FEDERAL Employment Law Insider

*An update on new federal law and regulation affecting your workplace*

*David S. Fortney and H. Juanita (Nita) Beecher, Editors*
*Fortney & Scott, LLC*

*Vol. 15, No. 1*
*September 2017*

*DIVERSITY*

# Diversity and inclusion: America's CEOs are showing the path forward

by David S. Fortney and H. Juanita M. Beecher
Fortney & Scott, LLC

*We should honor—not attack—those who have stood up for equality and other cherished American values.*

—Intel CEO Brian Krzanich
upon his resignation from the
American Manufacturing Council

*The summer of 2017 has shown that American business is committed to, and prepared to defend, broad-based EEO and affirmative action principles. In a rapidly unfolding series of events, equal opportunity, diversity and inclusion, and affirmative action principles have come under attack in America, and America's CEOs have responded.*

## *CEOs distance themselves from president*

The Trump administration has reversed a number of Obama administration EEO policies this summer, making the following moves since July 4:

- President Donald Trump tweeted on July 26 that the military would not allow transgender individuals to serve, to the apparent surprise of many military leaders.
- The U.S. Department of Justice (DOJ) filed an *amicus* (friend-of-the-court) brief in a case before the U.S. 2nd Circuit Court of Appeals, *Zarda v. Altitude Express Inc.*, challenging the Equal Employment Opportunity Commission's (EEOC) position that Title VII of the Civil Rights Act of 1964 covers sexual orientation.
- On August 1, the *New York Times* reported that the DOJ was seeking to sue universities over affirmative action admissions policies deemed discriminatory against white applicants.

However, it was President Trump's response (or lack of response) to the August 12 march by white supremacists and neo-Nazis in Charlottesville, Virginia, during which a female counterprotester was killed, that created a chasm between his administration and its CEO advisers and supporters.

The president's failure to strongly condemn the hate groups led CEOs—beginning with Kenneth C. Frazier of Merck, an African American—to resign from the manufacturing council. President Trump's response to the resignation was to make one of his now classic personal Twitter attacks against Frazier. The business community immediately responded, quickly escalating its criticisms of the president's statements on Charlottesville.

After more CEOs resigned or threatened to resign, the White House disbanded both the American Manufacturing Council and another corporate advisory

## What's Inside





*Fortney & Scott, LLC, is a member of the Employers Counsel Network*

EMPLOYERS COUNSEL NETWORK
EMPLOYERSCOUNSEL.NET

board, the Strategic and Policy Forum. Then, 48 hours later, a third corporate group, the Presidential Advisory Council on Infrastructure, was disbanded when additional corporate resignations were threatened.

### *Bottom line*

The corporate leaders' strong response is instructive and significant. The CEOs' actions and their willingness to strongly criticize the president for his Charlottesville response have demonstrated the business community's significant commitment to equal opportunity and inclusiveness. Business leaders' willingness to engage in high-stakes actions when the most basic political structures failed to support fundamental nondiscrimination demonstrates that corporate leaders value—and, more important, are willing to defend—equal opportunity and inclusion, even in the face of political criticism and retribution.

The CEOs of America's major corporations have taken the lead to protect diversity and inclusion and to reject hatred and division. CEOs have taken a stand because they know the current and future employees and consumers in America will be more diverse than in the past and that protecting equal opportunity and inclusion will be valued and rewarded. And they are taking a stand even though they may be attacked by the president and others who disagree with their position.

In these fractious times, business executives are filling the vacuum left by political leaders in providing positive leadership on equal opportunity and inclusion. As Merck's Frazier stated in his resignation letter, "America's leaders must honor our fundamental values by clearly rejecting expressions of hatred, bigotry and group supremacy, which run counter to the American ideal that all people are created equal.

