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. 6
February 2018

SEXUAL HARASSMENT

Impact of #MeToo on mandatory arbitration, nondisclosure agreements

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

Approximately 60 million Americans are subject to mandatory arbitration clauses, which employers often favor because arbitration tends to be more employer-friendly and less expensive than litigation, and less likely to attract attention from the media. Opponents claim that mandatory arbitration with an accompanying nondisclosure agreement unfairly protects wrongdoers by silencing victims and preventing them from taking their cases to court. In fact, many of the women who came forward as a result of #MeToo risked legal exposure because they had signed confidentiality or nondisclosure agreements after settling sexual harassment or assault claims. The use of nondisclosure agreements by alleged sexual predators has caused Congress and state legislatures to rethink employers' use of nondisclosure agreements, especially in cases of sexual harassment or assault.

Lawmakers seek a solution

On December 6, 2017, a bipartisan group of federal lawmakers introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017, which seeks to prevent sexual harassment in the workplace by voiding compulsory arbitration clauses in employment contracts applicable to sexual harassment and sex discrimination claims. The bill's sponsors include Senator Kirsten Gillibrand (D-New York) and Senator Lindsey Graham (R-South Carolina) as well as Representative Cheri Bustos (D-Illinois), Representative Walter Jones (R-North Carolina), and Representative Elise Stefanik (R-New York).

According to a press release from Senator Gillibrand's office, forced arbitration "prevent[s] survivors of sexual harassment from discussing the nature or basis of their complaint. If an employee's contract or employee handbook includes a forced arbitration clause, the employee is likely to have signed away his or her right to a jury trial whether or not they are aware of the clause. Employees are far more likely to win cases that go to trial than cases that go through the arbitration process."

On December 19, Microsoft became the first Fortune 100 company to endorse the bill. In a blog post, the company's president, Brad Smith, announced Microsoft's support for the bill and added that, effective immediately, Microsoft would void any mandatory arbitration clauses in its employment contracts. "Because the silencing of voices has helped perpetuate sexual harassment, the country should guarantee that people can go to court to ensure these concerns can always be heard," wrote Smith.

In addition, Congress provided in the new tax law that no tax deductions will be allowed for any settlement

What's Inside

Accommodations
Courts are placing limits on lengthy leave as an accommodation under the ADA 2

Contractor Corner
OFCCP director presents his vision of the agency to stakeholders, listens to their feedback ... 3

Inside OSHA
OSHA penalties increase by 2%, continuing their trend upward since 2016 5

Inside the EEOC
EEOC settles egregious sexual harassment claims against Arizona prisons 7

On HRHero.com

Federal Employment Law Insider subscribers can find additional resources at www.HRHero.com/feli:
- online version of current issue
- comprehensive index
- search engine for all past issues

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

ECN EMPLOYERS COUNSEL NETWORK
EMPLOYERSCOUNSEL.NET

or payment related to sexual harassment or sexual abuse if the settlement or payment is subject to a nondisclosure agreement. Attorneys' fees related to such a settlement or payment will also not be deductible.

Moreover, Senate Bill (SB) 820, introduced in the California Senate on January 4, 2018, proposes to prohibit an individual accused of sexual assault, harassment, or discrimination in the workplace from settling the allegations with an agreement that includes a confidentiality provision. SB 820 would apply to both private- and public-sector employers in California.

Bottom line

This may be only the beginning of the limitations on the use of mandatory arbitration, and especially nondisclosure provisions, as the effects of #MeToo continue to ripple through workplaces across the country.

H. Juanita M. Beecher and David Fortney are attorneys with Fortney & Scott, LLC, in its Washington, D.C., office. You can reach them at nbeecher@fortneyscott.com and dfortney@fortneyscott.com. Sean D. Lee is an associate with Fortney & Scott, LLC. He can be reached at slee@fortneyscott.com. ✤

REASONABLE ACCOMMODATION

Leave and the ADA: Is there a limit?

by Burton J. Fishman
Fortney & Scott, LLC

There is perhaps no more difficult decision for an employer to make under the Americans with Disabilities Act (ADA) than reaching the conclusion that a requested leave is unreasonable. In most instances, the decision arises in the context of a long leave that extends well beyond the limits of the Family and Medical Leave Act (FMLA).

