Dana A. Gutierrez, Esq.
Calvo Fisher & Jacob LLP
SHRM Guam Breakfast Briefing
July 12, 2017


TRUMP
MAKE AMERICA GREAT AGAIN!

WHATEVER HAPPENED TO…

DOL'S PROPOSED FINAL OVERTIME RULE

FINAL OVERTIME RULE

Final Overtime (OT) Rule issued in May 2016

- Raised annual salary threshold for exempt positions from $23,660 to $47,476 per year
- Allowed employers to use nondiscretionary bonuses to satisfy up to 10% of the salary threshold, if made on quarterly or more frequent basis
- Raised the annual highly compensated employees salary threshold from $100,000 to $134,004
- Automatic adjustment every 3 years to the annual salary threshold

FINAL OVERTIME RULE

- Scheduled to go into effect on December 1, 2016
- Lots and lots of training and briefings
- Employers reacted in anticipation of the OT Rule:
  - ✓ Reclassified employees from exempt (earning salaries below the new threshold) to non-exempt (hourly);
  - ✓ Raised exempt salary to avoid reclassification; and / or
  - ✓ Did nothing

FINAL OVERTIME RULE…NOT

- November 22, 2016: federal district court judge in Texas issued a nationwide temporary injunction
- Prevented the Final Rule from taking effect on December 1st
- The DOL appealed the injunction to the 5th Circuit Court of Appeals
- February 22, 2017: the DOL moved for an extension to file its brief citing the absence of a confirmed Secretary of Labor
- April 14, 2017: the DOL requested another 60-day extension to file its brief

NOMINEE ALEXANDER ACOSTA

- Son of Cuban immigrants and first Hispanic named to President Trump's cabinet
- Served in 3 positions during the Bush Administration
- Member, National Labor Relations Board
- Assistant Attorney General, Dep't of Justice, Civil Rights Division
- U.S. Attorney General, Southern District of Florida
- Dean of Florida International University Law School

SECRETARY OF LABOR ACOSTA CONFIRMED

- Confirmation hearing held March 22, 2017
- At his hearing, Acosta indicated that he believed the salary threshold figure should be around $33,000
- Also indicated he would first decide whether to continue the DOL appeal to the 5th Circuit
- Confirmed April 27, 2017

DOL FILES ITS REPLY

- June 30, 2017: DOL filed its reply in support of its appeal of the temporary injunction
- Many thought DOL would withdraw its appeal and allow the injunction to stand
- But, DOL appealing one issue
  - ✓ Whether DOL has the authority to set the minimum salary level for exemption
- DOL has been setting the minimum salary level since 1940

SO WHAT'S NEXT?

- "The Department has decided not to advocate for the specific salary level ($913 per week) set in the final rule... and intends to undertake further rulemaking.... Accordingly, the Department requests that this Court address only the threshold legal question of the Department's statutory authority to set a salary level, without addressing the specific salary level set by the 2016 final rule."

SO WHAT'S NEXT?

- Based on DOL's reply, the May 2016 version of the Final OT Rule will not survive

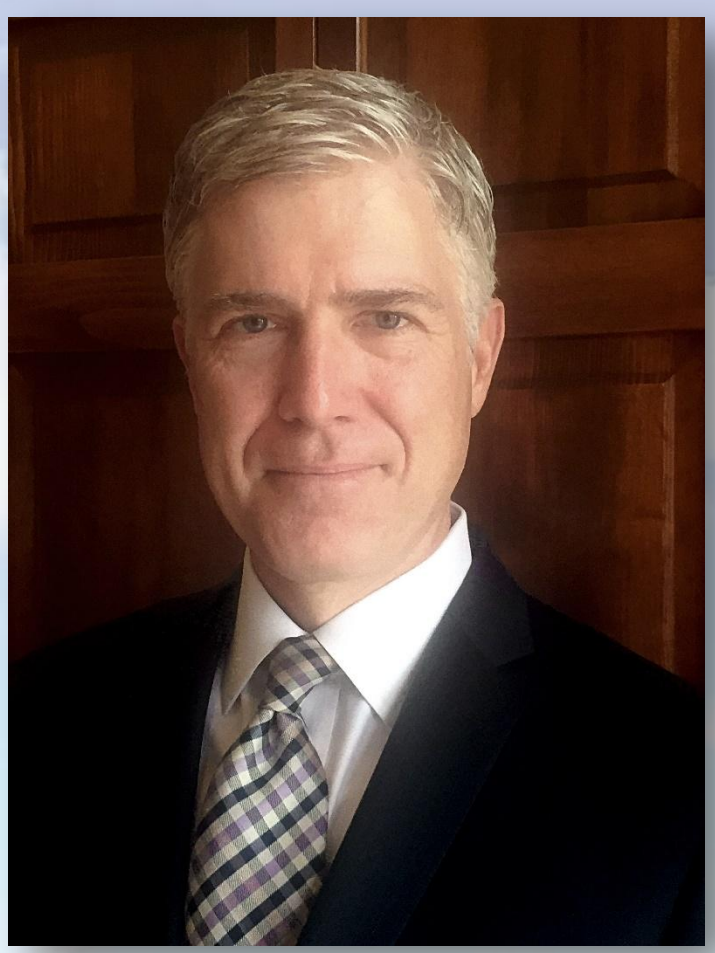
- June 27, 2017: DOL submitted a Request for Information (RFI) related to the OT Rule to the federal OMB

