In the aftermath of multiple natural disasters that have given rise to a humanitarian crisis, employers are taking stock of the damage and looking for ways to assist employees affected by Hurricanes Harvey, Irma and Maria. Human resource management plays an integral role in the workplace by responding to these disasters and assisting affected employees, beginning with the benefits and resources made available to them.

**Retirement Plan Relief**
Recent guidance issued by the IRS provides employers who offer qualified retirement benefits with several avenues of support. See IRS Announcement 2017-11, IRS Announcement 2017-13, IRS Announcement 2017-160. By relaxing procedural and administrative rules that would normally apply, plan sponsors of 401(k) plans, 403(b) plans, and 457(b) deferred-compensation plans can make loans and hardship distributions to affected employees and family members who live or work in a disaster area identified for individual assistance by FEMA. Specifically, hardship distributions can be used toward food and shelter, and employers may defer until a later date verification steps employees would otherwise need to satisfy to receive a hardship distribution from their retirement plan. In addition, employers may waive any provision in the plan that prohibits the employee from making contributions for at least six months after the hardship distribution. Although not required to adopt this relief, an employer may immediately begin making loans or hardship distributions before the retirement plan is formally amended to provide these relief features (plan amendments must be adopted by December 31, 2018, for calendar year plans.) The result is that affected employees are able to access their money more quickly and easily.

**Leave-Sharing and Donation Programs**
Leave-sharing programs provide employees with the opportunity to donate their accrued PTO, vacation or sick leave for the benefit of other employees adversely affected by a presidentially declared major disaster. Generally, the recipient employee must use the donated leave for purposes related to the disaster and cannot convert the leave to cash. If more time is donated by employees than is requested from affected employees by the end of the disaster period, the donated time must be returned to the donor employees (with exceptions for small amounts that may prove administratively impracticable to reallocate). If the plan is in writing and carefully structured to meet certain IRS requirements, the donor employee is not taxed and only the recipient employee is taxed on the value of amounts received.

Employers looking for ways to answer the call of employees who wish to support relief efforts may also consider adopting a leave-donation program. Such programs permit employees to donate their unused vacation, sick or personal leave time in exchange for the employer making a cash donation of equivalent value to a charitable organization providing relief to victims of the disaster. See IRS Notice 2017-48, IRS Notice 2017-52, IRS Announcement 2017-160. While donations of paid time off by an employee do not allow the employee to claim a charitable deduction, if the employer makes the cash payment to a charitable organization.
It is an exciting moment to author my first Newsletter column as Chair of the Section. It is both an honor and a privilege to have been selected for this position, and I look forward to an exciting year serving our 18,000+ members.

First, I want to offer sincere thanks to our last several Chairs who have labored long and hard to strengthen the fiscal position of the Section in order to offer the important learning opportunities we consistently offer our members. Thus, let me urge a round of applause (virtual, of course) for Joyce Margulies, Wayne Outten and Gail Holtzman. Without the selfless contribution of their time and effort, the Section would not be in a position to provide the programming of which we are so proud. Special appreciation is extended to Gail who has mentored me this past year and to Joel D’Alba, our last Union & Employee Chair, who has been a “guiding light” during our years together on the Council. I cannot name everyone here, but sincere “thanks” to all who have been faithful to the mission of our Section with their untiring service as members of the Council or in many various leadership roles on Committees and Task Forces.

Thus far, the year has already been eventful, with the convening of our first-ever Trial Institute, held in Chicago, where twenty-four section members were provided with instruction regarding practical trial skills and strategies by an experienced faculty of attorneys and judges.

Additionally, several of our members have been recently appointed by either the ABA President or the Chair of the Section Officers Council to important Commissions and Committees. Thus, the Section of Labor & Employment Law will be an influential entity as our profession prepares to face the challenging and changing landscape of the 21st Century.

Our crowded Section calendar included the very successful 11th Annual Conference in Washington, D.C., featuring three days of CLE, networking opportunities, business meetings and social events. This conference, like the ten preceding annual conferences, was an excellent opportunity to learn about the latest developments in the law, to broaden horizons within the profession by meeting fellow members from around the nation, to visit the landmarks of our nation’s capital and to interact with the newly-appointed Trump Administration lawyers and Board Members. Three special features of this gathering were brown bag lunch sessions at the various federal agencies, introductory remarks by the Secretary of Labor, Hon. Alex Acosta, and a “night at the [American History] Museum”. I am especially grateful to the Conference Planning Committee for their excellent preparation of an incredible educational experience.

Special “thanks” to the Host Committee for the warm welcome to our national’s capital and for opening the doors to the government agencies which hosted the brown bag lunches.

We should not overlook the importance of our on-going webinar presentations, which deliver timely information regarding latest developments throughout the year—information that is brought right to the comfortable surroundings of your own desk or conference table.

Well, I think that we will stop there, for now, and leave many other notable section activities, events and CLE offerings for discussion in the next Newsletter. Many “thanks” to those who expressed their care and concern with the welfare of fellow members in Texas, Florida, Puerto Rico and the Virgin Isles as they faced the trauma of Hurricanes Harvey, Irma and Maria. The Section has adopted some charities from the impacted areas, and began raising contributions at the Annual Conference. That effort will continue during the Committee Midwinter Meetings.