EEOC takes an expansive position

"Leave" is not among the accommodations listed in the original ADA. That omission appears to be intentional. Many of the early cases interpreting the ADA, including decisions by the U.S. Supreme Court, confronted the issue of whether being away from work was a legitimate accommodation under a law specifically designed to get individuals with disabilities back to work. After all, the argument went, if a disability prevented someone from working, was he still a "qualified" individual with a disability?

The Equal Employment Opportunity Commission (EEOC) has long maintained that leave is an appropriate accommodation without regard to the length of leave, particularly if it is intended to permit the employee to return to work. (See "Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," available at https://www.eeoc.gov/policy/docs/accommodation.html, and "Employer-Provided Leave and the Americans with Disabilities Act, available at https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.) There are only two exceptions recognized by the EEOC:

(1) The leave cannot be indefinite or open-ended.

(2) The leave cannot create an "undue hardship" on the employer, but the employer has the burden of meeting what has proved to be a very high standard.

Over the years, courts have struggled with the innate contradiction in the law. In most cases, the EEOC's position has prevailed. Most employers now routinely undertake "individualized assessments" of employees seeking extended leaves and try to make defensible conclusions on a case-by-case basis. But the issue has never been fully resolved, and many employers chafe at the prospect of keeping a job open for months on end in the service of a law that fails to recognize the realities of the workplace. Last year may have been a watershed year for this contentious issue, with appellate courts expressing their objections to the leave policy articulated by the EEOC.

Courts clap back

The leading decision in this revisionist view of ADA leave is *Severson v. Heartland Woodcraft, Inc.,* 2017 U.S. App. LEXIS 18197 (7th Cir., 2017). What makes *Severson* unusual is the sweeping nature of the holding by the U.S. 7th Circuit Court of Appeals.

Raymond Severson's bad back put him on FMLA leave for many weeks, to no avail. He scheduled surgery for the last day of his FMLA leave and asked his employer for another eight to 12 weeks off. Upon receiving that request, Heartland fired him and asked him to reapply for his job when he was able. Rejecting that option, Severson sued, alleging a violation of the ADA.

The court minced no words: "An employee who needs long-term medical leave cannot work and thus

is not a 'qualified individual' under the ADA." Period. Relying on its own 2003 precedent in *Byrne v. Avon Productions Inc.*, the often cantankerous 7th Circuit ignored the position of the EEOC and the holdings of a

FEDERAL CONTRACTOR CORNER

Director Harris meets with contractors, contractor organizations, and civil rights groups

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

The newly appointed director of the Office of Federal Contract Compliance Programs (OFCCP), Ondray T. Harris, has scheduled meetings with three different stakeholder groups. Harris was set to meet with federal contractor representatives on January 30, 2018, while on January 31, he was scheduled to meet with civil rights groups in the morning and contractor organizations in the afternoon. Harris is expected to present his vision for the agency during the meetings and to hear stakeholders' big-picture ideas for the agency.

Will OFCCP consider GAO recommendations on improving tech diversity?

In last month's "Federal Contractor Corner," we discussed the Government Accountability Office's (GAO) report on how to improve diversity in the tech industry. During stakeholders' meetings with Director Harris on the future of the agency, it's likely that four of the GAO's recommendations will be discussed:

(1) That contractors be required to provide goals based on individual ethnic or racial groups;

(2) That the agency revise the process it uses to select contractors for audit to identify contractor establishments at the greatest risk of noncompliance;

(3) That the agency evaluate its current approach to entities and determine whether modifications are needed to reflect current workplace structures and locations; and

(4) That the director of OFCCP reevaluate the Functional Affirmative Action Program (FAAP) to assess its usefulness as an effective alternative to the establishment-based program.

