

Beltway Buzz, July 20, 2018

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By James J. Plunkett

The Beltway Buzz is a weekly update summarizing labor and employment news from inside the Beltway and clarifying how what's happening in Washington, D.C. could impact your business.

See Ya Later, Persuader. It took more than eight years, but the U.S. Department of Labor's (DOL) persuader rule has finally been [rescinded](#). Proposed just one day prior to the National Labor Relations Board's (NLRB) [2011 ambush elections proposal](#), the persuader rule would have required employers and their attorneys or consultants to publicly disclose agreements they entered into regarding labor relations matters. Of course, the rule—which was finalized in April 2016—never went into effect as it was [permanently enjoined](#) in November 2016. The DOL offered several reasons for rescinding the 2016 interpretation including the fact that it impermissibly required reporting of activity that plainly constitutes “advice,” which is explicitly protected from reporting under the Labor-Management Reporting and Disclosure Act. This being Washington, D.C., however, the persuader reporting *concept* will never truly be dead, as it lives on in proposed legislation that the *Buzz* has recently discussed: the [Workplace Democracy Act](#) and the [Workers' Freedom to Negotiate Act](#). But that's another story . . .

Labor Veteran at OLMS. The individual who “signed” the persuader rescission is Arthur F. Rosenfeld, the newly minted director of the DOL's Office of Labor-Management Standards (OLMS). Rosenfeld is well-known to labor law wonks, having served as general counsel at the NLRB, among other high-profile positions. Rosenfeld's friend, Harold P. Coxson, has the [details on what's ahead for Rosenfeld at OLMS](#).

USCIS Memo on H-1B Denials. The U.S. Citizenship and Immigration Services (USCIS) recently issued a [new policy memorandum](#) that rescinds and replaces a 2013 policy memorandum on the use of requests for evidence (RFE). The [new memo](#) “restores to the adjudicator full discretion to deny applications, petitions, and requests without first issuing an RFE or a NOID [notice of intent to deny], when appropriate.” *In short, the memo gives more power to USCIS bureaucrats to deny H-1B applications or extensions.* The memo is another way, pursuant to President Trump's “[Buy American and Hire American](#)” executive order, the administration is looking to reform the H-1B visa program through subregulatory actions (rather than via the legislative process).

Kavanaugh Update. Senator Tom Carper (D-DE) has evidently [changed his position](#) on Brett Kavanaugh.

EMPOWER-ing Employees. House lawmakers this week introduced the “[Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting \(EMPOWER\) Act](#).” Text of the bill is not yet available, but assuming that the bipartisan bill tracks its [companion bill in the Senate](#), it would make it unlawful for “an employer to unilaterally include a nondisclosure clause or a nondisparagement clause that solely benefits the employer in a separation or settlement agreement.” Among other provisions, the bill would also require employers to disclose in their annual Securities and Exchange Commission (SEC) filings: (1) whether any awards or judgments were entered against it during the year regarding workplace harassment claims; (2) the number of workplace harassment settlements entered into during the year; and (3) the amounts of those settlements or judgments. Like current legislative efforts to limit predispute arbitration agreements, the EMPOWER Act is clearly a response and outgrowth of the #MeToo movement. While the *Buzz* doesn’t expect any immediate activity on the EMPOWER Act, we will be monitoring how the November elections could impact its chances.

The Heat Is On. Earlier this week, scores of worker advocates and health groups [filed a petition](#) with the Occupational Safety and Health Administration (OSHA) requesting that the agency adopt a national heat stress standard. Among the backers of the petition is David Michaels, who served as assistant secretary for OSHA in the Obama administration. As the *Buzz* discussed recently, a case is currently pending before the Occupational Safety and Health Review Commission regarding OSHA’s application of the general duty clause to heat exposure. OSHA is still without a Senate-confirmed assistant secretary and already has a lot on its plate (e.g., [injury and illness recordkeeping](#), [silica](#), beryllium, etc.), so the *Buzz* thinks that the petition—regardless of its merits—faces an uphill climb.

RIP, Ann Hopkins. Civil rights pioneer [Ann Hopkins](#) passed away this week. A top performer at a major accounting firm, Hopkins sued when she was passed over for a partnership position. Her case went all the way to the [Supreme Court](#), which established two significant tenets of discrimination law. First, the Court held that gender stereotyping is a form of sex discrimination. Second, a plurality of the Court set forth a new burden-shifting test that provided employers with a defense when they could demonstrate that they would have made the same employment decision even in the absence of discrimination. This “mixed motive” defense was largely codified in the Civil Rights Act of 1991. While maybe not necessarily a household name, Hopkins’s impact on workplace discrimination law and policy is immeasurable.

Big Man, Pig Man (Charade You Are). Earlier this week, Citizens Against Government Waste released its [2018 Congressional Pig Book](#)—its annual examination of the federal government’s pork-barrel spending. Some fun examples of “pork” in recent appropriations packages include the following:

- \$663,000 for a brown tree snake eradication program in Guam, which presumably can buy a lot of Tylenol-laced dead mice;

- \$65,000,000 for Pacific coastal salmon recovery—a 333.3 percent increase from the \$15 million last earmarked in fiscal year 2015; and
- \$16,700,000 for the East-West Center in Hawaii, secured entirely by Senator Brian Schatz (D-HI), who sits on the Senate appropriations committee.

Among those lawmakers who attended the launch of the *Pig Book* was Senator Jeff Flake (R-AZ), who attempted to get a [selfie with one of the book's mascots](#).

AUTHOR



James J. Plunkett

Shareholder, [Washington](#)

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