Wishing you a joyous holiday season as 2017 comes to a close.

Don Slesnick is a Partner in the Coral Gables, Florida office of Slesnick and Casey LLP. He became Chair of the Section on August 5, 2017.
Discrimination and harassment training has become a regular ritual of modern American corporate life. Employment lawyers like me who represent large employers frequently are called upon to train managers, front-line supervisors, and sometimes rank and file employees, on the importance of refraining from unlawful discriminatory and harassing behaviors.

Often we begin these presentations with heavy handed messages intended to make the audience sit up and take notice. We emphasize the possibility of personal liability for individual supervisors and we share alarming stories and statistics about verdicts obtained against those who failed to heed our message. We are, in effect, saying: this could happen to you—and it could be ruinous.

With that as our introduction, many employment lawyers and human resource professionals, who also put on these training sessions, begin to lecture their captive audience regarding “protected classes” or “protected groups.” The takeaway is, if you harass or discriminate against a person who is a member of one of these protected groups, or if you as a manager or supervisor fail to stop such harassment or discrimination against one of those people in one of those groups, your employment, and even your place in society, are at risk.

But the terms “protected classes” and “protected groups” are mentioned nowhere in the federal statutes that we are largely discussing, i.e., Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, or any other federal anti-discrimination statutes. The concept of “protected classes” appears to have arisen instead from judicial decisions going back decades that describe burdens of proof and it has been echoed by the Equal Employment Opportunity Commission, which enforces the major federal anti-discrimination statutes, as well as various state anti-discrimination agencies. The prima facie elements of proof in a discrimination claim, as recounted by many court decisions, include a showing that the plaintiff “belongs to a protected class.” But the term is a misnomer that is not grounded in the language of the statutes that Congress passed. And it is counterproductive.

Contrary to the popular perception, which is advanced by the protected classes terminology, what these laws actually prohibit is not discrimination against, say, African Americans, Hispanics, employees is entitled. Likewise, an employee of Japanese national origin is protected from national origin discrimination by a manager of Chinese national origin. And a male subordinate is protected from gender discrimination by a female manager. It is a mark of the societal progress that the anti-discrimination laws have helped bring about that we now have an increasingly heterogeneous workplace in which claims like these, while still by no means the majority, are much more commonplace than they once were.

By suggesting that discrimination is something that only is practiced by Caucasian, U.S. born, origin, a religion—or no religion. And, barring an early death, we all are, or will be, over forty. The real message that should be conveyed in training sessions and elsewhere is that these factors—these protected characteristics—should not determine any employee’s future or impede any employee’s success.

By shifting the emphasis in trainings and other communications away from the terminology Muslims, or women. Rather, these laws prohibit discrimination based on certain specified characteristics, including race, national origin, religion, gender, and others. Even the Americans with Disabilities Act offers protection not only for the “class” of people who have disabilities; rather the statute protects anyone from discrimination—disabled or not—whom the employer “regards as” disabled.

Employment lawyers know that a Christian employee who is subjected to discrimination based on her religion by, say, an atheist manager, is protected against such discrimination based on her protected characteristic, i.e., her religion. This protection is no different than the protection against discrimination to which a Muslim non-disabled Christian males under forty against other people who are members of “protected groups,” employment lawyers and human resources professionals may mislead their audiences about the true nature of the protections that these laws provide; they also communicate an arguably condescending message that engenders a combination of resentment and tribalism. And, as this protected group terminology moves into the popular understanding, it feeds the narrative that these laws create “special rights” for some people and not others, and thereby erodes support for laws that actually confer protection on everyone.

We all have a race, a gender (however it is defined), a national of protected classes, employment lawyers and human resources professionals can diminish their reliance on divisive, fear-based efforts at promoting nondiscrimination. Instead, by more accurately focusing on the prohibition on discrimination based on protected characteristics—which we all have—employment lawyers and human resources professionals can promote genuine buy-in to the antidiscrimination laws’ central promise of equal employment opportunity.

Paul Buchanan (paul@baaslaw.com) is a Partner at Buchanan Angeli Altschul & Sullivan LLP in Portland, Oregon.
Proposed OFCCP—EEOC Merger: A Match Made in Heaven?

By Jayde Ashford Brown

On March 13, 2017, President Donald Trump signed the Presidential Executive Order on a Comprehensive Plan for Reorganizing the Executive Branch (“E.O. 13781”). E.O. 13781 directs the Director of the Office of Management and Budget to propose a plan to reorganize the executive branch and make recommendations to eliminate unnecessary agencies and consolidate overlapping agency functions. The administration has touted the initiative as a means to improve the efficiency, effectiveness and accountability of agencies. Consistent with the President’s directive, on May 23, 2017, the U.S. Secretary of Labor, Alexander Acosta, released the fiscal year 2017 budget request for the U.S. Department of Labor (“DOL”), which lays the groundwork for merging the Office of Federal Contract Compliance Programs (“OFCCP”) into the Equal Employment Opportunity Commission (“EEOC”) by the end of fiscal year 2018. This merger proposal has rekindled a long-standing debate regarding the compatibility of the agencies.