Prior to Harris' appointment, Acting Director Thomas M. Dowd responded to the GAO recommendations as follows:

- As to the first recommendation, the OFCCP rejected the idea of specific hiring goals for each minority group as being "a regulatory change with little immediate benefit resulting at the current time."
- On the second recommendation, the agency stated that while it has worked to improve its ability to identify federal contractor establishments, it is working on processes that would enable it to better focus on industries that have a "greater likelihood of noncompliance" using an analysis it did on compensation and employment disparities by race and gender moving forward.
- As to evaluating its approach to work and workplaces, the agency acknowledged that they have changed and stated that it "will fully explore the operational implications and funding requirements to do so."
- Finally, the agency stated that it would fully explore the "operational implications" of increasing the use of FAAP.

It should be noted that any of the recommendations that require regulatory changes are unlikely to be implemented by the Trump administration. However, there are opportunities to use subregulatory guidance to streamline and improve OFCCP's current audit process.

Healthcare provider agrees to pay $50,000 to settle hiring claims

Millcroft Senior Living, a national healthcare and senior living provider, will pay $50,000 to resolve allegations of hiring discrimination at its facility in Newark, Delaware. A compliance review by the OFCCP found that the federal contractor discriminated against five Hispanic and 19 white candidates who applied for nurse's assistant positions and were not hired. Millcroft denies those claims but has agreed to resolve the issue through a conciliation agreement. Under the agreement, Millcroft will extend six job opportunities to rejected applicants.

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

number of other circuit courts and held, as it held in *Byrne,* that "an inability to do the job's essential tasks means that one is not 'qualified'; it does not mean that the employer must excuse the inability."

What makes *Severson* distinctive is the court's unwillingness to assess the specifics of the accommodation, preferring to deem all multimonth leaves unreasonable per se. In that respect, it goes significantly further than the 1st Circuit in *Delgado-Echevarria v. AstraZeneca Pharmaceutical LP,* No. 15-2232 (1st Cir., 2017).

In *Delgado,* an employee exhausted her five-month short-term disability leave and requested an additional 12 months of leave. Although the case was mired in disputes over the adequacy of the medical documentation, the core issue was the employee's request for 12 months of additional leave. A year off was deemed indefinite leave, which was unreasonable in the circumstances of this case. Moreover, the court ruled that the employee couldn't show that an additional year off would enable her to perform the essential functions of her position. However, the court hedged its "bet," noting: "We need not—and therefore do not—decide that a request for a similarly lengthy period of leave will be an unreasonable accommodation in every case."

In each of those cases, the appellate courts took the opportunity to test the limits of prevailing law. In *Severson,* the gauntlet was clearly thrown; in *Delgado,* the court found a way to fashion its denial of leave to fit into an accepted form. Both cases, however, indicate an increasing unwillingness by the courts to accept lengthy periods of time away from work as a justifiable burden to place on employers, even in the name of the ADA.

But beware of state law, and be attentive to the facts! In a California case, *Hill v. Asian American Drug Abuse Program, Inc.* (Cal. Sup. Ct., Case No. BC582516, judgment entered January 2018), an injured employee requested an additional two to three weeks off after her FMLA-like leave expired. Without making any further inquiry, the employer terminated her, a risky step under the expansive California law. The jury awarded $4.5 *million* to the employee, noting that the employer was obliged to conduct an interactive dialogue and assess the varying accommodations available before taking action against her.

Takeaway

Federal courts appear prepared to balance the needs of employees and employers when considering the reasonableness of lengthy leave as an ADA accommodation. However, certain state laws put heavier burdens on employers. The tide may be shifting, but not always in predictable ways.