  - ✓ An RFI is an optional step that gov't agencies can take to gain public input as to whether a new law or change in a law is necessary

  - ✓ Likely DOL will begin a new rule-making process and draft a new OT law with a lower salary threshold

TRIVIA QUESTION

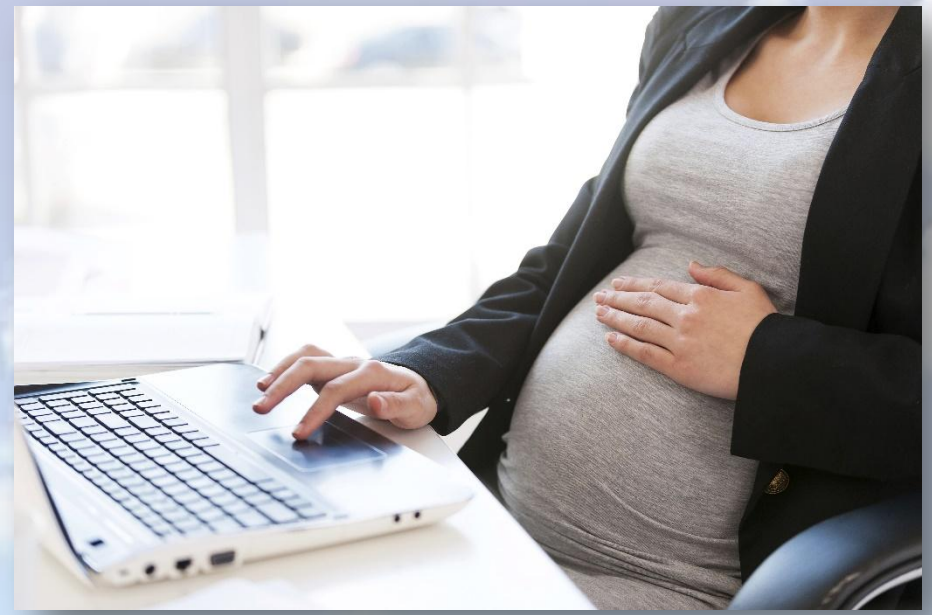
ANSWER TO TRIVIA QUESTION



NEIL GORSUCH

- Nominated by Pres Trump to replace vacancy left by the death of Justice Antonin Scalia
- Attended Harvard Law School & classmates with Barack Obama
- Appointed to U.S. Court of Appeals for the 10th Circuit by Pres. George W. Bush in May 2006
- Viewed as conservative & having an employer-friendly record
- Confirmed as the 113th Supreme Court Justice on April 7, 2017

EEOC SUBPOENAS



McLane Co. v. EEOC

Decided April 3, 2017

FACTS OF THE CASE

- Damiana Ochoa worked as a “cigarette selector” for McLane
- Cigarette selectors work in distribution centers where they must lift, pack and move large bins containing products
- McLane required all new employees and employees returning to work after a medical leave to take a physical capability strength test
- Ochoa took 3 months of maternity leave in 2007
- When she attempted to return to work, she was asked to take the physical test and she failed 3 times
- McLane fired her & Ochoa filed a charge with the EEOC for gender discrimination in violation of Title VII

EEOC INVESTIGATION

- EEOC initiated an investigation into Ochoa's Title VII claim
- EEOC issued an administrative subpoena for information re: the physical test and individuals who took the test
  - ✓ McLane provided information related to the test and a list of anonymous individuals who took the test, providing each individual's gender, role at the company, reason for the test and evaluation score
  - ✓ McLane refused to provide "pedigree information," i.e., names, social security numbers, last known addresses and telephone numbers for employees nationwide arguing it was irrelevant

COURT ACTION TO ENFORCE SUBPOENA

- EEOC filed a subpoena enforcement action in the district court in Arizona
- The district court agreed with McLane and refused to enforce the subpoena
- On appeal, the 9th Circuit did not defer to the district court's decision and determined that the EEOC's subpoena should have been enforced, i.e., was relevant to the EEOC's investigation

ISSUE BEFORE THE SUPREME COURT

- Whether a federal appellate court may review a district court's decision on enforcing an EEOC subpoena *de novo* or whether it must defer to the district court's decision absent "abuse of discretion."

