HRHero.com
A division of BLR®

North Dakota
EMPLOYMENT LAW LETTER

Part of your North Dakota Employment Law Service

Lisa Edison-Smith, Vanessa Lystad, and KrisAnn Norby-Jahner, Editors
Vogel Law Firm

Vol. 22, No. 7
August 2017

What's Inside

Agency Action
Age discrimination still prevalent 50 years after passage of ADEA 2

Federal Agencies
EEOC lays out aggressive enforcement plan for the next several years 3

Pensions
Supreme Court defines who can use ERISA's "church-plan" pension exemption 5

Disability Bias
8th Circuit throws a box to UPS and its employee in ADA case 6

Just for Fun
Test your HR know-how by filling out this month's crossword puzzle 8

What's Online

Podcast
Strengthen your brand by offering outplacement services
ow.ly/XDIr30dBlfU

Hiring
How your job descriptions can drive company culture
ow.ly/huz930dGxN4

Documentation
With I-9 reverification, more is not always better
http://bit.ly/2vc4XJW

Find Attorneys
To find the ECN attorneys for all 50 states, visit
www.employerscounsel.net

ECN EMPLOYERS COUNSEL NETWORK
EMPLOYERSCOUNSEL.NET

OVERTIME

2016 FLSA overtime regulations: Where are they now?

by Vanessa Lystad

In mid to late 2016, many employers across the United States scrambled to begin implementing new Fair Labor Standards Act (FLSA) overtime regulations issued under the Obama administration. The regulations raised the minimum salary level for employees to be exempt from overtime. The scrambling came to an abrupt stop because of a nationwide injunction issued by a federal court in Texas mere days before the regulations were set to take effect.

Employers may be wondering about the current status of the legal challenge to the regulations, particularly since there has been a change in the White House. The injunction is still being appealed, and the U.S. Department of Labor (DOL)—now under the Trump administration—recently submitted its brief in the appeal. The brief indicates the administration's position on the overtime regulations and alludes to how it may address them in the future.

Overview of overtime regulations

The tale of the 2016 FLSA overtime regulations actually started in March 2014. President Barack Obama issued a memorandum directing the secretary of labor to "modernize and streamline the existing overtime regulations for executive, administrative, and professional employees" because the regulations, according to Obama, had not kept up with the modern economy. Before the directive, the overtime regulations were last revised by the DOL in 2004. The regulations require an employee to satisfy three tests to qualify for the executive, administrative, or professional exemption under the FLSA:

(1) The "salary basis" test—i.e., the employee is paid on a salaried basis;

(2) The "salary level" test—i.e., the employee is paid at least the minimum salary ($455 per week, or $23,600 per year); and

(3) The "duties" test—i.e., the employee's primary duties are "executive," "administrative," or "professional" as defined by the regulations.

In response to the president's memorandum, the DOL published a Notice of Proposed Rulemaking. After receiving 293,000 comments on the proposed rules from businesses, state governments, and other entities, the department published the final rules on May 23, 2016.

The final rules did not modify the salary basis or duties tests. Rather, the rules addressed only the salary level test by increasing the minimum salary to qualify as exempt to $913 per week ($47,476 annually). The new salary level was based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage region of the country, the South.

AGENCY ACTION

EEOC marks 50th anniversary of ADEA with discussion on discrimination. Experts invited to a June meeting of the Equal Employment Opportunity Commission (EEOC) told of the continuing effects of age discrimination 50 years after passage of the Age Discrimination in Employment Act (ADEA). A 2017 AARP survey reports that nearly two-thirds of workers age 55 to 64 report their age as a barrier to getting a job. Also, a 2015 survey using résumés for workers at various ages found significant discrimination in hiring for female applicants and the oldest applicants, according to Patrick Button, an assistant professor of economics at Tulane University and a researcher with the National Bureau of Economic Research Disability Research Center. Laurie McCann, a senior attorney for AARP Foundation Litigation, called on the EEOC to strengthen ADEA protections and enforcement. John Challenger of the outplacement and career transition firm Challenger, Gray & Christmas said that older workers, particularly skilled workers, are being channeled out of the workforce, damaging the country's economic health. If more older workers stayed in the workforce, it would significantly reduce the skilled worker shortage in the United States, he said.