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

INSIDE THE DOL

DOL revives 17 opinion letters that were withdrawn in 2009

by Sean D. Lee
Fortney & Scott, LLC

On January 5, 2018, the U.S. Department of Labor (DOL) announced that it would reissue 17 opinion letters that were signed during the last days of George W. Bush's administration but subsequently withdrawn in March 2009 for "further consideration."

You might recall that opinion letters were reinstated last summer by DOL Secretary Alexander Acosta, who reintroduced them after an eight-year hiatus. Opinion letters, which employers and employees can seek from the DOL's Wage and Hour Division (WHD), provide guidance on how certain laws—particularly, the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA)—apply under certain factual circumstances. Under the Obama administration, opinion letters were abandoned in favor of broader administrator interpretations, which made general pronouncements about the application of labor laws rather than addressing specific scenarios.

Employers value opinion letters for the clarity they provide on complex laws like the FLSA. In addition, opinion letters can supply the basis for a good-faith defense against FLSA claims—both for the employer that requested the opinion letter and employers in similar situations. Under the Portal-to-Portal Act, for example, an employer that relies on an opinion letter and acts in good-faith conformity with it can raise an affirmative defense against minimum wage or overtime claims—even if the advice contained in the letter is subsequently invalidated.

Many of the reissued opinion letters address whether particular jobs can be considered exempt under

the FLSA's "white-collar" exemptions—i.e., the executive, administrative, and professional exemptions. For instance, the letters conclude that client service managers at an insurance company, product demonstration coordinators, and residential construction project supervisors can be exempt administrative employees—at least based on the facts presented. On the other hand, one letter found that civilian helicopter pilots did not fall within any of the white-collar exemptions.

Beyond questions of exempt status, the letters also address topics such as whether "on-call" hours of work for ambulance personnel are considered compensable under the FLSA, how bonuses affect the calculation of employees' regular rates of pay, and whether a registered nurse's salary can be docked for absences. Employers should carefully review the opinion letters to understand the applicability of both the specific factual scenarios and the broader general principles.

While employers will welcome the reissuance of the 17 opinion letters—and the revival of opinion letters in general—it's important to note that the letters don't have any bearing on the pending issue of how the DOL will rewrite the white-collar overtime regulations.

The opinion letters, which have been given new identification numbers to reflect their reissuance, are available online at https://www.dol.gov/whd/opinion/flsa.htm.

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

INSIDE OSHA

OSHA civil penalties on the rise again

by Eric J. Conn
Conn Maciel Carey, PLLC

As of January 2, 2018, civil penalties for workplace safety and health violations issued by the Occupational Safety and Health Administration (OSHA) have increased again by 2% across the board. Although a 2% increase doesn't shock the system, it's part of a program that has resulted in OSHA's civil penalty authority nearly doubling since 2016.

History of civil penalty adjustments

As I sat in my office on the afternoon of January 19, wondering if the government would shut down over disputes about immigration and, I was reminded of a time in the fall of 2015 when we were on the verge of a government shutdown over abortion rights and deficit spending. That shutdown was averted thanks to a backroom deal between outgoing Speaker of the House John Boehner and President Barack Obama, which ultimately took the form of the Bipartisan Budget Act of 2015.

That "kick the can down the road" measure included a controversial statute that was essentially unknown (including by the folks within OSHA) and saw exactly zero seconds of debate on the floor. The Federal Civil Penalties Inflation Adjustment Improvements Act (the Inflation Adjustment Act) mandated that executive agencies increase their maximum civil penalty authority by the percentage increase to the Consumer Price Index since the last time the agencies had raised their penalties.

On June 30, 2016, the U.S. Department of Labor (DOL) issued its interim final rule to implement the civil penalty inflation directive. OSHA's civil penalty authority had been stagnant longer than any other agency, not having been increased for 25 years (since 1990), so the "catch-up" penalty increase for OSHA was the most significant. Indeed, following the formula included in the statute, OSHA was required increase its penalties on August 1, 2016, by the percentage increase from the 1990 Consumer Price Index—Urban (CPI-U) to the October 2015 CPI-U, which was nearly 80%.

