



**STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL**

**STEVE MARSHALL
ATTORNEY GENERAL**

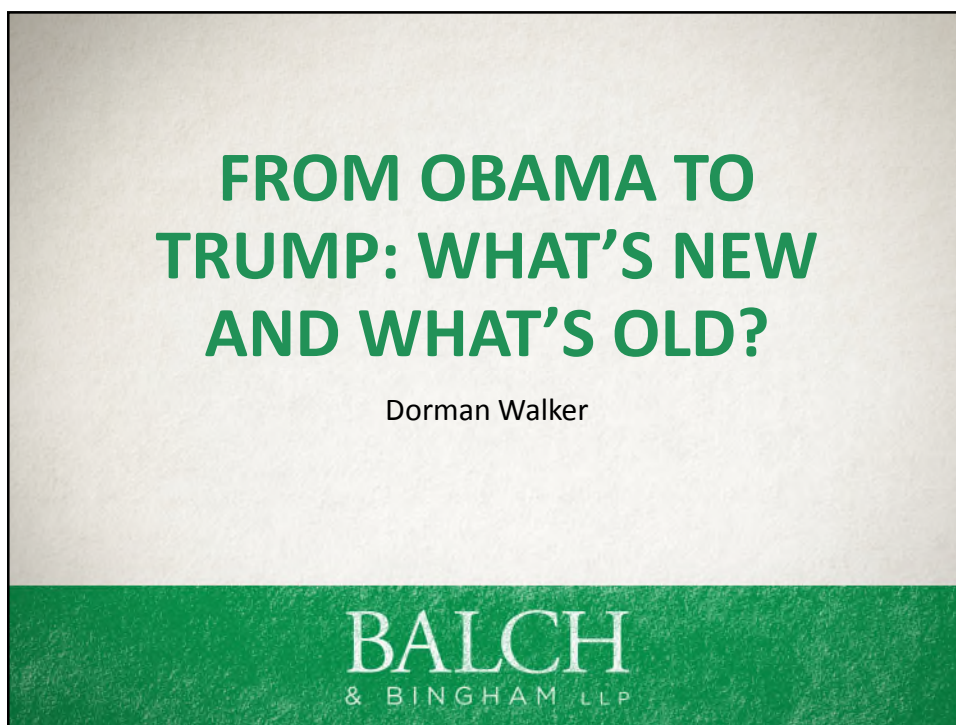
**OFFICE OF THE ATTORNEY GENERAL
CONTINUING LEGAL EDUCATION SEMINAR**

**Office of the Attorney General
Multipurpose Room
Thursday, December 14, 2017**

**MORNING SESSION
9:00 AM – 10:00 AM**

Labor and Employment Update

**Dorman Walker, Esq.
Balch & Bingham**



What's New and What's Old

- Obama Initiatives
- Trump Initiatives
- Trump Appointments
- Cases To Watch

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Obama Initiatives

- June 2012 – DACA
- July 2014 – EO Fair Pay And Safe Workplaces
- Jan. 2016 – Proposal To Revise EEO-1 Form
- May 2016 – Final Rule Revising FLSA Exemption/Overtime
- June 2016 – Revised DOL Rule On Sex Discrimination For Federal Contractors
- Aug. 2016 – Revised EEOC Guidance On Retaliation
- Sept. 2016 – EO On Federal Contractors And Sick Leave
- Nov. 2016 – Revised EEOC Guidance On National Origin
- Jan. 2017 –Affirmative Action For Disabled Vets

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Department Of Labor

[DOL HOME](#) / [NEWSROOM](#) / [NEWS RELEASES AND BRIEFS](#)

News Release

Please note: As of January 20, 2017, information in some news releases may be out of date or not reflect current policies.

US LABOR DEPARTMENT ANNOUNCES UPDATED SEX DISCRIMINATION REGULATIONS FOR FEDERAL CONTRACTORS

WASHINGTON – Women make up a significant share of the U.S. workforce, but sex discrimination remains an unfortunate reality. To address this issue, the U.S. Department of Labor is publishing new sex discrimination regulations that update – for the first time in over 40 years – the department’s interpretation of [Executive Order 11246](#) to reflect the current state of the law and the reality of a modern and diverse workforce. Updated rules on workplace sex discrimination will mean clarity for federal contractors and subcontractors and equal opportunities for both men and women applying for jobs with, or already working for, these employers.