SUPREME COURT DECISION

- Justice Sotomayor wrote the opinion of the Court
- The Court rejected the *de novo* (or new) review standard advanced by the 9th Circuit
- Held: Courts of appeals should review district court decisions to quash or enforce EEOC subpoenas based on an "abuse of discretion" standard, not *de novo* review
- The Court acknowledged that the EEOC has broad statutory authority to issue subpoenas in the course of investigating charges of employment discrimination
- The Court further stated that when the EEOC seeks enforcement of its subpoenas, the applicable test favors enforcement

SUPREME COURT DECISION

The Court also stated:

- If the charge is proper and the material requested relevant, the district court should enforce the subpoenas unless the employer establishes that the subpoena is “too indefinite,” has been issued for an “illegitimate purpose,” or is “unduly burdensome.”
- In other words, unless the district court abused its discretion, the district court’s decision would be upheld.
- The Supreme Court reversed the 9th Circuit decision and remanded the case back to apply the appropriate standard of review.

SO WHAT DOES THIS MEAN FOR EMPLOYERS?

- For employers who have experience responding to charges of discrimination, reminder that there are limits to the EEOC's subpoena power
- The decision shows that the EEOC has to show that material is relevant to an investigation
- District Courts may be more likely to exercise their discretion to limit the scope of EEOC subpoenas

SO WHAT DOES THIS MEAN FOR EMPLOYERS?

- Employers will be required to prepare challenges to subpoenas based on specific and compelling showings of burdensomeness, lack of relevance or improper purpose
- Regardless the standard of review, litigating with the EEOC over a subpoena can be time-consuming and expensive
- Depending on the circumstances, it may make sense for an employer to negotiate, if possible, a resolution with the EEOC

GENDER IDENTITY

Gloucester County School Board v. G.G.

Remanded to the 4th Circuit on March 6, 2017

FACTS OF THE CASE

- Gavin Grimm (G.G.) is a transgender student who was originally given permission to use the boys' restroom
- Due to public protest, the School Board passed a policy mandating that transgender students be allowed access to single-stall unisex restrooms or restrooms that correspond to their sex assigned at birth
- **January 7, 2015:** U.S. DOE issued an opinion letter to schools regarding its regulation under Title IX of the Education Amendments Act permitting the separation of restrooms and locker rooms on the basis of sex
- DOE stated that the regulation required schools receiving federal funds to allow transgender students to use facilities consistent with their gender identity
- **May 13, 2016:** U.S. DOJ & DOE issue joint bathroom guidance that schools should let transgender students use bathrooms that match their gender identity

COURT ACTION

- G.G. sued the Board and alleged that the policy violated Title IX as well as the Equal Protection Clause of the 14th Amendment and sought damages and an injunction against the policy
- The District Court granted the Board's motion to dismiss the Title IX claim and denied the request for preliminary injunction
- The U.S. Court of Appeals for the 4th Circuit reversed and held:
  - ✓ because the term "sex" in DOE's regulation was ambiguous as applied to transgender students, and
  - ✓ because DOE's interpretation was the result of its well-considered judgment, the district court erred in not according deference to DOE's interpretation of its own regulation

ISSUE BEFORE THE SUPREME COURT

- Whether judicial deference is owed to a federal agency's regulatory interpretation that a law prohibiting sex bias means schools must allow transgender students to use bathroom consistent with their gender identity.

SUPREME COURT ACTION

- February 22, 2017: U.S. DOJ & DOE rescinded their bathroom guidance

- Based on the rescission, the Supreme Court vacated the 4th Circuit's opinion and sent it back for further consideration

- Because the 4th Circuit's original ruling was heaving based heavily on the DOJ & DOE guidance, the court will have to look closer at the alleged constitutional and statutory issues

SO WHAT DOES THIS MEAN FOR EMPLOYERS?

- In Guam, the Guam Employment Nondiscrimination Act of 2015 (GENDA) already provides protection for employees from discrimination and harassment based on sexual orientation, gender identity & gender expression
- But there is no federal law that explicitly prohibits discrimination against lesbian, gay, bisexual and transgender (LGBT) people
- No local guidance, Guam looks to federal law for guidance

SO WHAT DOES THIS MEAN FOR EMPLOYERS?