In addition to the one-time 80% catch-up increase that went into effect for OSHA penalties on August 1, 2016, the Inflation Adjustment Act requires federal agencies to establish a process for automatic annual updates of civil penalties (by January 15 each year) to keep pace with inflation in the future. OSHA made its first automatic annual update on January 13, 2017, just before President Donald Trump's inauguration. That first automatic increase was a little more than 1%—from $12,471 to $12,675 for serious and other-than-serious citations, and from $124,709 to $126,749 for repeat and willful citations.

2018 civil penalty adjustments

Despite the transition to the Trump administration and Republican control of Congress, the automatic annual penalty increase directive hasn't been revisited. Accordingly, on January 2, 2018, OSHA issued its latest

2018 SAFETY SUMMIT
An EHS Daily Advisor Event
Mitigate Risk, Manage Compliance, Master Engagement
April 16-18, 2018 | Orlando, FL
safetysummit.blr.com
BLR

final rule to execute another annual penalty increase, this time by approximately 2%.

Under the Inflation Adjustment Act, the increased penalty levels apply to any penalties assessed after the effective date of the final rule. Accordingly, for citations issued on or after January 2, 2018, even if they relate to conduct or conditions that occurred earlier, the higher penalty authority will apply.

What practical effects can employers expect?

The impact of the catch-up increase back in 2016 was significant for violations of all stripes. The result for serious violations was to nearly double the average penalty per violation. However, the current program of annual increases has had a pretty negligible impact on serious and other-than-serious violations. Maximum civil penalty authority for other-than-serious and serious violations increased this year by only $319, from $12,615 per violation to $12,934 per violation.

Conversely, although the percentage increases are minor, the result is still meaningful for repeat and willful violations, where the gross dollar increases are measured in the thousands of dollars (from $126,749 to $129,336). All told, since 2016, the maximum penalty for willful and repeat violations has nearly doubled, jumping by almost $60,000, from $70,000 to $129,336.

It's important to note that the penalty increases being reported are just increases in the "maximum" per violation penalties OSHA is permitted to issue. More often than not, however, OSHA doesn't exercise its maximum penalty authority. There are numerous penalty reduction factors the agency can apply before it issues citations and proposed penalties.

For example, small employers usually get a "size discount," employers with prior "in-compliance" OSHA inspections get a "good history discount," and employers that engage with OSHA in good faith during an inspection can get a "good-faith" discount. So, despite an increase over the last three years of the maximum penalty for serious violations from $7,000 to $12,615, the average penalty per serious violation last year was just $3,600.

OSHA is much more likely to use its maximum penalty authority when it cites large employers with a history of violations, or in just about any situation in which there has been a serious injury or, worse, a fatality. In those cases, even when OSHA was flexing its muscles as hard as it could, it was still hard for the agency to issue a ton of significant enforcement actions. That has changed with the new penalty authority.

In fiscal year (FY) 2017, the first full year after the 80% catch-up penalty increase, we saw a 40% increase in OSHA citation packages with cumulative penalties higher than $100,000. Indeed, FY 2017 recorded the most cases of that size in OSHA's history.

State programs must impose penalties 'at least as high' as OSHA

Although Congress didn't mandate in the Inflation Adjustment Act that the nation's many OSHA-approved state occupational safety and health (OSH) regulatory programs (e.g., Cal/OSHA, NCOSHA) must also update their penalty levels, OSHA took that upon itself. The federal agency notified all state OSH programs that it expects them to adopt penalty levels at least as high as the new federal maximum penalty levels to maintain their approved status. Just as important, OSHA mandated that the states adopt the federal penalty "policies," such as maximum allowable penalty reductions for small businesses, penalty minimums, and discounts for good OSHA history and good faith.