Merger Proposal Has Long-Standing Roots

Congress has considered consolidating the OFCCP with the EEOC numerous times since 1972. Discussions regarding a potential merger resurfaced in 1977, when the OFCCP Task Force released the Preliminary Report on the Revitalization of the Federal Contract Compliance Program. This report emphasized the “essential” need for the agencies to remain separate until each realizes fully its individual capacity and remedies its individual problems. A couple of years later in Emerson Elec. Co. v. Schlesinger, 609 F.2d 898, 904 (8th Cir. 1979), the U.S. Court of Appeals for the Eighth Circuit noted that the legislative history of the Equal Employment Opportunity Act of 1972 indicates that the provision calling for the interagency merger was ultimately deleted from the law due to fears that administrative burdens would weaken the contract compliance program.

The Two Agencies Have Different Policy Goals, Regulatory Structures and Enforcement Models

There has been a groundswell of opposition to the merger from civil rights groups, business groups (including the U.S. Chamber of Commerce) and special interest groups. Opposition to the merger is largely based on the argument that the OFCCP and the EEOC should remain separate because they have distinct functions and purposes.

As an initial matter, the two agencies were established to provide different protections. The OFCCP’s purpose is to advocate for affirmative action and diversity for government contractors, while the EEOC’s purpose is to enforce non-discrimination protections under various laws, including Title VII of the 1964 Civil Rights Act (i.e., discrimination based on race, sex, religion, color and national origin). While the OFCCP’s scope encompasses the same categories as Title VII, the OFCCP focuses on making government contractors avoid violations. This is in stark contrast to the EEOC’s model because, by working with contractors on the front end, the OFCCP enforcement model is proactive, while the complaint-driven enforcement structure under the EEOC is reactive.

Proposals to merge the OFCCP with the EEOC have resurfaced multiple times since 1972. Disadvocacy groups (including the U.S. Chamber of Commerce) and special interest groups have long argued that the OFCCP and the EEOC should remain separate because they have distinct functions and purposes. While the OFCCP’s purpose is to advocate for affirmative action and diversity for government contractors, the EEOC’s purpose is to enforce non-discrimination protections under various laws, including Title VII of the 1964 Civil Rights Act (i.e., discrimination based on race, sex, religion, color and national origin). While the OFCCP’s scope encompasses the same categories as Title VII, the OFCCP focuses on making government contractors avoid violations. This single-minded focus on preventing violations is in stark contrast to the EEOC’s model because, by working with contractors on the front end, the OFCCP enforcement model is proactive, while the complaint-driven enforcement structure under the EEOC is reactive.

In addition, the OFCCP enforces Executive Order 11246 (“E.O. 11246”), Section 503 of the Rehabilitation Act (“Section 503”) and Section 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act (“VEVRAA”). In contrast, the EEOC does not provide protections specifically to veterans.

The differences in the enforcement models utilized by the two agencies are also remarkable. The EEOC typically investigates individual discrimination complaints triggered by the filing of EEOC charges. In contrast, the OFCCP typically investigates affirmative action and systemic discrimination by conducting audits of government contractors. Notably, the OFCCP is focused on making concerted efforts to promote holistic prevention programs, including training and outreach, to help contractors avoid violations. This collaborative vision for the OFCCP is in stark contrast to the EEOC’s model because, by working with contractors on the front end, the OFCCP enforcement model is proactive, while the complaint-driven enforcement structure under the EEOC is reactive.

Merger is a Double-Edged Sword for Federal Contractors

The potential merger is superficially appealing to federal contractors. Both agencies enforce variants of federal prohibitions against discrimination. According to the budget justification asserted in the merger proposal, a full integration of the two agencies would lead to “…seamless sharing of enforcement data and expertise, operational efficiencies, expanded compliance...”

---

**continued on page 10**
Airlines, unions and industry groups agree that the FAA’s air traffic services need to change. Its procurement procedures leave outdated technology in place for too long. “By the time the FAA introduces new technology, it is already outdated,” says First Officer Shawn Gray, an American Airlines pilot and Chairman of the Allied Pilots Association’s Government Affairs Committee. “The FAA uses 1950s technology to track aircraft,” Gray said. He’s optimistic that a solution will come about which would improve safety and allow the controllers to communicate better with pilots.

One potential solution to the FAA’s technology problem is the proposed 21st Century Aviation Innovation, Reform and Reauthorization (AIRR) Act. Under the AIRR Act, some FAA functions, including air traffic services, would move to a Congressionally-chartered not-for-profit corporation called the American Air Navigation Services Corporation. The FAA would keep its safety and regulatory functions and the Department of Defense would also remain authorized to provide air traffic services in the U.S. Moving the air traffic services function to the corporation would eliminate the need to go through bureaucratic procurement procedures to implement new technologies.

In addition to technological implications, the AIRR Act will impact the collective bargaining rights of the employees, their unions and the employer.

If passed, the secretary of the newly formed corporation would meet with the applicable unions to determine which activities and employees would move from the FAA to the corporation. This would include air traffic controllers but could also include employees in other support functions. Current FAA employees who move to the corporation would maintain their federal benefits or elect to have the benefits of the corporation. New employees would receive the benefits associated with the corporation.

