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An update on new federal law and regulation affecting your workplace

David S. Fortney and H. Juanita (Nita) Beecher, Editors
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FEDERAL JUDICIARY

Trump rapidly filling federal courts with young, conservative judges

by David Fortney and H. Juanita Beecher
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When President Donald Trump took office on January 20, 2017, there were more federal court vacancies than at any time in the past three decades. As a result, President Trump and Senate Republicans have a unique opportunity to reshape the federal judiciary for years to come. Senate Majority Leader Mitch McConnell (R-Kentucky), working closely with White House Counsel Don McGahn, has made judicial confirmations his top priority and is seeking to realign the federal judiciary with young conservatives who adhere to The Federalist Society's originalist approach to interpreting the U.S. Constitution.

When the Democrats controlled the Senate during President Barack Obama's administration, the Republicans were able to use the filibuster (a parliamentary procedure employed to prevent or delay a vote on a nomination) to block many of his judicial nominees. The Democrats became so frustrated with the Republicans' use of (or threat to use) the filibuster, they abolished it in 2013 for all judicial nominations except U.S. Supreme Court justices. Despite the elimination of the filibuster, the Republicans were able to block many of President Obama's nominees by using other Senate rules and unwritten understandings such as the "blue slip," which allows the nominee's home state senator to withhold approval for the consideration of the nomination.

After the Republicans took over the Senate in 2015, President Obama was able to get only 11 judges confirmed. In addition, the Republicans successfully blocked his Supreme Court nominee, Judge Merrick Garland, refusing to grant him a hearing. As a result, when President Trump took office, he already had 120 judicial openings to fill. Currently, there are 146 federal judicial vacancies and 80 nominees pending.

With the possibility that the Republicans might lose the Senate in November, Mitch McConnell and Senate Republicans are accelerating their efforts to confirm judicial nominees, and the Senate has abandoned some of its long-used rules and unwritten understandings. For example, the Senate Judiciary Committee no longer considers the American Bar Association's finding that a judicial nominee is unqualified as a bar to his or her confirmation. In addition, the Senate Judiciary chairman, Senator Chuck Grassley (R-Iowa), will no longer allow the blue slip to be a "single senator veto" of appellate court nominees.

Since President Trump's inauguration, the Senate has confirmed Neil Gorsuch as the newest justice on the Supreme Court and approved 21 court of appeals judges and 17 federal district court judges. The average age of the confirmed jurists is 48. President Trump has nominated an additional 11 appellate court judges and 65 district court judges. Observers have recently raised concerns that President Trump's appointments have

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resulted in the federal judiciary becoming less diverse, with more white men now serving as judges than at any time since George W. Bush took office in 2001.

McConnell's highly successful focus on confirming President Trump's judicial nominees has resulted in one-eighth of the seats on federal appeals courts now being held by appointees of the current president. The impact these young, conservative judges will have is likely to be the longest-lasting legacy of Trump's presidency.

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INSIDE OSHA

Tug-of-war between OSHA and states over e-recordkeeping rule

by Eric J. Conn, Dan Deacon, and Beeta Lashkari
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A fascinating jurisdictional tug-of-war has broken out between the Occupational Safety and Health Administration (OSHA) and a few state occupational safety and health (OSH) programs over OSHA's final rule titled "Improve Tracking of Workplace Injuries and Illnesses" (aka the e-recordkeeping rule). The e-recordkeeping rule requires large employers and smaller employers in "high-hazard industries" to submit electronic injury and illness data to OSHA through a special Web portal, the Injury Tracking Application.

State plan adoption of the e-recordkeeping rule

When OSHA promulgated the rule in May 2016, it mandated that all state plans adopt substantially identical requirements within six months. Most of the more than 20 state plans across the country promulgated their own e-recordkeeping rule ahead of the deadline to submit data in the first year, but seven state plans still have not adopted the rule. Those states include:

- California (Cal/OSHA);
- Maryland (MOSH);
- Minnesota (MN OSHA);
- South Carolina (SC OSHA);
- Utah (UOSH);
- Washington (DLI, DOSH, or WISHA); and
- Wyoming (WY OSHA).

The states' delay was primarily due to OSHA's numerous announcements that it would soon issue a Notice of Proposed Rulemaking (NPRM) to amend (or rescind) the federal e-recordkeeping rule.

