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Beltway Buzz, October 26, 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.

Agencies Propose HRA Expansion. On October 23, 2018, the U.S. Department of the Treasury, U.S. Department of Health and Human Services, and U.S. Department of Labor issued a proposed regulation to expand the use of health reimbursement arrangements (HRAs), which allow employers to reimburse employees for certain out-of-pocket healthcare expenses with money that is not counted as taxable income. In part, the proposal would allow employers to use HRAs to reimburse employees for the cost of health insurance plans that they might purchase on the individual market as a way to make it more affordable for those who are not covered by an employer-sponsored plan to obtain health insurance. The secretaries of the respective agencies described their proposal in the *Wall Street Journal* this week. Comments are due by December 28, 2018, and the agencies propose that the regulation become effective for plan years beginning on and after January 1, 2020.

NLRB GC Announces Clarification of DFR Standard. On October 24, 2018, National Labor Relations Board (NRLB) General Counsel Peter B. Robb issued a memorandum to his regional directors clarifying how they should pursue cases in which employees allege that the union has breached its duty of fair representation (DFR). Essentially, the memo states that unions may not merely claim negligence in

defense of mishandling employees' grievances. The memo sets forth the clarifying standard as follows: "In cases where a union asserts a mere negligence defense based on its having lost track, misplaced or otherwise forgotten about a grievance, whether or not it had committed to pursue it, the union should be required to show the existence of established, reasonable procedures or systems in place to track grievances, without which, the defense should ordinarily fail."

Dems Demand Demographic Data. It is no secret that certain policymakers and advocacy groups have long desired access to employer compensation data. These groups argue that this information will help regulators and enforcement agencies combat alleged pay disparities in the workforce. The most recent data grab effort—the Equal Employment Opportunity Commission's (EEOC) 2016 expanded EEO-1 form—was eventually stayed by the Office of Information and Regulatory Affairs (OIRA) in 2017. Still irked by this decision, on October 24, 2018, U.S. House Committee on Education and the Workforce Ranking Member Bobby Scott (D-VA) and two other members sent a letter to the Office of Management and Budget (OMB) demanding that it "rescind the stay and update and reinstate the 2016 revisions to the EEO-1 pay data collection form as soon as possible." While OMB and OIRA are unlikely to reverse themselves, this is no doubt a precursor of the agenda that Scott will pursue should he become chairman of the committee in the next Congress.

OFCCP Dangles Another Carrot. The *Buzz* recently reported on the Office of Federal Contract Compliance Programs's (OFCCP) plan to offer an Excellence in Disability Inclusion Award. In keeping with this "carrot" approach to compliance, late last week OFCCP proposed an additional award program, this one for Leadership in Equal Access and Diversity (LEAD). According to the proposal, "[t]his award will recognize contractor establishments that have developed and successfully implemented comprehensive equal employment opportunity and nondiscrimination programs, practice inclusion and fair treatment in the workplace regardless of race, color, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran[;] these programs recognize the importance of fairness in compensation practices and pay transparency." Award recipients will receive a three-year moratorium from scheduled compliance evaluations from the date OFCCP presents the award. Comments are due on December 18, 2018.

EEOC to Discuss Harassment Prevention. Continuing its efforts to confront sexual harassment in the workplace, the EEOC announced that it will hold a public meeting on October 31, 2018, entitled "Revamping Workplace Culture to Prevent Harassment." The meeting will focus on the recommendations for changing an organization's culture that are set forth in the EEOC's 2016 report of the Select Task Force on the Study of Harassment in the Workplace.

Justice O'Connor to Leave Public Life. In a letter released on October 23, 2018, retired Supreme Court Justice Sandra Day O'Connor announced that she will be withdrawing from public life as a result of being diagnosed with the "beginning stages of dementia, probably Alzheimer's disease." Reactions of the current Supreme Court justices are here. Of course, Justice O'Connor was the first woman to serve on

the Supreme Court. President Ronald Reagan appointed her in 1981 to replace Justice Potter Stewart, and she served on the Supreme Court until 2006. Upon her retirement, President George W. Bush nominated Justice Samuel Alito, Jr. to replace her. While a proper retrospective of the amazing life of the Supreme Court's first female justice is unfortunately beyond the scope of this publication, it is appropriate to acknowledge O'Connor's significant role in shaping federal employment law. Indeed, O'Connor authored the Supreme Court's 9–0 opinion in *Harris v. Forklift Systems, Inc.* (1993) that held that a plaintiff need not prove psychological injury in order to prevail in a sexual harassment claim under Title VII of the Civil Rights Act of 1964. O'Connor wrote:

> But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

These are no doubt significant and memorable words in the employment law lexicon, and we have Justice O'Connor to thank.

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