employers should consider studies reported by the National Institute on Drug Abuse, which found that individuals who use marijuana daily may function at a reduced intellectual level most or all of the time. A study performed on postal workers determined that employees who tested positive for THC metabolites on pre-employment tests were 55% more likely to have industrial accidents, 85% more likely to be injured on the job, and 75% more likely to be absent compared to those who tested negative.

Michigan permits drug testing as a precondition to employment. Recently, the Michigan Court of Appeals rejected a plaintiff's claim that an offer of employment had been unlawfully rescinded after she tested positive for marijuana on a pre-employment screening — notwithstanding that she was a medical marijuana cardholder. In *Eplee v. City of Lansing*, plaintiff Angela Eplee was conditionally offered a job with the Lansing Board of Water and Light — provided she passed a drug test. The Board withdrew its offer after Eplee tested positive for THC even though it knew she had a medical marijuana license, which she had disclosed in the hiring process. Eplee claimed that the Michigan Medical Marihuana Act (MMMA) prohibited the Board—"a business or occupational or professional licensing board or bureau" under the statute—from denying her any right or privilege, including civil penalty or disciplinary action, based on her medical use of marijuana.

Without any discovery, the Board moved for summary dismissal of her lawsuit. Relying on the plain language of the statute, the court found that it did not provide a cause of action in these circumstances. The court explained that the relevant section of the MMMA is "an *immunity* provision; it does not create affirmative rights"; and distinguished the court's 2014 ruling in *Brasaka v. Challenge Mfg.* Co.—which found the denial of unemployment benefits to be a "penalty" in violation of the MMMA—because, unlike unemployment benefits, employment is not a legal right.

California, Colorado, Montana, New Jersey, New Mexico, Oregon, Washington, Florida, and Ohio also have medical marijuana statutes like Michigan's and allow employers to terminate employees or rescind offers of employment for a positive test. However, this is not the case in Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, Oklahoma, Pennsylvania, Rhode Island, and West Virginia, where adverse action against employees with medical marijuana licenses *solely* for testing positive for marijuana is statutorily prohibited. In New York City, employers will be prohibited under a new ordinance from conducting mandatory pre-employment drug screening.

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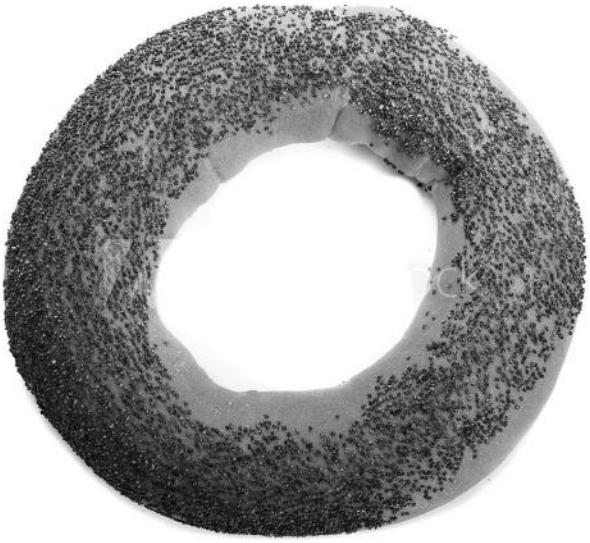
Although Michigan law allows employers to seek a drug free workforce, it has been increasingly difficult for employers to find employees who are not lighting up off duty. According to Quest Diagnostics Inc, the largest U.S. drug testing lab, employee or potential employee positive marijuana drug test results in Michigan have increased from 1.9% in 2008 to 3.3% in 2013, after recreational marijuana use was legalized. In Colorado, where recreational use of marijuana has been legal since 2015, employers in the construction industry have had to recruit new hires from out of state to maintain a drug-free workforce.



With low unemployment and a shrinking talent pool, employers may choose to look the other way when it comes to pre-employment drug screens for marijuana. Some employers are doing just that—*i.e.*, removing marijuana from pre-screening drug tests—but it is only a small number of companies according to Quest Diagnostics. Approximately 99% of general workforce drug testing still includes marijuana.

Sarah L. Nirenberg

Poppy Seeds And CBDs

Astute employers are certainly aware of the "poppy seed" defense: following a failed drug test, the employee says "It wasn't heroin! It must have been my bagel!" Readers of a certain age will remember this as the plot of a classic Seinfeld episode, where Elaine tested positive for opium after eating a poppy-seed muffin. But this is neither a lame excuse nor an urban legend: poppy seeds really can cause false positives on drug screen tests.

In fact, in 1995, the federal government revised its Mandatory Guidelines for Federal Workplace Drug Testing by increasing the testing threshold for a "positive" hit on opiates to "eliminate the identification of most persons…who have ingested poppy seeds." But false positives are still possible, particularly if the laboratory in question uses old testing protocols, and that can lead to litigation—as with the 2018 case of New York City corrections officer Eleazar Paz, who was fired over a positive drug test, even after an administrative judge held that poppy-seed bagels were likely the culprit. Paz was later reinstated after continued litigation.