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DACA

- June 2012 - Executive Order
- Allowed certain illegal immigrants who entered the U.S. before their 16th birthday to receive a renewable two-year period of deferred action from deportation and eligibility for a work permit
- Nov. 2014 – attempts to expand DACA blocked by federal courts
- Approximately 800,000 Dreamers as of 2017

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DACA

- June 2017 - Lawsuit threatened by 10 states unless DACA rescinded by Sept. 5, 2017
- September 5, 2017 – Trump rescinds DACA but delays implementation for six months to allow Congress to pass legislation
 - New applications stopped as of Sept. 5, 2017
 - Oct. 5, 2017 – deadline for renewals
 - March 5, 2018 – stop processing renewals for existing recipients
- September 6, 2017 - 15 states sue to prevent DACA's rescission

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DACA

- From August to December, 2017, **201,678** people will have their DACA expire
 - 55,258 already submitted renewal request by 9-5-17
- From 2018, **275,344** scheduled to lose DACA protection
 - only 7,271 have submitted renewal request by 9-5-17
- First seven months of 2018, more than **320,000** expected to have their DACA expire
 - 8 applied by 9-5-17

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DACA DO'S AND DON'TS

- Employers must keep track of worker's DACA eligibility
- When worker becomes no longer eligible to work, employers must obey the law
- Can DACA eligible workers be terminated in advance of loss of eligibility?

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Fair Pay & Safe Workplaces

- EO 13673 (July 31, 2014) - *aka Blacklisting Reg.*
- Three parts:
 1. Certain subs to disclose labor law violations to DOL
 2. Wage statements re hours worked, OT hours, pay, additions and deductions, and whether the worker is treated as an independent contractor
 3. Limits on use of pre-dispute arbitration clauses in employment agreements covered by federal contracts
- Penalty for violations could be denial of award or extension of a federal contract

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Fair Pay & Safe Workplaces

- October 2016 – Texas federal court enjoined implementation of the first and third parts
- March 2017 - Senate narrowly vote to “disapprove” EO 13673 IAW the Congressional Review Act
- March 2017 – Trump signed the Senate’s disapproval resolution, and issued an EO officially revoking EO 13673

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EEO-1 Pay Data

- **EEO-1 proposal (1-1-16)**
 - Continue to collect ethnicity, race, and sex data
 - Would add employee's W-2 earnings and hours worked
 - Reported by job category, with each category broken into 12 pay bands
 - Effective March 31, 2018

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EEO-1 Pay Data

- EEOC's uses for this information:
 - Early assessment of discrimination claims
 - Allows EEOC staff to examine pay disparities by job category, pay bands, and gender, ethnicity, or race for individual employers
 - Big data study of pay disparities by race, sex, industry, occupational groupings, and MSA
 - To enhance EEOC training programs

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EEO-1 Pay Data


EXECUTIVE OFFICE OF THE
PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY
AFFAIRS

MEMORANDUM

TO: Acting Chair Victoria Lipels, Equal Employment Opportunity Commission

FROM: Neeraj Rao, Administrator, Office of Information and Regulatory Affairs

DATE: August 29, 2017

SUBJECT: EEO-1 Form; Review and Stay

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EEO-1 Pay Data

After careful consideration and consultation with the Equal Employment Opportunity Commission (EEOC), and in accordance with the Paperwork Reduction Act (PRA) and its regulations at 5 CFR 1320.10(f) and (g), the Office of Management and Budget (OMB) is initiating a review and immediate stay of the effectiveness of those aspects of the EEO-1 form that were revised on September 29, 2016. These revisions include new requests for data on wages and hours worked from employers with 100 or more employees, and federal contractors with 50 or more employees. EEOC may continue to use the previously approved EEO-1 form to collect data on race/ethnicity and gender during the review and stay.

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New FLSA Regs.

- New FLSA Regs.
 - Salary threshold for exempt positions would have increased from \$23,660 to \$47,476
 - OT eligibility for highly compensated workers increased from \$100,000 to about \$134,000
 - Greatly increased number of employees subject to OT
 - Future changes keyed to federal index
 - Effective December 1, 2016

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New FLSA Regs.

