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Leading the News

Pay Equity

Google May Be Pressed to Turn Over More Pay Data in Bias Probe

The Labor Department wants an appeals panel to force Google to turn over more worker salary information in an ongoing investigation into alleged pay disparities at the tech giant's California headquarters.

DOL lawyers Aug. 24 asked the department's administrative review board to order Google to turn over salary histories for some 25,000 workers, dating back to the company's formation in 1998. An administrative law judge last month blocked the request but said Google had to give the DOL a separate "snapshot" of pay, job duties, and other information for 21,000 workers from 2014.

The Labor Department says it has already uncovered "systemic compensation disparities against women pretty much across the entire workforce" at Google as part of an Office of Federal Contract Compliance Programs audit of federal contractors. ALJ Steven Berlin in the July decision called the allegation "legally questionable and factually unsupported at this point."

"We believe the decision here was well-reasoned, thorough and should be upheld," Google spokeswoman Gina Scigliano told Bloomberg BNA via e-mail. "We've already produced hundreds of thousands of documents to the OFCCP in this matter and believe, as the judge ruled, that they have adequate information to do their analysis, with the few additional records the Court asked us to produce."

The appeal comes weeks after Google found itself in the center of a media firestorm over its diversity policies. The company fired engineer James Damore for a manifesto criticizing the company's culture and pushing stereotypes that Damore said explain differences between men and women workers.

Damore has filed a National Labor Relations Board complaint against Google for wrongful termination. The company is also facing an NLRB complaint from an unidentified worker who said Google threatens and monitors employees who discuss their pay online.

The Labor Department's OFCCP audits federal contractors—identified in a "neutral selection process"—to ensure compliance with pay discrimination regulations and other worker protections. Google has worked on a number of government contracts, including with the General Services Administration, the Commerce Department, and the Department of Defense.

Labor Department spokesman Michael Trupo declined to comment for this story.

New Administration, Same Approach? The Labor Department says it needs the salary history information to determine whether some Google workers were trapped in a cycle of lower pay rates based on their previous salaries, or what department officials called an "anchoring bias." Berlin said he will not force the company to turn over the data unless the department shows that the request is reasonable, relevant and not "unduly burdensome."

"I don't know anything personally about Google's underlying employee data systems and practices, but I would expect them to be better than most," Pamela Coukos, a former Obama administration Labor Department program manager, told Bloomberg BNA. "And in my experience understanding what's happening for women in terms of starting salary is an important aspect of investigating gender-based pay disparities in a professional workforce."

The investigation is being conducted by the OFCCP's Pacific Region, which in recent years has been considered more aggressive than other regional offices in efforts to root out discrimination at government contractors. The region brought in about one-fifth of the total settlement money stemming from OFCCP audits of companies that do business with the federal government in the last two years, according to Bloomberg BNA's analysis of government data.

Some contractor advocates hope that the OFCCP may eventually take a more business-friendly, compliance-oriented approach to enforcement of pay discrimination and other federal requirements. But others told Bloomberg BNA that they aren't surprised the agency is pursuing the appeal despite the change in administration.

The OFCCP historically has taken an "aggressive position" in "denial of access" cases, Christopher Wilkinson, a former DOL associate solicitor for labor-management, told Bloomberg BNA.

The agency brings such actions against contractors that don't provide requested data during audits or that block on-site reviews. Those cases, like the one involving Google, generally turn on what the agency may request from businesses without bumping into Fourth Amendment protections against unreasonable government searches.

DOL's long-running hiring discrimination case against Bank of America, for example, included access issues, many of which were litigated during the George W. Bush administration, said Wilkinson, now a partner with Orrick, Herrington & Sutcliffe in Washington. The bank and agency ultimately reached a settlement in April after more than two decades of litigation.

"Any administration is going to seek to extend its authority at least from an access standpoint, mainly because the authority of the agency is at issue," Wilkinson said.

All Eyes on Tech Sector The Damore saga and the ongoing Labor Department investigation have put Google, and the tech sector as a whole, in the spotlight. Kellie McElhaney, a business and social impact professor at the University of California Berkeley, said the biggest diversity issue for tech companies may not be recruiting

women workers but rather convincing them to stay on the job.

"Getting women in the tech workforce is the start, but they don't feel like its an inclusive environment," McElhaney told Bloomberg BNA. "They are not seeing themselves in higher, executive type positions in those companies."

Google made the smart move by firing Damore shortly after his memo came to light, McElhaney said. But the company may have also nipped an important conversation about stereotypes in the bud by acting so quickly, she said.

"The chill they put on the conversation may work against longer-term goals," McElhaney said. "While I strongly disagree with Damore's memo, I think the worst thing we can do is to not have an intellectual conversation."

BY CHRIS OPFER AND JAY-ANNE B. CASUGA

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Organizing

Seattle Law Allowing Uber Drivers to Organize Survives Challenge

A Seattle law that lets ride-hail drivers for services like Uber and Lyft unionize survived a challenge filed by the National Right to Work Legal Defense Foundation (*Clark v. City of Seattle*, 2017 BL 298107, W.D. Wash., No. 2:17-cv-00382, 8/24/17).

The Aug. 24 ruling by Judge Robert Lasnik of the U.S. District Court for the Western District of Washington clears the way for the city to carry out the law enabling drivers to form or join a labor union.

International Brotherhood of Teamsters Local 117, which qualified under the law for an opportunity to organize drivers, asked Uber Technologies Inc., Lyft Inc., and a third company called East Side for Hire Co. to turn over lists with their drivers' names and contact information. Local 117 didn't immediately respond to a request for comment Aug. 25.

"The court's ruling is not surprising," Brooke Steger, Uber general manager for the Pacific northwest, said in a statement emailed to Bloomberg BNA Aug. 25. "Unfortunately, if allowed to stand, thousands of drivers will be negatively impacted. The original ordinance passed by the City Council was never about benefiting drivers, but about helping Teamsters and taxi companies."

The Seattle ordinance, enacted in 2015, is the first of its kind in the country to extend organizing rights to drivers classified as independent contractors. Federal labor law excludes independent contractors from coverage.

"Part of the reason that this is important is because a lot of companies have attempted to get around not only the National Labor Relations Act, but also all sorts of requirements for how you treat an employee, by turning those workers into independent contractors," Ilene DeVault, a professor of labor relations, law, and history at Cornell University's Industrial and Labor Relations School, told Bloomberg BNA Aug. 25. "My understanding is the city of Seattle said 'this is a ridiculous conversation; we're going to pass an ordinance saying they can unionize.' "

The ordinance had been on hold since Lasnik enjoined it in in April following a separate challenge by the U.S. Chamber of Commerce on behalf of Uber, Lyft, and East Side for Hire. He dismissed the Chamber's challenge earlier this month but left the injunction in place pending resolution of the National Right to Work challenge.

Appeals Could Be Consolidated The Chamber appealed Lasnik's ruling. Lasnik rejected its request to block implementation of the law while the decision is before the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit said Aug. 24 it's considering the Chamber's appeal for oral argument in December.

"This decision is not the end of the road, even for the injunction," Charlotte Garden, a labor law professor at Seattle University School of Law, told Bloomberg BNA Aug. 25. "There will be a flurry of motions possibly in both the district court and the Ninth Circuit."

"I think what would happen is the two cases would be tied together and a motions panel in the Ninth Circuit might take a closer look at a motion for injunction filed there," Garden said.