Although the corporate employees would no longer have the right to appeal certain adverse actions to the Merit Systems Protection Board (MSPB), they would remain within federal jurisdiction for limited purposes. Specifically, the Federal Labor Relations Authority, which governs labor relations in the federal workplace, would keep jurisdiction over the parties and determine appropriate bargaining units. The labor law framework for the employees of the private corporation would be rather unique, providing under the Merit Systems Protection Board (MSPB) The AIRR would take a different approach: The Federal Labor Relations Authority (FLRA), which governs labor relations in the federal workplace, would keep jurisdiction over the parties and determine appropriate bargaining units, even though the employees would no longer be federal employees and would not have the right to appeal certain adverse actions to the MSPB. The AIRR Act provides that the corporation would recognize the unions which were previously recognized as the representatives of the transferred employees. Collective bargaining agreements which were in force prior to the transfer of employees to the corporation would continue to be in effect until they expire. Arbitration decisions issued before the transfer would continue to be binding.

The parties’ collective bargaining rights would be construed under Section 8(d) of the National Labor Relations Act (NLRA) rather than the Federal Labor Relations Act, meaning that the corporation could bargain with the unions over wages, benefits and other practices. Currently, the FAA negotiates with unions over wages and working conditions, while most federal sector unions primarily negotiate over working conditions.

Under the AIRR Act, employees of the corporation would be prohibited from engaging in strikes, work stoppages or slowdowns. The AIRR Act provides for mediation if the parties do not reach a collective bargaining agreement voluntarily and binding interest arbitration if that mediation effort fails.

Airline executives and unions have supported privatization efforts, including the AIRR Act, which was introduced in the U.S. House of Representatives on June 22, 2017. The House has not yet voted on the bill. Supporters argue that the AIRR act would provide a more predictable funding source (through a user fee structure) and would remove the bureaucracy associated with federal procurement procedures. Airline executives such as American Airlines CEO Doug Parker have publicly stated that FAA reform will improve flight times and reduce delays. The chief executives of United, Delta and Southwest have also supported privatization.

The bill does have detractors, including employers and unions which support smaller airports and private (non-commercial) pilots. Captain “Sully” Sullenberger spoke out against privatization, saying that it would put profits before safety and harm rural communities. Unions which represent FAA employees other than controllers also oppose privatization.

NATCA, the much larger union representing the approximately 14,000 FAA air traffic controllers and thousands of other employees, has supported the AIRR Act, stating that it would help modernize the air traffic control system while protecting the work force NATCA represents. Pilot unions, including APA, ALPA, SWAPA, and NJASAP have also supported the AIRR Act, believing that it would provide the needed modernization while ensuring that pilot interests are represented on the corporation’s governing board. Even if the AIRR Act does not become law, the issue of FAA privatization is not one that is likely to go away soon.

Jonathan Elifson (jelifson@alliedpilots.org) is the Senior Director of Legal Affairs at the Allied Pilots Association in Fort Worth, Texas.
On January 21, 2017 an estimated five million participants all over the world took part in the historic Women’s March to advocate for human rights broadly and women’s rights more specifically. The march drew over four million demonstrators in the United States alone and was the largest single day-protest in U.S. history. The “Values and Principles” drafted by the organizers of the first planned protest in Washington, D.C. included doctrines like reproductive freedom and an end to violence against women. Unsurprisingly, they also called for numerous workplace related mandates such as: an end to hiring and promotion discrimination against women; basic workplace protections including benefits like paid family leave, access to affordable childcare, sick days, healthcare, vacation time, and healthy work environments; and equal pay for equal work. Indeed, the Women’s March was in part a reaction to Hillary Clinton’s unsuccessful attempt to break the highest glass ceiling to become the first female president of the United States and the perceived hostility of the primaries and general election. The battle for employment equality is one that women have been fighting in this country since its inception and the Women’s March makes evident that there is renewed momentum behind it.

Perhaps the most important weapon in this fight has been Title VII of the Civil Rights Act of 1964. While Title VII is best known as a cornerstone of the Civil Rights Movement, prohibiting employment discrimination on the basis of race and color, the eleventh hour addition of sex as an unlawful basis of discrimination has made it an essential tool used by countless women to make strides towards workplace equality. (Indicative of how seriously the idea of employment equality was taken at the time, the amendment to include sex in Title VII was greeted with laughter when introduced). In Because of Sex, published last year and released in paperback on August 8th of this year, author Gillian Thomas skillfully relates the story of ten of these women, their attorneys, and the landmark cases they brought under Title VII all the way to the Supreme Court.

Thomas, a senior attorney with the ACLU’s Women’s Rights Project (which was co-founded by Justice Ruth Bader Ginsburg in 1972), has written a comprehensive and carefully researched homage to a group of largely unknown women who improved the landscape of the American workplace for all women. Like the best of narrative non-fiction, it is engaging and accessible, to lawyers and non-lawyers alike, as well as exceptionally informative. The women and cases Thomas has chosen to portray in her book reveal the wide diversity of issues to which Title VII has been applied in the fifty years since its passage—from Ida Phillips, who applied for a job and was refused because she had preschool-age children (though men with such children were regularly hired) and whose case, Phillips v. Martin Marietta Corporation (1971), was the first sex discrimination case under Title VII to reach the Supreme Court; to Anne Hopkins (Price Waterhouse v. Hopkins (1989)), who was denied partnership because she did not fit the firm’s partners’ stereotyped ideas of how a female employee should look and act; to Sheila White (Burlington Northern & Santa Fe Railway Company v. White (2006)), who suffered retaliation after complaining to her employer about the relentless sexual harassment she suffered at the hands of her supervisor and coworkers. Thomas weaves these women's captivating personal experiences with a thoughtful examination of their legal proceedings, all culminating in the event that binds them together: a hard-earned victory in the Supreme Court.