- Regs. challenged in Texas federal court
- Nov. 2016 - preliminary injunction halting Regs.
- Federal government (Obama) appealed to 5th Cir.
- August 31, 2017 – final judgment against the Regs.
- Sept. 5. 2017 – federal government (Trump) drops appeal as moot

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Sex Discrimination Rule

- **DOL rule revising sex discrimination guidelines for federal contractors and subcontractors** guidance mostly unchanged since 1970
- implements EO 11246 which prohibits federal contractors from discriminating on the basis of sex
- <https://www.dol.gov/ofccp/regs/statutes/eo11246.htm>

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Sex Discrimination Rule

- Amended rule contains explicit protections against pay discrimination, sexually hostile work environments, and pregnancy bias
- Also protects against discrimination based on unlawful stereotypes, gender identity, and transgender status
- Sick leave/family leave must be available to mothers and fathers on the same terms
- Workplace accommodations must be provided to employees who need them because of pregnancy, childbirth, or other medical conditions
- Requires adding “sexual orientation” and “gender identity” to EO clause in federal contracts and use of bathrooms, changing rooms, and showers as per identified gender

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Sex Discrimination Rule

- No change under Trump

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EEOC Retaliation Guidance

- 1st revision to EEOC Retaliation Guidance in 18 years (8/29/16)
- Retaliation is the most common complaint by employees (44.5% FY 2015)
- <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>

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EEOC Retaliation Guidance

- New guidance incorporates case law developments from the past 18 years (*e.g., Burlington*)
- No change under Trump

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Sick Leave Requirement

- EO 13706
- Requires federal contractors (& subcontractors) to provide employees with up to 7 days of paid sick leave annually
- Employee can use paid sick leave for an absence resulting from physical or mental illness, injury, or medical condition, obtaining diagnosis, care, or preventative care from a health care provider, care for child, parent, spouse, domestic partner or other close relation by the employee, also domestic violence, sexual assault, and stalking

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Sick Leave Requirement

- No change under Trump

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National Origin Guidance

- **First EEOC national origin update since 2002 (11-21-16)**
<https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm>
- “National origin discrimination” means discrimination because a person (or the person’s ancestors) is from a certain place or shares physical, cultural, or language characteristics of a national origin or ethnic group
 - Country (Mexico), a former country (Yugoslavia), a place that is not a country but is closely associated with an ethnic group (Kurdistan)
- “National origin group” – people who share a common language, culture, ancestry, or other social characteristics (Hispanics/Latinx, or Arabs)
- “Nation origin” does not refer to citizenship or immigration status

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National Origin Guidance

- Language - May an employer consider language issues in the workplace?
- Yes, but:
 - An employer may not act on the basis of **accent** *unless* the ability to communicate in spoken English is required to perform job duties effectively and the person's accent *materially interferes* with job performance
 - A language **fluency** requirement is lawful *if* fluency is required for the *effective performance* of the position for which it is imposed
 - A **language-restrictive policy** may violate Title VII if it is applied *across the board* in the workplace, but it may be lawful in limited circumstances when needed to promote safe and efficient job performance or business operations

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National Origin Guidance

- **No change under Trump**

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Affirmative Action for Vets

- **Final Rule (1-3-17)**
- <https://www.eeoc.gov/laws/regulations/qanda-ada-disabilities-final-rule.cfm>
- Amends rules implementing § 501 Rehabilitation Act
- Applies only to the federal government
- Sets employment goals of 12% disabled, 2% with targeted disabilities
- Targeted disabilities: developmental disabilities (Cerebral Palsy, autism spectrum disorder), deafness, blindness, missing extremities, significant motor impairments, partial or complete paralysis, epilepsy or other seizure disorders, intellectual disabilities, significant psychiatric disorders, significant disfigurement (burns, wounds, congenital disorders)

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Affirmative Action for Vets

- **No change under Trump**

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Trump Initiatives

- Midnight Relief Act of 2017
- REINS Act
- Regulation Accountability Act
- EO 13771

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Midnight Relief Act of 2017

- Passed in the House (1-4-17); approved by Senate Homeland Security and Government Affairs Committee (5-17-17)
- Would allow Congress to repeal in a single vote any rule finalized in the last 60 days of the previous (*i.e.*, Obama) administration
 - Congress could bundle multiple rules and overturn them en masse with a joint resolution of disapproval
- The existing Congressional Review Act requires Congress to review and vote against regulations individually - used successfully only one time, in 2001 until Trump; he has signed at least 13 such repeals