OSHA's controversial April 2018 press release

With only two months until the July 1, 2018, deadline for the second year of injury data submissions, OSHA sparked controversy with an April 30 press release instructing employers with establishments in states with a state plan to submit their 300A annual injury data summary "even if the employer is covered by a State Plan that has not completed adoption of their own state rule." (To read the press release, go to https://www.osha.gov/news/newsreleases/trade/04302018.)

The states that haven't yet adopted the e-recordkeeping rule responded differently to OSHA's directive, falling into three categories:

(1) Recommending that employers in their state submit their injury data;

(2) Reporting that the state would be adopting an e-recordkeeping rule imminently, so employers should plan to submit their 2017 injury data; or

(3) Pushing back against OSHA.

Cal/OSHA updated its website with a notice advising employers to submit their reports, and Minnesota and South Carolina stated that they are planning to adopt the e-recordkeeping rule before the July 1 submission deadline.

By contrast, Maryland, Washington, and Wyoming struck back at OSHA. For example, Washington issued a statement on Twitter announcing, "Washington employers . . . are still NOT required to electronically submit data to OSHA's new Injury Tracking Application, despite a recent announcement from OSHA."

OSHA's authority over state plans and employers in state plan states

OSHA's directive, which seemingly impinges on the exclusive jurisdiction of state plans, and the states' responses to the directive have caused confusion. Although OSHA is directing establishments in state plan states that haven't adopted the e-recordkeeping rule to submit their 300A data, our legal analysis leads us to conclude that employers in those states need not submit the data this year, assuming the states do not adopt an e-recordkeeping rule in the immediate future.

The provision of the Occupational Safety and Health Act (OSH Act) cited by OSHA for its supposed authority actually doesn't give the agency any authority over employers in state plan states. Rather, it sets the minimum criteria a state OSH plan must meet to be eligible for approval by the federal agency. In other words, the provision gives OSHA authority over state plans, not over employers in those states.

If a state plan fails to adopt the e-recordkeeping rule or the state otherwise doesn't meet some minimum requirement to operate an approved state OSH plan, OSHA's remedy is to rescind the state plan's approved status, but only then would the agency have any jurisdiction over employers in the state. Short of that, OSHA may not inspect, cite, or direct employers in state plan states to take any actions.

What does this mean for employers in noncompliant states?

There is currently no legal requirement for employers operating in the seven states that haven't adopted the e-recordkeeping rule to submit their 300As. OSHA has no authority to compel employers in those states to submit the reports, and neither OSHA nor the state OSH agencies can issue a violation under Section 1904.41 because that regulation doesn't cover employers in state plan states.

Since OSHA has already announced that it is using the data it collects to allocate enforcement resources, we don't recommend that establishments in those states submit data. However, employers should track the progress of the state plans in adopting the e-recordkeeping rule. OSHA's announcement was an attempt to pressure the few delinquent states to finalize the rule. Several state plans now appear to be scrambling to do just that.

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ARBITRATION

Supreme Court rules class arbitration can be barred by agreement

by Burton J. Fishman
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The U.S. Supreme Court recently ruled that employers may insist on and enforce mandatory arbitration agreements that bar class actions by employees. That remains true even if signing such agreements is a condition of employment.

The issue before the Court in *Epic Systems Corp. v. Lewis* has been brewing since the National Labor Relations Board's (NLRB) 2012 ruling in *D.R. Horton*. In a break with precedent, the NLRB ruled that class action prohibitions in arbitration agreements violate Section 7 of the National Labor Relations Act's (NLRA) guarantee that employees may engage in collective action and are therefore a valid exception to the strict requirements of the Federal Arbitration Act (FAA).

The FAA, a law that otherwise broadly supports arbitration, includes a "saving clause" that permits courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." After the federal appellate courts split over whether the NLRB's *D.R. Horton* ruling expressed the proper application of the FAA in class arbitration cases, the Supreme Court agreed to resolve the matter.

The Court found little ambiguity in the applicable laws. Among the rationales upon which the majority based its ruling were its conclusions that the saving clause was intended to save defenses arising from state and federal statutes and that because the FAA is a law of general application, its saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability'" (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). The Court noted, "This means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'"

Thus, the lengthy judicial—and philosophical—battle among jurists and employers and employees has ended. The "saga" of *D.R.Horton* is over, and arbitration agreements prohibiting class actions are legal.

The Court also rejected the argument that the NLRA, passed by Congress after the FAA, implicitly "amended" the FAA or otherwise altered its effect. Commenting that the NLRA focuses on the right to form unions and bargain collectively, the Court pointedly noted that it is silent on arbitration and shows no intent to modify the FAA. The Court dryly stated, "Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them." The Court went on to note that it has consistently rejected attempts to "conjure" conflicts between the FAA and other statutes.