Seattle City Attorney Peter Holmes welcomed the ruling, saying in a statement emailed to Bloomberg BNA that "the court recognized the public importance of maintaining and promoting the safety and reliability of the for-hire transportation industry in the City of Seattle, goals which this law advances."

The National Right to Work Foundation said it's disappointed by the ruling and will appeal. "The decision will be appealed and we still feel strongly that this scheme to force independent drivers into union ranks not only violates federal labor law, but also these drivers' First Amendment Constitutional rights," Patrick Semmens, the organization's vice president, said in a statement emailed to Bloomberg BNA Aug. 25. "We're prepared to take this case all the way to the U.S. Supreme Court if necessary to defend these drivers' rights."

David Dewhirst and James Abernath, attorneys with the Freedom Foundation in Olympia, Wash.; and William Messenger and Amanda Freeman, attorneys with the National Right to Work Legal Defense Foundation Inc. in Springfield, Va., represented the drivers.

Assistant city attorneys Michael Ryan, Gregory Narver, Sara O'Connor-Kriss, and Josh Johnson; and Stephen Berzon, Stacey Leyton, and Casey Pitts with Altshuler Berzon LLP in San Francisco represented the city of Seattle.

BY JON STEINGART

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Text of the opinion is available at http://www.bloomberglaw.com/public/document/Clark_et_al_v_City_of_Seattle_et_al_Docket_No_217cv00382_WD_Wash_?doc_id=X1Q6NT4G9VO2&fmt=pdf.

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Whistle-Blowers

Whistle-Blower Damages to Get Hearing in Pa. High Court

Pennsylvania's turnpike commission and a discharged employee will get to make their cases to the state high court on the availability of noneconomic damages for employees fired in violation of a state whistle-blower protection law (*Bailets v. Pa. Turnpike Comm'n*, 2017 BL 295576, Pa., No. 126 MAP 2016, 8/23/17).

A lower court awarded more than $3 million to former employee Ralph Bailets. The Pennsylvania Turnpike Commission argues that a portion of the award, $1.6 million for noneconomic damages—harm to reputation, humiliation, and mental anguish—wasn't authorized by state law, and the Pennsylvania Supreme Court Aug. 23 ordered the parties to present oral arguments on that issue.

The high court's action means the justices will have a chance to clarify whether whistle-blowers can pursue claims for noneconomic injuries like emotional distress. Such claims can be particularly important to employees who have been affected by unlawful retaliation but can't demonstrate a substantial economic impact from the injury.

The state supreme court largely upheld the earlier judgment that Bailets was illegally fired in 2008 for complaining about the Pennsylvania Turnpike Commission's allegedly improper dealings with a computer networking contractor. The court affirmed that Bailets should be paid lost wages and attorneys' fees.

Long-Running Fight Over 2008 Discharge Bailets, a manager of financial reporting and systems, alleged that the turnpike commission terminated his employment after he complained of waste and mismanagement. Bailets claimed that a private contractor was given inside information before it prepared a bid on a state contract, and he made additional reports about allegedly improper practices in the commission's staffing and financial management of its operations.

The turnpike commission said it eliminated Bailets' job and laid him off with other employees due to poor economic conditions in late 2008. Bailets filed a retaliatory discharge claim under the state whistle-blower law, which prohibits retaliation against an employee for reporting "wrongdoing or waste by a public body."

The state's Commonwealth Court ruled against Bailets in February 2014, but the state supreme court reversed and remanded, finding there were material disputes of fact about the case.

A Commonwealth Court judge then conducted a bench trial on the whistle-blower claims and entered a judgment for Bailets of $3.2 million.

The commission appealed, challenging both the entry of any judgment for the former employee and the lower court's award of nonceconomic damages. The state supreme court denied the appeal but granted oral argument on the issue of noneconomic damages.

The court hasn't yet set a date for the oral argument.

James J. West in Harrisburg, Pa., and Sprague & Sprague in Philadelphia represented Bailets. Duane Morris and Pietragallo, Gordon, Alfano, Bosick & Raspanti LLP in Philadelphia represented the Pennsylvania Turnpike Commission.

BY LAWRENCE E. DUBÉ

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Text of the court's order is available at http://www.bloomberglaw.com/public/document/Bailets_v_Pa_Tpk_Commn_No_126_MAP_2016_2017_BL_295576_Pa_Aug_23_2/1?doc_id=X13QKRGH0000N.

News

Education

Philadelphia School Principals Have Five-Year Contract

Principals, assistant principals, and other school administrators in Philadelphia ratified a five-year contract with the city's school district, the Teamsters announced Aug. 25.

The Commonwealth Association of School Administrators, an affiliate of Teamsters Local 502, represents the 550 members who work as administrators for the School District of Philadelphia. Members ratified the contract late Aug. 24.

Starting July 1, 2018, principals will be restored as 12-month employees under the deal. The contract also establishes room for collaboration between CASA and the district on issues related to health-care plan reviews and professional development and support.

The deal is retroactive to July 1, 2016, and lasts through Aug. 31, 2021.

The union rejected a contract proposal last year, so employees were working under an expired pact, Robin Cooper, CASA's president, told Bloomberg BNA. Negotiations on this version began in January.

Cooper: Deal Creates Stronger Partnership This deal acknowledges the sacrifices the union made during contract renegotiation in 2014 and establishes a stronger partnership between the district and its employees, Cooper said.

By making contractual changes in 2014, like cutting back principal work schedules from 12 months to 10 months, the school system saved $20 million, the district said in an Aug. 25 statement.

Now that the district is in a financially stable position, those terms were reinstated.

Through committees that will be made up of district and CASA representatives, both parties will have a part in improving districtwide issues like professional development, school safety, and transparency, Cooper said.

"We are in the field. We know what teachers and students need. We need to be at the table and need to be heard. We're not trying to tell the district how to run itself. We just want input. We have a lot to bring to the table," she said.

Members will also receive a combination of 2 percent raises and bonuses throughout the life of the contract. Employee contributions to the health-care plan will remain at 8 percent of the premium for most employees. A new tier of employees earning less than $60,000 will contribute 5 percent of the premium.

The principals, who typically manage others, can organize under a provision in state law that allows CASA to bargain for them.

Collective Bargaining

Alaska Airport Machinists Can Strike After Judge's Ruling

An Anchorage airport could still see a Machinists strike over a union recognition dispute with a service provider, after a federal judge refused to block such an action.

The International Association of Machinists District Lodge 160 and Local Lodge 1690 collectively represent 70 ground support employees of Aircraft Service International Group at Ted Stevens Anchorage International Airport. The lodges have been in communication with ASIG, the union's attorney, Darin Dalmat, told Bloomberg BNA Aug. 25. But union members are "prepared to exercise their lawful right to strike," he said.

ASIG said in April that it would terminate the existing collective bargaining agreement on June 30 and stop recognizing the union as the bargaining unit representative. Union members voted overwhelmingly June 14 to strike over the lack of negotiations for a new agreement. ASIG and the union later agreed to extend the current CBA to Aug. 24.