The book also richly illustrates the myriad hurdles these women and their colleagues had to overcome to obtain justice, or in some cases simply to work, from hostile employers and untested legal theories, to unsympathetic judges. (As Thomas notes in the book, in 1964, when Title VII was passed, only three of the 422 federal judges in the country were women; today about one-third are women.) In a testament to just how much these women transformed the workplace, many readers will find shocking some of the incidents these women and their contemporaries experienced, incidents that seem outrageous to our modern sensibilities. Take, for instance, Thomas’s discussion of one district court judge’s dismissal of a woman’s Title VII claim in 1976 because Title VII was “not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley.” (Fortunately, the dismissal was reversed by the Third Circuit.)

Equally unsettling is Thomas’s account of women in the 1980s undergoing sterilization in order to comply with their employer’s mandate that, in order to remain eligible for the best paying jobs, women provide medical proof of infertility if they were under seventy years of age, due to the harm that lead exposure in these jobs had on women’s reproductive health (though at the time OSHA found no basis for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy). The employer did not require that men provide proof of infertility, although lead exposure also had adverse effects on men’s reproductive health.

Thomas concludes her book with a sobering discussion of the challenges women in the workforce continue to face, particularly low-wage workers, immigrants, and women of color, and the recognition that antidiscrimination laws will never be a cure-all. Thomas briefly discusses cases such as Ledbetter v. Goodyear Tire & Rubber Company (2007), in which the Supreme Court held that even though Goodyear paid Ledbetter less than her male counterparts at the time she filed the lawsuit, it was not enough to trigger Title VII liability. In a 5-4 decision from which Justices Stevens, Souter, Ginsburg and Breyer dissented, the majority reasoned that because the “discriminatory act” occurred twenty years earlier when the company made its “pay-setting decision” to pay Ledbetter less, the statute of limitations had long run on her claims. (Fortunately, the effect of the Court’s holding was reversed by the passage of the Lilly Ledbetter Fair Pay Act signed into law by President Obama in 2009, clarifying that each paycheck was a renewed act of discrimination.) Thus, while Thomas’s book is an important and welcome presentation of how far women have come in the quest for workplace equality, it is also a reminder, as the Women’s March and its catalysts confirm, that there is still far to go.
Update Your Library at
Exclusive Section
Member Discount Prices!

New Edition!
Employee Benefits Law, Fourth Edition
Ivelisse Berio LeBeau, Editor-in-Chief; Jeffrey Lewis, Myron D. Rumeld, and Ivelisse Berio LeBeau, Co-Chairs, Board of Senior Editors; Employee Benefits Committee

Employee Benefits Law, Fourth Edition covers ERISA Titles I and IV; tax qualification, deductibility, and other tax issues; preemption, with regard to ERISA and medical malpractice; evidentiary issues and abuse of discretion in denials; interplay with related legal areas; and effects of sexual orientation and veteran status on benefits.

Highlights include:
• Review of the ACA, HITECH security and breach notification regulations, and changes to MEWA requirements

New Edition!
The Family and Medical Leave Act, Second Edition
William Bush and James M. Paul, Editors-in-Chief; Federal Labor Standards Legislation Committee

Fully revised in its Second Edition, The Family and Medical Leave Act addresses the issues that practitioners on all sides face in exercising rights under, and in complying with, the Act.

New Cumulative Supplement!
By Barbara T. Lindemann, Paul Grossman, and C. Geoffrey Weirich; Executive Editors: Debra A. Millenson, Laurie E. Leader, and Scott A. Moss; Equal Employment Opportunity Law Committee

Employment Discrimination Law is the definitive treatise in this field—it is described as an "indispensable resource" in the Legal Information Buyer’s Guide and Reference. The 2017 Cumulative Supplement analyzes issues including:
• Disparate treatment/disparate impact
• Employer and employee burdens in accommodation claims

Detailed and comprehensive, yet user friendly, each chapter addresses a discrete FMLA concept, and includes a short overview and a listing of the key statutory and regulatory provisions covered.

Visit www.bna.com/bnabooks/abalefmla for more detailed information.

Order #3314/$535.00/Special Member Price: $401.25

For more information about Bloomberg Law® books call 800.960.1220, or visit www.bna.com/bnabooks/abale.
Washington State has two new employment laws benefiting working families. One requires employers to reasonably accommodate pregnant workers, and the other creates a paid family and medical leave insurance program.