Employers today, particularly those who wish to ban marijuana use by employees despite Michigan's legalization of the drug (see preceding article), should be aware of a modern-day version of the poppy-seed defense: the cannabidiol—or CBD—defense. CBD is a chemical compound that is contained within the cannabis plant, with purportedly therapeutic properties. But unlike THC, the psychoactive substance in marijuana, CBD does not cause a "high." Changes in federal law legalizing hemp have also legalized CBD products processed from hemp, so long as they have the same low levels of THC.

This legal change has created somewhat of a CBD boom, with skyrocketing sales of CBD-infused oils, sprays, lotions, and the like. Unfortunately for CBD users, many CBD products sold on the market contain few actual CBDs, and often contain too much THC—rendering them illegal. And since marijuana drug test-

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ing looks for signs of THC, an employee who only wanted to use legal CBDs and did not want to get high might screen positive for marijuana on a workplace drug test.

Employers should take note, and consider clarifying their workplace drug policies to inform their employees about the potential side effects and consequences of CBD usage, and evaluate their drug testing protocols to determine whether false positives can be reduced.

Thomas J. Davis

Michigan Streamlines Litigation Discovery

The Michigan Supreme Court recently approved what Chief Justice Bridget M. McCormack has called "the most comprehensive effort to improve civil discovery rules in at least a generation." The rule changes will take effect on January 1, 2020. Practitioners and in-house counsel should take note of these significant changes to existing civil litigation practice. The business community should welcome this attempt to streamline lawsuits, reduce unnecessary expense, and curtail the opportunity for harassment.

A major theme of the rule changes is proportionality. The new rules make clear that the scope, cost, and burden of discovery must be commensurate with the issues at stake in the case. An April 21, 2018 State Bar Committee Report explains that the changes are intended to send a "powerful signal" that "allows proportionality to modulate what is discoverable in the first instance, rather than allow proportionality to be only a defensive concept. . . ."

These rule changes should provide significant protection against abusive, "scorched-earth" litigation tactics. New Rule 2.302(C) makes explicit the court's power to "control the scope, order, and amount of discovery, consistent with these rules." New Rule 2.302(B) provides that discovery must be "relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information."

Consistent with the emphasis on increasing efficiency and eliminating abuse, new Rule 2.306(A)(3) limits depositions to one day and seven hours, and new Rule 2.309(A)(2) limits interrogatories to twenty, including subparts. New Rule 2.411(H) provides for mediation of discovery issues, either by stipulation or order of the court. New Rule 2.302(B)(4) makes clear that communications with experts, "regardless of the form of the communications," are privileged except as expressly noted in the rule.

New Rule 2.301(A) provides for initial disclosures in most cases, modeled in large part after federal practice. The parties may not conduct discovery prior to these initial disclosures other than by stipulation of the parties or order of the court. These disclosures will facilitate the cooperative exchange of relevant information and should enhance the opportunity for the early resolution of disputes.

The new rules also significantly update and modernize Michigan's discovery rules related to Electronically Stored Information (ESI). This topic is increasingly important in the digital era and could be the subject of a separate article. New Rule 2.302(B)(5) *eliminates* this provision from former rules MCR 2.302(B)(5) and 2.313(E): "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." New Rule 2.313(D) instead provides that where a party fails to take reasonable steps to preserve ESI and there is prejudice to the other party, a court "may order measures no greater than necessary to cure the prejudice."

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And where a party acts with an "intent to deprive" the other party of the information, the court may impose discretionary sanctions including a presumption that the information was unfavorable to that party or dismissal of the action. MCR 2.401(J) provides for an ESI conference in suitable cases and an ESI Discovery Plan.

The overhaul and modernization of Michigan's civil discovery rules is a welcome development and one that should be noted by all stakeholders.

Joseph E. Viviano

Who's First? Lien Distinctions And Priorities

While the State of Michigan recognizes a number of different liens with respect to real and personal property, it is important to understand that not all liens are created equal. Generally, Michigan is a "recording priority" jurisdiction (*i.e.*, liens are prioritized in the order in which they are recorded); but that does not mean first-in-time will always be first-in-right. Instead, Michigan law contains nuances depending on the type of lien that will determine a lien's priority. This article will briefly highlight the basic distinctions between real and personal property tax liens, state and federal tax liens, judgment liens, and construction liens.

Real and Personal Property Tax Liens. The Michigan General Property Tax Act (GPTA) creates a statutory lien for unpaid real and personal property taxes. It states that "the people of this state have a valid lien on the property, with rights to enforce the lien as a preferred or first claim on the property."

Real and personal property tax liens take priority over *all other liens* on that property including first-in-time mortgages. Property taxes (real and personal) become a first priority lien on December 1 following Tax Day (the prior December 31). Real and personal property tax liens only attach to the property on which the tax was levied, and have a superior priority over any other liens on the specific property on which the tax was levied no matter when the liens are recorded. They will, for example, always be superior to a mortgage on the property.