No report of this decision can be complete without noting the acerbity of the language in both the majority decision and the lengthy dissent. The 5-4 decision once again split the high court along ideological grounds, and the "battle lines" were once again distinctly drawn: the role of legislative history, the importance of legislative intent, the extent of judicial "activism" or "restraint" and on behalf of whom. Justice Neil Gorsuch also took the opportunity to articulate his position on the limits of the *Chevron* decision in parsing asserted "statutory ambiguities."

In sum, *Epic Systems* can be read as a simple and straightforward decision permitting the use of arbitration agreements that prohibit class actions. To careful readers, the decision indicates that a number of battles

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FEDERAL CONTRACTOR CORNER

OFCCP's Leen outlines agency's goals

by H. Juanita M. Beecher
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At a recent employer conference, Craig Leen, senior adviser to Ondray Harris, director of the Office of Federal Contract Compliance Programs (OFCCP), gave a rousing speech about the changes planned for the agency. He began by sharing his background and his focus on autism in his former position as city attorney for Coral Gables, Florida. He then pivoted to discuss the OFCCP's enforcement efforts and contractors' voluntary compliance as two sides of the same coin.

Echoing themes from the OFCCP Town Hall Action Plan discussed below, Leen stated the agency's goals are transparency, certainty, efficiency, and recognition. He went on to say that although the agency is and will continue to be an enforcement agency, its leadership is committed to telling contractors what to expect while hoping they go beyond what is simply required by the law and regulations.

More specifically, Leen said that once the OFCCP makes preliminary findings during a compliance review, it will share those findings with the contractor, and the expectation is that the agency and the contractor will engage in active conciliation. Only if such talks are unsuccessful will the agency move forward with enforcement. Leen stated the OFCCP is working on some FAQs and a contractors' bill of rights to clarify roles and expectations.

Leen also noted that the agency is focused on resolving old cases and developing a recognition program for high-performing contractors that go beyond what is required under the law and regulations. There will be two areas of focus for the recognition awards: contractors that excel in complying with Section 503 of the Rehabilitation Act and those that excel in creating equal employment opportunities, generally through an affirmative action plan (AAP), outreach, and diversity.

Finally, Leen turned to AAPs. He said that based on a report from the Government Accountability Office (GAO), 85 percent of contractors ask for an extension to turn in their desk audits after they receive scheduling letters. He feels that is problematic, and he wants to ensure that all federal contractors have their AAPs completed every year.

Leen concluded his remarks with a heartfelt statement that he sees his job at the OFCCP as the most important job he has ever had. He knows that everyone needs a fair shot at being paid and treated fairly. To reach that result, the OFCCP intends to make it very clear to contractors what compliance means in order to attain its goal of 100 percent compliance.

OFCCP Town Hall Action Plan revealed

In response to the GAO's 2016 report titled "Strengthening Oversight Could Improve Federal Contract Nondiscrimination Compliance" and building on its compliance assistance town halls, the OFCCP plans to focus on three general issues through its Town Hall Action Plan: training, communication, and trust. The plan was developed not only to address the three themes identified in the town halls during fiscal year 2017 but also to contribute to the agency's response to the 2016 GAO report.

The plan is based on three initiatives:

(1) Review and enhance contractor compliance assistance;

(2) Assess and improve the quality of contractor and compliance officer training and education; and

(3) Increase transparency and communication.

According to the plan, the OFCCP will "create a 'roadmap' or written guide to the compliance evaluation process for contractors," which will further its goal of enhancing communications with contractors, improve the transparency in its work, and begin to address trust issues. That includes a commitment to "develop policy guidance for creating greater transparency around the identification of indicators of a violation, explaining the basis for a supplemental data request, and conducting a meaningful compensation self–assessment."

The Town Hall Action Plan also previewed a contractors' bill of rights, to be titled "What Contractors Can Expect," which will outline certain principles that will come into play during an engagement with the OFCCP. Those principles should "include, but are not limited to, things such as timeliness, accuracy, communication, confidentiality, and professionalism."

Dell will pay $2.9M to resolve alleged pay discrimination violations

Dell EMC has agreed to pay more than $2.9 million in back wages to remedy alleged pay discrimination violations uncovered by the OFCCP at four locations in California and North Carolina.