- Because the language of Title IX mirrors that in Title VII with regard to discrimination on the basis of sex, the case has significance because the Court's ruling could provide clarity as to whether the term "sex" in Title IX and Title VII should be interpreted to include gender identity
- Concern that the Trump administration may pressure the EEOC to change its position that the definition of "sex" under Title VII, i.e., that it includes gender identity and sexual orientation

ISSUES RIPE FOR REVIEW

- **Age Discrimination**
  - **Issue**: Whether older "subgroups" of workers—those in their 50s, 60s, etc. - can proceed with disparate impact claims even if comparators are 40-plus
  - **Issue**: Whether ADEA bars compensatory & punitive awards

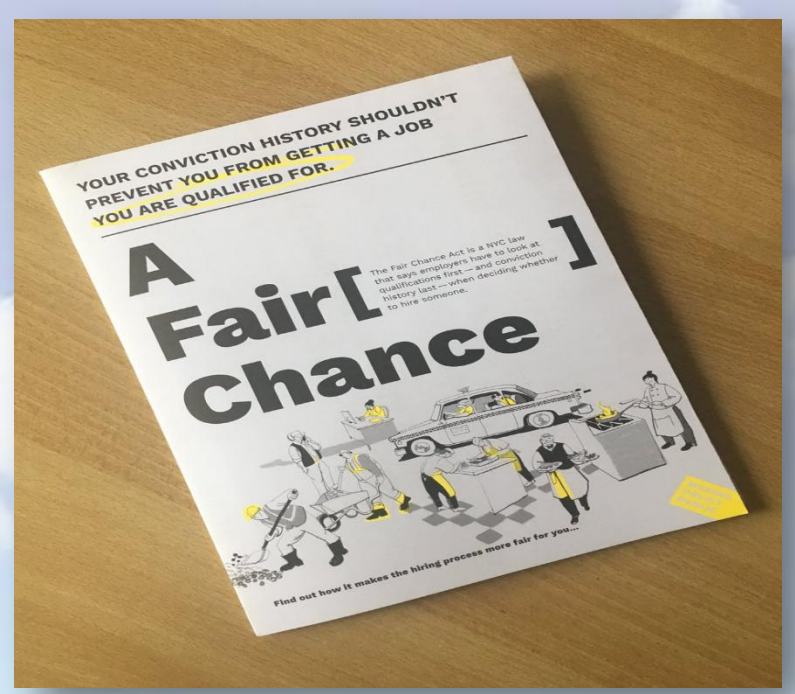
ISSUES RIPE FOR REVIEW

- **Sex discrimination**
  - **Issue**: Whether Title VII's sex discrimination ban covers sexual orientation
- **Disability discrimination**
  - **Issue:** Whether obesity is a covered disability under the ADA

TRIVIA QUESTION:

CHIEF JUSTICE KATHERINE MARAMAN

BILL 40



THE FAIR CHANCES HIRING PROCESS ACT

LEGISLATIVE INTENT OF BILL 40

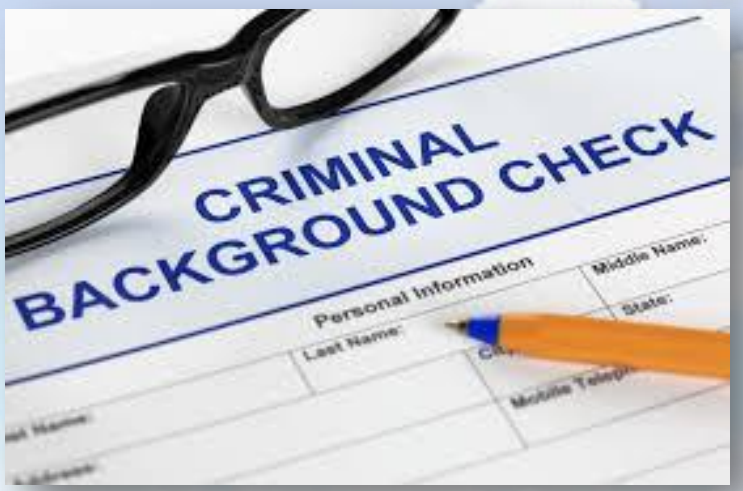
- Legitimate government interest to successfully reintegrate individuals convicted of crimes into the community

- Reintegration critical to:

- ✓ reducing recidivism;
- ✓ increasing public safety and welfare;
- ✓ providing those convicted with the dignity of honest work;
- ✓ an increased tax base
- ✓ reduced reliance on government welfare programs

LEGISLATIVE INTENT OF BILL 40

- No quota for employers to hire individuals with criminal history
- Does not entitle all persons with criminal histories employment
- Provides a fresh start after a conviction during the “job hunting process”
- Effective 210 days after enactment