State and Federal Tax Liens. State tax liens are governed by a separate Michigan statute which creates a state tax lien in favor "of the state against all property and rights of property… owned at the time the lien attaches, or afterwards acquired by any person liable for the tax, to secure payment of the tax." The statute further provides that the lien "shall take precedence over all other liens and encumbrances, except bona fide liens recorded before the date the lien under this act is recorded." This statute follows the first-in-time, first-in-right approach with a caveat of actual knowledge, meaning a majority of liens recorded before the date of the state tax lien will be superior unless someone has actual knowledge of the state tax lien. For example, a mortgage recorded before a state tax lien becomes effective has priority over that subsequent state tax lien, unless the party holding the mortgage has actual knowledge of an unrecorded tax lien.

Federal law establishes the priority of federal tax liens and has different rules. A federal tax lien attaches to all property and rights to property of the taxpayer as well as against any person who later acquires an interest in the taxpayer's property. A federal tax lien will not have priority over a prior recorded mortgage on real property if the mortgage is properly recorded with the register of deeds. Federal tax liens will not, however, have priority over real property tax liens.

Judgment Liens. A judgment lien generally follows the first-in-time, first-in-right recording rule. Before a judgment lien can take effect, a party must obtain a money judgment from a court. The party must then record the judgment lien with the register of deeds where the specific property is located and give the affected party notice of the recording. A judgment lien remains in existence for five years after it is recorded,

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and may be recorded once more for an additional five years. A judgment lien will not have priority over a mortgage that was recorded first on a property.

Construction Liens. The date a construction lien attaches to property, for purpose of determining priority, is the date of the *first actual physical improvement* made on the property. The Michigan statute creating construction liens states that it "shall take priority over all other interests, liens, or encumbrances" that might attach to the building, structure, or improvement, or upon the real property on which it is erected. A lien that is recorded after the first actual physical improvement will be inferior to a construction lien even if the construction lien is recorded later. The priority of the construction lien is of course limited to the scope of the project referred to in the original notice.

Because the rules of lien priority under Michigan law vary significantly depending on the type of lien, it is a mistake for a lienholder to assume the general rule of first-in-time, first-in-right will apply to a particular lien. Recognizing the differences will help the lienholder discern how best to protect its interest, whether it is filed first-in-time or not.

Joseph C. Pagano

DOL Keeps Cranking Out Opinion Letters And Proposed Regulations

Opinion Letters. Since our last issue, the U.S. Department of Labor (DOL) has been very busy. So far in 2019, the DOL has issued 13 opinion letters regarding the Fair Labor Standards Act (FLSA), four of which likely have significance for a wide audience of employers.

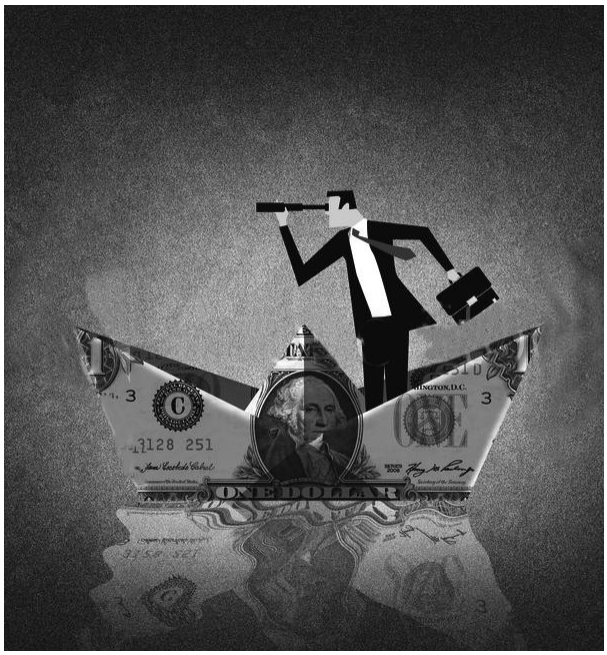
On March 14, in FLSA 2019-1, the DOL addressed conflicting state and federal wage and hour laws. Under New York law, "live in" residential janitors are excluded from minimum wage and overtime provisions. However, they are nonexempt under the FLSA. It should not be any surprise that the DOL takes the position that in the case of conflicting wage and hour laws, employers must comply with both laws and meet the standard contained in whichever law gives the employee the greatest protection. In the opinion letter, the DOL considered whether an employer who complies with state law, but not the FLSA, can use compliance with state law to establish a good faith defense to noncompliance with the FLSA. Where a good faith defense applies, an employer can limit its liability for damages to two years, rather than three. The DOL concluded that it "does not believe that relying on a state law exemption from state law minimum wage and overtime requirements is a good faith defense to noncompliance with the FLSA, but a court retains discretion to make that determination on a case-by-case basis."

Compensation for employees volunteering for an employer's volunteer program was the subject of a second DOL opinion letter, FLSA 2019-2. The employer requesting the opinion compensated employees who participated in its volunteer program during working hours. It questioned whether hours employees spend on volunteer activities outside of normal working hours are compensable. Of course, employees who are "voluntold" (not an official DOL term) by their employer must be compensated for their time. But, as the DOL confirmed, volunteer work that is both charitable and truly voluntary is noncompensable. In the situation presented, the time spent outside of working hours was deemed not compensable. The employer did not control or direct the volunteer work; the employees did not suffer adverse consequences if they did not participate; and employees were not guaranteed a bonus for participating (although the group with the most impact received a group reward which the supervisor distributed at his or her discretion). The DOL also opined that the employer could use a mobile device application

DOL Keeps Cranking Out Opinion Letters And Proposed Regulations *from page 7*

to track time spent volunteering, as long as it did not use the app to direct or control the employee's activities.