National Labor Relations Act at Play ASIG argued before the U.S. District Court for the District of Alaska that a strike would violate the Railway Labor Act, which the company said governed its relationship with the union. But the National Labor Relations Act governs the relationship instead, Judge H. Russel Holland found. This means that ASIG couldn't unilaterally withdraw its recognition of the union, he said (*Aircraft Serv. Int'l, Inc. v. Int'l Ass'n of Machinists, District Lodge 160*, D. Alaska, No. 3:17-0167, 8/22/17).

Accordingly, Holland denied ASIG's motion for a preliminary injunction against a strike or other unlawful job actions by the union.

Holland noted that in the Ninth Circuit, which covers Alaska, ASIG couldn't unilaterally decide to withdraw its recognition of the union even if the RLA covered the bargaining relationship.

Though the major disruption at the airport resulting from any strike is "not something anyone is excited about," the workers are ready to strike in response to the company's "bad faith bargaining," Dalmat said. Menzies Aviation, which purchased ASIG early this year, has taken a "very adversarial approach to labor relations," he said.

"It looks like we're going to have some bargaining dates next week, and if they're serious, we think that we can conclude a contract next week," Dalmat said. "There's no reason why we shouldn't—they've had our bargaining proposals for over a month now."

Menzies Aviation is "very disappointed" by Holland's ruling and is currently evaluating all of its legal options, the company said in a statement.

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Signs of NLRA Coverage Because the NLRA covers the bargaining relationship, the provisions of the Norris-LaGuardia Act cover ASIG's request for injunctive relief against a strike, Holland noted. The Norris-LaGuardia Act generally limits the ability of courts to issue injunctions in labor disputes. Holland said if the union were recognized under the RLA instead, the company could seek injunctive relief that the Norris-LaGuardia Act would otherwise prohibit.

The union in 1981 filed a petition with the National Labor Relations Board to represent workers employed by ASIG's predecessor, which went on to recognize the union. A petition to deauthorize the union came in 1982, which led to a majority of members voting against deauthorization. "Both of these petitions are positive evidence that the Union was recognized under the NLRA," Holland said.

ASIG thus far has failed to meet Norris-LaGuardia Act requirements of showing that the union committed or threatened some unlawful act, that there was injury to ASIG's property, and that there was threatened violence that law enforcement wouldn't address, Holland determined.

Foley & Lardner LLP and Stoel Rives LLP represented ASIG. Jermain Dunnagan & Owens PC, James & Hoffman PC, and Schwerin Campbell Barnard Iglitzin & Lavitt LLP represented the union.

By Elliott T. Dube

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Labor Law

Punching In: Decision on EEOC Pay Data Looming

The Trump administration has a decision to make about new pay data disclosure requirements for businesses, while House lawmakers have a couple of labor agenda items in the queue when they return from their summer break. To learn more, punch in with Ben Penn and Chris Opfer Monday morning for a look at the labor week ahead. You'll find their column here and can contact them on Twitter at @chrisopfer and @benjaminPenn.

The Office of Management and Budget may decide soon whether to revisit the Equal Employment Opportunity Commission's new pay data obligations for employers with at least 100 workers. The U.S. Chamber of Commerce wants the OMB to take another look at the burden on businesses that would be forced to turn over pay data categorized by sex, race, and ethnicity.

Congress is in recess for one more week, but there are already some signs that lawmakers in the House may turn to bills on joint employer liability and paid leave when they return. In the meantime, Ben and Chris are watching for pre-Labor Day updates on workplace policy from the AFL-CIO and Chamber of Commerce.

By Chris Opfer

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LGBT Discrimination

Trump Orders Military to Stop Accepting Transgender Recruits

President Donald Trump ordered the U.S. military Aug. 25 to reject openly transgender people as new recruits but authorized Defense Secretary James Mattis to decide how to handle transgender personnel already serving in the armed forces.

Trump also ordered the military to stop paying for gender reassignment surgical procedures by March 23 except to protect the health of someone who has already begun the process of reassigning sex, according to a senior White House official who briefed reporters on condition of anonymity.

The Defense Department will have six months to consider how to handle openly transgender people currently serving in the military under a memorandum that Trump signed on Aug. 25, the official said. The memorandum directs the department to consider unit cohesion, applicable law and resources in making the determination, the official said.

Trump announced July 26 he would ban transgender people from serving "in any capacity" in the U.S. military, reversing President Barack Obama's policy to let them serve openly in the ranks.

That announcement, in a series of early morning tweets, caught Pentagon officials and key members of Congress off guard, and the Pentagon said it wouldn't change its policies until it received a formal order from the president.

"There will be no modifications to the current policy until the President's direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance," the office of Joint Chiefs Chairman Joseph Dunford said in a statement after Trump's July tweets. "In the meantime, we will continue to treat all of our personnel with respect."

Trump Issues Formal Notification That formal notification came in a presidential memorandum Trump signed Aug. 25, the White House official said.

Trump said in July his concern hinged on the additional medical costs and "disruption" of such troops. White House Press Secretary Sarah Huckabee Sanders cited "military readiness and unit cohesion."

Care related to gender reassignment costs the Pentagon $2.4 million to $8.4 million annually, the larger number a little more than 0.1 percent of the military's entire health-care bill, according to a 2016 Rand Corporation study. By contrast, the military spent $84 million on Viagra and other drugs for erectile dysfunction for active-duty troops, eligible family members, and retirees in 2014 alone, the Military Times reported.

Treatment of transgender people has become a flashpoint in the U.S. culture wars as social conservatives lead fights in some states to require that students and sometimes adults use school and public restrooms corresponding to their gender at birth.

Trump has attempted as a candidate to thread a needle between the two sides. In his campaign, he cul-

tivated evangelical voters while at the same time promising to "fight for" the gay and transgender community.

By Jennifer Jacobs and Arit John

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Church Plans

RI Hospital Pension Seeks OK for 40 Percent Benefit Cuts

A Rhode Island hospital pension fund with more than 2,700 participants says it could run out of money in the next decade if it doesn't cut benefits by at least 40 percent.

St. Joseph Health Services of Rhode Island Retirement Plan on Aug. 18 asked a Rhode Island Superior Court judge for permission to enter receivership, which it says would allow for a "long-term wind-down" of the plan. The plan—which was 90 percent funded when the hospital was sold to California-based Prospect Medical Holdings Inc. in 2014—now has a deficit of more than $43 million and could become insolvent as early as 2026, according to the receivership petition filed with the court.

The 2014 transaction—in which the plan received a one-time $14 million contribution and froze future benefit accruals—transferred St. Joseph's hospital operations to Prospect but didn't require Prospect to continue funding the pension plan. This appears to have left the plan effectively orphaned. During one recent 12-month period, the plan paid out more than $10 million in benefits while receiving no employer contributions, according to documents filed with the petition.

In the receivership petition, St. Joseph said the assumptions made about funding levels at the time of the 2014 transaction "did not consider all of the long-term issues affecting the Plan."

The deal was approved by Rhode Island Attorney General Peter Kilmartin under the state's Hospital Conversion Act. Kilmartin on Aug. 24 released a statement calling the recent developments troubling and questioning how a pension fund could become insolvent three years after being 90 percent funded. Kilmartin said he will be closely monitoring the legal process and "assessing where we have legal standing to intervene."

Church Plan Exemption The decision to seek receivership was driven in part by St. Joseph's belief that the pension plan would lose "church plan" status on or before Dec. 31, 2018, the petition says. Church plans are exempt from many rules governing employer-sponsored pension plans under the Employee Retirement Income Security Act, including minimum contribution requirements and the mandate to obtain government-backed pension insurance with the Pension Benefit Guaranty Corporation.