Obama-era guidance on joint employment, independent contractors withdrawn. On June 7, Secretary of Labor Alexander Acosta announced that the U.S. Department of Labor's (DOL) 2015 and 2016 informal guidance on joint employment and independent contractors has been withdrawn. The two guidance letters from the Obama administration—FLSA 2015-1 (dealing with independent contractors) and FLSA 2016-1 (dealing with joint employment)—narrowed the definition of independent contractor and made more employers subject to joint-employer status. Acosta's announcement said the DOL will continue to enforce both the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act even though the guidance letters have been withdrawn.

Executive Order expands apprenticeships, vocational training. Secretary Acosta in June hailed President Donald Trump's Executive Order to expand apprenticeships and vocational training. The order calls on the secretary of labor, in consultation with the secretaries of education and commerce, to propose regulations that promote the development of apprenticeship programs by industry and trade groups, nonprofit organizations, unions, and joint labor-management organizations. It also directs the DOL and the Commerce Department to promote apprenticeships to business leaders in critical industry sectors, including manufacturing, infrastructure, cybersecurity, and health care. ✤

The final rules also established an automatic updating mechanism that would have adjusted the minimum salary level every three years starting on January 1, 2020. The rules were scheduled to take effect December 1, 2016.

What happened to the regulations?

Twenty-one states filed a lawsuit against the DOL in Texas federal district court challenging the final rules. The states asked the court to issue an injunction (or "stop order") to prevent the new regulations from going into effect. On November 22, 2016, mere days before the rules' effective date, the court issued an order enjoining the DOL from "implementing and enforcing" the rules. The court's order specified that it applied nationwide.

In its order, the court looked at the language of the exemptions providing that "any employee employed in a bona fide executive, administrative, or professional capacity . . . as defined and delimited from time to time by regulations" issued by the secretary of labor is exempt from the overtime requirements. According to the court, that language allowed the DOL to issue only regulations related to the types of duties that qualify an employee for the exemption. The court did not believe the language indicated a congressional intent for the department to define and delimit the minimum salary level. Ultimately, the court determined that the final rules were unlawful because they exceeded the DOL's delegated authority and ignored Congress's intent "by raising the minimum salary level such that it supplants the duties test."

The DOL, which was still under the Obama administration, appealed the district court's order to the U.S. 5th Circuit Court of Appeals. Shortly thereafter, the Trump administration took over, and the DOL requested a number of extensions to file its reply brief to "allow incoming leadership personnel adequate time to consider the issues." In other words, the new administration was tasked with deciding whether (or to what extent) to pursue the appeal. Also, new Secretary of Labor Alexander Acosta was the last Cabinet member to be confirmed, which contributed to the delay.

At long last, the DOL filed its reply brief in the appeal on June 30, 2017. In its brief, the DOL did not endorse the salary level set by the Obama administration. Rather, the department asked the 5th Circuit to rule that it has the authority to establish a salary level test, alluding to the possibility of pursuing a different methodology to calculate a more modest increase to the minimum salary level. As this newsletter went to print, the 5th Circuit has not issued a decision related to the enforceability of the 2016 final rules. Thus, for now, the nationwide injunction is still in place.

The reply brief came on the heels of the DOL's formal request to the Office of Management and Budget (OMB) for information on the final rules. Again, the move signals that the DOL is seeking information in order to potentially change the salary level set by the 2004 regulations, but likely not to the extent of the 2016 final rules.

New lawsuit

However, to make matters more confusing (as is wont of attorneys), a Chipotle Mexican Grill employee recently filed a lawsuit alleging that the fast-food chain should have followed the final rules despite the nationwide injunction. The employee contends that the injunction affects only *the DOL's* ability to implement and enforce the rules. She argues it does not prevent *employees* from filing private lawsuits against employers based on the rules.

At this point, employers need not be overly alarmed about the case for several reasons. First, Chipotle has answered the complaint, denying that the rules are effective, and has also sought sanctions against the worker's attorneys for filing suit in light of the nationwide injunction. The court has not yet issued a ruling on whether the employee's position is correct. Second, if the court were to rule on the employee's position, it would be required to find that the Texas federal district court, which issued the injunction, used the wrong language when it enjoined the DOL from "implementing" the final rules. Although that is possible, it may be unlikely since the Texas federal court sought to preserve the status quo and not raise the salary level.