*David S. Fortney is a cofounder of Fortney & Scott, LLC, in Washington, D.C. You can reach him at dfortney@fortneyscott.com. H. Juanita M. Beecher is an attorney with Fortney & Scott, LLC, in its Washington, D.C., office. You can reach her at nbeecher@fortneyscott.com.* ✤



## INSIDE THE NLRB

# Class action waivers affirmed again, Miscimarra to depart NLRB

by Burton J. Fishman
Fortney & Scott, LLC

You can't fault the National Labor Relations Board (NLRB) for lack of trying. For at least five years, the General Counsel and the NLRB have attempted to convince the courts that a compulsory arbitration agreement that waives the right to institute class actions is an illicit infringement on employees' rights. You might have thought that once the 5th Circuit nixed the Board's position in *D.R. Horton Inc. v. NLRB* in 2013, the matter was closed. However, because the NLRB doesn't recognize appellate court rulings as binding beyond the deciding circuit, it has been testing its theory around the country—with modest success. As a result, a split among the circuits has been created.

The Board's record got worse in early August when another 5th Circuit panel ruled that an employer didn't violate the National Labor Relations Act (NLRA) by requiring employees and job applicants to waive their right to participate in class or collective actions against the company. *LogistiCare Solutions Inc. v. NLRB* (5th Cir. 2017). Not surprisingly, the court wrote that it was bound by its own precedent in *D.R. Horton.*

The NLRB's ruling in *LogistiCare* largely mimicked its position in *D.R. Horton,* so the 5th Circuit's holding was hardly unexpected. In prompt measure, the court held (again) that the company's class waivers didn't violate the NLRA because pursuing class action procedures is "not a substantive right." Not only did the 5th Circuit's new holding affirm *D.R. Horton,* but it also upheld its ruling in *Convergys Corporation v. NLRB* (5th Cir. 2017), decided days before the *LogistiCare* case.

It's somewhat surprising that the NLRB elected to pursue *LogistiCare* in light of the fact that the U.S. Supreme Court had already agreed to hear the *D.R. Horton* case in January (only to defer arguments to the 2017-18 term). No decision in *LogistiCare* would have much legal weight. But logic hasn't been an obvious factor in a number of the Board's actions in recent years. Which makes the decision of NLRB chair Philip Miscimarra to resign when his term ends in December all the more regrettable.

Miscimarra has been an often lone voice for precedent, reason, and logic since he was appointed by President Barack Obama in 2013. His dissents are widely regarded as templates for future decisions, restoring many of the precedents upended by the Obama Board.

It must have been a difficult decision for Miscimarra to give up the opportunity to chair a Republican NLRB, where his level-headed leadership would have been particularly valuable. However, he explained that during his next term, he would have to fund three children's college education, and a return to private practice was a fiscal necessity. Even though he faces a number of restrictions on the breadth of his legal practice, there's no doubt his counsel will be sought by a number of law firms. He is a veteran of law firms Morgan, Lewis & Bockius and Seyfarth Shaw LLP.

*Burton J. Fishman is an attorney with Fortney & Scott, LLC, in Washington, D.C. You can reach him at bfishman@fortneyscott.com.* ✤

*POLITICAL APPOINTMENTS*

## President Trump's recent appointments and nominations

by Sean D. Lee
Fortney & Scott, LLC

On July 31, 2017, President Donald Trump nominated Daniel Gade to serve on the Equal Employment Opportunity Commission (EEOC). The Iraq War veteran and former West Point professor would serve a five-year term expiring on July 1, 2021. Gade's nomination comes soon after Trump tapped Janet Dhillon, the former general counsel of Burlington Stores, to be EEOC chair. If Dhillon and Gade are confirmed, they will join current Commissioner Victoria Lipnic to create a Republican majority on the five-member EEOC.

On August 10, Trump nominee Marvin Kaplan was sworn in as a member of the National Labor Relations Board (NLRB), the independent agency tasked with administering the National Labor Relations Act (NLRA). Kaplan, who was confirmed by the Senate on August 2 on a party-line vote, will fill one of the two vacancies on the Board. The Senate will schedule a vote on Trump's second nominee, William Emanuel, following the August recess.