Church plans also are exempt from an ERISA rule barring reductions in accrued benefits—such as the 40 percent cuts proposed here.

St. Joseph's petition says that if the plan loses church plan status, the nonprofit corporation "would be required to make minimum annual contributions and annual payments to PBGC, and would otherwise be required to comply with ERISA." St. Joseph, which ceased hospital operations in 2014, said it "does not have the financial resources" to do this.

St. Joseph's belief that a loss of church plan status may be imminent is informed by advice from counsel and not from conversations with federal regulators, Richard J. Land, an attorney representing St. Joseph and a partner with Chace Ruttenberg & Freedman LLP in Providence, R.I., told Bloomberg BNA.

Land said the concern stems partly from the fact that St. Joseph no longer generates revenue through the operation of a church-affiliated hospital.

The receivership petition says St. Joseph has been "an affiliate of the Catholic Church" both before and after the 2014 transaction. The Roman Catholic Diocese of Providence, which St. Joseph says it operates "under the patronage of," released a statement calling the development "troubling" and denying responsibility.

"It should be noted that no action by the Diocese resulted in the filing of this receivership," the statement says. "The Diocese of Providence is not currently, and has not been, responsible for the ownership, management, or oversight of the pension funds in question, and SJHSRI is not a diocesan entity."

Since 2013, dozens of religiously affiliated hospitals have been hit with class actions saying they've mismanaged their pension plans by wrongly treating them as church plans exempt from ERISA's funding, disclosure, and vesting requirements. Several lawsuits have led to multimillion-dollar settlements, including a $352 million deal inked by Providence Health & Services. The U.S. Supreme Court addressed this issue in June, holding that church-affiliated hospitals are free to run their pensions as church plans exempt from ERISA's requirements in certain circumstances.

Land said St. Joseph's concern over losing church plan status wasn't specifically influenced by the Supreme Court's decision.

Familiar Facts It's not unprecedented for a hospital with a claimed ERISA-exempt church plan to attempt benefit cuts following a merger.

Workers at Chicago's Holy Cross Hospital in 2016 filed a lawsuit saying their pension benefits were shortchanged after Holy Cross merged with Sinai Health System three years earlier. The workers accused Holy Cross of attempting to transfer liability for the underfunded pension plan to an order of nuns, which the workers say led to significant benefit cuts when the plan was ultimately terminated.

Holy Cross settled this lawsuit in 2017 by adding an additional $4 million to the pension plan.

Schenectady, N.Y., hospital St. Clare's Corp. informed workers and retirees last fall that its pension plan had a deficit of more than $35 million and would run out of money between 2024 and 2028, according to correspondence reviewed by Bloomberg BNA. St. Clare's, which was consolidated with other Schenectady health providers in 2008, said the plan had no meaningful source of contributions and "will not be

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able to pay benefits to participants after its assets have been exhausted."

In November 2016, participants in the pension plan for St. James Hospital of Newark, N.J., were informed by the plan's custodian that it hadn't received any deposits to the plan "for a number of years" and it had been unable to communicate with the parties responsible for funding the plan. The letter from Transamerica Retirement Solutions LLC, which was obtained by Bloomberg BNA, said plan assets would be depleted within the year and that "no further pension payments will be processed" after that time.

St. James closed in 2008 in connection with a hospital acquisition by Catholic Health East, which has since become Trinity Health Corp.

By Jacklyn Wille

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Text of the receivership application is at http://src.bna.com/rUU.

Education

Point Park Professors Reach Deal at Long Last

Full-time faculty at Point Park University in Pittsburgh will finally get to vote on a first contract more than a decade after voting to unionize.

Professors at the liberal arts college in downtown Pittsburgh were scheduled to get a peek at the tentative deal Aug. 25. The 140-member unit will vote on the five-year contract Aug. 28, a university spokesman told Bloomberg BNA. The workers are represented by the Newspaper Guild of Pittsburgh. The Guild is affiliated with the Communications Workers of America.

The tentative deal was reached Aug. 23, the university said.

If ratified, the contract will be retroactive to the 2016-17 school year and continue until the 2021-22 academic year, Michael A. Fuoco, the union's president, told Bloomberg BNA Aug. 25.

The deal significantly improves wages, benefits, and workloads for faculty members, Fuoco said. He would not elaborate on details of the proposal.

Organizing Fight Spans Years The median amount of time it takes for a union to ratify a first contract after organizing is 355 days, according to Bloomberg BNA's analysis of 110 first contracts in its database of wage settlements.

A dispute between Point Park administrators and the union began in 2003 when the faculty voted to organize. The university argued that full-time faculty were managerial employees and thus not entitled to form a union. The issue was litigated for several years at the National Labor Relations Board and the U.S. Court of Appeals for the District of Columbia Circuit.

The case was remanded to the NLRB's regional director in Pittsburgh in 2015, and Point Park subsequently announced it was ceasing all appeals and would recognize the union. The university said at the time that it did not "wish to spend any more resources on a potentially costly legal battle."

That dispute is in the past, Fuoco said. "With this contract the full-time faculty has a brighter future," he said.

While a good number of current members were not part of the union when it was first formed in 2003, new staff have remained supportive of the union. No one has come forward in 14 years to decertify it, Fuoco said.

Members who weren't "big union people" before the deal are fully in support now after seeing the contract. "That's how good it is," Fuoco said.

Part-time faculty at Point Park have been organized under the United Steelworkers since 2015 and are currently under contract.

By Jaclyn Diaz

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Religious Discrimination

Kobach's Office Cleared of Firing Kansas Worker Over Religion

The office of Kansas Secretary of State Kris Kobach didn't discriminate against a worker who alleged she was fired because she didn't attend church, a federal jury decided Aug. 24 (*Canfield v. Kansas Sec'y of State*, D. Kan., No. 15-04918, *jury verdict* 8/24/17).

Kobach, a conservative Christian, occasionally held religious gatherings in his office after the close of business, Courtney Canfield said in a 2015 lawsuit. Canfield didn't attend any of the devotional meetings.

Three days before her firing, she said, Assistant Secretary of State Eric Rucker visited Canfield's grandmother and told her that Canfield was being fired partly "for not going to church." Rucker and Canfield's grandmother are acquaintances, Canfield said. The secretary of state's office countered that Canfield wasn't fired because of religion but because of alleged disruptive behavior, poor attendance, and excessive personal phone calls.

A jury sided with the government and found no religious discrimination against Canfield under Title VII of the 1964 Civil Rights Act or Kansas law.

"This result shows that our courts remain an effective institution for finding out the truth," Kobach said in statement. "Oftentimes frivolous claims like this are made in the hope that the defendant would settle and pay out money."

Charges filed with the Equal Employment Opportunity Commission alleging discriminatory discharge based on religion have dipped slightly in the past few years, according to government enforcement statistics. The agency received 1,815 such charges in fiscal 2010. That number dipped to a low of 1,714 in fiscal 2015 before moving back up to 1,794 in fiscal 2016. Employees like Canfield must file bias charges with the EEOC before bringing a private Title VII lawsuit.

Canfield's attorney, Gary E. Laughlin of Hamilton Laughlin Barker Johnson & Jones in Topeka, Kan.,

didn't immediately respond to Bloomberg BNA's Aug. 25 request for comment.