Third, whether the employee was properly classified as exempt based on the duties test appears to be an independent issue in the case. As noted above, the final rules did not affect the duties test. Whether an employee performs duties that fall under the executive, administrative, or professional exemption is a more rigorous analysis than simply determining the employee's salary.

Bottom line

The nationwide injunction that stopped the 2016 overtime regulations from taking effect is still in place. Even so, some employers have chosen to observe the new salary level when it comes to classifying employees as exempt from overtime. Others have not.

Keep in mind that the regulations did not alter the duties test, which remains a crucial element in classifying employees as exempt. Review the job duties of employees who currently fall under the exemptions—even if they meet the new salary level test—to ensure they perform the necessary duties to be properly classified as exempt. Whether employees meet the duties test is often an issue in litigation related to misclassification. It appears to be an issue in the Chipotle case.

When it comes to the 2016 overtime regulations, stay tuned. The 5th Circuit will issue its decision on the enforceability of the regulations in due time, but the Trump administration may have plans to change the FLSA regulations. Thus, perhaps the most important question is, "What will the regulations be in the near future?" Only time will tell.

The author can be reached at vlystad@vogellaw.com or 701-237-6983. ✤

EEOC ENFORCEMENT

Best practices for employers under EEOC's new SEP

The Equal Employment Opportunity Commission (EEOC) recently released its Strategic Enforcement Plan (SEP) for 2017 to 2021. The new plan replaces an earlier version issued in 2012, but it isn't a radical departure from the agency's previous agenda. Employers hoping for a more employer-friendly EEOC under the new administration may be disappointed by the 2017 SEP.

The plan makes clear that the agency will continue to aggressively investigate and litigate issues it sees as having the greatest impact on the development of the law or on promoting compliance across a large organization or industry. The EEOC expresses its intent to "focus on strategic impact" to be effective as a "national law enforcement agency," despite its increasingly limited funding and staffing.

The new plan focuses on developing substantive areas, including the "gig economy," "backlash" discrimination against Muslim and Middle Eastern employees, and discriminatory hiring and recruitment policies. It also makes clear that hot-button topics from recent years are likely here to stay. Employers are strongly urged to develop practices now to help them avoid EEOC charges and withstand the agency's scrutiny.

EEOC takes on 'gig economy'

Today, employees are more likely than ever before to be temporary, part-time, leased, employed through a staffing agency, or employed by more than one employer. These days, more workers fall in that ill-defined gray zone between true independent contractors and employees. The "gig economy" is defined by the prevalence of short-term contracts and freelance work. In its SEP, the EEOC "adds a new priority to address issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on[-]demand economy."

Employers that use those types of employment arrangements must remember that "gig" workers can also allege discrimination or harassment. Don't cut corners on training on your antidiscrimination and antiharassment policies. Temporary employees may be viewed as easy targets for harassment, discriminatory treatment, or bullying. As the recent events at Uber have made clear, companies that grow quickly need to make sure they "grow up" by timely implementing clear and consistent policies and encouraging a culture of professionalism.

Discrimination against Muslim, Middle Eastern employees

Another focus area for the EEOC is "addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asian descent, as well as persons perceived to be members of these groups." While it's somewhat unusual for the EEOC to announce that it will specifically focus on particular religious groups or nationalities, the plan explains that strategic protection is necessary because of "backlash against [those groups] from tragic events in the United States and abroad." It's unclear how enforcement of the issue will proceed under the new presidential administration.

Remember that you must provide employees reasonable accommodations for religious observances, including breaks for prayers. Appearance and dress code standards that arbitrarily ban or restrict beards, turbans, or head coverings likely will draw increased scrutiny from the EEOC. Backlash discrimination should be specifically covered in antidiscrimination training.

Barriers in recruitment and hiring

The EEOC restated its commitment to eliminating barriers in recruitment and hiring and added new details to its goal. Specifically, the EEOC will take aim at the lack of diversity in certain industries, including technology and police work, and the increasing use and impact of data-driven employment screening tools. Employers in targeted industries should continue to focus on recruiting a diverse workforce.