On April 29, in FLSA 2019-6, the DOL provided guidance on its view of whether certain "gig economy" service providers should be classified as independent contractors or employees. The entity requesting the opinion was a virtual marketplace company that connects service providers to end-market consumers to provide a variety of services, such as transportation and delivery. Based on the detailed facts set forth in the opinion letter, the DOL concluded that the service providers were independent contractors, not employees of the virtual marketplace company. The DOL analyzed the facts according to its long-standing six-factor test for determining whether the workers are economically independent based on the economic realities. It found that all six factors — control; permanency of relations; investment in facilities, equipment or helpers; skill, initiative, judgment, and foresight required; opportunity for profit and loss; and integrality — led to the conclusion that the service providers possessed economic independence from the virtual marketplace company and that they are working for the consumer of their services, not the referral platform.



In July, the DOL issued an opinion letter regarding calculation of overtime pay for nondiscretionary bonuses that are paid on a quarterly or annual basis. Nondiscretionary bonuses must be included in the employee's regular rate for purposes of calculating overtime. Where the bonus is paid quarterly, if it is not a fixed percentage that already simultaneously pays overtime compensation, the employer must recalculate the overtime over the period which the bonus covers. In this case, the quarterly bonus was a percentage that already included the overtime and straight time wages, so there was no recalculation required. However, the annual bonus was one percent of a "journey" straight time rate, and the DOL concluded that the employer was required to recalculate the regular rate for each workweek in the bonus period and pay the overtime due on the annual bonus. The employer was not obligated to do that until it could ascertain the weekly amount of the bonus at the end of the bonus period. Further, because the employer could readily ascertain the amount of the annual bonus earned in each workweek, the employer was required to retrospectively include the exact proportionate amounts in the regular rate for each workweek.

Other DOL opinion letters issued in 2019 include the topics of an "8 and 80" overtime pay system at a youth residential care facility; application of the teacher exemption to nutritional outreach instructors; the agricultural exemption; application of the highly compensated employee exemption to paralegals; rounding practices; and compensability of time spent in a truck's sleeper berth while otherwise relieved from duty.

Proposed Regulations. The DOL has been busy proposing new regulations as well. On March 7, the DOL continued the salary level saga by issuing a new proposed regulation regarding the minimum salary level required for the executive, administrative, and professional, or white collar exemptions. The salary threshold has been $455 per week for many years. You may recall that a new regulation raising the minimum salary level to $913 per week went into effect in 2016, but was quickly enjoined by a Texas federal court.

DOL Keeps Cranking Out Opinion Letters And Proposed Regulations *from page 8*

The new proposed regulation rescinds the 2016 rule and proposes a salary threshold of $679 per week ($35,308 per year) for the white collar exemptions. It also sets the salary level for the exemption for highly compensated workers at $147,414. It does not contain a proposed change to the duties requirements or automatic adjustments to the salary level. Nondiscretionary bonuses, incentives, and commissions can be counted for up to 10% of the white collar salary threshold.

On June 11, 2019, in response to the proposed rule, members of the House of Representatives and Senate introduced bills to raise the minimum salary threshold for the white collar exemptions to nearly $51,000 per year. If passed, which seems unlikely, this would be the first time the salary thresholds would be set by legislation rather than rule-making.

On March 28, the DOL proposed a rule to clarify and update the rules regarding regular rates. The regular rate regulations concern what types of compensation and benefits must be included in the regular rate for the purpose of calculating overtime. The DOL proposed the new rule out of concern that employers are discouraged from offering more perks to their employees because it is unclear whether those perks must be included in the regular rate of pay. The proposed rule confirms and clarifies that employers may exclude the following benefit costs from the regular rate:

- Wellness programs, on-site specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- Payments for unused paid leave, including paid sick leave;
- Reimbursed expenses, even if not incurred "solely" for the employer's benefit;
- Reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that satisfy other regulatory requirements;
- Discretionary bonuses;
- Benefit plans, including accident, unemployment, and legal services; and
- Tuition programs, such as reimbursement programs or repayment of educational debt.

On April 1, the DOL proposed a rule to revise and clarify the responsibilities of employers and joint employers in joint employer arrangements. It pointed out that it has not meaningfully revised its joint employer regulation in over 60 years. In 2016, the Obama administration issued an Administrator Interpretation containing an expansive view of joint employment. The DOL rescinded this interpretation in 2017. The new proposed rule sets forth a four-factor test for joint employment, which considers whether the potential joint employer exercises the power to hire or fire the employee; supervises and controls the employee's work schedules or conditions of employment; determines the employee's rate and method of payment; and maintains the employee's employment records.