The settlement followed compliance evaluations in which the agency determined that beginning in 2014, Dell EMC systemically discriminated against women in engineering, marketing, and sales roles at its Pleasanton (California) facility and women in engineering and manufacturing roles at its Santa Clara (California) facility. OFCCP investigators also claimed the company paid female and African-American employees in engineering roles at its Durham (North Carolina) facility less than white male employees and paid African-American women in manufacturing roles in Apex (North Carolina) less than white men.

"The [U.S.] Department of Labor [DOL] appreciates Dell EMC's cooperation to resolve these issues," said OFCCP Director Harris. "Together, we will ensure that the company complies with equal employment opportunity laws in its compensation practices."

In its conciliation agreement with the OFCCP, Dell EMC denies liability but will pay nearly $3 million in back pay and interest to the affected class members. The company will also make pay adjustments and take steps to ensure its pay practices meet legal requirements.

OFCCP extends 2014 TRICARE enforcement moratorium

On May 18, 2018, the OFCCP issued a two-year extension of its enforcement moratorium on the affirmative obligations of TRICARE providers. The moratorium, which has been in effect for four years, will now expire on May 7, 2021, and will also apply to Veterans Affairs Health Benefits Program providers.

"By providing greater regulatory certainty to TRICARE providers and Veterans Affairs Health Benefits Program providers, the Administration can help ensure that America's veterans and their families can access quality health care," said OFCCP Director Harris. According to the OFCCP's press release, the extension will give the agency time to receive feedback from stakeholders, relieve uncertainty, and allow it an opportunity to evaluate and address legislation that may be enacted on the issue.

Litras is now acting deputy director of OFCCP

The OFCCP website now lists Marika Litras as the agency's acting deputy director. After spending 7½ years in various positions in the OFCCP's Pacific Region, Litras moved to the agency's national office in 2011. In that office, she has served as deputy director of the Division of Program Operations, director of the Division of Program Operations, and, more recently, director of enforcement.

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over workplace practices and social policies have yet to be waged. And the make up of the Court may be a chief determinant of the outcomes.

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EQUAL PAY

Federal court blocks Philadelphia's prohibition against seeking wage history

by Consuela A. Pinto
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A recent decision by U.S. District Court for the Eastern District of Pennsylvania in *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia* is the latest offering in the debate over using salary history to determine current wages. Philadelphia enacted an ordinance prohibiting employers from (1) inquiring about a prospective employee's wage history (the inquiry provision) and (2) relying on wage history to determine an employee's salary (the reliance provision). The Chamber of Commerce for Greater Philadelphia filed a lawsuit seeking to prevent the city from enacting both provisions based on the argument that they violate employers' First Amendment free-speech rights. On April 30, 2018, the court ruled in favor of the chamber with respect to the inquiry provision but allowed the city to move forward with implementation of the reliance provision.

The court agreed that the city has a substantial interest in promoting fair pay. However, it failed to show that the ordinance "directly advances" that substantial interest. The city presented articles and testimony from advocates, attorneys, and researchers on the existence of a pay gap between men and women and between minorities and nonminorities. In addition, it submitted the affidavit of a nationally recognized labor economist, Dr. Janice Madden, to support the premise that wage discrimination exists and salary histories are tainted.

Madden noted that "consideration of prior salary in the hiring process is comparable to hiring by using racially or gender-based requirements, not necessary to the job, to screen applicants differently by race or gender." While the court found the testimony of the city's witnesses persuasive on the question of whether the gender wage gap exists, it wasn't persuaded that a ban on asking about prior pay would narrow the gap. Consequently, it held that the inquiry provision violated the First Amendment.

The court upheld the reliance provision, finding it did not trigger First Amendment protection. The reliance provision makes it unlawful for employers to "rely on wage history of a prospective employee from any current or former employer of the individual in determining the wage of such individual at any stage in the employment process." The city argued, and the court agreed, that the provision regulates conduct rather than speech. Consequently, the reliance provision may go into effect.

Employers shouldn't get too excited about this ruling. The court issued its decision in response to a request for a preliminary injunction. Accordingly, the hold placed on the implementation of the inquiry provision may be temporary. Although the court barred the city from enacting the prohibition against asking about prior pay, employers in Philadelphia are still prohibited from using salary history as a factor in determining current pay.

Moreover, other jurisdictions, such as California, Massachusetts, and New York, have passed similar pay inquiry prohibitions. To date, those laws have not been challenged. Finally, the Pennsylvania decision comes on the heels of the recent decision in *Rizo v. Yovino* in which the U.S. 9th Circuit Court of Appeals found that prior pay isn't a "legitimate factor other than sex" as defined in the Equal Pay Act, and relying on that factor alone or in combination with other factors perpetuates past compensation discrimination.