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REINS Act Regulations from the Executive In Need of Scrutiny

- Passed in the House (1-5-17); approved by Senate Homeland Security & Government Affairs Committee (5-17-17)
- Would allow Congress to hold up-or-down votes on any “major” rule from a federal agency
 - A major rule is one the OMB finds results in an annual effect on the economy of \$100 million or more, a major increase in costs to consumers, individual industries, governmental agencies, or geographic regions, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of US-based enterprises to compete with foreign-based enterprises
- Joint resolution of approval must be passed within 70 session days after a major rule is submitted by an agency; exception for imminent threat

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Reg. Accountability Act

- Passed the House (1-5-17), approved by the Senate Homeland Security and Government Affairs Committee (5-17-17)
- Collectively, its provisions would:
 - Require agencies to choose the lowest-cost rulemaking alternative
 - Repeal doctrines of judicial deference to agency interpretations
 - Require agencies to account for the direct, indirect, and cumulative impacts of new regulations
 - Prohibit “new billion-dollar rules” from taking effect until courts resolve timely-filed litigation challenging their promulgation
 - Force agencies to publish online timely information about regulations in development and their expected nature, costs, and timing
 - Require agencies to publish online plain language summaries of proposed new rules

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EO 13771

- “Reducing Regulation and Controlling Regulatory Costs” (1-30-17)
- “One in, two out” Directs federal agencies to repeal two regulations for every regulation they promulgate
- Requires that the body of new regulations promulgated in 2017 have a net zero cost after factoring in money saved through repeals, with the OMB having final say on whether a new rule is sufficiently offset

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Spring 2017 Unified Agenda

- July 2017 – OMB’s Unified Agenda of Federal Regulatory and Deregulatory Actions
- Cross-sectional snapshot of regulations at various stages in the federal pipeline
- Trump administration pulling or suspending 860 regulations, of which 469 were completely withdrawn, and 392 were set aside or being reevaluated (subject to being revisited or dropped entirely)

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Trump Appointments

- 120 administration appointments, including 70 secured just before Congress' summer break
- About 100 appointments behind Obama at this time in his last term
- Vacancies necessarily slow agency action

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Trump Appointments

- DOL
- EEOC
- NLRB
- Eleventh Circuit
- Northern District Alabama
- Middle District Alabama
- Southern District Alabama

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Appointment – DoL



Alexander Acosta – April 28, 2017

Son of Cuban refugees, native of Miami
Harvard – undergrad and law

Clerk for Samuel Alito (3d Cir); Kirkland & Ellis, Geo. Mason School of Law; Dean, Florida International University School of Law

Former member of the NLRB, Ass't AG for Civil Rights Division, and AUSA, S.D. Fla.

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Appointments - EEOC

Commissioners

- Victoria Lipnic - Acting Chair - July 2020
- Chai Feldblum - July 2018
- Charlotte Burrows - July 2019

• *Vacant*

• *Vacant*

General Counsel

• *Vacant*

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Appointments - EEOC

Commissioners

- Victoria Lipnic - Acting Chair - July 2020
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- Charlotte Burrows - July 2019
- *Janet Dillion*
- *Vacant*

General Counsel

- *Vacant*

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Appointments - EEOC

Commissioners

- Victoria Lipnic (R) - Acting Chair - July 2020
- Chai Feldblum (D) - July 2018
- Charlotte Burrows (D)- July 2019
- *Janet Dillion (R)*
- *Daniel Gade (R)*

General Counsel

- *Vacant*

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Appointments - NLRB

- Board Members
 - Philip Miscimarra (R) named chair April 2017 – Dec. 2017
 - Mark Gatton Pearce (former chair) (D) - August 2018
 - Lauren McFerran (D)- December 2019
 - Marvin Kaplan (R)- August 2020
 - William Emanuel (R) – September 2021
- General Counsel
 - Richard Griffin - November 2017
 - *Peter Robb*

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Eleventh Circuit

- Kevin Newsome
 - fills the Dubina vacancy
 - Samford University, Harvard Law School
 - Clerked for Justice Souter
 - Alabama Solicitor General
 - Practiced appellate law
 - Federalist Society



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Eleventh Circuit



- *Elizabeth (Lisa) Branch*
 - Davidson College, Emory University School of Law
 - Currently Georgia Court of Appeals (2012)
 - Counselor to the Administrator of the Office of Information and Regulatory Affairs OMB; and Associate General Counsel, Rules and Legislation
 - Department of Homeland Security (2004-08)
 - Private practice in Atlanta

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N.D. AL.