At the time this article went to press, the comment periods had closed for all three proposed regulations, and the DOL was in the process of considering the comments before issuing a final rule. We plan to include an update in our next issue.

Sonja L. Lengnick

New FMLA And ADA Decisions Of Interest

DOL Confirms Employers Must Designate FMLA-Qualifying Leave. The Wage and Hour Division of the U.S. Department of Labor (DOL) issued an opinion letter addressing an inquiry whether an employer could allow employees to use some or all available paid leave without designating the leave as FMLA, even where the reason for the leave was clearly FMLA-covered. The DOL confirmed that "an employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave" and thus must

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notify the employee within five days of the employer obtaining enough information to make the determination. The DOL opined that "[o]nce an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave." Employers must designate FMLA-qualifying leave even if the employee requests to forego the use of FMLA leave and use other available leave under the employer's policies, thus "saving" FMLA leave for future use. The DOL expressly disagreed with *Escriba v. Foster Poultry Farms, Inc*., a 2014 opinion issued by the U.S. Court of Appeals for the Ninth Circuit. In *Escriba*, the court had departed from prevailing case law and held that employees can decline to take FMLA leave even when their leave is for FMLA-qualifying reasons. The DOL reiterated that its opinion does not prevent employers from requiring that employees substitute available paid leave to cover unpaid FMLA leave. FMLA, however, runs concurrently with any paid leave.

Employee's PTSD Did Not Render Her Disabled Under ADA. Although the ADA Amendments Act of 2008 broadened the scope of protection under the ADA, employees must still show a substantial limitation in a major life activity. In *Tinsley v. Caterpillar Financial Services Corp*., the U.S. Court of Appeals for the Sixth Circuit held that Tinsley could not establish that she was disabled because she failed to show that her impairment (PTSD) substantially limited one or more major life activities, and Caterpillar was therefore not required to provide accommodation. After receiving a poor performance rating and being placed on a performance improvement plan, Tinsley requested and received a series of medical leaves. She eventually requested a transfer to another supervisor as an accommodation for her PTSD, claiming she could not work for her manager who gave her unreasonable deadlines and excessive work. Caterpillar denied her requests to transfer and for additional leave. She then sued, alleging her employer violated the ADA by failing to accommodate her disability, and had also retaliated against her for taking FMLA. The Sixth Circuit affirmed summary judgment in Caterpillar's favor, finding that Tinsley was not disabled and that her issues instead stemmed from her manager's management style, and did not substantially limit her from working in a class or broad range of jobs. The court, however, reversed the grant of summary judgment on Tinsley's retaliation claim, which was based on her poor performance review and performance improvement plan, and remanded the case to the trial court for the presentation of additional evidence.

Work Restrictions Do Not Necessarily Mean Employee Has ADA Disability. In *Booth v. Nissan North America*, the U.S. Court of Appeals for the Sixth Circuit affirmed summary judgment for Nissan and held that Booth failed to present evidence of a disability under the ADA. Booth was an assembly line worker who had restrictions related to a neck injury, including not reaching above his head or flexing his neck too much. He worked on the assembly line for a decade without incident. He then, however, requested transfer to a material handler position, which Nissan denied because the position's duties conflicted with his work restrictions. Booth claimed Nissan's denial was disability discrimination violative of the ADA. He also claimed Nissan violated the ADA by modifying his assembly line job from a two-element position to a four-element position. The court found that Booth appeared to assume that because he had work restrictions, and because Nissan denied his transfer request because of those restrictions, he was disabled under the ADA. The court disagreed, holding that a plaintiff who claims his condition substantially limits the major life activity of working is still required to show that the impairment limits his ability to perform a class of jobs or broad range of jobs. Here, Booth's neck injury and related restrictions kept him from working in the material handling role he desired, but that did not resolve whether he was disabled under the ADA, because his condition must preclude him from working in a class or broad range of jobs.

New FMLA And ADA Decisions Of Interest *from page 10*

Employer Did Not Violate FMLA By Prorating Bonus Based on Leave. In *Clemens v. Moody's Analytics, Inc.*, the U.S. Court of Appeals for the Second Circuit found that the employer did not improperly interfere with Clemens' FMLA rights when it reduced his bonus under an incentive compensation plan by taking into account the amount of time he was on FMLA leave. Clemens claimed that his bonus was already "self-prorating" because a reduced work period would naturally yield a lesser commission under the plan, and that this reduction constituted unlawful FMLA interference. The court rejected Clemens' argument, finding that Moody's prorated bonus payments were based on the length of the employee's leave, regardless of the reason for the leave. "Because the undisputed evidence showed that Moody's neutrally applies its prorating policy to incentive payments under the Plan, as opposed to payments based on, for example, mere attendance, and there is nothing else to indicate a violation of the FMLA," Clemens' FMLA interference claim failed.