Employers that use online applications, algorithms, or similar data tools to screen applicants must be particularly careful. Those tools can provide a first look at applicants and assist hiring managers. However, you must know what parameters are used in the screenings and make sure you consider how the screenings could present barriers (even unintentionally) for groups such as older workers, minorities, women, and people with disabilities. For example, a screening tool that automatically eliminates applicants with a long gap in employment may unintentionally have a disparate impact on women who left the workforce to care for a young family. Date-of-birth inquiries could discriminate against older workers. Online application processes that aren't accessible to people with disabilities present an obvious problem.

Screening applicants by checking their social media profiles also can be risky. Social media profiles may reveal more than a potential employer should know about employees' religion or other protected characteristics.

Pregnancy discrimination, unequal pay, LGBT protections

The EEOC will continue to prioritize substantive issues such as rooting out pregnancy discrimination, preventing unequal pay, and protecting LGBT individuals from discrimination.

The EEOC has focused on accommodating employees' pregnancy-related limitations. Employers are reminded that pregnant employees should be treated the same as nonpregnant employees with a similar ability or inability to work. Remember, if a pregnant employee hasn't requested leave or a new role, you can't force her to take leave or change roles because you believe she shouldn't perform a certain job. At the same time, a pregnant employee who requests an accommodation should be treated the same as other employees who request accommodations.

The EEOC will continue to focus on equal pay. However, the SEP makes clear the agency won't focus on equal pay strictly as a gender issue: "The Commission will also focus on compensation systems and practices that discriminate based on any protected basis." The guidance reminds employers that pay differentials should be based on seniority, merit, or quantity or quality of production, not on protected characteristics.

Finally, as you likely know by now, the EEOC interprets the prohibition against sex discrimination under Title VII of the Civil Rights Act of 1964 as forbidding employment discrimination based on gender identity and sexual orientation. The agency has enjoyed great success in enforcing its position. It has obtained more than $6 million in monetary relief for LGBT workers, required policy changes by employers, and convinced a growing number of courts to endorse its interpretation of Title VII.

The number of EEOC charges based on sexual orientation or gender identity increased by 34 percent in 2015. The agency is unlikely to slow down in its strategic enforcement in this area, and you would do well to include sexual orientation and gender identity as protected characteristics in your equal employment and antiharassment policies. The Human Rights Campaign has reported that the vast majority—89 percent—of Fortune 500 companies already prohibit discrimination based on sexual orientation, and two-thirds prohibit discrimination based on gender identity.

Bottom line

The EEOC expects employers to follow not only the laws it enforces but also its interpretations of those laws. Take the time to analyze your work environment regarding the issues in the agency's SEP. Consider revising your policies and practices to more closely align them with the EEOC's strategic positions. Your efforts will prove to be invaluable if your company faces an EEOC charge or investigation. ✤

PENSIONS

Supreme Court delivers sermon on ERISA 'church-plan' exemption

The Employee Retirement Income Security Act of 1974 (ERISA) generally requires private employers offering pension plans to adhere to a lengthy list of rules designed to ensure plan solvency and protect plan participants. Church plans, however, are exempt from those requirements. But what exactly constitutes a "church plan"? The U.S. Supreme Court has just ruled—unanimously—on this issue.

Church-affiliated hospital pension plans

The case involved three church-affiliated nonprofits that run hospitals and other healthcare facilities. The hospitals offer defined-benefit pension plans to their employees. The plans were established by the hospitals themselves—not by a church—and are managed by internal employee benefits committees.

The three hospitals involved in the case were Advocate Health Care Network, associated with the Evangelical Lutheran Church in America and the United Church of Christ; Saint Peter's Health Care System, which is both owned and controlled by a Roman Catholic diocese; and Dignity Health, which maintains ties to the Catholic religious orders that initially sponsored some of its facilities.

A group of current and former employees filed class actions alleging that the hospitals' pension plans didn't fall within ERISA's church-plan exemption because they weren't established by a church. The district courts agreed with the employees, ruling that a plan must be established by a church to qualify for the exemption, and the appeals courts affirmed the district court's ruling.

The U.S. Supreme Court, however, ruled 8-0 (Justice Neil Gorsuch didn't participate in the case) that a plan maintained by a principal-purpose organization qualifies as a "church plan," regardless of who established it.