While the Pennsylvania court breathed a bit of life into the practice of asking applicants about past pay, the trend is still against the use of salary history to determine starting pay. Courts and legislators are increasingly deciding that prior pay isn't a legitimate factor for determining starting pay. Employers should avoid asking about salary history and relying on it to set current compensation.

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AGE DISCRIMINATION

7th Circuit says older job applicant can sue under ADEA over rejection

by Sean D. Lee
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On April 26, 2018, the 7th Circuit held that the Age Discrimination in Employment Act (ADEA)—the federal antidiscrimination law covering workers who are older than 40—protects older job applicants, not just existing employees, against "disparate impact" discrimination. Disparate impact claims arise when a company has a policy, practice, or rule that appears neutral but in practice has a disproportionate adverse effect on members of a protected group, such as older workers, women, or minorities.

The case before the 7th Circuit arose in 2014 when Dale Kleber, an attorney with significant job experience, applied for a job with CareFusion Corporation, a healthcare products company. At the time he applied for the position, he was 58 years old. The job posting contained a requirement that applicants have "3-7 years (no more than 7 years) of relevant legal experience." Kleber was considered but didn't receive an interview, and the company ultimately hired a 29-year-old.

Kleber sued CareFusion in federal district court, alleging disparate impact discrimination based on the seven-year experience cap. The district court dismissed his case, finding the ADEA's disparate impact provision expressly covers current employees but not outside job applicants. Kleber appealed to the 7th Circuit.

On appeal, a three-judge panel of the 7th Circuit reversed the district court in a 2-1 decision and revived Kleber's case, holding that the ADEA protects older job applicants as well as current employees against disparate impact discrimination. The court reached its conclusion based on a close reading of the language of the ADEA, along with "nearly fifty years of case law interpreting the ADEA and similar language in other employment discrimination statutes," namely, Title VII of the Civil Rights Act of 1964. The court added that it saw no "plausible policy reason" why Congress would allow current employees (including internal job applicants) to raise disparate impact claims, while excluding outside job applicants. Thus, the 7th Circuit concluded that Kleber was allowed to bring his claim and sent the case back to the district court for further proceedings. *Kleber v. CareFusion Corporation* (No. 17-1206).

Importantly, the 7th Circuit's decision is squarely at odds with a 2016 ruling by the 11th Circuit in *M. Villarreal v. R.J. Reynolds Tobacco Co.* The split between the circuits sets up the issue for review by the U.S. Supreme

Court, either in this case or a later one. In the meantime, employers under the jurisdiction of the 7th Circuit—i.e., in Illinois, Indiana, and Wisconsin—should be aware that they face broader liability under the ADEA than employers in other parts of the country.

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INSIDE THE EEOC

DU to pay $2.66M, increase salaries to settle equal pay lawsuit

by H. Juanita M. Beecher
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The University of Denver (DU) will pay $2.66 million and furnish other relief to settle a pay discrimination lawsuit brought by the Equal Employment Opportunity Commission (EEOC). The EEOC charged that the university violated federal law by paying a class of female full professors at Sturm College of Law lower salaries than it pays their male counterparts who perform substantially equal work under similar working conditions.

According to the EEOC's lawsuit, as of October 2013, the salaries of female full professors at DU were on average $19,781 lower than the salaries of male full professors, and all of the women's salaries were below the average salary paid to men. Despite formally recognizing the significant pay disparity in a 2013 memo, the university declined to take corrective action by adjusting the salaries of female full professors.

"The favorable resolution of this case is a clear example of the EEOC's commitment to fully enforcing our federal laws against pay discrimination. I hope cases like these get the attention of all employers and lead them to not only review their pay practices, but take action to address discrimination when they find it," said EEOC Acting Chair Victoria A. Lipnic.

In addition to the monetary damages being paid to the seven female professors who participated in the lawsuit, the consent decree settling the lawsuit also requires DU to increase the professors' 2018 salaries; annually disclose salary and compensation information to tenure, tenure-track, and contract faculty; and employ a labor economist to conduct an annual compensation equity study.

DU will also work with an independent consultant to review the methods and criteria it uses to determine pay and compensation, and it will announce the standards for determining annual raises to the faculty in advance of the academic year. The independent consultant will also assist the university in revising its antidiscrimination policies and conducting an informational campaign and training on the revised policies.