Attendance At Certain School Meetings Is Covered By FMLA. In a recently issued opinion letter, the Department of Labor (DOL) confirmed that the FMLA covers employees' attendance at school meetings held to discuss a child's Individualized Education Program (IEP). The opinion letter was sought by parents whose children have FMLA-qualifying serious health conditions. One of the parents requested intermittent FMLA leave from her employer to attend her children's medical appointments and school meetings held by the school's Committee on Special Education (CSE). The employer approved her request to use FMLA-approved time for the medical appointments but not to attend CSE/IEP meetings with the school. The Individuals with Disabilities Education Act (IDEA) requires public schools to prepare IEPs for children who receive special education and related services. The IEP requires input from the teachers, school administrators, occupational, speech and physical therapists, as well as parents. The school held CSE/IEP meetings four times a year to review a child's educational and medical needs, well-being, and progress. The DOL concluded that the employee's attendance at these meetings qualifies as "care for a family member . . . with a serious health condition" and thus the meetings were qualifying reasons for use of intermittent FMLA.

Court Addresses ADA And FMLA Issues That Commonly Confront Employers. In *Hannah P. v. Coats*, the U.S. Court of Appeals for the Fourth Circuit reaffirmed the law on several recurring issues. Hannah was a contract analyst with the Office of the Director of National Intelligence (DNI), who was diagnosed with depression shortly after her hire. She voluntarily shared her depression diagnosis with her management, but did not initially request accommodation. Hannah then began to exhibit poor attendance. Her employer tried to work with her to develop a plan that required her to arrive to work at certain times and to provide advance notice if she was going to be late. But she was not compliant with the plan. DNI revoked the plan and referred her to an Employee Assistance Program (EAP), but her attendance did not improve. Hannah eventually requested a

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four-week medical leave, which was approved. Prior to starting her leave, she applied for several permanent positions and was the recommended candidate for one position, but was ultimately denied the job because of her attendance issues. Her employment ended when her contractual term expired. Hannah sued the DNI alleging that it violated the Rehabilitation Act (claims under that Act are analyzed in the same manner as the ADA), including failing to accommodate her depression, requiring her to undergo a "medical examination," and refusing to hire her for a permanent position.

She also alleged that DNI violated the FMLA by failing to give notice of her rights under that statute.

The Fourth Circuit affirmed summary judgment for DNI on Hannah's disability discrimination and failure to accommodate claims. Hannah had claimed that the DNI failed to accommodate her because it unilaterally rescinded her attendance plan and instead referred her to the EAP. The court disagreed, holding that while employers must engage in the interactive process, the employer "has the ultimate discretion to choose between effective accommodations." The court also noted that the employer acted unilaterally only when the attendance plan accommodation did not work.

The court rejected Hannah's claim that the EAP referral was an improper examination under the statute, holding that even if the EAP was a mandatory medical examination under the facts of this case, it was "job-related and consistent with business necessity." The DNI had a reasonable belief that Hannah's ability to perform the essential functions of her job were affected by her attendance problems.

Hannah had claimed that her supervisor's inquiries about her attendance were an effort to improperly solicit confidential medical information about her depression. The court disagreed and found that her supervisor was entitled to ask her about her problematic attendance, and reiterated that the "ADA does not require an employer to simply ignore an employee's blatant and persistent misconduct even where that behavior is potentially tied to a medical condition."

Finally, the court held that DNI did not discriminate by failing to select Hannah for a permanent position because of her attendance issues. Although Hannah claimed her attendance problems were caused by her disability, the court reasoned that DNI could make its hiring decision based on those performance deficiencies.

The Fourth Circuit, however, overturned summary judgment for DNI on Hannah's FMLA claim. The court held that Hannah's disclosure of her depression diagnosis, together with her initial request for leave, triggered DNI's obligation to inquire whether she needed FMLA leave — which it failed to do. The court found that there was a genuine issue whether Hannah was prejudiced by DNI's failure to notify her of her FMLA rights because, if she had been aware of her rights, she could have structured her leave differently.

Shannon V. Loverich

Class Arbitration Waivers Keep Marching On

Since our last issue, the U.S. Supreme Court has completed the trilogy of arbitration decisions it agreed to render during its 2018-19 Term. And we have two noteworthy decisions from a U.S. District Court in New York, and the National Labor Relations Board.

U.S. Supreme Court. In *Lamps Plus, Inc. v. Varela*, the Court ruled, 5-4, that courts may compel class action arbitration *only* if the parties have *expressly* agreed to permit arbitration on a class wide basis. The Court noted that unlike individual arbitration, undertaking class arbitration is a "fundamental" change that "sacrifices the principal advantage of arbitration" and "greatly increases risks to defendants."

Looking back to its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010), the Court explained—

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more pointedly than it had before—that "[c]lass arbitration is not only 'markedly different' from the 'traditional individualized arbitration' contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration." Because of the different character and higher risks of class arbitration, and because arbitration is at bottom "a matter of consent, not coercion," the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a class wide basis."

Renewing the reservations it had previously expressed about class arbitration in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) and in *AT&T Mobility LLC v. Concepcion* (2011), the Supreme Court found that class arbitration's dilution of the principal advantages of arbitration—informality and speed—meant that ambiguity is not sufficient to infer that the parties consented to sacrifice these primary advantages of arbitration: An "affirmative contractual basis" must exist.