- Annemarie Carney Axon
 - University of Alabama B.A., J.D.
 - Practiced trust, estates, and business litigation in Birmingham
 - Former Ass't VP, AmSouth Bank
 - Clerked for Hon. Inge Johnson
 - Succeed Hon. Sharon Lovelace

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M.D. AL.



- Emily Coody Marks
 - Springhill College, University of Alabama School of Law
 - Private practice Montgomery - labor and employment, civil rights and appellate law
 - Daughter of Magistrate Judge Charles Coody
 - Filling Judge Albritton's vacancy

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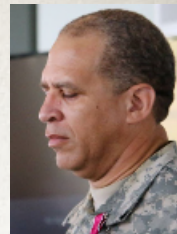
M.D. AL.



- Brett Talley
 - University of Alabama, Harvard Law School
 - Deputy Assistant Attorney General, DOJ Office of Legal Policy
 - Alabama Solicitor General
 - Speechwriter Sen. Rob Portman and Mitt Romney
 - Clerked for Judge Dubina
 - Taking Judge Fuller's vacancy
 - Walker County

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S.D. AL.



- Terry Moorer

- Marion Military, Huntingdon College, University of Alabama
- Magistrate Judge (M.D. AL.) 2007-present
- AUSA 1990-2007
- Ret. Colonel, Alabama National Guard
- Taking Judge Steele's vacancy

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S.D.AL.



- Jeffrey Beaverstock

- The Citadel, University of Alabama School of law
- Private practice in mobile - civil and commercial litigation
- Lt. Col JAG (R)

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U.S. Supreme Court

- Neil Gorsuch
- Took Justice Scalia's vacancy
- Clerked for Justice Kennedy



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Cases To Watch

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Class Waivers

- Whether mandatory class-action waivers violate right to engage in concerted action under §7 FLSA?
 - 5th Cir. –yes; and 2nd and 8th agree
 - 7th and 9th - no; and 6th agrees
 - NLRB – waivers are not legal

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Class Action Waivers

- Whether mandatory class-action waivers violate right to engage in concerted action under §7 FLSA?
 - 5th Cir. –yes; and 2nd and 8th agree
 - 7th and 9th - no; and 6th agrees
 - NLRB – waivers are legal

- *Ernst & Young LLP v. Morris*, no. 16-300; *NLRB v. Murphy Oil USA Inc.*, no-6-307; *Epic Systems Corp. v. Lewis*, no. 16-285

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Sexual Orientation and Title VII

- Whether Title VII's bar on sex discrimination includes sexual orientation
 - EEOC said yes; this is a priority of the Agency's
 - 7th Cir. - agrees with EEOC
 - 11th Cir. – disagrees
- *Evans v. Georgia Regional Hospital*, no. 17-370

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Joint Employment

- Whether 4th Circuit erred in January ruling that broke from 8 other circuits and established a new test for identifying joint employers under the FLSA
 - Petition for writ of cert pending
- FLSA's own *Browning-Ferris* Industries joint control standard under review by D.C. Circuit
- Sept 5 – DoL returned to pre-Obama direct control standard – not binding on NLRB, which is an independent agency
- *DirectTV LLC v. Hall*, no. 16-1449

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ADEA Retaliation Damages ?

- Whether compensatory and punitive damages are available under the ADEA for retaliation claims.
- “Legal relief” means (pick one):
 - Compensatory and punitive damages,
 - Compensatory damages only,
 - Punitive damages only, or
 - No damages
- *Vaughn v. Anderson Regional Med. Center*, no. 16-1386

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Service Advisors Exempt?

- Whether service advisors in dealerships are exempt from FLSA’s overtime payments”
 - All about statutory construction – “or”
- Does the phrase “primarily engaged in selling or servicing automobiles” encompass service advisors who are engaged in selling the servicing of automobiles even though they do not go under the hood and *personally* perform the service?
- Split from 4th and 5th Circuits
- *Encino Motorcars, LLC v. Navarro, LLC* , no. 16-1362

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QUESTIONS ?

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