Majority opinion

Justice Elena Kagan wrote the majority opinion. The definition of "church plan" came in two distinct phases, noted the Court. Initially, ERISA defined it as a "plan established and maintained . . . for its employees . . . by a church or by a convention or association of churches."

But in 1980, Congress amended the statute to expand the definition. Now, for purposes of the church-plan definition, an "employee of a church" includes an employee of a church-affiliated organization, such as the hospitals in this case.

Congress in 1980 also added a provision stating that the definition of "church plan" includes a plan established *or maintained* by an entity whose principal purpose is to fund or manage a benefit plan for the employees of churches or church affiliates.

The intent of Congress, the Supreme Court concluded, was to encompass a different type of plan in the definition—one that "should receive the same treatment (i.e., an exemption) as the type described in the old definition." And these "newly favored plans" are described by the Court as those maintained by "principal-purpose organizations," regardless of their origins.

In short, the Court stated that "because Congress deemed the category of plans 'established and maintained by a church' to 'include' plans 'maintained by' principal-purpose organizations, those plans—and *all* those plans—are exempt from ERISA's requirements." *Advocate Health Care Network v. Stapleton*, U.S. Supreme Court 581 U.S. ___ (June 5, 2017).

Sotomayor: Right decision, but a troubling one

Justice Sonia Sotomayor, in a concurring opinion, noted that the majority opinion meant that "scores of employees—who work for organizations that look and operate much like secular businesses—potentially might be denied ERISA's protections. In fact, it was the failure of unregulated 'church plans' that spurred cases such as these."

While Sotomayor joined the majority opinion because she was "persuaded that it correctly interprets the

relevant statutory text," she was nonetheless "troubled by the outcome of these cases." She noted that while Congress acted in 1980 to exempt plans established by orders of Catholic Sisters, "it is not at all clear that Congress would take the same action today with respect to some of the largest health-care providers in the country[,] . . . organizations [that] bear little resemblance to those Congress considered when enacting the 1980 amendment." ✤

DISABILITY DISCRIMINATION

Former UPS driver gets second chance to prove disability bias claim

The 8th Circuit (whose rulings apply to all North Dakota employers) recently held there were factual questions regarding whether a former UPS employee was qualified to perform the essential functions of his position and whether he suffered an adverse employment action when UPS effectively forced him to reduce his hours. However, the court affirmed the award of summary judgment (dismissal without a trial) in favor of UPS on the employee's other disability discrimination claim.

Background

Jerry Faidley worked as a package delivery driver for UPS. After he hurt his back twice and had hip surgery, his doctor restricted him to working eight-hour days. Because the delivery driver position required employees to work 9½ hours per day, UPS prohibited Faidley from holding the position after it learned of his restriction in 2012.

Thereafter, Faidley took unpaid leave and sought an accommodation for his disability. He proposed working as a delivery driver with a daily limit of eight hours or working a less physically demanding position without accommodations. Although UPS considered providing him a feeder driver position, which involved driving trailers between the company's locations, it did not offer him the job because it wasn't available at the time. However, UPS did offer him a part-time job that would have reduced his seniority, but he declined it. Faidley then sued UPS under the Americans with Disabilities Act (ADA) and a state civil rights law for failing to accommodate his disability.

Several months later, Faidley's doctor issued new restrictions that did not limit his hours at any job other than delivery driver. In early 2013, he found a combination preloader-loader job, but it proved to be too physically demanding and caused him a great deal of pain. Thereafter, his doctor limited him to working four hours per day for five weeks as a preloader rather than a loader. Faidley asked to work a reduced schedule, but UPS refused his request because he had already used all his available leave under the company's temporary alternative work program.

Later, Faidley was issued more work restrictions. UPS reinitiated the accommodation process, but no full-time positions that fit his restrictions were available. UPS again offered him a part-time position, which he declined. Faidley retired later in 2013.

Faidley then sued UPS again for disability discrimination and retaliation under the state civil rights law for its alleged failure to accommodate him in 2013. The district court consolidated his 2012 and 2013 claims and granted summary judgment in favor of UPS. Faidley appealed to the 8th Circuit.