Chairman Philip Miscimarra announced on August 8 that he will leave the NLRB when his term expires on December 16, giving President Trump the opportunity to select a Republican replacement to head the five-member board. As we've previously reported, the NLRB under Trump will seek to undo the work of the Obama Board, which issued a number of controversial prolabor rulings, including decisions allowing "quickie elections" and expanding the definition of joint employment.

The U.S. Department of Labor (DOL) is also undergoing some staffing changes. Nicholas Geale, the acting solicitor of labor, has taken on the additional role of chief of staff under DOL Secretary Alexander Acosta. Geale replaces former chief of staff Wayne Palmer, who became the acting head of the DOL's Mine Safety and Health Administration (MSHA). With the exception of Patrick Pizzella, the nominee for deputy secretary of labor, Trump has yet to nominate candidates to fill a number of key leadership positions within the DOL, including administrator of the Wage and Hour Division (WHD). Bloomberg BNA reports the DOL intends to fill high-level positions within the next few weeks.

On August 22, the White House announced the DOL is establishing the Regulatory Reform Office, created in compliance with an Executive Order signed by the president in February. The office will be run by Nathan Mehrens, who has already held a variety of labor roles in the Trump administration and is currently the DOL's acting assistant secretary for policy. Previously, Mehrens recommended that a number of DOL regulations and policies issued under the Obama administration be eliminated because of the burden they impose on businesses. He joined the agency's beachhead team on January 20 after serving as a member of President-elect Trump's DOL landing team.

*Sean D. Lee is an associate with Fortney & Scott, LLC. He can be reached at slee@fortneyscott.com.* ✤

# INSIDE THE EEOC

## Acting Chair Lipnic expects decision on EEO-1 report by Labor Day

by H. Juanita M. Beecher
Fortney & Scott, LLC

At the recent Industry Liaison Group (ILG) National Conference, Victoria Lipnic, acting chair of the Equal Employment Opportunity Commission (EEOC), recognized that the "most important thing" conference attendees wanted to talk about was the EEO-1 report Component 2 pay data reporting. Lipnic acknowledged that "time is of the essence," and employers need to know soon what will be done with the pay and work hours components of the report so they can start making the investments and system changes necessary to comply.

Lipnic said that in response to a petition by the U.S. Chamber of Commerce, the Office of Management and Budget (OMB) is reevaluating the burden estimate associated with the revised EEO-1 report. She shared that she has written to the newly appointed head of the Office of Information and Regulatory Affairs (OIRA), the office within the OMB tasked with reviewing the report, to point out the impeding March 2018 reporting deadline

*continued on pg. 5*

# FEDERAL CONTRACTOR CORNER

## Acting OFCCP Director Dowd reaches out to contractors

by H. Juanita M. Beecher
Fortney & Scott, LLP

As opening speaker on the first day of the 2017 Industry Liaison Group (ILG) National Conference, Tom Dowd, interim director of the Office of Federal Contract Compliance Programs (OFCCP), spent the majority of his address emphasizing his vision for the agency to work harder on compliance assistance and communications with the contractor community. Dowd asked all OFCCP regional directors to attend the conference for the first time in ILG conference history so they could hear from the contractor community directly.

Transparency and direct communications with contractors were two big themes of Dowd's speech, which fed into his larger goal for the agency: to improve its relationship with contractors. He shared several of his ideas for the agency, including a voluntary training program that would "earn" contractors a two- to three-year moratorium from compliance reviews based on successful completion of the training. Another idea is to bring back public acknowledgment for contractors that demonstrate commitment to EEO, as in the past with the Exemplary Voluntary Efforts (EVE) awards. Throughout his speech, Dowd reaffirmed that a "vast majority" of contractors—approximately 98 percent—are in compliance.

In closing, Dowd emphasized his desire to use the conference as a way for the OFCCP and the contractor community to interact, asking specifically for contractors' suggestions and comments on creative and innovative ways for the two sides to work together.

### *Compliance assistance town halls scheduled*

Following up Dowd's announcement at the ILG National Conference, the OFCCP announced on Wednesday, August 16, that it would be holding three town hall meetings to enhance the scope and quality of its compliance assistance. The agency stated that it is holding the town halls because it wants to hear federal contractors' views and learn more about their experiences in implementing and managing their nondiscrimination and EEO requirements and how it can help. The agency also wants to hear from workers and their allies.