DEFINITIONS IN BILL 40

- **An *Applicant* means**: any person considered for, or who requests to be considered for, employment or for another employment position

- **An *Employer* means**: any person, company, corporation, general contractor, firm, labor organization, or association, including the Government of Guam

  ✓ That employs more than 15 employees

DEFINITIONS IN BILL 40

- ***Employment* means**: any occupation, vocation, job, or work for pay, including temporary, seasonal, contracted, or contingent work, work through a temporary or other employment agency, or any form of vocational or educational training with pay

- ***Criminal history* means**: any conviction, plea of nolo contendere, or deferred adjudication arising from a felony or misdemeanor criminal accusation under federal or local law

EMPLOYER PROHIBITIONS

- An employer *shall not* request that a police clearance or a court clearance be provided as part of the application for employment

- But, upon a conditional offer of employment, an employer may request an employee provide evidence as to any pending criminal cases or criminal history

EMPLOYER PROHIBITIONS

- An employer *shall not* make any inquiry about, or require the disclosure of, an applicant's arrest record or criminal cases which resulted in dismissal, expungement, sealing, or did not result in a conviction

PROHIBITION NOT APPLICABLE TO:

- Where any federal or local law or regulation requires the consideration of an applicant's criminal history for the purpose of employment

- To any position designated by the employer as part of a federal or local government position or obligation that is designed to encourage the employment of those with criminal histories

- To any position which requires that employee to work in close proximity of or provides programs, services or direct care to minors

WITHDRAWAL OF OFFER

- An employer may only withdraw the conditional offer to an applicant for a legitimate business reason
- Determination of a legitimate business reason must be reasonable

- **Factors to be considered when withdrawing an offer include**:
  - ✓ The specific duties and responsibilities of the employment sought or held
  - ✓ The bearing, if any, that the open criminal case or criminal history will have on the applicant's fitness or ability to perform one or more such duties
  - ✓ The time which has elapsed since the occurrence of the pending criminal case or criminal history

WITHDRAWAL OF OFFER

- **Factors to be considered when withdrawing an offer include**:
  - ✓ The age of the person at the time of the pending criminal case or criminal history
  - ✓ The frequency and severity of the pending criminal case or criminal history
  - ✓ Any information produced by the person, or produced on his/her behalf, in regard to his/her rehabilitation and good conduct since the occurrence of the pending criminal case/history

STATEMENT OF DENIAL

- If terminated on the basis of the pending criminal case or criminal history, applicant may request within 30 days:
  - ✓ A copy of any and all records procured by the employer, including criminal records; and
  - ✓ A written Statement of Denial which:
    - ❑ Articulates a legitimate business reason for denial;
    - ❑ Specifically demonstrates consideration of each of the factors set forth in the Act
    - ❑ Advises the applicant of his or her opportunity to file an administrative complaint with the GDOL

STATEMENT OF DENIAL

- Failure to provide the Statement of Denial upon request shall create a rebuttable presumption that no legitimate business reason exists for denying the applicant employment or taking an adverse action against an employee on the basis of a criminal history

GDOL TO ENFORCE ACT

- Person aggrieved may file an administrative complaint
- Person claiming to be aggrieved shall not have a private cause of action in any court
- Any administrative complaint must be made within 90 days of notification of denial of employment
- GDOL to investigate and enforce the Act

GDOL TO ENFORCE ACT

- GDOL authorized to issue fines as follows:

  - ✓ 15 to 30 employees = up to $1,000.00 per violation
  - ✓ 31 to 99 employees = up to $2,000.00 per violation
  - ✓ 100 or more employees = $4,000.00 per violation

- Employer may request an advisory opinion from FEPO, but Director may decline to entertain such requests

POSTING REQUIREMENTS

- If an employer has more than 1 violation, the GDOL shall post the name of the employer on the GDOL website
- The posting shall include the name of the employer and the date of the violation
- Violating employers shall be listed on the website for a period of 7 years after the violation

EMPLOYER PROTECTIONS

- A cause of action may not be brought against an employer for negligently hiring or failing to adequately supervise an employee based on evidence that the employee has a pending criminal case or criminal history
- **Exceptions**:
  - ✓ The employer knew or should have known of the pending criminal case or criminal history; and
  - ✓ The employee was convicted of an offense that was committed while performing duties substantially similar to those reasonably expected to be performed; or
  - ✓ Under conditions substantially similar to those reasonably expected to be encountered in the employment
- Does not create a cause of action or expand an existing cause of action