Several states questioned the legitimacy of that directive and asserted that they weren't required to match the new penalty levels. However, OSHA provided guidance to the states in the 2017 final rule adjusting its civil penalties just days before President Trump took office, explaining, "OSHA-approved State Plans must have maximum and minimum penalty levels that are at least as effective as federal OSHA's." That includes penalties that match the penalty amounts set by federal OSHA. Therefore, according to the agency, "all State Plans must increase their maximum and minimum penalty levels to be at least as high as OSHA's initial catch-up maximum and minimum penalty levels in 29 CFR 1903.15(d), and must thereafter increase these maximums and minimums based on inflation."

Many states resistant to those changes were hoping the Trump administration would reverse the requirement and permit state OSH programs to set penalty levels independently from OSHA. For now, however, OHSA's directive hasn't been revisited. Because each state has its own legislative or rulemaking process for making changes to its regulatory landscape, the various

A Recruiting Daily Advisor Event
RecruitCon 2018
Groundbreaking Talent Strategies for the Future of Business
May 10-11, 2018 | Nashville, TN
recruitcon.blr.com

state plans have flexibility over when they will increase penalties, and some are just now updating penalties from the first jump a couple of years ago.

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. ✤

INSIDE THE EEOC

GEO Group pays $550K to settle sexual harassment and retaliation lawsuit

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

The GEO Group, Inc., which operates Central Arizona Correctional Facility and Arizona State Prison-Florence West in Florence, Arizona, agreed on January 8, 2018, to pay $550,000 and furnish other relief pursuant to a consent decree settling claims of sexual harassment and retaliation filed by the Equal Employment Opportunity Commission (EEOC) and the Arizona Civil Rights Division (ACRD) of the Attorney General's Office.

The EEOC and the ACRD alleged that several incidents of sexual harassment and retaliation occurred at the Arizona facilities between 2006 and 2012. The harassment included sexual assault, a male manager grabbing and pinching the breasts and crotch of a female correctional officer, and a male employee forcing a female employee onto a desk, shoving her legs apart, and kissing her. There were also allegations of verbal harassment, including male officers asking female officers for sex, a male officer calling a female officer "bitch" and "f___ing bitch" daily, and supervisors and male officers making sexually explicit comments to female officers. The comments included offensive remarks such as "All I want to see of you is the top of your head bobbing up and down while you are on your knees" and a supervisor frequently saying that women should be barefoot and pregnant.

The EEOC and the ACRD claimed that GEO retaliated against female employees when they complained about the harassment. For example, women who complained or sought help from GEO were allegedly disciplined, forced to quit, fired, or placed in unsafe conditions in the prison.

The EEOC filed a lawsuit in U.S. District Court for the District of Arizona in September 2010, after first attempting to reach a prelitigation settlement through its conciliation process. The ACRD filed a similar lawsuit, and the two lawsuits were consolidated. After the district court dismissed claims filed on behalf of a class of women identified during the litigation and held that some of the allegations didn't rise to the level of actionable harassment, the agencies appealed those rulings to the 9th Circuit.

The 9th Circuit reversed the district court's decision and sent the case back for further proceedings on March 14, 2016. The court of appeals held that the EEOC and the ACRD had properly sought relief for the class of women identified during the litigation and must be allowed to discover additional aggrieved individuals during litigation when they conciliate on behalf of a class. The 9th Circuit reversed the dismissal of the harassment claims, finding that the cumulative effects of the misconduct—including the unwanted physical contact, a male employee making gestures while talking dirty, officers using profanity, and officers saying that a woman's bra set off the metal detector—were enough to go to trial.

The consent decree resolving the case provides $550,000 for 16 women who were dismissed from the case in 2012. GEO must also send letters of regret to the women and provide employment references for them. In addition, GEO will review its EEO policies, ensure that all complaints of sexual harassment and retaliation are immediately and thoroughly investigated by a neutral employee, and ensure that the complaining employee is informed of the results of the investigation. GEO is also required to designate certain alleged harassers as ineligible for rehire, post notices of the consent decree in its Florence facilities, conduct antidiscrimination training, and include EEO compliance when evaluating its managers.