The town halls will be held on September 19 in Washington, D.C., September 26 in San Francisco, and September 28 in Chicago.

### *Update on filing VETS 4212 report*

In response to a letter from employers asking for clarification on the filing date for the 2017 VETS 4212 report and the possibility of moving the 2018 filing date, the deputy assistant secretary of the Veterans' Employment and Training Service (VETS) clarified that beginning in 2018, contractors can use the same calendar year data for the VETS 4212 report that they will be using for the EEO-1 report. However, according to the U.S. Department of Labor (DOL), the reporting period specified in the VETS regulations cannot be changed without notice and comment.

So, for 2018, contractors can use the same data for both the VETS 4212 report and the EEO-1 report even though the 2018 VETS 4212 cannot be filed until August 1, 2018. For 2017, federal contractors are required to file the VETS 4212 no later than September 30.

### *WHD issues clarifying memo on paid sick leave EO and SCA*

The DOL's Wage and Hour Division (WHD) has ruled that contractors providing paid leave in compliance with former President Barack Obama's Executive Order (EO) on paid sick leave can reduce other benefits they offer employees under the Service Contract Act (SCA). The memo sent to government agencies was an attempt to respond to employers' complaints about the confusion caused by the sick leave EO, which added a new benefit over and above the health and welfare benefits required under the SCA. While the memo is an attempt to take away the additional benefit, it's more likely to add confusion to an already complex rule.

### *B&H Foto agrees to pay more than $3M to settle OFCCP charges*

B&H Foto & Electronics Corp. has agreed to pay more than $3 million to resolve allegations of systemic discrimination in hiring, compensation, and promotion decisions as well as charges of harassment. The company agreed to a consent decree with the OFCCP that settles allegations that it discriminated against

female, black, and Asian jobseekers by hiring only Hispanic men for entry-level positions.

In addition, the decree settled allegations that Hispanic shipping workers were paid significantly less than comparable workers of different national origin and denied promotions to higher-level positions. There were also allegations that Hispanic workers were routinely subjected to harassment and had unequal access to restroom facilities, and the company failed to take corrective action when it was confronted with employee complaints.

"Federal contractors who benefit from taxpayers' dollars are required to treat their employees fairly, or risk losing their government contracts," said Regional Solicitor of Labor Jeffrey S. Rogoff. "We are pleased that B&H Foto entered into this agreement, and has committed to ensuring that [its] workers will receive equitable wages and opportunities, and enjoy a workplace that promotes equal employment opportunity."

Under the terms of the consent decree, the retailer has agreed to pay $3,220,000 in back wages and other monetary relief to more than 1,300 affected class members and to hire a workplace consultant to help correct employment practices and workplace conduct at its Brooklyn Navy Yard warehouse as well as at a warehouse in Florence, New Jersey, that will open later this year. The company also agreed to provide its managers annual training on EEO principles and workplace harassment prevention.

*H. Juanita M. Beecher is an attorney with Fortney & Scott, LLC, in its Washington, D.C., office. You can reach her at nbeecher@fortneyscott.com.* ✤

*continued from pg. 3*

and request that OIRA have a response before Labor Day. She believes the burdensome pay and work hours reporting requirements are a "poster child" for the kind of regulation President Donald Trump campaigned against. She further shared that she believes it is a "false choice" that if you are "not in favor of [the report,] you are not in favor of equal pay."

Meanwhile, as we mentioned in last month's issue of *Federal Employment Law Insider,* the budget approved by the House Appropriations Committee would bar the EEOC from using any funds to implement the new EEO-1 Component 2. (See "OMB has yet to reverse approval of revised EEO-1 report" on pg. 2 of the August 2017 issue.)