The consent decree will remain in effect for six years but may end a year early based on an established record of compliance. While the decree is in effect, the independent consultant will provide regular progress and compliance reports to both the EEOC and DU. The court that approved the settlement will retain jurisdiction while the decree is in effect.

Seasons 52 to pay $2.85M to settle age discrimination lawsuit

Seasons 52 will pay $2.85 million and provide significant equitable relief to settle nationwide class claims of age discrimination brought by the EEOC. The lawsuit sought relief for job applicants older than 40 who were denied front-of-the-house or back-of-the-house positions at 35 restaurants around the country.

During the course of the litigation, more than 135 job applicants provided sworn testimony that Seasons 52 managers asked them their age or made age-related comments during their interviews, including: "Seasons 52 girls are younger and fresh," "Most of the workers are younger," "Seasons 52 hires young people," or "We are really looking for someone younger." The company also hired applicants older than 40 at a significantly lower rate than applicants younger than 40.

The consent decree sets up a claims process that will identify and compensate the affected individuals who applied for front-of-the-house or back-of-the-house positions at the 35 restaurants but were denied jobs because of their age. In addition to the monetary relief, the decree requires Seasons 52 to make significant changes to its recruiting and hiring processes. Moreover, the order contains an injunction preventing Seasons 52 from discriminating on the basis of age in the future and requiring the company to pay for a decree compliance monitor, who will be charged with ensuring that it doesn't discriminate further and complies with the decree's terms.

"As we commemorate May as Older Americans Month, we should be mindful that age discrimination continues to keep too many older, experienced American workers out of the workforce—many of whom are not working as a matter of choice, but as a matter of need," said Lipnic. "I am very proud of the relief the EEOC has obtained here, including almost [$3 million] in financial relief, and, perhaps even more important, strong equitable relief to ensure that applicants and workers do not face this sort of discrimination in the future. I commend our investigative and trial teams in Miami for their outstanding work."

Jury awards workers $5.1M in 'Onionhead' case

Following a three-week trial, a unanimous Brooklyn federal jury found on April 25 that United Health Programs of America, Inc., and its parent company, Cost Containment Group (CCG), violated federal law by coercing 10 employees to engage in religious practices at work and creating a hostile work environment for nine of the employees. The jury also found that CCG violated federal law by firing an employee who opposed its practices, Faith Pabon.

The jury awarded $5.1 million in compensatory and punitive damages to the 10 individuals for whom the EEOC was seeking relief. The EEOC will also seek injunctive relief against CCG to prevent future violations of federal law and a back pay award for Pabon for her wrongful termination, to be determined by the district court judge, Kiyo A. Matsumoto.

According to the EEOC, CCG employees were forced to engage in a variety of religious practices at work, including prayer, religious workshops, and spiritual cleansing rituals. The practices were part of the "Harnessing Happiness" or "Onionhead" belief system created by the aunt of CCG's CEO. The judge previously ruled the practices constituted a religion for purposes of Title VII.

The aunt, employed by CCG as a consultant and fully supported by upper management, spent substantial time in the company's offices beginning in 2007, implemented the religious activities at the workplace, and played a role in the hiring and firing of employees. Nine victims said the religiously infused atmosphere created a hostile work environment for them, and the jury unanimously agreed. The jury also found that Pabon was fired for opposing the practices.

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LABOR LAW

NLRB chair promises 'joint-employer' rulemaking

by Burton J. Fishman
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On May 9, 2018, John Ring, chairman of the National Labor Relations Board (NLRB), announced that the NLRB would commence rulemaking to clear up the indescribably confused situation created by its "joint-employer" rule. The announcement may be intended as a declaration by Republican NLRB members to the business community that they remain dedicated to addressing the joint-employer issue despite the missteps and diversions of the past months.

It isn't likely that this course of "action" will be what resolves the matter. Rulemaking is slow and arduous and not something the NLRB has much experience at. In the many, many months that will pass while the Board drafts the rule, publishes it for notice and comment, issues a final regulation, and staves off judicial challenges, it's highly likely that another opportunity permitting the Board to issue a decisive reversal of *Browning-Ferris* will arise.

In the meantime, the objections from Democratic members Mark Gaston Pearce and Lauren McFerran illustrate that not only is the rulemaking a Republican initiative but it has also made the rifts at the NLRB public. The "Twitter joust" between McFerran and Ring, each marking out their respective positions, may have been inevitable during the Trump presidency, but it augers many months of unbecoming internecine spats.

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