BATTLE OF THE MINIMUM WAGE BILLS

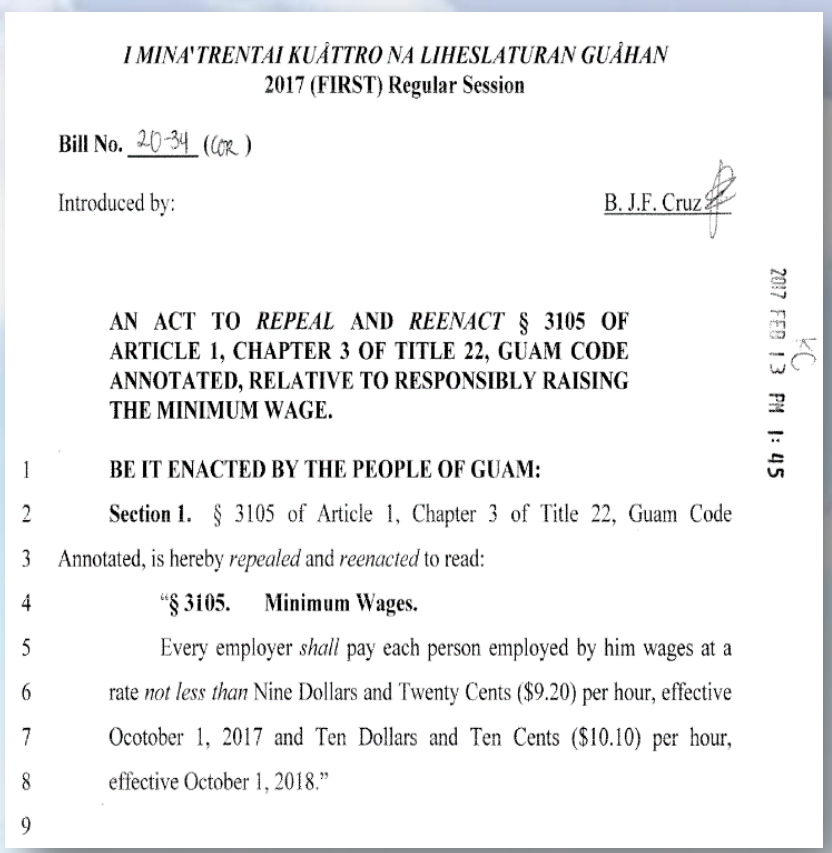
IN THIS CORNER …
SENATOR B.J. CRUZ'S BILL

<u>December 30, 2016</u>: 33rd Guam Legislature passed Bill 312

- Would have raised the minimum wage to $9.20 effective January 1, 2017, and $10.10 effective January 1, 2018
- In January 2017, Governor Calvo vetoed Bill 312 & proposed his own minimum wage bill
- Governor's bill contained 4 determinations that the Director of GDOL had to make before the minimum wage could be increased to $9.20
- Governor's bill has not moved forward at the legislature

SENATOR B.J. CRUZ'S MINIMUM WAGE BILL

February 13, 2017: Sen. Cruz introduced Bill 20



I MINA'TRENTAI KUÂTTRO NA LIHESLATURAN GUÂHAN
2017 (FIRST) Regular Session

Bill No. 20-34 (COR)

Introduced by: B. J.F. Cruz

2017 FEB 13 PM 1:45

AN ACT TO *REPEAL* AND *REENACT* § 3105 OF ARTICLE 1, CHAPTER 3 OF TITLE 22, GUAM CODE ANNOTATED, RELATIVE TO RESPONSIBLY RAISING THE MINIMUM WAGE.

BE IT ENACTED BY THE PEOPLE OF GUAM:

Section 1. § 3105 of Article 1, Chapter 3 of Title 22, Guam Code Annotated, is hereby *repealed* and *reenacted* to read:

"**§ 3105. Minimum Wages.**

Every employer *shall* pay each person employed by him wages at a rate *not less than* Nine Dollars and Twenty Cents ($9.20) per hour, effective Ocotober 1, 2017 and Ten Dollars and Ten Cents ($10.10) per hour, effective October 1, 2018."

Would repeal & reenact 22 G.C.A. § 3105 to read:

§ 3105. Minimum Wages.

Every employer *shall* pay each person employed by him wages at a rate *not less than* Nine Dollars and Twenty Cents ($9.20) per hour, effective October 1, 2017 and Ten Dollars and Ten Cents ($10.10) per hour, effective October 1, 2018.

SENATOR B.J. CRUZ'S MINIMUM WAGE BILL

- **PUBLIC HEARING ON BILL 20 SCHEDULED FOR JULY 19**

  - 3 opportunities to testify on Bill 20
  - 9 a.m., 2 p.m. and 6 p.m. at Guam Congress Building

AND IN THIS CORNER …
SENATOR ESPALDON'S BILL

June 26, 2017: Senator Espaldon introduced Bill 135

- Would repeal & reenact 22 G.C.A. § 3105 to read:

§ 3105. Minimum Wages.