## *Ford Motors to pay $10.1M to settle harassment claims*

Ford Motor Company agreed to pay up to $10.125 million to settle sexual and racial harassment allegations investigated by the EEOC at two Ford plants. In its investigation, the EEOC found reasonable cause to believe that personnel at two Ford facilities in the Chicago area—the Chicago Assembly Plant and the Chicago Stamping Plant—had subjected female and African-American employees to sexual and racial harassment. The EEOC also found that the company retaliated against employees who complained about harassment or discrimination. Ford chose to voluntarily resolve this issue with the EEOC, without admitting liability, to avoid an extended dispute.

The conciliation agreement provides monetary relief of up to $10.125 million to employees who are deemed eligible through a claims process established by the agreement. The agreement also ensures that during the next five years, Ford will conduct regular training at two of its Chicago-area facilities, continue to disseminate its antiharassment and antidiscrimination policies and procedures to employees and new hires, report to the EEOC any complaints of harassment or related discrimination, and monitor its workforce for alleged sexual or racial harassment and related discrimination.

"Ford Motor Company has worked with the EEOC to address complaints of harassment and discrimination at these two facilities and to implement policies and procedures that will effectively prevent future harassment or provide prompt action when harassment complaints arise. Ford has taken its responsibilities seriously and is committed to providing its employees with a work environment free of discrimination and harassment," said the director of the EEOC's Chicago District Office, Julianne Bowman.

## *UPS to pay $2M to resolve disability discrimination claims*

UPS has agreed to pay $2 million to nearly 90 current and former employees to resolve a nationwide disability discrimination lawsuit filed in 2009 by the EEOC. The agency charged that UPS violated the Americans with Disabilities Act (ADA) by failing to provide reasonable accommodations that would enable employees with disabilities to perform their jobs. The EEOC further alleged that UPS maintained an inflexible leave policy under which it fired disabled employees automatically when they reached 12 months of leave, without engaging in the interactive process required by law.

The EEOC filed suit in the U.S. District Court for the Northern District of Illinois after first attempting to

reach a prelitigation settlement through its conciliation process. In addition to providing $2 million in monetary relief, UPS has agreed to update its reasonable accommodation policies, improve its implementation of the policies, and conduct training for employees who administer its disability accommodation processes. Furthermore, the company has agreed to provide periodic reports to the EEOC on the status of every accommodation request for the next three years to ensure the efficacy of its procedures.

> **Lipnic acknowledged that "time is of the essence," so employers can start making the changes necessary to comply.**

"The ADA requires companies to make a real effort to work individually with their employees with disabilities to provide them with the necessary and reasonable accommodations that will allow them to do their jobs," said Greg Gochanour, regional attorney of the EEOC's Chicago District Office. "As a result of this lawsuit, UPS now has practices in place to better ensure that this happens."

### *Bass Pro to pay $10.5M to settle hiring discrimination/retaliation suit*

Bass Pro Outdoor World, LLC, agreed to pay $10.5 million and provide other significant relief to settle a hiring discrimination and retaliation lawsuit brought by the EEOC. The nationwide agreement resolves a pattern-or-practice lawsuit filed on September 21, 2011, in which the EEOC charged that the company discriminated in hiring at its retail stores, unlawfully retaliated against employees who opposed practices they believed to be unlawful, and failed to adhere to federal recordkeeping laws and regulations.

A central focus of the agreement is strengthening Bass Pro's diversity efforts and its commitment to nondiscriminatory hiring, including appointing a director of diversity and inclusion, engaging in affirmative outreach efforts to increase diversity in its workforce, updating its EEO policies and hiring practices, and conducting annual EEO training for management and nonmanagement employees.

"The EEOC is pleased to have reached what the agency believes to be a fair resolution," said EEOC Deputy General Counsel James Lee. "We look forward to working with Bass Pro in implementing the consent decree."