David R. Cooper, Seth A. Lowry, and Terelle A. Mock of Fisher, Patterson, Sayler & Smith in Topeka represented the secretary of state's office.

BY JAY-ANNE B. CASUGA

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The jury verdict is available at http://www.bloomberglaw.com/public/document/Canfield_v_Secretary_of_State_et_al_Docket_No_515cv04918_D_Kan_Au?doc_id=X1Q6NT4HPB82.

In-House Counsel

Artificially Intelligent Corporate Counsel on the Horizon

Artificial intelligence is making its way into in-house legal departments, with companies like Microsoft Corp. speeding the use.

Some large companies and law firms already are using AI—technology in which machines perform tasks that require human intelligence—to review contracts, analyze legal spending, and predict litigation outcomes.

Microsoft has been testing the use of AI in several in-house legal projects for the past several months, according to Lucy Bassli, assistant general counsel of legal operations and contracting.

In addition to time savings for in-house attorneys and increased effectiveness in Microsoft's compliance programs, the goal of the pilot programs are "fast and easier access to information that is right now spread across multiple systems, and in a variety of unstructured documents," Bassli said.

"We hope to be able to speed through information quicker, negotiate contracts faster, and make it a smoother process for the people we are negotiating our contracts with, as well," she said.

There are a variety of other early-stage AI developments out there that will "evolve and develop in the short term pretty aggressively," likely in the next year to 18 months, Bassli told Bloomberg BNA.

"We are almost there as a legal industry," she said.

Growing Interest While AI is still in its infancy, there is growing interest in how AI can aid, speed up or improve in-house functions, corporate counsel told Bloomberg BNA.

Online business payment network Viewpost, for example, is watching the applications and use of AI to determine where the technology best fits its legal operations, General Counsel and Chief Security Officer Christopher Pierson told Bloomberg BNA.

The Orlando, Fla.-based company also is partnering with firms that are exploring this area "from a thought leadership and operational capacity as well," Pierson said.

The areas in which in-house departments are likely to benefit from AI are efficiencies in the contract review and creation process, and predicting and preventing future litigation, Pierson said.

By using AI tools to look at company litigation patterns, general counsel will be able to "figure out where we might want to pay attention," he said. The technology also can help in-house attorneys identify risks, both internal and external.

For example, AI can sort through the unstructured data from emails, documents, and other computer activities to allow general counsel to predict when there is "something amiss" with an individual employee, Pierson said.

Early Adopters Ultimately, public companies likely will lead the way in using AI for legal services.

"Public companies could be early adopters as they have the resources to invest and implement the technology," Michael Caplan, the New York-based chief operating officer of law firm Goodwin Procter LLP, told Bloomberg BNA.

Companies in highly regulated industries such as health care and banking could also adapt early to leverage the technology to address compliance pressures, Iohann Le Frapper, board chair of the Association of Corporate Counsel, told Bloomberg BNA.

Corporate legal departments that want to be forerunners in AI use face a challenging prospect because they have to invest time and resources to figure out the technology, Le Frapper said. However, once there are more users, "the adoption rate will likely increase dramatically," he said.

Using AI General counsel, in deciding whether to use AI, must consider their individual data utilization strategies when it comes to things like managing and predicting outside counsel budget, and building preferred panels and risk reward models, Caplan said.

For in-house attorneys that want to ease into AI, there are many vendors out there that offer services based on the technology. Tel Aviv-based LawGeex, for example, uses AI to analyze "low value, high volume" contracts.

Its clients include general counsel from U.S. finance, insurance, and retail companies, and from foreign companies such as U.K.-based social media online monitoring service Brandwatch, LawGeex co-founder and chief executive officer Noory Bechor told Bloomberg BNA.

AI supporters also reject concern that the technology will replace jobs in the legal industry.

The technology shouldn't be thought of as human versus computer, said Ned Gannon, chief executive officer of AI contract review service eBrevia, based in Stamford, Conn. Instead, the technology should be viewed as the enhancement of the capabilities of a human using the software versus one who is not, he said.

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Plan Contributions

Ochsner Health Must Face Claims of 401(k) Shortchanging

Ochsner Health System workers are moving forward with a lawsuit saying the company denied them retirement benefits by failing to credit their overtime compensation toward the company's 401(k) matching contribution (*Bergeron v. Ochsner Health Sys.*, 2017 BL 297343, E.D. La., No. 2:17-cv-00519-LMA-JCW, 8/24/17).

A federal judge on Aug. 24 refused to dismiss the workers' Employee Retirement Income Security Act claims against Ochsner, explaining that it had a fiduciary duty to honor the terms of its 401(k) plan, which allegedly required the matching contribution to reflect overtime compensation.

Ochsner argued that the ERISA claims should be dismissed because the workers didn't first raise them with the company, but the judge disagreed. ERISA's exhaustion requirement only applies to claims for benefits and not to claims of fiduciary breach, the judge said.

The workers say that as many as 10,000 people were harmed by Ochsner's 401(k) practices. Besides requesting class action treatment for their ERISA claims, the workers seek to maintain a collective action under the Fair Labor Standards Act. Those claims—which weren't at issue in this ruling—accuse Ochsner of shortchanging them on wages by excluding shift differentials, hourly on-call and callback pay, and lunch periods spent working.

Judge Lance M. Africk of the U.S. District Court for the Eastern District of Louisiana also considered the workers' claims under state law, dismissing their claims for penalty wages and attorneys' fees under the Louisiana Wage Payment Act.

Ochsner is a New Orleans-area nonprofit health system with 29 hospitals and more than 18,000 employees.

Jackson Shields Yeiser & Holt and Kenneth C. Bordes represent the workers. Jones Walker represents Ochsner.

BY JACKLYN WILLE

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Text of the decision is at http://bloomberglaw.com/public/document/Bergeron_v_Ochsner_Health_Sys_No_17519_SECTION_I_2017_BL_297343_E?doc_id=XSNTODJ0000N.

Productivity

Seeing a Summer Productivity Slump? Don't Blame Vacations

The summer months are often associated with a slower work pace, but if productivity is dropping dramatically, employers may need to rethink some policies and practices.

Restricting employees from taking summer vacation, however, isn't a solution, consultants say.

"The summer months are definitely prime time for employees to use their PTO and head out on vacation," Vip Sandhir, founder and chief executive officer of employee engagement solutions provider HighGround, told Bloomberg BNA via email Aug. 24. "Naturally, productivity dips in the summer when workers are in and out of the office, which oftentimes leaves their colleagues with heavier-than-usual workloads."

But summer vacations shouldn't bring business to a halt, Ken Oehler, global culture and engagement practice leader at Aon Hewitt, told Bloomberg BNA Aug. 24.

Time Off for Recharging "Businesses should question the conventional wisdom that time off leads to loss of productivity," Oehler said, because when done right, vacations allow employees to recharge and come back to work in a highly productive and engaged mode.

Businesses experiencing a large drop in productivity or engagement in June, July, and August need to look at whether they're providing employees with work-life balance, he said, adding that employers should be encouraging workers to take a break to recharge, he said.

Companies should also look at how managers are handling leave during the popular vacation months, Oehler added. "The loss of productivity is really a result of managers not planning well," he said. "If too many critical employees are taking time off at once, or taking short amounts of time," that can leave the employer with no back-up plan, he said.