**Pregnancy Accommodations**

Under federal law, an employer’s duty to accommodate a pregnant worker is limited to when she has a disability or (sometimes) when the employer accommodates non-pregnant workers with similar limitations:

- The Americans with Disabilities Act requires an employer to reasonably accommodate a pregnant worker if she has a disability (defined as a physical or mental impairment that substantially limits one or more major life activities). Pregnancy alone is not a disability.
- Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 (PDA), requires an employer to accommodate a pregnant worker if it accommodates workers who are not pregnant and who are similar in their ability or inability to work. Under the Supreme Court’s framework in *Young v. UPS*, discrimination can be shown in a number of ways, including through proof that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers, and its reason for doing so is not sufficiently strong to justify the burden on pregnant workers. 135 S. Ct. 1338, 1354-55 (2015).

But these two frameworks leave many pregnant workers unprotected. Often lacking protection are women whose doctors recommend accommodations to maintain healthy pregnancies, like limits on lifting, sitting or standing for long periods, or travel. And for pregnant workers who have mild or moderate symptoms that accompany many typical pregnancies (such as nausea, vomiting, fatigue, and back pain), their right to be accommodated is too uncertain to be useful when they need help. Under federal law and many state laws, unless the pregnant worker can prove disability or discrimination she has no legal recourse. 1

Washington State’s new pregnancy accommodation law fills this gap. It requires employers to provide reasonable accommodations to pregnant workers who need them. Period. No disability or discrimination analysis is required. The right is not dependent on whether the worker has a complicated pregnancy, or whether the employer also accommodates workers who are not pregnant.

Reasonable accommodations include:

- more frequent, longer, or flexible restroom breaks
- modification of no food or drink policy
- job restructuring or modified work schedule
- reassignment to a vacant position or temporary transfer
- modification of equipment, seating, or work station
- assistance with manual labor and limits on lifting
- schedule flexibility for prenatal visits

Additionally, employers must consider other accommodations prompted by the State or the worker’s health care provider.

An employer may refuse to make a reasonable accommodation that imposes an undue hardship (a significant difficulty or expense). However, an employer cannot claim undue hardship or require a medical certification for requests for: restroom breaks, modification of no food or drink policies, seating, or limits on lifting over 17 pounds.
The law applies to all Washington employers with 15 or more employees. It prohibits discrimination against an employee who seeks, declines, or uses an accommodation. Employers may not require a pregnant employee to take leave if a reasonable accommodation would allow her to continue working. Available remedies include injunctive relief, actual damages, and attorneys’ fees.

Washington’s new law became effective July 2017, codified at RCW 43.10.005.

**Paid Family and Medical Leave**

This year, the Washington legislature created a paid family and medical leave insurance program that provides employees the right to take paid leave to care for themselves or their families, and greatly expands who is eligible. In doing so, Washington followed private employers who adopted paid leave policies (e.g. the Bill and Melinda Gates Foundation and Microsoft), five states (California, Hawaii, New Jersey, New York, and Rhode Island), Washington D.C., and most economically advanced countries.

Previously, Washington’s Family Leave Act mirrored the federal Family Medical Leave Act (FMLA) in nearly all respects. The FMLA provides eligible employees the right to take leave to care for themselves or their family members, for a qualifying reason (e.g. for the birth of a child, or a serious health condition). But to be eligible an employee must have worked for more than 12 months, and at least 1,250 hours in the preceding year, and for an employer with 50 or more employees. Under the FMLA, eligible employees are entitled to take up to 12 weeks of leave and to return to their job (or an equivalent job). But the leave is unpaid. Many employees simply cannot afford to take leave from work without pay.

Recognizing that workers who do not meet FMLA eligibility need leave just as much as those who do, and a worker’s right to take leave is meaningful only if he or she can afford to exercise that right, Washington has now expanded the scope of its leave law and created a mechanism to fund paid leave. The details are set forth in Senate Bill 5975, and summarized briefly below.

**Eligibility:** Starting January 2020, all workers will be eligible for paid leave once they have worked at least 820 hours during the qualifying period (four calendar quarters). The hours worked can be with different employers, so the right to take leave is portable from job to job. And the new law applies to small and large employers alike. Even self-employed persons and those family members already covered by the FMLA children, parents, and spouses.

**Duration:** The maximum duration of the paid leave benefit is 12 times the typical workweek during a period of 52 consecutive calendar weeks, or a combined total of 16 weeks if an employee requires both family and medical leave (or 18 weeks if a pregnant employee has a serious health condition resulting in incapacity).

**Funding and pay:** The program is funded through premiums paid by employers with 51 or more employees, and by employees. The initial premium rate is 0.4 percent of wages, beginning in 2019. The amount of the benefit depends on the employee’s wage and the state’s average weekly wage. For example, if an employee’s average weekly wage is 50% or less of the state’s average weekly wage, her weekly benefit is 90% of her average weekly wage. Higher paid workers receive a lower percentage of their weekly wage. The maximum weekly benefit is $1,000.

**Reinstatement:** Employees are entitled to reinstatement to their job or an equivalent job if they would be entitled to job restoration under the FMLA. Although the right to reinstatement applies to a narrower group of workers than the right to take leave, Washington employers should be cautious about terminating any employee who takes leave because other laws may prohibit an employer from doing so.

**Remedies:** The remedies available are the same as those provided for under the FMLA and the WFLA: equitable relief, lost compensation or actual monetary losses, interest, liquidated damages for willful violations, and reasonable attorneys’ fees.