Court's decision

The 8th Circuit first considered Faidley's 2012 failure-to-accommodate claim. Under the ADA and applicable state law, discrimination includes a failure to provide reasonable accommodations for the known physical or mental limitations of an otherwise qualified individual with a disability. To prove disability discrimination, an employee must establish that he (1) has a disability within the meaning of the ADA, (2) is a qualified individual under the ADA, and (3) suffered an adverse employment action as a result of his disability. The 8th Circuit found that it was undisputed that Faidley was disabled, which satisfied the first element.

Regarding the second element, an employee is a qualified individual under the ADA if he (1) possesses the requisite skill, education, experience, and training for his position and (2) is able to perform the job's essential functions with or without reasonable accommodation. The 8th Circuit held that the district court correctly concluded that Faidley was not qualified to perform the essential functions of the delivery driver position because it required the ability to work more than eight hours per day.

However, the 8th Circuit also held that the district court erred in finding that Faidley was unable to perform the essential functions of the feeder driver position.

UPS asserted that the feeder driver position sometimes required employees to work more than eight hours per day, but an HR manager wrote on a 2012 accommodation worksheet that Faidley "preliminarily appear[ed] capable of performing" the job's essential functions. Although the HR manager wrote that Faidley could work no more than eight hours per day, the 8th Circuit concluded that his note created a factual issue regarding whether Faidley was qualified to perform the feeder driver position's essential functions.

The 8th Circuit also rejected UPS's argument that the feeder driver position was not available when Faidley went through the accommodation process. The 8th Circuit observed that in accordance with guidance from the Equal Employment Opportunity Commission (EEOC), other appeals courts have deemed positions an employer reasonably anticipates will become vacant in the fairly immediate future "available." In this case, there was evidence that UPS expected feeder driver positions to become open in the near future. Thus, Faidley established a factual issue regarding whether he was a qualified individual under the ADA.

In addition, the 8th Circuit concluded that Faidley established a factual question regarding whether he suffered an adverse employment action because he provided evidence that UPS rejected his bids for full-time positions and instead offered him only part-time jobs that would have eliminated his seniority and reduced his benefits and pension. As a result, the court concluded that the district court erred in dismissing his failure-to-accommodate claim and returned the claim to the lower court for further proceedings.

The 8th Circuit agreed with the district court, however, that Faidley's 2013 disability discrimination and retaliation claims failed because there was no evidence that he was qualified to perform the essential functions of any position when he made his claims. Although he claimed he could perform a combination loader-preloader job, his restrictions prevented him from performing the loader job. Even on a reduced schedule, he would have been unable to perform half the duties of the combination job. UPS was not required to reallocate the essential functions of the combined position. Also, there was no evidence to support Faidley's claim that the company failed to engage in the interactive process. The record showed that UPS made a good-faith effort to assist him in seeking an accommodation. Therefore, the 8th Circuit affirmed the award of summary judgment in favor of UPS on Faidley's 2013 disability discrimination and retaliation claims.

Concurring and dissenting opinions

Circuit Judge Jane L. Kelly concurred in part and dissented in part. She opined that the case should have been treated as a single disability discrimination claim rather than two discrete claims. Because Faidley produced evidence that he was qualified for the feeder driver position, Judge Kelly would have reversed the district court's decision and sent the entire matter back to the lower court.

District Judge Ann D. Montgomery, who sat on the appellate panel, agreed that Faidley's 2013 disability discrimination claim failed. However, she believed that his 2012 failure-to-accommodate claim also failed because he was unable to raise a factual issue regarding whether he was qualified for the feeder driver position. She asserted that it was undisputed that the job required the ability to work 9½ hours a day and that he was restricted from doing so. In her opinion, the HR manager's note that Faidley preliminarily appeared capable of performing the job's essential functions did not create a genuine issue of fact. *Faidley v. United Parcel Service of America, Inc.*, No. 16-1073 (8th Cir., April 4, 2017).