Effective January 1, 2018, every employer *shall* pay each person employed by him wages at a rate *not less than* Eight Dollars and Seventy-Five Cents ($8.75) per hour. Effective January 1, 2019, every employer *shall* pay each person employed by him wages at a rate *not less than* Nine Dollars and Twenty Cents ($9.20) per hour.

- Senator Espaldon's bill includes two additional provisions:
  - ✓Training and Youth Wage

SENATOR ESPALDON'S MINIMUM WAGE BILL

TRAINING WAGE

Would add 22 G.C.A. § 3105.1 to read:

§ 3105.1. Training Wage, established.
Effective January 1, 2018, every employer may pay each person newly employed by him a training wage at a rate *not less than* Eight Dollars and Twenty-Five Cents ($8.25) per hour, for a period not to exceed ninety (90) calendar days. Upon the successful completion of training, each person receiving a training wage *shall* be paid the applicable wages listed in § 3105 of this Chapter.

SENATOR ESPALDON'S MINIMUM WAGE BILL

YOUTH MINIMUM WAGE

Would add 22 G.C.A. § 3105.2 to read:

§ 3105.2. Youth Minimum Wage, established.

Effective January 1, 2018, every employer *may* pay each person under twenty (20) years of age a wage at a rate *not less than* Eight Dollars and Twenty-Five Cents ($8.25) per hour for the initial ninety (90) calendar days of employment. Upon the completion of the initial ninety (90) calendar days of employment, or having attained twenty (20) years of age, each person shall be paid the applicable wages listed in § 3105 of this Chapter.

- Similar Youth Minimum Wage under federal FLSA of $4.25

AND THE WINNER IS . . .

- Is a compromise possible?
- Senator Cruz said in the Guam Daily Post that he is:

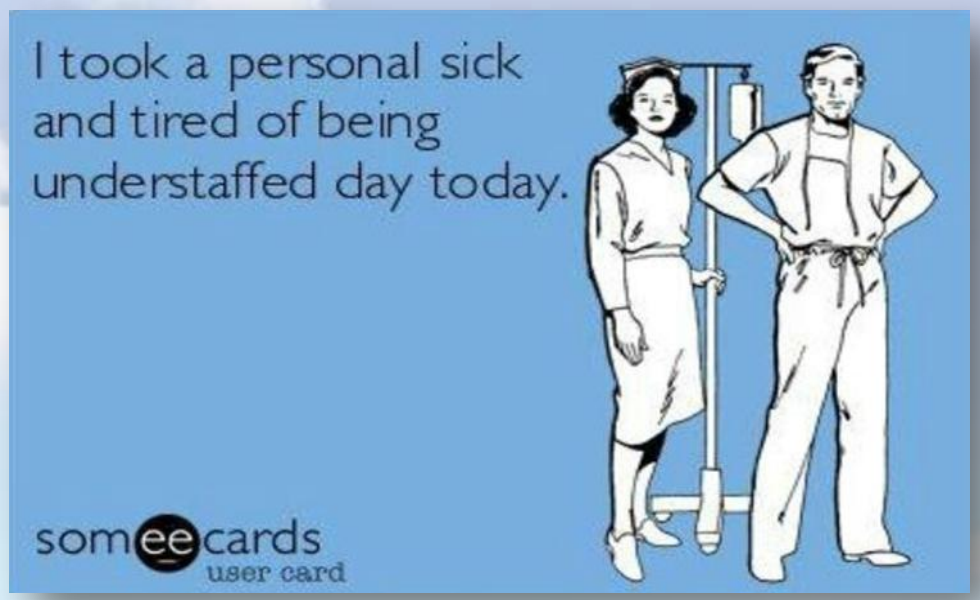
"open to any reasonable request that does not demean minimum wage workers, or expose them to potential abuse by unscrupulous employers."

- But in the Guam PDN he also said of Senator Espaldon's Bill 135:

"If the goal of this legislation is a clever way to pay people the least amount possible, this makes Guam a national pioneer for all the wrong reasons."

- Stay tuned !!!