Encouraging Vacations Engenders Trust "For some companies, summer is slower than other seasons so using PTO won't force other employees to pick up the slack, Sandhir said.

And encouraging employees to take time off fosters an environment of trust, he noted. Company culture should be balanced enough that employees don't feel guilty about using vacation time, he added.

Oehler warned that discouraging employees from taking vacations actually creates less productive and engaged workers and a less effective workplace. Instead of planning weeklong vacations where work has been appropriately delegated for business continuity, employees feel they can only take a short weekend away, he said. "Balance is a really important thing," he said.

The Flexibility Fix Another strategy for managing employee absences--and potentially lost productivity--in the summer months is to offer flexible work options. Brie Reynolds, senior career specialist at FlexJobs, told Bloomberg BNA via email Aug. 24.

"Even temporarily, flexible work options can help employees get their work done while balancing all of the things they have going on outside of work," she said, citing a FlexJobs 2017 flexible work survey.

Sixty-six percent of workers think they'd be more productive working from home and 32 percent think they'd be just as productive, according to the survey. In fact, only 7 percent of workers say they're at their most productive in the office during normal work hours, Reynolds said.

When it comes to improving engagement, 79 percent of respondents to the FlexJobs survey said they would be more loyal to their employers if they had flexible work options and 45 percent said a job with flexibility would be a "huge improvement" on their overall quality of life.

"If employers are noticing a slump in productivity during a standard workday, they should consider allowing people to work from home, even occasionally," Reynolds said.

Train Managers as Slump Busters If companies are experiencing a productivity slump in the summer, they need to examine workforce gaps, management, and workflow, not individuals' workloads, Oehler said. HR can best help by training managers to better supervise their teams and plan for leave, he said.

"HR might make the policies but managers execute them. So training managers to create a culture of balance and engagement will better serve avoiding the summer slump," Oehler said.

HR can also solicit feedback or send out pulse surveys to measure employee productivity and happiness in real time, Sandhir said.

"This tactic allows HR departments to track seasonal dips in productivity and employee engagement—insights that can help organizations get their workforce back on track during the summer months," he added.

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Energy

U.S. Lays Groundwork for Rescuing Coal Plants With Grid Report

The Energy Department, in a long-anticipated report on the security of the U.S. electric grid, makes the case for rescuing the nation's coal industry from widespread plant shutdowns, but stops short of an assault on renewable power that environmentalists had feared.

The study, commissioned by Energy Secretary Rick Perry who has warned that policies favoring solar and wind may be forcing shut plants and threatening the grid, recommends that the Environmental Protection Agency ease rules on coal plants. It also calls for changes to how wholesale electricity is traded and easier permitting for resources such as coal, nuclear, and hydropower.

The report hands President Donald Trump a plan for fulfilling his campaign promise to revive America's ailing coal industry and put miners back to work. It paints a somewhat grimmer picture of grid security than an earlier draft that concluded the nation's power system is more reliable than ever, in spite of coal plant shutdowns. By contrast, the final report cautions that "market designs may be inadequate" to keep "traditional" power generation online.

"It is apparent that in today's competitive markets certain regulations and subsidies are having a large impact on the functioning of markets, and thereby challenging our power generation mix," Perry said in a statement. "Customers should know that a resilient electric grid does come with a price."

The U.S. power industry has been waiting for the Energy Department to release the study for months. Power generator FirstEnergy Corp. said in April that it wanted to see the results before pressing ahead with a plan to divest money-losing coal and nuclear plants. Rival Exelon Corp., the largest operator of reactors in the U.S., told investors this month that it expected the report to highlight the "critical role" that nuclear plays.

Cheap Gas The sweeping 181-page report concludes that coal-fired and nuclear power plants are being forced out of business primarily because they can't compete against cheap and abundant natural gas, which is flowing out of U.S. shale formations at a record pace. Policies favoring solar and wind energy also have played a role, the study shows.

It stresses the critical need to preserve coal, nuclear and other baseload plants that continue to produce power when the wind isn't blowing and sun isn't shining. The report argued that even natural gas-fired generators, which rely on pipelines to receive fuel, may be less resilient.

"The more we rely on natural gas, the more we're relying on fuel that arrives just in time" at a power plant, said Joseph Dominguez, Exelon's vice president of governmental and regulatory affairs and public policy.

'Warped View' Federal regulators are "going to have to value these resilience attributes" of dependable resources, especially coal plants that can store enough fuel on-site to last months, said Paul Bailey, chief executive officer of American Coalition for Clean Coal Electricity. "Coal stacks up really well. Natural gas does OK. Nuclear does pretty well. Renewables don't do well in some respects and do OK in others.

"You need a coal fleet in order to have a resilient and reliable grid," Bailey said.

John Shelk, president of the Washington-based Electric Power Supply Association, said ensuring the resilience of the U.S. power grid doesn't simply mean handing out subsidies for coal and nuclear plants.

"Coal and nuclear want resilience to be a code word to subsidize them when they can't compete," said Shelk, whose group represents power generators such as NRG Energy Inc. and Dynegy Inc. that sell their supplies into wholesale markets. "That's a warped view of resilience. All fuels, technologies and attributes should be considered together."

Advanced Energy Economy, a group that promotes solar and wind, said the report "seriously overstates" the challenges associated with new energy resources. The American Petroleum Institute meanwhile noted that natural gas is now the source of more electricity in the U.S. than any other fuel and has cut consumers' energy costs "without government mandates and subsidies."

One way that the federal government can assist uneconomic coal plants is to compensate baseload plants for the resilience they offer the power grid, according to the report. The authors recommend that the Federal Energy Regulatory Commission, which oversees power markets, study ways in which those reliability attributes can be appropriately valued. That could include the creation of new pricing mechanisms or changing the agency's approach to energy price formation, the report says.

That recommendation echoes comments recently made by Neil Chatterjee, who was tapped by Trump to temporarily lead the energy commission. Chatterjee said coal-fired plants are a crucial part of America's en-

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ergy mix that needed to be "properly compensated to recognize the value they provide."

The commission is already weighing whether it should redesign market rules to better account for state policies encouraging the use of zero-emissions power. New York and Illinois recently established subsidies for nuclear power and others are considering doing the same.

The "study reaffirms our view that nuclear energy is a key and necessary contributor to a clean, reliable and resilient electric grid, which now is more important than ever," Nuclear Energy Institute Chief Executive Officer Maria Korsnick said in a statement.

One regulation cited by the report requires coal plant operators to apply for a permit before making substantial upgrades. That requirement "creates an unnecessary burden that discourages rather than encourages" investments, the report says.

Since ordering the study in April, Perry has taken a deliberately hands-off approach and was only briefed on its findings on the morning of Aug. 22, agency officials said. The report was overseen by Travis Fisher, a senior adviser at the department, and Brian McCormack, Perry's chief of staff.

—With assistance from Tim Loh, Jennifer A. Dlouhy and Mark Chediak.

By Catherine Traywick and Jim Polson

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OSHA

Worker Fatalities List Moved Off OSHA Website Home Page

OSHA removed information on worker deaths, as well as an instructional video on reporting employer safety violations, from visible locations on the agency website's home page Aug. 25.

The Occupational Safety and Health Administration said it changed the website so it didn't inaccurately suggest employers were at fault for the workplace fatalities listed. But former agency officials said the changes will make it more difficult for the public to learn about worker deaths and the importance of OSHA's work.