In passing the new paid leave law, the Washington Legislature recognized that the demands of the workplace and of families need to be balanced to promote family stability and economic security. Moreover, leave rights are needed to accommodate changes in the workforce including the rising numbers of dual-career couples, working single parents, and an aging population. The legislature acknowledged that paid leave improves public health by decreasing infant mortality, increasing baby bonding with parents, and reducing overall family stress.

**Endnotes**

1. During committee hearings in Olympia, Washington, legislators heard compelling testimony about pregnant women who lost their jobs for taking restroom breaks or needing a lifting restriction during pregnancy.

2. “Pregnancy” includes the employee’s pregnancy and pregnancy-related health conditions. Pregnancy-related health conditions is not defined but should be interpreted broadly.

3. Smaller employers must accommodate pregnant workers with disabilities and not discriminate, under the Washington Law Against Discrimination and some local ordinances.

Katherine Chamberlain (katherinetc@mhb.com) is an Associate at MacDonald Hoague & Bayless in Seattle, Washington.
Disaster Relief
continued from page 1

organization supporting relief efforts and such payment is made prior to a certain date (January 1, 2019, for Hurricanes Harvey, Irma and Maria), typically the value of the paid time off donated will not be included as gross income or wages for the employee. The employer is permitted to deduct the cash payments as a business expense.

Legislative Relief
In addition to the tax relief provided by the IRS, the Disaster Tax Relief and Airport and Airway Extension Act of 2017 (the “Act”) was signed by President Trump on September 29, 2017. Pub. L. No. 115-63, 131 Stat. 1168. The Act provides, among other things, the following relief for retirement plan participants in an affected area: waives the 10 percent tax penalty on early withdrawals from retirement plans that would normally apply to participants who are under age 59 ½, provides up to $100,000 in retirement plan distributions as “qualified hurricane distributions” increases the plan loan limits from $50,000 to $100,000 and delays repayments of any outstanding plan loans for one year. Any plan amendments needed to implement the changes must be adopted by the last day of the plan’s 2019 plan year (with a two-year extension for governmental plan sponsors of a 457(b) plan).

How an employer navigates the aftermath of Hurricanes Harvey, Irma and Maria will have a lasting impact on its business operations and employees. The extensive damage and long-term recovery involved poses unique human resource challenges for employers. While much of the guidance provided to date may help minimize losses and disruption in the workplace, it is not mandatory that any employer adopt any of the guidance. However, while certain administrative requirements are temporarily relaxed, employers considering adopting such guidance should ensure that they can administratively manage any such changes in accordance with IRS requirements to preserve intended tax benefits. With any forthcoming additional guidance, it is important to remember that effective crisis management from a human resource perspective may involve more than an employee assistance program.

Virginia E. McGarrity
(vmcmgarrity@rc.com) is a Partner and Alisha N. Sullivan (asullivan@rc.com) is an Associate in the Hartford, Connecticut office of Robinson & Cole, LLP.

OFCCP
continued from page 4

assistance to employers, improved customer service, and fully aligned policy.” In other words, by consolidating the oversight of equal employment opportunity under one umbrella, contractors would not have to provide duplicative information to two agencies, for example, if an EEOC complainant were also part of an OFCCP compliance audit. Although this “one-stop shop” bait may initially appear appetizing to contractors who have previously dealt with the frustrations of duplicate inquiries from the two agencies, any benefit could very well be offset by the contractor’s heightened risk of exposure to increased scrutiny. For instance, the EEOC has expressed on multiple occasions its plan to increasingly focus on claims under the Age Discrimination in Employment Act (“ADEA”). Thus, a merger between the EEOC and the OFCCP could open the door to referrals for ADEA claims as the newly-merged EEOC may have discretion to request age data that would otherwise not be relevant or accessible when reviewing termination data submitted during an OFCCP audit. This scenario reinforces the fear that cooperation with the merged agency will lead to threats of or actual referrals for Title VII or other litigation. As a result, the incentive for enhanced cooperation traditionally encouraged by the OFCCP may be lowered.

The earliest that any such merger could be completed is during fiscal year 2019, which starts on October 1, 2018. The merger is not currently included in the Congressional budgets. Proposals do not include funding for the possible merger, but that can change in the future. In the meantime, contractors would face general uncertainty as to their compliance obligations during the merger transition period.

To Merge or Not to Merge: The Devil Is In the Detail
Whether or not the OFCCP will be merged into the EEOC—and whether or not a merger will have the intended benefits—is difficult to ascertain given critical details that remain unclear. For instance, how exactly would the merger be accomplished and what would it entail? President Trump could issue a new Executive Order amending E.O. 11246, but he would need congressional action to implement the transfer of authority under specific laws from the purview of one federal agency to another. Further, how would the merged agency handle enforcement actions? It is pertinent to know whether the administrative litigation model would apply to actions traditionally in the OFCCP arena, or if the federal courts would take the reins. Only time will tell.

Jayde Ashford Brown (jaydebrown@andrewskurth.com) is an Associate at Andrews Kurth Kenyon LLP in Dallas, Texas.

Save the Dates!