The U.S. Court of Appeals for the Ninth Circuit had approved inferring assent to class wide arbitration from silence or ambiguity, but the Supreme Court held that this conflicted with "the foundational FAA principle that arbitration is a matter of consent" and rejected the lower court's reliance on the California state law rule that ambiguity in a contract should be construed against the drafter (the doctrine known as *contra proferentem*). Taking that approach could permit class arbitration to be imposed without the *consent* of both parties. The Court's analysis extends the argument that the FAA alone must provide rules for resolving ambiguities in arbitration agreements, because state law principles that may appear neutral in standard contract settings can distort the fundamental nature of arbitration.

Supreme Court Justice Ginsburg, citing a series of dissents in prior cases, observed that the Court's parade of decisions giving arbitration agreements ever wider reach in the employment context was far removed from the FAA's original objective of blessing arbitration of "commercial disputes" between parties of roughly equal bargaining power. In a separate dissent, Justice Kagan took aim at the majority's election to "federalize contract law" as it applies to arbitration agreements. State contract law, she argued, should provide the rule of decision except when state law "discriminates against arbitration agreements." In Justice Kagan's view, there was no basis for preempting California's "anti-drafter rule," which applied to all types of contracts and thus did not disfavor arbitration agreements. She chided the majority for setting the Court on a path that pushes aside general state-law contract interpretation principles—but only when they interfere with enforcing arbitration agreements designed to pit individuals against better funded corporate employers.

U.S. District Court. More recently, in late June, a federal trial judge in New York City held in *Latif v. Morgan Stanley & Co.* that the FAA preempted a statute enacted by the New York Legislature in 2018 that would have prohibited mandatory arbitration of sexual harassment claims. This is not a new principle. In 2011, for instance, the Supreme Court said in *Concepcion*: "When state law prohibits outright the arbitration of a particular type of claim, the . . . conflicting rule is displaced by the FAA." The New York Legislature decided to test that rule in the "Me Too" era when it enacted the ban on mandatory arbitration in April 2018 as part of provisions concerning sexual harassment included in the 2018-19 New York budget bill. But the language declaring mandatory arbitration clauses "null and void" as to sexual harassment claims was effectively erased by a prescient exception for clauses that were "inconsistent with federal law," and the FAA is indisputably federal law. Apparently, parties may carve out an exception for sexual harassment claims when describing the scope of their private agreement, but a state legislature cannot impose such a limitation by statute.

National Labor Relations Board. Finally, as we were about to go to press, the National Labor Relations Board issued a decision in *Cordua Restaurants, Inc.* — one of the Board's early attempts to address questions

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surrounding mandatory arbitration agreements following the Supreme Court's May 2018 decision in *Epic Systems v. Lewis*. The Board's 3-1 Republican majority held in *Cordua Restaurants* that the National Labor Relations Act does not prohibit employers from (1) promulgating mandatory arbitration agreements that require employees to bring their claims individually, even if the employees have already opted into a class or collective action brought under the FLSA or a state wage and hour law; and (2) telling employees that failing or refusing to sign the mandatory arbitration agreement will result in their discharge. Although the Board also held that filing a class or collective action remains a protected concerted activity, other aspects of its decision enable employers to neutralize that concerted activity after filing. Query whether the Board's decision will be appealed to the U.S. Court of Appeals.

Noel D. Massie

OFCCP Partially Retreats From Expanded Data Gathering Plan

The Office of Federal Contract Compliance Programs (OFCCP), currently down to fewer than 500 employees, nevertheless has pursued a systematic expansion of the personnel data it gathers from those employers that contract with the federal government. The agency has poised itself as a vigorous enforcement mechanism through efficiencies: doing more with less. As part of that effort, OFCCP sought to aggressively recast its scheduling letters to gather significantly more personnel data than in the past — including more intrusive compensation data — in preparation for its release of its 2019 Fiscal Year Contractor Supply & Service Scheduling List.

Now, however, hit with critical comments from the contractor community about the increased burdens, and facing possible rejection of the entire effort by the Office of Management and Budget (OMB) based on Paperwork Reduction Act concerns, OFCCP finds itself toning down the scope of its scheduling letter revisions to more closely resemble past audit requests. Still, the increased burden on federal contractors will be significant, absent OMB rejection.

For example, OFCCP's initial proposed revisions to its supply and service audit scheduling letters added two entirely new categories of documentation: (1) a list of the contractor's three largest subcontractors based on contract value; and (2) the contractor's most recent compensation study analyzing any gender, race, or ethnic disparities. OFCCP also proposed increasing the race/ethnicity analyses to require race and ethnic specific breakdowns in data, *e.g.,* by comparing Asian to Hispanic or Asian to African-American, etc., whenever there is a substantial disparity in one protected subgroup over another. Similarly, OFCCP sought to have contractors distinguish between voluntary and involuntary terminations and submit data for their "pool" of potential candidates for promotion.