PROPOSED AMENDMENTS TO THE GUAM FMLA



THE GUAM FMLA

- Became law on June 30, 2016
- Companion leave law also passed → Leave for Child School-Related Purposes
- Discrepancy in the final version of the Guam FMLA sent to the Governor for signature
  - ✓ One part of the Act defined employer as one "who directly employs twenty-five (25) or more persons"
  - ✓ Another part of the Act states that it is not applicable "if the employer employs fewer than twelve (12) employees in Guam"

TWO AMENDMENTS PROPOSED

Senator Regine Biscoe Lee is the main sponsor of both proposed amendments

- Bill 117 amends the Guam FMLA to add job-protected bereavement leave
- Bill 118 clarifies the employee threshold for coverage under the Guam FMLA

BEREAVEMENT LEAVE
BILL 117

- Bill provides for unpaid job-protected leave "for reason of the death of a family member of the employee" (new § 3603(c)(4))
- <u>Legislative intent</u>:
  - ✓ The pain of losing a family member is immensely difficult for our people
  - ✓ An employee who is not allowed time off after the death of a loved one can suffer from low morale

  - ✓ Even when paid bereavement is not available, the option of utilizing unpaid, job-protected leave can help grieving families at extraordinarily difficult times

DEFINITION OF FAMILY MEMBER (NEW § 3603(e))

- Adds a definition for “family member” which is defined as:
  - ✓ The spouse of the employee
  - ✓ The biological, adoptive or foster parent or child of the employee
  - ✓ A person with whom the employee was or is in a relationship of *in loco parentis*
  - ✓ A parent or child of the spouse of the an employee
  - ✓ A sibling
  - ✓ A person within one degree of consanguinity or affinity

DEFINITION OF BEREAVEMENT LEAVE

Bereavement Leave is defined as follows:

§ 3610. Bereavement Leave.

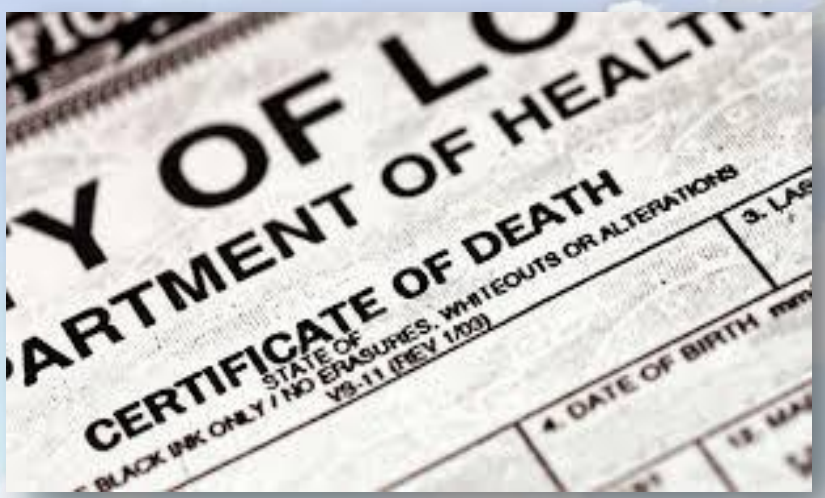
. . . an eligible employee is **entitled to a total of two (2) weeks** of family leave upon the **death of each family member** . . . of the employee **within any twelve (12)-month period**, except that leave taken provided by this subsection **may not exceed the total period of family leave** authorized by [§ 3602(a)]. All leave taken . . . shall be counted toward the total period of family leave authorized by [§ 3602(a)]. Leave . . . must be **completed within 60 days** of the date on which the eligible **employee receives notice of the death** of a family member. (emphasis added)

CERTIFICATION MAY BE REQUESTED

- An employer may request that an employee provide a death certificate

  § 3611. Certification Related to the Death of a Child of the Employee. An employer may require that a request for leave under § 3603(c)(4) be supported by a death certificate.

- § 3611 refers to child of the employee, but language appears to refer to all family members



CLARIFICATION OF EMPLOYEE THRESHOLD BILL 118

- Legislative intent recognizes the inconsistency regarding the employee threshold for Guam FMLA coverage
- Notes that the inconsistency prevents HR managers and business owners that employ between 12 and 25 employees from effectively carrying out the provisions of the law

PROPOSED THRESHOLD

The proposed threshold is explained as follows:

- According to the 2012 Economic Census for Island Areas on their General Statistics by Kind of Business and Employment Size of Establishments for Guam released on September 29, 2015, seventy-two percent (72%) of employees on Guam are employed by nineteen percent (19%) of business establishments who employ twenty (20) employees or more.
- Providing job-protected leave to employees who work in business establishments employing twenty (20) employees or more will cover the majority of employees on Guam, without causing harm to the eighty-one percent (81%) of small business employing nineteen (19) employees or less.

CLARIFICATION OF EMPLOYEE THRESHOLD BILL 118

- Bill 118 amends the Guam FMLA to propose and clarify the employee threshold at twenty (20) or more employees

- If Bill 118 goes forward in its current form, it will lower the employee threshold for Leave for Child School-Related Purposes from 25 to 20

Thank you!

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