2018
San Francisco
12th Annual Labor and Employment Law Conference
November 7-10, 2018
IN MEMORIAM: Sorrell Logothetis

By David Cook

Sorrell Logothetis, a former Union Co-Chair of the Committee on Development of the Law Under the National Labor Relations Act, a former Chair of the Section of Labor and Employment Law, and a nationally acknowledged union-side expert on traditional labor law, passed away on October 4, 2017. Sorrell was a wonderful friend, an esteemed colleague, a tireless advocate for workers, and a wonderful mentor to several generations of young lawyers, both in his private law practice and in the Section.

He was justifiably proud of his decades long representation of the Teamsters, where he worked tirelessly on behalf of their union and their members.

Sorrell's other labor of love was his work with the American Bar Association Section of Labor and Employment Law, where he worked to advance and promote a fair and balanced understanding of the law, of unions, and of the collective bargaining process. Sorrell's work with the Section spanned the spectrum: he contributed to the key work of his home committee, Development of the Law under the NLRA, and its seminal work, The Developing Labor Law.

Following his service on the Committee on Development of the Law Under the NLRA, Sorrell was appointed to serve on the Section Council, and from there, moved up to become Chair of the Section in 2001. As Section Chair he worked to nurture the carefully constructed balance of professional relationships and civility fostered and promoted by the Section, knowing that at times that task would try the soul of an angel. Sorrell mastered it well, using his charm, wit and experience to see that necessary balance continued. After completion of his term as Section Chair, Sorrell was appointed and served 4 years as the Section's Delegate to the ABA House of Delegates. He was committed to, and actively promoted, diversity in all aspects of the Section.

Sorrell and others prominent in the Section conceived, created and founded the College of Labor and Employment Lawyers. He took to heart the mission of the College: “Leadership for Greater Purpose.” He was a Founding Governor of the College and was inducted in its inaugural class in 1996.

Sorrell gave his very best to his union practice and to the Section. His passion for excellence shone through in all aspects of his legal career. He used his wit, and considerable charm, to dispel tensions and promote compromise, while never sacrificing his passion, and never suffering fools gladly.

David M. Cook (dcook@econjustice.com) is a Partner with Cook & Logothetis, LLC in Cincinnati, Ohio.

CONGRATULATIONS!

Trial Advocacy Competition

The Section congratulates the winning teams from the regional tournaments of the 14th Annual Law Student Trial Advocacy Competition. The winning schools and the regional that they won are listed below.

MIAMI
St. Thomas University School of Law

DALLAS
Southern Methodist University Dedman School of Law

CHICAGO
Northwestern University Pritzker School of Law

LOS ANGELES
University of California, Hastings College of the Law

NEW YORK
Harvard Law School

WASHINGTON
William & Mary Law School

The National Final will be conducted in January 2018 in New Orleans, Louisiana.
## Calendar of Events

### 2018

**MIDWINTER MEETINGS**

- **January 25–27**
  - State & Local Government Bargaining & Employment Law Committee*
  - Westin Resort & Spa Puerto Vallarta, Mexico

- **January 27–28**
  - Trial Advocacy Competition National Finals
  - New Orleans, Louisiana

- **January 31–February 6**
  - ABA Midyear Meeting
  - Fairmont Pacific Rim Vancouver, British Columbia

- **February 6–7**
  - Federal Sector Labor & Employment Law Committee*
  - Washington Hilton Washington, D.C.

- **February 7–10**
  - Employee Benefits Committee*
  - Wyndham Grand Clearwater Beach, Florida

- **February 8–11**
  - ADR in Labor & Employment Law Committee*
  - Wyndham Grand Clearwater Beach, Florida

- **February 21–23**
  - Federal Labor Standards Legislation Committee*
  - Grand Hyatt Baha Mar Nassau, The Bahamas

- **February 25–28**
  - Committee on Development of the Law Under the NLRA*
  - La Concha Renaissance San Juan, Puerto Rico

- **February 27–March 2**
  - Committee on Practice & Procedure Under the NLRA*
  - La Concha Renaissance San Juan, Puerto Rico

- **March 1–3**
  - Workers’ Compensation Committee Midwinter Seminar & Conference*
  - The Westin Nashville Nashville, Tennessee
  - Co-Sponsored by Tort Trial and Insurance Practice Section

- **March 7–9**
  - Railway and Airline Labor Law Committee*
  - The Biltmore Hotel Coral Gables, Florida

- **March 14–17**
  - National Conference on Equal Employment Opportunity Law*
  - Hotel del Coronado Coronado, California

- **March 20–24**
  - Employment Rights & Responsibilities Committee*
  - Wyndham Grand Clearwater Beach, Florida

- **March 22–24**
  - Ethics & Professional Responsibility Committee*
  - Wyndham Grand Clearwater Beach, Florida

- **April 11–13**
  - National Symposium on Technology in Labor and Employment Law*
  - Hilton San Francisco Union Square San Francisco, California

- **May 6–10**
  - International Labor & Employment Law Committee Midyear Meeting*
  - Four Seasons Hotel Milano Milan, Italy

- **August 3–4**
  - ABA Annual Meeting
  - Chicago, Illinois

---

*For more event information, contact the Section office at 312/988-5813 or visit [www.americanbar.org/laborlaw](http://www.americanbar.org/laborlaw).*