Following the negative comments, OFCCP has now resubmitted to OMB a more narrowly tailored audit letter that no longer seeks a compensation analysis. Also eliminated is the distinction between voluntary and involuntary terminations and separate subgroup comparisons. In addition, the resubmitted letter refines the request for subcontractor information — a historically controversial category for which OFCCP has never requested information and has consequently had no reliable database of information. Presumably, the decision to start requesting this data is to build a database that will then subject federal subcontractors to routine audits. As modified, the audit letter now seeks only a list of the contractor's three most recent subcontracts valued at $150,000 or more.

In addition, the promotional candidate pool information request has now been revised to seek only the

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"workforce representation of women and minorities in the job group(s)" from which any employee has recently been promoted.

OFCCP also has reinstituted "compliance checks" — an audit tool discontinued during the Obama Administration. In connection with this effort, the agency initially proposed an audit notice for all three affirmative action plans contractors must maintain and a list of all disability accommodation requests received by the contractor during the audit year and the response provided to each request. In its recently re-submitted notice, OFCCP still seeks the three AAP's but has limited the disability information to recent examples of ways in which the contractor has accommodated individuals with disabilities.

OFCCP also has re-submitted to OMB its more comprehensive scheduling letters for "focused" reviews under either Section 503 (disabilities) or VEVRAA (protected veterans). The letters, while also somewhat narrowed from the agency's earlier proposal, still impose a more significant burden on contractors than in the past, including individualized job group, job title, and job action data for each employee or applicant.

The revised audit letters are now in OMB's hands for approval and OMB has set a July 29, 2019 deadline for comments on the revised letters. Stand by.

Julia Turner Baumhart

How Far Can SOX Be Stretched?

In the past few months, there have been two noteworthy decisions that address the scope and limitations of the whistleblower protection provision of the Sarbanes-Oxley Act (SOX). You will recall that a whistleblower protection provision was built into SOX when it was enacted in 2002 in the wake of the Enron and other corporate financial meltdowns.

In brief, the SOX whistleblower protection extends to employees (complainants) who report certain misdeeds of a publicly traded company, and then experience adverse job action because of that report. The alleged misdeeds reported by the complainant must involve violations of one of six enumerated categories—*i.e.,* (1) mail fraud, (2) wire fraud, (3) bank fraud, (4) securities fraud, (5) SEC rule or regulation violation, or (6) any federal law violation relating to fraud against shareholders. And the complainant must have *both* a subjective belief that a violation occurred, and objective evidence that such a violation had been committed.

The first of the two recent decisions was by the U.S. Department of Labor's Administrative Review Board (ARB), issued May 2, 2019: *Griffo v. Bookdog Books, LLC, et al*. Griffo's employer was a private company that sold and rented textbooks, and had contracts and a line of credit with publicly traded entities. Griffo was the CFO of Bookdog Books and alleged that he believed there were financial improprieties at Bookdog Books, complained to his superiors, and was terminated shortly after that.

Reversing a judge who had found that the public entities with which Bookdog Books dealt were covered "contractors" under SOX, thereby extending SOX whistleblower protection to Griffo, the ARB concluded that the relationship between Griffo's employer and the publicly traded entities was merely a "customer relationship," beyond SOX's coverage.

The second decision was by the U.S. Court of Appeals for the Fourth Circuit, issued on June 13, 2019: *Northrop Grumman Systems Corp. v. U.S. Dep't of Labor*. The complainant in that case alleged that her employer's (Northrop's) use of a mandatory arbitration policy violated SOX, and that her termination after complaining about it violated SOX's whistleblower provision. Her linkage between the arbitration policy and the six SOX criteria was rather convoluted. She claimed she believed that the mandatory arbitration policy was

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"incorporated" into Northrop's conflict of interest policy that employees were required to sign; that this violated SOX because SOX prohibits mandatory arbitration of certain claims; and that she believed this satisfied one or more of the six categories.

After a close review of SOX's whistleblower provision, the Fourth Circuit emphasized that, to assert an actionable whistleblower claim, the complainant had to establish that she engaged in a protected activity, that the employer knew or suspected the complainant had engaged in a protected activity, and that the complainant then suffered adverse job action under circumstances that raised an inference that there was a causal relationship. In addition, the burden is always on a SOX complainant to establish that she *subjectively and objectively reasonably believed* that her employer's actions violated one of the six enumerated categories.

Reversing the ARB's finding in her favor, the Fourth Circuit concluded that the complainant's argument that Northrop's arbitration policy violated one of the six categories was meritless, because it did not involve shareholder fraud, which would require a material misrepresentation or omission in connection with the purchase or sale of stock. The court emphasized that the SOX categories are not a broad catchall for corporate misdeeds, as had been urged by the Department of Labor.

The court also noted that, even if it accepted the Department's expansive view, there still had to be substantial evidence that the complainant's beliefs were objectively reasonable. The court determined that a "reasonable person" could not believe that Northrop's conflict of interest form incorporated the arbitration policy (there was no mention of it in the form), and could not believe the arbitration policy violated SOX (because it expressly excluded claims "as to which an agreement to arbitrate . . . is prohibited by law").

These two new decisions illustrate the dangers of appearing before administrative law judges with expansive views of SOX's whistleblower provisions. Fortunately, subsequent review has confirmed important limitations on the scope of SOX's coverage and protected activity.

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