The changes include the removal of a box labeled "Workplace Fatalities" from the right-hand column of the home page, which had listed all workplace fatalities and names of those who had died. Some of the information is available through the "data" button on the home page, but that lists only work-related fatalities for cases cited by OSHA and doesn't include the workers' names.

Replacing the worker fatalities box is information on training and compliance assistance programs.

OSHA spokeswoman Amanda Kraft wrote in an email to Bloomberg BNA Aug. 25 that the previous home page listed initial reports of worker fatalities, but that those reports didn't always result in citations to an employer and some were later determined to be outside of OSHA's jurisdiction.

Kraft said the change "is a more accurate reflection of work-related fatalities." She also said it "respects the privacy of the victim's surviving family members and loved ones" by not listing the names of workers who had died.

"We are continuing to review all of the data to ensure it is accurate and useful to our stakeholders," she said.

Marc Freedman, executive director for labor law policy at the U.S. Chamber of Commerce, said in an email Aug. 25 that posting the information was counterproductive.

"OSHA made no attempt in their previous postings to distinguish between fatalities where the employer was at fault and those where the employer had no role," Freedman said. "Similarly, by including fatalities not under their jurisdiction, the implication was that those employers were subject to federal OSHA jurisdiction and therefore, somehow at fault under federal law."

Ex-Officials Criticize Decision The changes could bring less scrutiny to companies if advocates, reporters, and other members of the public take longer to identify worker deaths. If information is not posted until a citation is issued, it may not be publicized in a timely manner because an investigation would have to first occur.

Debbie Berkowitz, a senior fellow at the National Employment Law Project and a former senior policy adviser to OSHA, said the information was added in 2010 to better publicize the issue of worker deaths after staff noticed the Mine Safety and Health Administration had a similar tool on its homepage.

"The whole point of putting these names on the website was to illustrate that we have a serious problem in this country, that more than 4,500 workers are killed in the workplace each year," Jordan Barab, who served as OSHA deputy director from 2009 to 2017, told Bloomberg BNA Aug. 25.

Berkowitz said the listing of worker deaths, usually posted within a month of the incident, came from fatalities that companies told OSHA about by phone. Deaths determined to be outside of OSHA's jurisdiction were promptly removed, Berkowitz said. She said displaying the deaths prominently was important to show the public why OSHA's work matters.

OSHA's new leadership feels "they no longer have to remind anyone that safety is important, and that workers are being killed on the job," Berkowitz said.

By Sam Pearson

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Business of Law

Workflows: Law Firm News for Aug. 25, 2017

In Workflows, Bloomberg BNA brings you the latest in the steady stream of news about practitioners of labor and employment law.

Meredith Kaufman has joined **Baker McKenzie** in New York as a partner in the employment and compensation practice.

Elkins Kalt Weintraub Reuben Gartside added employment litigator **Rebecca Torrey** as a partner in Los Angeles.

Christine A. Amalfe, chair of the labor and employment law department at **Gibbons** in Newark, N.J., has been appointed to the **American Bar Association** Advisory Council for the Initiative on Achieving Long-Term Careers for Women in Law.

Worklaw firm **Jackson Lewis** added **Justin M. Winter** as counsel in Reston, Va. Winter focuses his practice on mine safety and health law. **Joanne Braddock Lambert** was named managing principal of Jackson Lewis' office in Orlando, Fla.

Anthony Hall has been elected vice president of finance for the **National Bar Association**. Hall is the managing shareholder in the Orlando, Fla., office of labor and employment firm **Littler Mendelson.**

Momkus McCluskey Roberts in Lisle, Ill., promoted attorney **Lauryn Parks** to partnership status. Parks is a member of the firm's employment law and commercial litigation groups.

Smith Haughey Rice & Roegge hired employment litigator **Jeffrey S. Dornbos** as a senior counsel in Holland, Mich.

The Wagner Law Group, an ERISA and employee benefits law firm, added **Patrice Maloney-Knauff** as counsel in Chicago.

Susan Cancelosi has been appointed associate dean at **Wayne State University Law School** in Detroit. As a faculty member there, her research focused on employment-based retiree benefits.

Beth Jones in Raleigh, N.C., is the new leader of the labor and employment team at **Womble Carlyle**.

BY GAYLE CINQUEGRANI

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Latest Cases

Litigation

Latest Labor and Employment Cases for August 25, 2017

The following are summaries of the latest court and National Labor Relations Board rulings involving labor law, wage and hour, discrimination, disabilities and individual employment rights, prepared by Bloomberg BNA legal editors.

LABOR

Federal Preemption A federal court in Seattle won't get involved in a brewing controversy over whether a new city ordinance that provides a mechanism for drivers to collectively bargain with ride-hailing companies, such as Lyft, Inc., and Uber Technologies, Inc., is preempted by federal labor law or violates the drivers' First Amendment rights. Although a Seattle Teamsters local has informed three ride-hailing services that it would like to be the bargaining representative for their drivers, the dispute isn't ready to be heard in court yet because there is no way to determine the impact any future collective-bargaining agreement will have on drivers who don't want to join a union (*Clark v. City of Seattle*, 2017 BL 298107, W.D. Wash., No. C17-0382RSL, 8/24/17).

Waterfront Labor Union officials for several International Longshoremen's Association locals representing waterfront workers at the Port of New York can't quash subpoenas issued to them by the Waterfront Commission of New York Harbor as part of an investigation of a waterfront strike that wasn't authorized. The union officials claim that the subpoenas infringed their right to engage in collective activities, but the commission's subpoenas are authorized by the Waterfront Commission Compact between New York and New Jersey, a court said. (*Daggett v. Waterfront Comm'n of N.Y. Harbor*, 2017 BL 297578, D.N.J., No. 16-cv-4314 (ES), 8/24/17).

WAGE & HOUR

Collective Certification New York delivery drivers for a food company may not move forward collectively with their claim that they are owed wages because they were misclassified as independent contractors rather than employees. There are already two other collective actions against the company for the same claims, and adding another would be an inefficient use of court resources and may be confusing to the claimants (*Schucker v. Flowers Foods, Inc.*, 2017 BL 297833, S.D.N.Y., No. 16-CV-3439 (KMK), 8/24/17).

Settlement Distribution North Carolina sweet potato packers may distribute unclaimed funds from the settlement of their wage claims to the Student Action With Farmworkers organization. The organization's goal is aligned with the purpose of state and federal wage laws because its mission is to assure protections for agricultural workers (*Mateo-Evangelio v. Triple J Produce, Inc.*, 2017 BL 297329, E.D.N.C., NO. 7:14-CV-302-FL, 8/24/17).

Settlement Agreements An oilfield worker can't settle his federal overtime collective action claiming that bonuses shouldn't have been deducted from workers' regular rate of pay, because he didn't provide enough information to certify the class. He also didn't show that there was really a dispute about the bonuses or that the agreement's confidentiality agreement was valid under federal law, the court found (*Prim v. Ensign United States Drilling, Inc.*, 2017 BL 298056, D. Colo., No. 15-cv-02156-PAB-KMT, 8/24/17).

