

Beltway Buzz, August 11, 2023

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Congress Breaks While Shutdown Looms. It is August in Washington, D.C., and the U.S. Congress is on recess. When our federal legislators return in September, their top priority will be to fund the federal government beyond the current September 30, 2023, deadline. If the [debt ceiling debate](#) from earlier this year is any indication, this is likely to be a challenging task. Absent the timely passage of a funding package or continuing resolution, the federal government will shut down, which will [have a significant impact on employers](#). Expect to hear a lot more about a potential federal government shutdown as we get closer to the September 30 deadline.

Kotagal Joins EEOC. Kalpana Kotagal was sworn in this week as a commissioner of the U.S. Equal Employment Opportunity Commission (EEOC). Kotagal will join Chair Charlotte Burrows and Vice Chair Jocelyn Samuels to give Democrats a three-to-two majority on the Commission. This is the first time during the Biden administration that Democrats are in the majority on the Commission, and they are expected to revitalize a policy agenda that has been relatively dormant during this time. Employers should expect the Commission to explore wage and hour data reporting and the delegation of authority to the general counsel, among other policy initiatives.

EEOC Proposes Pregnancy Accommodation Regulations. Today, the EEOC published in the *Federal Register* much-anticipated [proposed regulations](#) implementing the Pregnant Workers Fairness Act (PWFA). Words matter when it comes to statutes and regulations, so the proposed rule provides definitions for key words and phrases such as “pregnancy, childbirth, or related medical conditions,” “qualified employee or applicant,” “essential functions,” and “undue hardship.” The proposed rule provides a nonexhaustive list of examples of “reasonable accommodations” that employers may make for pregnant workers, and it also makes clear that “the physical or mental condition (the limitation) required to trigger the obligation to provide a reasonable accommodation under the PWFA does not require a specific level of severity.” The PWFA requires the Commission to publish final regulations by December 29, 2023. Comments on the proposed rule are due by October 10, 2023.

Persuader Activity Update. Readers may recall our [recent discussion](#) of the letter Senate Committee on Health, Education, Labor and Pensions (HELP) Ranking Member Bill Cassidy (R-LA) sent to Acting Secretary of Labor Julie Su expressing concern that the Office of Labor-Management Standards (OLMS) may be unlawfully requiring employers to report payments made to company officials engaging in persuader activity (the Labor-Management Reporting and Disclosure Act does

not require employers “to file a report covering expenditures made to any regular officer, supervisor, or employee of an employer as compensation for service as [such an officer]”). This week, Virginia Foxx (R-NC), chair of the House Committee on Education and the Workforce, doubled down on this issue in a [similar letter to Su](#), noting that “OLMS does not have a license to engage in actions that are contrary to the LMRDA and its own interpretive manual.” Chair Foxx requested that Su reply with, among other information, “[t]he specific legal authority OLMS is using to engage in this enforcement activity.”

DOL Finalizes Davis-Bacon Act Changes. On August 8, 2023, the U.S. Department of Labor’s (DOL) Wage and Hour Division announced the issuance of a final rule entitled “[Updating the Davis-Bacon and Related Acts Regulations](#).” The Davis-Bacon Act requires government contractors to pay government-set prevailing wages to workers performing work on covered federally funded construction projects. The final rule turns back the clock to the prevailing wage method used prior to 1983, which establishes a “prevailing wage” if it is paid to at least 30 percent of workers in a given area. (This amends the current definition, which establishes a prevailing wage if it is paid to a majority of workers in the area.) The rule also applies Davis-Bacon Act clauses and wage determinations to contracts “by ‘operation of law’ notwithstanding their mistaken omission from a contract.” This means that employers could be liable under Davis-Bacon Act requirements even without knowledge that they were subject to such requirements. The rule also includes new anti-retaliation protections for workers, as well as new cross-withholding procedures by which “agencies withhold contract monies due a contractor from contracts other than those on which the alleged violations occurred.” The rule, which has been submitted to the Office of the Federal Register, becomes effective sixty days after publication in the *Federal Register*.

President Reagan and PATCO. Last week in 1981—in a watershed moment for labor relations policy in the United States—President Ronald Reagan fired more than 11,000 air traffic controllers who were engaged in an unlawful strike. During contract negotiations with the Federal Aviation Administration (FAA), the union representing the air traffic controllers—the Professional Air Traffic Controllers Organization (PATCO)—sought a thirty-two-hour workweek and an across-the-board \$10,000 pay increase. When the FAA balked at those demands, PATCO members went on strike. However, as federal employees, the air traffic controllers were prohibited from striking. On August 5, 1981, declaring the strike a “peril to national safety,” President Reagan fired the striking controllers. A combination of FAA supervisors, nonstriking controllers, and military controllers stepped in to ensure that passenger and freight flights soon returned to normal. Just months later, in October 1981, the Federal Labor Relations Authority ruled that PATCO had committed an unfair labor practice by authorizing the strike and revoked the union’s exclusive recognition status, effectively ending the union.

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