"Sexual harassment has no place in the work environment," said EEOC Phoenix District Office regional attorney Mary Jo O'Neill. "This kind of misconduct is degrading and inexcusable and violates federal

POLITICAL APPOINTMENTS

Trump taps John Ring to fill remaining NLRB vacancy

by Sean D. Lee
Fortney & Scott, LLC

In a statement released on January 12, 2018, President Donald Trump announced his intention to nominate John F. Ring to serve a five-year term on the National Labor Relations Board (NLRB). Ring, a management attorney at Morgan Lewis & Bockius in Washington, D.C., would replace former NLRB Chairman Philip Miscimarra and join fellow Trump picks Marvin Kaplan and William Emanuel to create a Republican majority on the five-member Board.

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

anti-discrimination laws. In the June 2016 Workplace Report by Acting Chair [Victoria] Lipnic and Commissioner [Chai] Feldblum, the Select Task Force on the Study of Sexual Harassment in the Workplace identified several studies that demonstrated that sexually harassed women can experience depression, stress, anxiety, and post-traumatic stress disorder. We are proud of these women for standing up and helping to end this sexually hostile work environment." *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189, 1200 (9th Cir., 2016).

Louisville restaurant chain settles sexual harassment lawsuit for $340K

On January 8, Louisville, Kentucky-based restaurant chain Indi's Fast Food Restaurant, Inc., agreed to pay $340,000 to 15 female former employees, some of whom were teenagers when they worked at Indi's, and implement other relief to settle a federal lawsuit filed by the EEOC.

According to the EEOC's suit, managers at the Indi's Broadway, Cane Run Road, Fern Valley Road, and Poplar Level Road locations in Louisville subjected female employees to long-standing sexual harassment, including requests for sexual favors, sexually offensive comments, and unwanted sexual touching. Under the consent decree resolving this case, Indi's must provide letters of apology to the women, implement new policies, conduct extensive training for employees and management, post an antidiscrimination notice at all workplaces, and report compliance to the EEOC for a five-year period.

"No one should have to endure sexual harassment just to pay their rent and feed their families," said EEOC senior trial attorney Aimee L. McFerren. "Protecting vulnerable workers, including low-wage earners and teenagers, is a top priority for the EEOC. We hope this case sends a clear message that the EEOC will hold accountable employers who fail to protect their employees from workplace harassment."

Hospital pays $400K to settle age discrimination lawsuit

It was announced on January 4 that Montrose Memorial Hospital will pay $400,000 and furnish other relief to settle an age discrimination lawsuit brought under the Age Discrimination in Employment Act (ADEA) by the EEOC.

Montrose violated federal law when it fired or forced 29 employees who were 40 or older to resign, the EEOC said. The longtime employees, many of whom had worked 10 to 20 or more years at the hospital, were fired for supposed performance deficiencies for which younger employees were treated more leniently. The EEOC also alleged that hospital managers made ageist comments, saying that younger nurses could "dance around the older nurses" and that they preferred younger and "fresher" nurses.

In addition to monetary damages, the consent decree requires Montrose to conduct annual antidiscrimination training for its employees, managers, supervisors, and HR employees. Montrose will also revise and distribute its antidiscrimination policy and report any complaints of age discrimination to the EEOC. The U.S. District Court for the District of Colorado approved the settlement and will retain jurisdiction for compliance purposes for three years.

"The ADEA is clear—age-based discrimination is prohibited by federal law," said EEOC regional attorney Mary Jo O'Neill. "The EEOC remains committed to the elimination of age discrimination in the workplace."

Juanita M. Beecher is an attorney with Fortney & Scott, LLC, in its Washington, D.C., office. You can reach her at nbeecher@fortneyscott.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. Copyright 2018 BLR®. Photocopying or reproducing in any form in whole or in part is a violation of federal copyright law and is strictly prohibited without the publisher's consent.

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.