Collective Certification An ex-IBEX call center worker can't get her federal wage law collective action certified because of looming questions about workers' arbitration agreements. She filed a collective action of her own because she didn't opt into another such action in time, but it appears that she's required to arbitrate her claim individually. The parties to the other collective action agreed to a collective arbitration, so she should try to reach a similar agreement, the court instructed (*Myers v. TRG Customer Sols., Inc.*, 2017 BL 298360, M.D. Tenn., Case No. 1:17-cv-00052, 8/24/17).

FMLA Interference/Retaliation The Henry Ford Hospital in Detroit didn't use a nurse anesthetist's positive drug-test results and improper narcotics handling as an excuse to retaliate against his use of Family and Medical Leave Act leave for a knee surgery. The fact that two other nurses weren't fired after they were audited for suspected drug mishandling doesn't show that the hospital had a retaliatory motive because those two nurses resigned voluntarily in lieu of being tested for drug use (*Eichbauer v. Henry Ford Health Sys.*, 2017 BL 297212, E.D. Mich., 16-cv-11404, 8/24/17).

Overtime A Texas human-resources recruiter can't go ahead with his federal unpaid overtime claim, because he didn't show that the company knew he was working overtime. Although he said that he didn't report the extra hours he worked due to the company's no-overtime policy, he was paid extra for the overtime he reported six times, and his supervisor's receipt of after-hours emails from him wasn't enough to show that she knew that he was working overtime, the court found (*Johnson v. Cameron Int'l Corp.*, 2017 BL 297779, S.D. Tex., No. CIVIL ACTION H-16-262, 8/24/17).

Default Judgment A Pennsylvania flag car service owner's heart attack and bankruptcy didn't excuse his failure to respond to drivers' federal and state overtime and wage collective claims, so the $70,894 award to the class stands. The fact that the drivers worked doing the

primary purpose of the service, which was to provide escort vehicles for wide-load trucks, undermined the defense that they were independent contractors, and the owner's claimed ill health didn't stop him from hiring an attorney who still waited until the owner faced jail for contempt to respond, the court noted (*Hancock v. A&R Flag Car Serv.*, 2017 BL 298057, E.D. Pa., No. 13-6596, 8/24/17).

DISCRIMINATION

Hostile Work Environment A black female employee over the age of 40 at the Federal Emergency Management Agency can't show that she was subjected to a hostile work environment despite what she alleges was "intense [b]ullying" by co-workers and a specific incident where her supervisor cornered her in an office and confronted her about her prior EEOC activity against FEMA. She didn't provide any evidence supporting her conclusory allegations that FEMA had treated her poorly because of her prior EEOC activity or because of her race or age (*Gordon v. Duke*, 2017 BL 297784, D.D.C., Civil Action No. 14-917 (JEB), 8/24/17).

Hostile Work Environment A Caucasian male program specialist didn't show that the Department of Veterans Affairs subjected him to a hostile work environment because of his race, age, or sex. Although the specialist's allegation that his supervisor's threats caused him to be hospitalized could be sufficiently severe enough to alter the conditions of his employment, he didn't show that the threats occurred because of his age, race, or sex (*Farsetta v. VA*, 2017 BL 297815, S.D.N.Y., 16cv6124 (DLC), 8/24/17).

Discharge A black employee didn't show that a plastics production company in Alabama fired her because of her race. She failed to show that she was treated differently than any non-black employees under similar circumstances or that her race was a factor in the firing decision, the court said (*Smitherman v. Decatur Plastics Prods., Inc.*, 2017 BL 297678, N.D. Ala., NO. 4:15-cv-1576-JEO, 8/24/17).

Sex Discrimination A male employee at A-1 Electric Heat & Air in Oklahoma can't go forward on his sex discrimination claim that he brought without an attorney representing him, because his allegation that his female supervisor showed gender favoritism was too conclusory (*Martin v. A-1 Elec. Heat & Air*, W.D. Okla., Case No. CIV-16-1348-R, 8/24/17).

Age Discrimination A 52-year-old benefits implementation specialist at Dominion Payroll Services in Virginia can go forward on her age discrimination claim after the company fired her without warning or notice. She had received only positive feedback prior to and at the time she was fired, and she was replaced with someone who was under 40 years old with little experience in the relevant areas of the position (*Georges v. Dominion Payroll Servs., LLC*, 2017 BL 298144, E.D. Va., Civil Action No. 3:16cv777, 8/24/17).

Discharge A black customer satisfaction specialist at Mercedes-Benz in New Jersey can go forward on his race discrimination claim after the company fired him for stealing food from the company cafeteria. His replacement was a white man who was less qualified and had allegedly been told by the specialist's white supervisor that he would be promoted soon despite his lack of qualifications (*Sims v. Mercedes-Benz USA, LLC*, 2017 BL 298001, D.N.J., Civil Action No.: 16-cv-9051, 8/24/17).

Race Discrimination A black former employee didn't show that an automotive repair facility and his supervisor subjected him to a racially hostile work environment. The facility took quick action to investigate and address the alleged harassment once the employee reported it and the conduct, such as racial slurs, that occurred in the supervisor's presence wasn't severe or pervasive enough to support the employee's claim, the court said (*Garner v. Gerber Collision & Glass*, E.D. Mich., Case No. 16-12908, 8/24/17).

DISABILITIES

Discharge BNSF Railway didn't discriminate against a locomotive engineer with sleep apnea by firing him for absenteeism, because he missed 11 calls for shifts while working an on-call schedule. It doesn't matter if his condition kept him from waking up, because he could have taken other steps to ensure he received calls, and the disciplinary process to fire him began before BNSF knew of his condition (*Alamillo v. BNSF Ry.*, 9th Cir., No. 15-56091, 8/25/17).

Qualified Individual The executive chef at a New Jersey inn can go to trial on his disability discrimination claim after he had a massive heart attack, had to take medical leave, and was replaced by another. A jury must decide whether he was a qualified individual, because he asked to come back to "light duty," but the inn didn't take any action to respond to his request and he might have been able to do his job outside of the kitchen (*Spikes v. Chotee, Inc.*, D.N.J., No. 16-0406-BRM-DEA, *unpublished* 8/24/17).

Sanctions An employee in Illinois won't be sanctioned for bringing a frivolous disability discrimination lawsuit against her employer, despite admitting in her deposition that she wasn't actually limited in any major life activity, because she could argue that her employer believed she was disabled (*Knapp v. Evgeros, Inc.*, 2017 BL 297218, N.D. Ill., No. 15 C 754, 8/24/17).

INDIVIDUAL EMPLOYMENT RIGHTS

Arbitration A former employee for Ace American Insurance Co. must arbitrate his claim that he was laid off for reporting the destruction of materials in violation of a litigation hold notice. The employee argues that he never received an arbitration agreement and didn't voluntarily waive his right to go to court, but Ace American has shown that the employee signed two documents regarding the agreement and that he had the chance to review its terms before returning it to the company (*Ace Am. Ins. Co. v. Guerriero*, 2017 BL 298037, D.N.J., Civil Action No.: 2:17-cv-00820, *unpublished* 8/24/17).

Contracts A former U.S. State Department employee fired from a Rule of Law Senior Advisor job in the Iraqi Transition Assistance Office can't proceed with his breach-of-contract claim for back pay and damages. He didn't show that he had a contract because he was hired under a temporary appointment, and he can't get back pay for any time that he wasn't working for the govern-

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ment, the court said (*Soliman v. United States*, Fed. Cl., 17-18C, *unpublished* 8/24/17).