*H. Juanita M. Beecher is an attorney with Fortney & Scott, LLC, in its Washington, D.C., office. You can reach her at nbeecher@fortneyscott.com.* ✤

*WHITE HOUSE BUDGET*

## House votes to cut DOL, NLRB, OSHA budgets

by H. Juanita M. Beecher
Fortney & Scott, LLC

On July 18, 2017, the full House Appropriations Committee approved the fiscal year (FY) 2018 U.S. Department of Labor (DOL), Department of Health and Human Services (HHS), and Department of Education spending bill. The budget will cut about 11% from the DOL budget and about 9% from the National Labor Relations Board (NLRB) compared to the FY 2017 budget. Specifically, the DOL would receive $10.64 billion as opposed to the 21% cut proposed by the Trump administration. The NLRB will receive $274.2 million, an increase from the $249 million proposed by the administration's FY 2018 budget.

As to the subagencies within the DOL, the committee approved the following:

- Office of Federal Contract Compliance Programs (OFCCP)—$94.5 million ($10 million more than proposed by the administration);
- Wage and Hour Division (WHD)—$217.5 million ($10 million less than proposed by the administration);
- Occupational Safety and Health Administration (OSHA)—$531.5 million ($12 million less than proposed by the administration and $21.3 million less than FY 2017); and
- Employment and Training Administration—$3.4 billion ($295 million less than FY 2017).

In addition, the committee placed a number of riders on the budgets:

- The OFCCP would be required to submit a report on its efforts and the status of implementing each of the

Government Accoutability Office (GAO) recommendations to the Committees on Appropriations of the House of Representatives and the Senate within 160 days of enactment of the budget.

- The NLRB would be prohibited from enforcing its rule allowing formation of small unions and expanding joint-employer liability for affiliated businesses.
- The DOL would be barred from enforcing the financial advisory conflicts of interest.

Nothing in the bill discusses President Donald Trump's proposal to merge the OFCCP into the Equal Employment Opportunity Commission (EEOC).

*H. Juanita M. Beecher is an attorney with Fortney & Scott, LLC, in its Washington, D.C., office. You can reach her at nbeecher@fortneyscott.com.* ✤

*REGULATIONS*

# Trump administration pumps the breaks on new OSHA rules

by Eric J. Cohn
Cohn Maciel Carey, PLLC

*President Donald Trump was carried into the White House on promises (or threats) of rolling back government regulations. At the Conservative Political Action Conference (CPAC) this year, his now former senior policy adviser, Steve Bannon, framed the president's agenda in terms of "deconstruction of the administrative state," meaning he plans to dismantle the system of regulations he believes has stymied economic growth. The spring unified regulatory agenda explains the shift in the U.S. Department of Labor's (DOL) agenda for rules and standards affecting workplace safety, canceling or placing on the regulatory back burner Obama-era regulatory priorities such as new standards to address infectious diseases in health care and various chemical exposures as well as other broad-based initiatives. Here's a breakdown of what President Trump's first regulatory agenda reveals about the Occupational Safety and Health Administration's (OSHA) future plans.*

## *Controversial rules off the table or moved to 'long-term' actions*

Some of the higher-profile OSHA rulemaking efforts that are now effectively dead in the water include:

- Updates to a host of chemical exposure permissible exposure limits;
- Hearing protection for construction workers; and
- Vehicle backing hazards in general industry and construction.

In addition, OSHA has indefinitely delayed plans for some major rules, such as:

- Reforms to the process safety management standard developed in response to President Barack Obama's Executive Order following the 2013 fertilizer plant explosion in West, Texas;
- A new regulation addressing emergency response and preparedness; and
- A new standard to address infectious diseases in health care.

## *Electronic record-keeping rule to be revisited*

Under the new regulatory agenda, OSHA has introduced two regulatory actions related to the e-record-keeping rule. One regulatory action would extend the deadline for employers to make their first electronic submissions of 300A data to OSHA (the new deadline already announced for December 1, 2017), and the other would reopen the rule for possible wholesale revisions. As the agency put it when announcing the extension earlier this summer, a delay "will allow OSHA an opportunity to further review and consider" the rule.

Officials added that possible revisions to the electronic record-keeping rule include:

- Limiting the scope of injury data employers must submit (e.g., even large employers may be allowed to submit only 300A annual summaries instead of 300 logs or 301 incident reports);
- Increasing the threshold trigger average industry DART rate (DART stands for days away, restricted, or transferred) to be considered a "High Hazard Industry," therefore reducing the number of smaller employers covered by the rule;
- Increasing the threshold number of employees for smaller employers to be covered by the electronic record-keeping rule; and
- Eliminating or cutting down on the scope of the antiretaliation provisions.