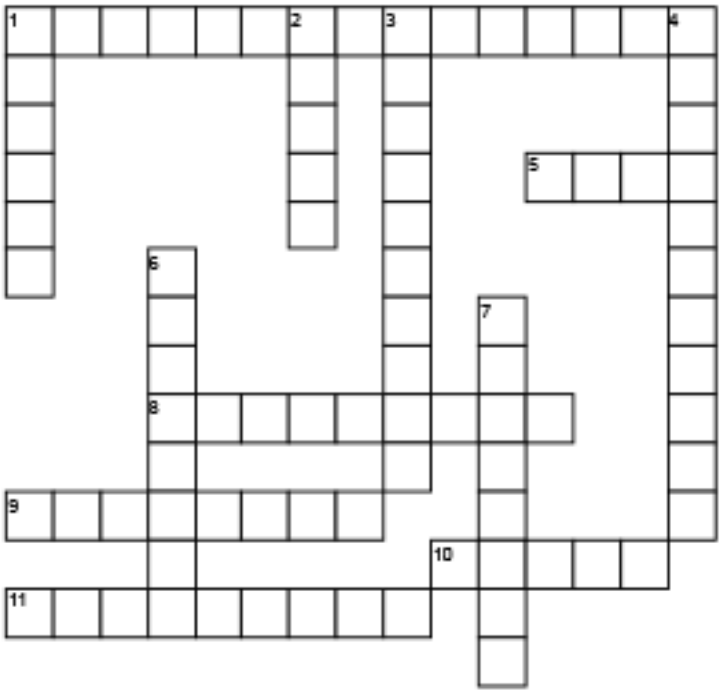
Takeaway for employers

This opinion demonstrates that the importance of accurate record keeping cannot be understated. The 8th Circuit reversed summary judgment in favor of UPS on the failure-to-accommodate claim in large part because of a note made by the HR manager, who wrote that Faidley appeared capable of performing the essential functions of the position in question. However, that contradicted medical evidence and another note made by the HR manager that Faidley could work no more than eight hours a day, an essential function of the position. Had the HR manager included more details in his notes or left out his conclusion because there was evidence to the contrary, the outcome of the claim may have been different.

Another takeaway from this opinion is that employers must consider as "available" positions they reasonably anticipate will become vacant in the fairly immediate future, not just jobs available at the time. Therefore, the absence of an immediately available position that a disabled employee can perform is not necessarily fatal to his claim that he is qualified to perform the essential functions of the position. ✤

JUST FOR FUN

Mindteaser of the month



ACROSS

1 President Trump issued an Executive Order expanding _____ and vocational training.

5 The ____ recently celebrated its 50th anniversary (acronym).

8 In its Strategic Enforcement Plan, the EEOC has indicated it will focus on accommodating _____-related limitations.

9 The DOL recently celebrated the ADEA's _____ anniversary.

10 Alexander Acosta is the current secretary of _____.

11 An employee is a qualified individual under the ADA if she is able to perform her job's _____ functions with or without a reasonable accommodation.

DOWN

1 The current secretary of labor's last name is _____.

2 _____ tests must be satisfied for an employee to fall under the FLSA's executive, administrative, or professional exemption.

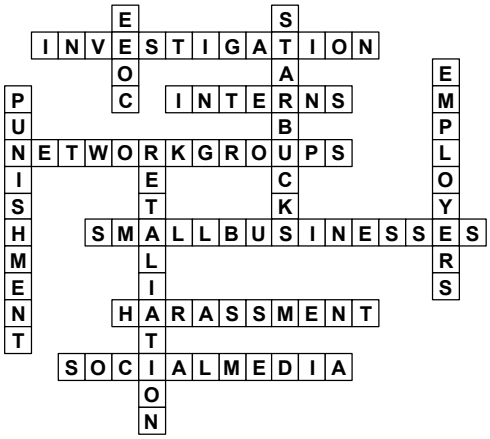
3 A _____ ____ is exempt from ERISA's requirements (two words).

4 The DOL sought to change the _____ _____ test with the 2016 FLSA regulations (two words).

6 A lawsuit related to the 2016 overtime regulations was recently filed against _____.

7 The EEOC is focusing on _____ discrimination against Muslim and Middle Eastern employees.

Solution for July's puzzle



NORTH DAKOTA EMPLOYMENT LAW LETTER (ISSN 1086-2641) 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 the editors at Vogel Law Firm, 218 NP Ave., P.O. Box 1389, Fargo, ND 58107-1389, 701-237-6983; 200 North 3rd St., Ste. 201, P.O. Box 2097, Bismarck, ND 58502-2097, 701-258-7899.

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

HRhero® a division of BLR BLR®