

# THE NATIONAL LAW REVIEW

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## Beltway Buzz June 14, 2019

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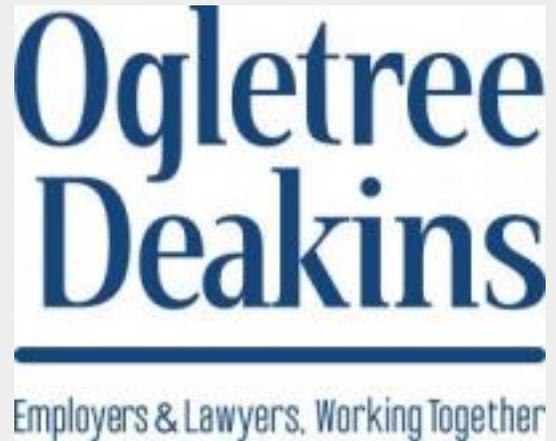
**Wage and Hour Rulemaking News.** June 12, 2019, was the deadline for submission of public comments in response to the U.S. Department of Labor's Wage and Hour's Division's (WHD) proposed changes to clarify what forms of payment must be included (or excluded) from workers' [regular rate](#) for purposes of calculating overtime pay. [According to the WHD](#), the clarification is necessary because the current, outdated regulations discourage employers from "offering more perks to their employees as it may be unclear whether" to include those perks when calculating an employee's regular rate of pay for overtime purposes. A final rule will be the next step in the process, but the WHD has not provided any indication as to when this may occur.

**Oils Well That Ends Well.** The current term of the Supreme Court of the United States is coming to an end, but unlike the class trips and field days associated with the end of a school year, there is actually a lot of work being done at the high court. For example, this week the Court issued a unanimous decision in *Parker Drilling Management Services, Ltd. v. Newton*, which stated that federal wage and hour law—not California law—applies to offshore oil rig workers. This overturned an earlier decision by the U.S. Court of Appeals for the Ninth Circuit. With only two weeks remaining in the Supreme Court's current term, there are [24 decisions still to issue](#). In particular, the *Buzz* is watching for the Court's opinion in *Kisor v. Wilkie*, regarding courts' deference to agencies' interpretations of their own rules.

**USCIS and the FVRA Shuffle.** On June 10, 2019, United States Citizenship and Immigration Services (USCIS) [announced](#) Kenneth T. Cuccinelli as the new acting director of the agency. But Cuccinelli has never served in the federal government and was never even nominated for the position, which requires U.S. Senate confirmation. So how did he get installed? Generally, the [Federal Vacancies Reform Act of 1998](#) (FVRA) allows only three classes of individuals to serve in an acting capacity when a vacancy arises: (1) the deputy or first assistant to the office; (2) another official (not necessarily from the same agency) who has been confirmed by the Senate; and (3) a senior employee at the agency if he or she has been employed for at least 90 days within the past year. Cuccinelli does not meet any of those criteria. However, according to [Politico](#), Cuccinelli was officially named as "principal deputy director," a newly created position that doesn't require Senate confirmation and that instantly becomes the second-highest position within the agency, thereby allowing Cuccinelli to slide into the acting director role via the FVRA. While the *Buzz* isn't sure whether this is legal, we do know that the FVRA further states that actions taken by individuals who are improperly installed as "acting" officials "shall have [no force or effect](#)."

**Full House.** It was a busy week in the U.S. House of Representatives, as the Democratic-controlled House Committee on Education and Labor advanced several HR-related bills.

- *Protecting Older Workers Against Discrimination Act (POWADA) (H.R. 1230)*: This bill would reverse a 2009 Supreme Court decision by amending the Age Discrimination in Employment Act of 1967 to allow for mixed-motive discrimination claims.



Article By  
[James J. Plunkett](#)  
[Ogletree, Deakins, Nash, Smoak & Stewart, P.C.](#)  
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- *Workplace Violence Prevention for Health Care and Social Service Workers Act (H.R. 1309)*: This bill would require the Occupational Safety and Health Administration to issue an interim workplace violence prevention standard covering healthcare and social assistance settings.
- *Rehabilitation for Multiemployer Pensions Act (H.R. 397) (aka, the Butch Lewis Act)*: This bill would create the Pension Rehabilitation Administration, which would make long-term, low-interest loans to critical and declining multiemployer plans.

With the exception of the pension bill, which moves on to the House Committee on Ways and Means, the next stop for the bills is a vote on the House floor. POWADA, although it only has 28 cosponsors, at least enjoys bipartisan support in both the House and Senate. Indeed, the [average age](#) of legislators is 57.6 years in the House and 62.9 years in the Senate, meaning that most of the legislators would fall within the protections of the act. This is something that they might consider when debating the bill. J

**EPA B-Day.** On June 10, 1963, President John F. Kennedy signed the Equal Pay Act (EPA) into law. The genesis of the EPA goes back to World War II, when more women began to enter the workplace. In 1942, the [National War Labor Board](#) endorsed the concept of “equal pay for equal work,” and in June 1944, [Winifred Claire Stanley](#), an attorney and Republican congresswoman from Buffalo, New York, introduced the first piece of legislation to ensure equal pay for equal work as an amendment to the National Labor Relations Act (NLRA). But it wasn’t until the early 1960s that the push for the EPA really took off. The President’s Commission on the Status of Women, led by Eleanor Roosevelt and Esther Peterson of the United States Women’s Bureau, supported equal pay legislation. Soon thereafter, legislative champions like [Edith Green](#) and [Katharine St. George](#) pushed the EPA across the finish line. Of course, 56 years later, some federal legislators in the House of Representatives have proposed making changes to the EPA’s defenses (among other amendments), by passing the Paycheck Fairness Act at the end of March 2019.

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