## LOTO tug-of-war

Surprisingly, OSHA's portion of the regulatory agenda includes two rulemaking items on the standard-setting plan related to its lockout/tagout (LOTO) requirements that are somewhat contradictory.

First, OSHA introduced a substantive LOTO rule (still in the prerulemaking stage) that would give employers more flexibility in how they control hazardous energy during service and maintenance activities. According to OSHA, recent advancements in technology and computer-based controls of hazardous energy can be more effective but clash with the existing LOTO standard. The agency has recently seen an increase in requests for variances for such devices. OSHA's standards division will work on a request for information due out next April.

However, just as the new LOTO rule would give employers flexibility, the Trump administration appears to be pushing ahead on another action that would strip the LOTO rule of some long-standing flexibility. Specifically, OSHA's latest regulatory agenda maintains the current version of the Standards Improvement Project-Phase IV (SIP-IV), a kind of ongoing rulemaking the agency has used for years to streamline, clarify, and update workplace safety standards to remove duplicative, unnecessary, or inconsistent safety and health regulations.

However, SIP-IV, as initiated by OSHA under the Obama administration, contains a LOTO provision that doesn't meet the purpose or spirit of the SIP process. Specifically, OSHA proposes to remove the term "unexpected energization" from the LOTO standard, not for clarification or simplification or a minor, noncontroversial rule change, but to overrule the 6th Circuit's 1996 decision in *Reich v. GMC* (aka the *GM-Delco* case).

For 20 years, employers have relied on the interpretation of "unexpected energization" in the *GM-Delco* case. OSHA now asserts that a change is needed under SIP-IV to return the scope of LOTO to its original intent, ensure that LOTO is used instead of less-effective warning systems, and reduce the burden on compliance officers who must perform a case-by-case assessment of warning schemes. If OSHA wishes to make such a fundamental change to the LOTO rule, it should do so through a separate full rulemaking (which it is already initiating, according to the current regulatory agenda) and solicit and consider comments from stakeholders.

## Other rulemaking that remains active

Finally, a few regulatory actions remain in active status, purportedly with general industry buy-in, including:

- A new standard addressing communications tower safety;
- An update to the powered industrial truck standard; and
- An amendment to the regulation for mechanical power presses.

## Looking ahead

The Trump administration is following through on the president's campaign pledge to roll back government regulations, and OSHA is no exception. Given that workplace safety issues were not part of Trump's appeal to voters, the agency's backpedaling on various rules shouldn't come as a surprise. Future semiannual agendas will undoubtedly reflect a continued regulatory rollback.

**Possible data breach.** Subsequent to this article being written, the DOL temporarily shut down its injury reporting portal after being informed by the U.S. Department of Homeland Security (DHS) that some data may have been compromised. Employers are cautioned not to submit their data until they are required to do so.

*Eric J. Conn is a founding partner and chair of the national OSHA practice group at Conn Maciel Carey, PLLC. He can be reached at econn@connmaciel.com.* ✤



**FEDERAL EMPLOYMENT LAW INSIDER** (ISSN 1085-9152) is published monthly for $447 per year by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094. 

Editorial inquiries should be directed to David S. Fortney (dfortney@fortneyscott.com), or H. Juanita Beecher (nbeecher@fortneyscott.com) at Fortney & Scott, LLC, 1750 K Street N.W., Suite 325, Washington, DC 20006.

**FEDERAL EMPLOYMENT LAW INSIDER** does not attempt to offer solutions to individual problems but rather to provide information about current developments in federal employment law. Questions about individual problems should be addressed to the federal employment law attorney of your choice.

For questions concerning your subscription, ***www.HRHero.com***, or Electronic Multi-User Accounts, contact your customer service representative at 800-274-6774 or custserv@blr.com.

HRhero® a division of BLR BLR®